

THE UNIVERSITY OF CHICAGO

FROM WEIMAR TO VIETNAM:
GERMAN ÉMIGRÉS IN THE UNITED STATES AND THE FIGHT FOR AMERICAN
LIBERALISM

A DISSERTATION SUBMITTED TO
THE FACULTY OF THE DIVISION OF THE SOCIAL SCIENCES
IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

DEPARTMENT OF HISTORY

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CHICAGO, ILLINOIS

DECEMBER 2021

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ACKNOWLEDGEMENTS

My work was made possible through the help and generosity of many others. First, I would like to thank the staff of the M. E. Grenander Department of Special Collections and Archives at the University at Albany, SUNY, who oversee the excellent German and Jewish Intellectual Émigré Collection. While exploring their archival collections, I made my initial discovery of the connections between German émigrés and Americans that I analyze in depth throughout this dissertation. I would also like to thank the staff of the Harvard University Archives, the Harvard Law School Library's Historical & Special Collections, the New York Public Library Archives & Manuscripts division, the Library of Congress' Manuscript Division, the Yale University Manuscripts and Archives division, the University of Chicago's Special Collections Research Center, the Columbia University Rare Book & Manuscript Library, the Cornell University Law Library, and the Landesarchiv Nordrhein-Westfalen in Duisburg, Germany. All of these archival collections and the helpful, knowledgeable people who run them were invaluable to my research. I would like to thank the staff of the University of Chicago Library in particular for creating and maintaining a library collection that was easily accessible to researchers even in the midst of a pandemic.

I am grateful to the Center for International Social Science Research at the University of Chicago for its generous Lloyd and Susanne Rudolph Field Research Award. I would also like to thank the University of Chicago for its financial support through the Mellon Foundation Dissertation-Year Fellowship.

I am deeply indebted to the community of legal historians I have been privileged to meet with and talk to over the years. Jonathan Bush, who is unfailingly generous with his time, shared his encyclopedic knowledge of Telford Taylor's life and work with me. He also introduced me

to Douglas Morris, who was kind enough to speak with me about his illuminating work on Franz Neumann and especially Ernst Fraenkel. At the University of Chicago, I was lucky to encounter fellow legal historian Lael Weinberger in my graduate school cohort, whose deep understanding of American legal history has always helped enlighten my own thinking. Early on in my time at Chicago, I also had the privilege of taking a course with Constantin Fasolt, whose interpretation of medieval and early modern European legal and political history was extremely instructive.

I would be remiss if I failed to thank my outstanding mentors in legal history at Harvard Law School, especially Bruce Mann, Adriaan Lanni, and Elizabeth Papp Kamali. Among my good friends from law school, I must also thank Vincent Li, whose discussions with me about American legal history were of assistance in my dissertation writing.

At the University of Chicago, I had the honor of presenting an early and much rougher version of Chapter 2 to the Transnational Approaches to Modern Europe Workshop. The discussion of my work was extremely productive and helped me better understand the broader outlines of my project. I would like to thank Roy Kimmey for inviting me to present there, and for sharing his deep knowledge of European intellectual history.

I have also had the privilege of working with the best dissertation committee one could ask for. Tom Ginsburg's comprehensive understanding of comparative law and international law helped me understand the historical roots of the legal concepts I have written about, as well as their contemporary relevance. I am grateful that John McCormick was always willing to share his erudite knowledge of German legal and political theory, particularly those theories developed during the Weimar Republic. Mark Bradley always pushed me to bridge the divide between American and German history, guiding my understanding of transnational and global history while at the same time helping me retain the nuances of each particular tradition. He often

helped me grasp the arguments I was trying to make but failing to articulate, and his advice always strengthened my research and my writing. Michael Geyer's influence is indelibly stamped on my dissertation and my understanding of German history. He gave me the freedom I needed to think about German history with all of its complexities and contradictions. He pressed me to think more broadly and more deeply about the nature of law and politics. Professor Geyer always encouraged me to explore the diverse avenues down which this dissertation often travels – through law, political theory, sociology, psychology, and philosophy.

Finally, I would like to thank my parents – especially my father. His discussions with me about European intellectual history on our way to and from Syracuse University basketball games when I was a child were the primeval forces that have shaped my enduring love of history.

ABSTRACT

In the 1930s and 1940s, the rise of Nazism forced American liberals to defend their political beliefs, especially during World War II. This was followed by the reemergence of Soviet Communism as a threat to American liberalism when the Cold War began in the late 1940s. As American thinkers struggled against these ideological enemies, they were forced to explicitly describe liberal political and legal theory, unleashing a clash of ideas over what an ideal political order should look like.

American liberals deployed a defensive strategy that criticized the opponents of liberalism, aligning Nazism and Communism together under the framework of “totalitarianism” as an example of what liberalism was not. At the same time, American liberals grappled with the more difficult task of building a positive political philosophy that explained what precisely defined a liberal political order and how it ought to be organized – analyzing the centrality of individual rights, the role of democracy, the importance of international law, and the relationship between capitalism and government in a liberal society.

German émigrés to the United States in the 1930s played an important role in defining and defending American liberalism. After escaping the Nazis, a small group of émigrés coalesced in the early 1940s around the American lawyer David Riesman – who later became a leading American social theorist in the 1950s. The most influential members of this “Riesman club” included the political theorist Carl J. Friedrich – Riesman’s mentor from Harvard – and several Frankfurt School scholars, including the lawyer and political theorist Franz Neumann and the psychoanalyst Erich Fromm – another Riesman mentor. The group also included émigré lawyers Otto Kirchheimer and Ernst Fraenkel.

The German émigrés Neumann and Friedrich, and the American Riesman, became influential in the U.S. as they sought to explain and protect the ideas underpinning American liberalism from the 1930s to the early 1960s. During the 1930s and 1940s, Neumann analyzed how antitrust law could be used to battle Nazism. After World War II, he worked with Telford Taylor, a U.S. prosecutor at the Nuremberg Trials, to develop a comprehensive study of how these trials changed international law. Friedrich sought to create a new theory of democracy, influenced by the German jurist Otto von Gierke, that Americans could use to fight totalitarianism. And Riesman created a theory of utopian liberalism that he believed could invigorate politics in the U.S. by better attuning liberalism to Americans' deepest desires.

Some refugees from Europe, especially the neo-liberal Austrian émigré Friedrich Hayek, argued that liberalism was synonymous with individualism. In contrast, Neumann, Friedrich, and Riesman asserted that liberalism required an interwoven relationship between the need for social cooperation and the individual desire for personal autonomy. This form of American liberalism could be called solidaristic liberalism. Solidaristic liberals believed the Nazis and Soviets provided examples of societies with uncritical obsequiousness toward government coordination. At the same time, solidaristic liberals sought to avoid the atomism of neo-liberalism by emphasizing the importance of empathy between citizens and loyalty to various cultural groups in a diverse, pluralistic state.

INTRODUCTION

Historian Arthur Schlesinger, Jr., declared in his 1956 essay “Liberalism in America: A Note for Europeans” that the concept of liberalism was indelibly stamped onto American politics: “With freedom thus a matter of birthright and not of conquest, the American assumes liberalism as one of the presuppositions of life.”¹ According to Schlesinger, American liberalism was marked by an inherent stability: “Consequently, he [the American] is, by nature, a gradualist; he sees few problems which cannot be solved by reason and debate; and he is confident that nearly all problems can be solved.”² In 1956, Schlesinger also began actively weighing into politics, helping Democrat Adlai Stevenson run for U.S. President for a second time against the Republican incumbent Dwight D. Eisenhower.³

Although in the contemporary United States the notion of liberalism is often identified with left-leaning politics, Schlesinger’s definition was more capacious.⁴ He traced all forms of American liberalism back to the Enlightenment liberalism of the American Revolution: “It is this birthright liberalism of American society which justified the European political thinkers two centuries ago who saw in America the archetype of primal political innocence. Here, at last, men were free to inscribe their own aspirations in society without the clog or corruption of the accumulated evils of history.”⁵ Schlesinger’s conceptualization of liberalism in the American Revolution appears to be an example of what historian Joyce Appleby calls “the Neo-Whig explanation of the American Revolution,” which she says “relies upon the liberal concept of

¹ Arthur M. Schlesinger, Jr., *The Politics of Hope* (Boston: Houghton Mifflin, 1962), 63.

² *Ibid.*, 63.

³ Richard Aldous, *Schlesinger: The Imperial Historian* (New York: W. W. Norton, 2017), 170, 172-73.

⁴ For a more recent example that uses the term liberal to indicate a left-leaning mode of thought, see Paul Krugman, *The Conscience of a Liberal* (New York: W. W. Norton, 2009).

⁵ Schlesinger, 63.

human nature and the proper relationship of the individual to social authority.”⁶ According to Appleby, Neo-Whigs believe “[t]he only form of social tension which liberalism recognizes is that generated by the explicit and unwarranted intrusion of authority upon individual freedom” which they tend to presume is universally applicable.⁷ However, as Appleby points out, such assumptions may not be globally applicable – for example, if the Neo-Whig belief has come about because of cultural suppositions that emerged in a particular place and specific society.⁸

Yet even the status of the Neo-Whig vision of history was ambiguous in Schlesinger’s discussion. Despite Schlesinger’s argument in “Liberalism in America” that “[t]he American political tradition is essentially based on a liberal consensus” he struggled to offer a clear definition of what constituted American liberalism.⁹ He noted that it was difficult to characterize American liberalism because “[t]he use of words like ‘liberalism’ and ‘conservatism’ immediately raises questions of definition.”¹⁰ According to Schlesinger, values identified as “conservative” were often also adopted by American liberals – and vice versa.¹¹ For Schlesinger, the inability to set forth a cogent definition of American liberalism actually revealed the strength of the political character of the United States: “All this ambiguity and even interchangeability of position testify once again to the absence of deep differences of principle in American society. ‘Each is a great half, wrote [Ralph Waldo] Emerson of the liberal and the

⁶ Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* (Cambridge, MA: Harvard University Press, 1992), 143.

⁷ *Ibid.*, 143.

⁸ *Ibid.*, 143.

⁹ *Ibid.*, 65. As historian Lily Geismer observes, even contemporary historians are divided over the definition of mid-twentieth century American liberalism: “Historians have never fully agreed on a coherent definition of liberalism, especially in the postwar era, which has led to different and even conflicting definitions of its intellectual philosophy and political coalition; its economic, social, and cultural ideals; its domestic and foreign policy; and the coalitions it produced.” Lily Geismer, “Kennedy and the Liberal Consensus,” in *A Companion to John F. Kennedy*, ed. Marc J. Selverstone (Chichester, U.K.: Wiley Blackwell, 2014), 500.

¹⁰ Schlesinger, 65.

¹¹ *Ibid.*, 65-66. As Schlesinger asserted: “[T]he conservatives Alexander Hamilton and John Quincy Adams and the liberal Franklin D. Roosevelt agreed in advocating government direction of the economy, while the liberal Thomas Jefferson and the conservative Herbert Hoover agreed in wishing to limit the power of the state.” *Ibid.*, 66.

conservative, ‘but an impossible whole. Each exposes the abuses of the other but in a true society, in a true man, both must combine.’”¹²

But what were the boundaries of Schlesinger’s “liberal consensus?”¹³ As historian Gary Gerstle argues: “Liberalism is not infinitely flexible, of course.”¹⁴ Indeed, the “Red Scare” of the late 1910s and early 1920s called into question whether American liberalism could accommodate socialists and Communists, who might challenge the very foundations of the liberal order in the United States.¹⁵ Although the first Red Scare indicated that in practice many liberals in the U.S. were willing to exclude certain political movements they believed were

¹² Ibid., 67. Schlesinger erred slightly in quoting from Emerson’s 1841 Boston lecture “The Conservative” in which Emerson declared: “[E]ach is a good half, but an impossible whole. Each exposes the abuses of the other, but in a true society, in a true man, both must combine.” Ralph Waldo Emerson, *The Collected Works of Ralph Waldo Emerson: Nature, Addresses, and Lectures*, vol. 1, ed. Robert E. Spiller and Alfred R. Ferguson (Cambridge, MA: Belknap Press, 1971), 184, 186.

¹³ In contrast to Schlesinger’s celebratory description of consensus liberalism in the United States, his contemporary Richard Hofstadter – also a well-known expositor of the liberal consensus in America – was more critical of the lack of radicalism he perceived in American history. Daniel Geary, *Radical Ambition: C. Wright Mills, the Left, and American Social Thought* (Berkeley: University of California Press, 2009), 8-9. Indeed, as historian David Brown observes, Hofstadter’s historical work, especially *Anti-Intellectualism in American Life*, criticized the political consensus Hofstadter saw in the United States, which Hofstadter argued was stifling to intellectual growth in America. David S. Brown, *Richard Hofstadter: An Intellectual Biography* (Chicago: The University of Chicago Press, 2006), 121; Richard Hofstadter, *Anti-Intellectualism in American Life* (New York: Vintage, 1963).

¹⁴ Gary Gerstle, “The Protean Character of American Liberalism,” *American Historical Review* 99, no. 4 (Oct. 1994): 1046.

¹⁵ After the November 1917 Bolshevik takeover of the Russian government, fear of socialism and Communism was an important element of American liberalism in the late 1910s and early 1920s. Archie Brown, *The Rise and Fall of Communism* (New York: Ecco, 2011), 50-52. Socialist politician Eugene V. Debs was imprisoned with a ten year sentence after a trial in 1918 for delivering a speech in Canton, Ohio, on June 16, 1918, when he declared during the early days of the American entry into World War I that the United States was simply joining the war to feed capitalist avarice. Ernest Freeberg, *Democracy’s Prisoner: Eugene V. Debs, the Great War, and the Right to Dissent* (Cambridge, MA: Harvard University Press, 2008), 3-4, 68-69, 113. Socialists and progressives protested his federal incarceration as a violation of the First Amendment to the U.S. Constitution, and he ran his Socialist Party campaign for the U.S. Presidential Election of 1920 from prison. Thomas J. Knock, *To End All Wars: Woodrow Wilson and the Quest for a New World Order* (Princeton: Princeton University Press, 1992), 256; Freeberg, 1-2. After several bombings in June 1919, many American politicians feared the emergence of a Communist conspiracy in the U.S. organized by Russians. David M. Kennedy, *Over Here: The First World War and American Society* (Oxford: Oxford University Press, 1982), 288-89. In November 1919 and January 1920, following the orders of U.S. Attorney General A. Mitchell Palmer, federal and state officials carried out searches and seizures – often warrantless – of hundreds of foreigners associated with Communist organizations and other groups. Ibid., 290. Some of those detained by the authorities were subsequently deported – such as a group of 249 sent to Russia on December 21, 1919. Ibid., 290. These events indicated exclusion rather than political consensus.

unjustifiable in American society, Schlesinger was skeptical of thinkers who sought to more clearly elucidate the contours of a philosophical theory of American liberalism.

Schlesinger noted that there had been attempts in the twentieth century to create a clear political theory of American liberalism: “In the 1920’s, however, a liberal ideology did begin to crystallize, deriving its main tenets from the philosophy of John Dewey and from the economics of Thorstein Veblen. Dewey, with his faith in human rationality and in the power of creative intelligence gave this ideological liberalism a strong belief in the efficacy of overhead social planning; and this bent was reinforced by Veblen, who detested the price system and the free market and thought that the economy could be far more efficient and sensibly operated by a junta or soviet of engineers.”¹⁶ But Schlesinger was critical of these efforts, arguing that “[t]his liberal ideology, with its commitment to central government planning, was shattered, however, by the experience of the New Deal.”¹⁷ He believed the pragmatism of the New Deal more accurately reflected the social and political structure of the United States compared to abstract philosophy: “[I]n time it began to appear that the somewhat helter-skelter, catch-as-catch-can improvisations of the New Deal were more true to the helter-skelter, catch-as-catch-can conditions of American society than any rational central *Gosplan* could have been.”¹⁸ President Franklin Delano

¹⁶ Schlesinger, 68-69. For an in-depth analysis of John Dewey’s liberalism, see Alan Ryan, *John Dewey and the High Tide of American Liberalism* (New York: W. W. Norton, 1995), 284-327. For a discussion of Thorstein Veblen’s criticism of American capitalism and the debates he had with his contemporaries during the Progressive Era, see Rick Tilman, *Thorstein Veblen and His Critics, 1891-1963: Conservative, Liberal, and Radical Perspectives* (Princeton: Princeton University Press, 1992), 88-113. A comparison between Dewey and Veblen can be found in Rick Tilman, “Dewey’s Liberalism versus Veblen’s Radicalism: A Reappraisal of the Unity of Progressive Social Thought,” *Journal of Economic Issues* 18, no. 3 (Sept. 1984): 745-69.

¹⁷ *Ibid.*, 69.

¹⁸ Emphasis in original, *ibid.*, 69. Schlesinger’s discussion of “Gosplan” was a reference to the Soviet “State Planning Commission.” Robert C. Tucker, *Stalin as Revolutionary 1879-1929: A Study in History and Personality* (New York: W. W. Norton, 1973), 383.

Roosevelt consciously favored pragmatic policymaking and set aside efforts to create a unified theory of government action during the New Deal.¹⁹

At the same time as President Roosevelt launched the New Deal with his inauguration on March 4, 1933, a new political threat to American liberalism was emerging across the Atlantic Ocean.²⁰ On March 5, 1933, the day after Roosevelt was sworn in, Germans went to the polls to elect parliamentary representatives to the Reichstag.²¹ In this election the National Socialists, led by Adolf Hitler, who had been appointed German Chancellor on January 30, 1933, and their Nationalist allies received 51.9 percent of the votes cast.²² It was a slim majority, but the results emboldened Hitler, who informed his governing cabinet on March 7th that he wanted to pass legislation that would permit his administration to create laws independently of the German executive and legislature.²³ On March 23, 1933, in the Kroll Opera House surrounded by Nazi paramilitary forces, the Reichstag met and passed the Enabling Act that Hitler had discussed on March 7th, effectively ending the Weimar Republic in Germany.²⁴

The rise of Nazism forced American liberals to defend their own beliefs, slowly at first in the 1930s, then with greater urgency in the 1940s during the Second World War.²⁵ This was followed by the reemergence of Soviet Communism as a perceived threat to American liberalism in the late 1940s as the Cold War began.²⁶ Although in 1956 Schlesinger was celebrating what

¹⁹ Alan Brinkley, *Liberalism and Its Discontents* (Cambridge, MA: Harvard University Press, 1998), 17-18.

²⁰ David M. Kennedy, *Freedom from Fear: The American People in Depression and War, 1929-1945* (New York: Oxford University Press, 1999), 131.

²¹ Richard J. Evans, *The Coming of the Third Reich* (New York: Penguin, 2003), 321; Ian Kershaw, *Hitler: 1889-1936: Hubris* (New York: W. W. Norton, 2000), 422-23.

²² Evans, 307, 339; Kershaw, 461.

²³ Evans, 349.

²⁴ *Ibid.*, 350-51, 354; Kershaw, 465-66, 468. By that time the Communist representatives had been imprisoned or were in exile, and only the Social Democrats voted against the Act. *Ibid.*, 466, 468. Even the Catholic Center Party voted in favor of it. *Ibid.*, 468; Evans, 352.

²⁵ Gerstle, 1070.

²⁶ *Ibid.*, 1071.

he saw as a liberal consensus in the United States, from the 1930s to the 1950s it was becoming increasingly clear that American liberalism could not be all things to all people. Many American thinkers were forced to explicitly set forth the boundaries of liberal political and legal theory. This was not simply a conflict over what pragmatic policy program was more effective – this was a clash of ideas over what an ideal political order should look like.

Although a battle over ideas seems quite abstract, it was of pressing importance to American leaders in the 1940s and 1950s, because they perceived Nazism and Communism not only as political threats but also as military and economic threats to the United States. For example, in the immediate aftermath of World War II, Communist parties across Western Europe expanded dramatically in size.²⁷ In the elections immediately following the end of the Second World War, Communists in Italy received 19 percent of the vote, in Finland 23.5 percent, and in France 26 percent.²⁸ American officials feared that if Communist parties could gain enough traction in Western Europe, they would align their governments and economies with the Soviet Union.²⁹ Moreover, American leaders remained worried about a resurgence of support for militant jingoism or the emergence of powerful non-alignment movements in Germany and Japan.³⁰ Ideas became a key weapon in the ideological battle between American liberalism and Soviet Communism during the Cold War by creating a new debate over the values and theories that were acceptable in the United States.³¹

²⁷ Melvyn P. Leffler, *A Preponderance of Power: National Security, the Truman Administration, and the Cold War* (Stanford: Stanford University Press, 1992), 7.

²⁸ Brown, 118.

²⁹ Leffler, 7-8.

³⁰ *Ibid.*, 8.

³¹ David C. Engerman, “Ideology and the Origins of the Cold War, 1917-1962,” in *The Cambridge History of the Cold War*, vol. 1, ed. Melvyn P. Leffler and Odd Arne Westad (Cambridge: Cambridge University Press, 2010), 20-24.

On the one hand, American liberals deployed a defensive strategy that explicitly criticized the ideological opponents of liberalism, equating Nazism and Communism under the framework of “totalitarianism” as an example of what liberalism was *not*.³² On the other hand, American liberals grappled with the perhaps more difficult task of building up a positive political philosophy that explained what precisely defined a liberal political order and how it ought to be organized – analyzing the centrality of individual rights balanced with freedom of association, the role of democracy, the importance of international law, and the relationship between capitalism and government in a liberal society. While the critique of totalitarian societies was often intertwined with the discussion of what elements defined liberalism, creating a constructive political philosophy of liberalism was frequently a more pressing task. It forced American liberals to explain the background assumptions of their political theory and to wrestle with inconsistencies in liberal thought that could appear once their principles were clearly laid out.

German émigrés to the United States in the 1930s played an important role in the struggle to define and defend American liberalism.³³ After Hitler and his Nazi supporters seized power in 1933, they increasingly attacked Jewish people living in Germany, causing nearly half a million German-speaking Jews to escape.³⁴ While those who emigrated often had a shared religious

³² Michael Geyer and Sheila Fitzpatrick, “Introduction,” in *After Totalitarianism: Stalinism and Nazism Compared*, ed. Michael Geyer and Sheila Fitzpatrick (New York: Cambridge University Press, 2009), 1-2.

³³ Udi Greenberg’s excellent work on the importance of émigré scholars to the Cold War focuses more broadly on the diverse notion of “democratization” that many German émigrés developed. Udi Greenberg, *The Weimar Century: German Émigrés and the Ideological Foundations of the Cold War* (Princeton: Princeton University Press, 2014), 22-33. My work focuses more specifically on the political theory of liberalism developed by German émigrés in response to the rise of Nazism in the 1930s and early 1940s and to the increase in Communist political power during the Cold War from the late 1940s to the 1960s. For a more in-depth discussion of the differences between the notions of “democracy” and “liberalism,” see Chapter 4.

³⁴ Reinhard Zimmermann, “‘Was Heimat hieß, nun heißt es Hölle’: The Emigration of Lawyers from Hitler’s Germany: Political Background, Legal Framework, and Cultural Context,” in *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth Century Britain*, ed. Jack Beatson and Reinhard Zimmermann (Oxford: Oxford University Press, 2007), 25. As Reinhard Zimmermann observes: “[O]f the about 500,000 persons from Central Europe, who left Germany between 1933 and 1941, close to 95 percent were of the Jewish religion, or had a Jewish family background [...]” Ibid., 25.

heritage, they were quite diverse in their occupations – the émigrés included statesman, former officials, academics, reporters, and artists.³⁵ Some émigrés fled to other countries on the European continent, some crossed the English Channel to settle in the United Kingdom, and others went to Latin America, while the United States took in approximately 130,000 people.³⁶

Of these refugees, a small group of émigrés coalesced informally around the American lawyer David Riesman in the early 1940s – the emigrants in this “Riesman Club” included Carl J. Friedrich, Franz Neumann, Otto Kirchheimer, Erich Fromm, and Ernst Fraenkel.³⁷ Riesman later went on to be the leading American social theorist of the 1950s after publishing his seminal work *The Lonely Crowd: A Study of the Changing American Character*.³⁸ The political theorist Friedrich was Riesman’s mentor from Harvard, while the lawyers Neumann and Kirchheimer and the psychoanalyst Fromm – who mentored Riesman’s later work – had been members of the Institute for Social Research, or Frankfurt School.³⁹ Fraenkel, another lawyer, had been Neumann’s law partner in Berlin, Germany, before emigrating.⁴⁰ These German intellectuals and the American Riesman, whose ideas were deeply indebted to these emigrant thinkers,

³⁵ Ibid., 25.

³⁶ Ibid., 39-40.

³⁷ This notion of a “Riesman Club” is modeled after Louis Menand’s discussion of what he calls the “Metaphysical Club” in his historical investigation of the interconnected lives of Oliver Wendell Holmes, Jr., William James, Charles Sanders Peirce, and John Dewey, see Louis Menand, *The Metaphysical Club* (New York: Farrar, Straus and Giroux, 2001).

³⁸ Daniel Geary, “Children of *The Lonely Crowd*: David Riesman, the Young Radicals, and the Splitting of Liberalism in the 1960s,” *Modern Intellectual History* 10, no. 3 (2013): 607-8; David Riesman, *The Lonely Crowd: A Study of the Changing American Character* (New Haven, CT: Yale University Press, 1950).

³⁹ Riesman’s discussion of his mentors Friedrich and Fromm can be found in David Riesman, “Becoming an Academic Man,” in *Authors of Their Own Lives: Intellectual Autobiographies by Twenty American Sociologists*, ed. Bennet M. Berger (Berkeley: University of California Press, 1990), 30-31, 45-46. A discussion of the role Neumann, Fromm, and Kirchheimer played in the Institute for Social Research can be found in Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute for Social Research 1923-1950* (Berkeley: University of California Press, 1996), 88, 143-44, 147-50.

⁴⁰ On Neumann and Fraenkel’s law partnership, see Karsten Olson, “Franz L. Neumann’s *Behemoth*: A Materialist Voice in the *Gesamtgestalt* of Fascist Studies,” in *The SAGE Handbook of Frankfurt School Critical Theory*, vol. 1, ed. Beverley Best, Werner Bonefeld, and Chris O’Kane (Los Angeles: SAGE Publications, 2018), 90. For an excellent discussion of Ernst Fraenkel’s life and career, see Douglas G. Morris, *Legal Sabotage: Ernst Fraenkel in Hitler’s Germany* (Cambridge: Cambridge University Press, 2020), 6-8.

became influential in the United States as they sought to explain and defend the ideas underpinning American liberalism from the 1930s to the early 1960s. Chapter 1 will describe the creation of this “Riesman Club” and the backgrounds of its members, with a special focus on the German thinkers’ work during the Weimar Republic.

The German emigrants often drew upon ideas they first encountered in the Weimar Republic to shape their arguments about liberalism – though their relationship with Weimar was frequently ambivalent because they tended to view the Republic as a political failure. As discussed in Chapter 2, after escaping from Germany in the early 1930s, Franz Neumann developed a liberal theory of antitrust law that harshly criticized the monopolization of industry during the Weimar Republic. He believed monopolies had transformed the German political system, turning the Weimar Republic into an illiberal regime which ultimately led to the collapse of constitutional government in Germany and the rise of Nazism. Neumann offered this theory to receptive American policymakers in the U.S. Department of Justice in the late 1930s and the Office of Strategic Services during World War II as a tool for fighting the Nazi ideology.

Alongside questions of domestic politics and constitutionalism, Neumann also grappled with explaining the role liberalism could play in the sphere of international law, as described in Chapter 3. Neumann was skeptical of those lawyers who argued that liberal international law could be used to reign in illiberal regimes, such as the Nazis. He debated this question with the American theorist of international law, Quincy Wright, arguing that strong national sovereignty would be more beneficial for liberal nations than trying to push for liberal reforms to international law.⁴¹ However, after Neumann assisted the American prosecution team at the first

⁴¹ An analysis of their discussion will be traced in depth in Chapter 3. An overview of Wright’s career and scholarship can be found in Paul J. Scheips, “In Memoriam: Quincy Wright, 1890-1970,” *Military Affairs* 35, no. 2 (Apr. 1971): 49; William B. Ballis, “Quincy Wright: An Appreciation,” *Journal of Conflict Resolution* 14, no. 4 (Dec. 1970): 453-55.

Nuremberg Trial of Nazi war criminals in the mid-1940s, he began to see international law as a useful, if imperfect, tool.⁴² By the early 1950s Neumann and Telford Taylor, the lead prosecutor at the subsequent Nuremberg Trials held in the American occupation zone, attempted to create a research program for the Carnegie Endowment for International Peace that would assess the changes to state sovereignty the Nuremberg Trials had created under international law.⁴³ Although Neumann and Taylor were unsuccessful in finalizing their project, these issues maintained relevance as America fought Communism abroad during the Cold War – particularly after the United States entered the Vietnam War in the 1960s.

Carl J. Friedrich had a similar trajectory to Neumann. As discussed in Chapter 4, he began his academic career in Germany during the Weimar Republic as an *organic liberal*, a concept unfamiliar to Americans but quite influential in Germany, which argued government was an organic unity rather than a simple grouping of individuals.⁴⁴ However, the disintegration of the Weimar Republic and the Nazi seizure of power in the early 1930s led Friedrich to strip away organic elements from his political theory and he instead developed a democratic political theory during his time at Harvard University.⁴⁵ Although Friedrich did not consider himself a liberal, he nevertheless tended to argue that a properly functioning democracy maintained certain liberal values, such as protections of civil liberties, and acted as the loyal opposition to American

⁴² Among other things, Neumann was influential in the drafting of the Nuremberg indictments. Michael Salter, *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg: Controversies Regarding the Role of the Office of Strategic Services* (Abingdon, UK: Routledge-Cavendish, 2007), 6, 333.

⁴³ For an excellent analysis of Taylor's role in the subsequent trials of Nazi criminals held in Nuremberg by the American occupation forces in Germany following the first Nuremberg Trial, see Jonathan Bush, "Soldiers Find Wars: A Life of Telford Taylor," *Columbia Journal of Transnational Law* 37, no. 3 (1999): 679-83.

⁴⁴ For a discussion of organic liberalism, see Michael Stolleis, *Public Law in Germany 1800-1914*, trans. Pamela Biel (New York: Berghahn Books, 2001), 337. While David Runciman does not use the term *organic liberalism*, his discussion of the German concept of *Rechtsstaat*, or state based upon law, also helps explain the concept of organic liberalism. David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997), 52-53. Chapter 4 offers a more extensive definition and analysis of what organic liberalism specifically entails and its influence in German legal and intellectual history, as well as its role in Friedrich's theory.

⁴⁵ A description of Friedrich's democratic theory can be found in Greenberg, *The Weimar Century*, 35-37.

liberalism during World War II and the Cold War.⁴⁶ While this may seem odd, because liberalism and democracy are often seen as aligned, liberal values – which are rooted in the centrality of individual rights – can sometimes clash with democratic values – which emphasize the importance of self-governance.⁴⁷

Ultimately, the efforts of these German intellectuals to create robust theories of liberalism also led American thinkers like David Riesman to question their own underlying assumptions about liberalism in the United States during the Cold War. As examined in Chapter 5, under the influence of Erich Fromm and Sigmund Freud, Riesman’s sociological studies and social theory began to question the consensus liberalism celebrated by thinkers such as Schlesinger. Riesman believed that in practice American liberalism in the late 1940s and early 1950s did not always value individualism, but instead often celebrated conformity. In place of this conformist attitude, Riesman called for a *utopian liberalism* that would allow autonomous individuals in the United States to realize their deepest desires. He believed this psychological satisfaction, combined with the material fulfillment of post-World War II capitalism in the U.S., would allow American liberalism to flourish. This vision led Riesman to debate the nature of American liberalism with the leading American intellectuals of the time, including Walt Rostow and Henry Kissinger, both of whom became key players in American foreign policy by the 1960s.⁴⁸

These German thinkers and their American counterparts faced numerous difficulties as they sought to craft a coherent theory of American liberalism. These obstacles appear as themes

⁴⁶ For Friedrich’s discussion of a properly organized democratic society – which includes many elements often considered part of liberal law, see Carl Joachim Friedrich, *Constitutional Government and Politics: Nature and Development* (New York: Harper & Brothers, 1937), 111-12.

⁴⁷ William Rehg, “Translator’s Introduction,” in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: M.I.T. Press, 1998), xxiv-xxv.

⁴⁸ For a discussion of Rostow’s career in foreign policy, see David Milne, *America’s Rasputin: Walt Rostow and the Vietnam War* (New York: Hill and Wang, 2008). For an analysis of Kissinger’s career, see Robert Dallek, *Nixon and Kissinger: Partners in Power* (New York: HarperCollins, 2007); Daniel J. Sargent, *A Superpower Transformed: The Remaking of American Foreign Relations in the 1970s* (Oxford: Oxford University Press, 2015).

throughout this work – sometimes in the foreground, at other times in the background. A problem the German intellectuals discovered was that there was often a substantial divide between their own ideas and those of their American counterparts.⁴⁹ One of the major challenges the Germans faced in developing their theories of liberalism was the difficulty in translating certain ideas from the German-language into English.⁵⁰ In some circumstances, the ideas the Germans discussed had no clear analogue in the English-language. For example, in Carl Friedrich’s political theory the German concept of *Genossenschaft*, discussed at length in Chapter 4, was foundational to his analysis of democracy but was difficult to explain to an American audience because it can be translated as association, fellowship, guild, or cooperative.

Even when the Germans and the Americans could discuss a shared concept, such as the idea of sovereignty that Franz Neumann and Quincy Wright debated, they frequently disagreed about the underlying assumptions behind those concepts. As seen in Chapter 3, Neumann and Wright took very different views of sovereignty in international law because the intellectual history of sovereignty in Germany differed greatly from the history of sovereignty in American law, politics, and history. While the Germans and the Americans often found common ground, the difficulties they encountered in trying to formulate a political theory of liberalism they could both understand foreshadowed the problems the U.S. would face in exporting liberalism abroad.

⁴⁹ This is not to say that some ideas were uniquely “German” or “American” – instead, it treats ideas, such as liberalism, as their own independent categories and seeks to explain how the Germans and Americans understood these concepts based on historical and cultural assumptions that sometimes differed and that were sometimes shared. For an explanation of how to avoid essentializing certain ideas as part of a particular nation’s character, see Helmut Walser Smith, “When the Sonderweg Debate Left Us,” *German Studies Review* 31, no. 2 (May 2008): 236-37.

⁵⁰ For a discussion of the obstacles to capturing meaning with linguistic translation, see Lydia H. Liu, *Translingual Practice: Literature, National Culture, and Translated Modernity – China, 1900-1937* (Stanford: Stanford University Press, 1995), 1-42. A useful example of the difficulty of translating and adapting German-language texts to suit an English-language audience can be found in historian Jennifer Ratner-Rosenhagen’s work on the reception of Friedrich Nietzsche in the United States. Jennifer Ratner-Rosenhagen, *American Nietzsche: A History of an American Icon and His Ideas* (Chicago: The University of Chicago Press, 2012), 47-49.

Another issue these German and American thinkers encountered was the challenge of developing a philosophically justifiable theory of liberalism that also reflected social practice. The writings of contemporary sociologist and philosopher Jürgen Habermas are instructive on this complicated problem. According to Habermas – whose work on the validity of legal norms is equally applicable to political theory: “[O]ne can adequately explain the meaning of such legal validity only by referring simultaneously to both aspects – to de facto validity or acceptance, on the one hand, and to legitimacy or rational acceptability, on the other.”⁵¹ For legal and political norms to be valid, they must meet two conditions. First, they need to have some degree of social acceptance that Habermas calls “*de facto validity*,” meaning norms cannot simply be plucked out of the metaphysical ether.⁵² Schlesinger’s celebration of New Deal pragmatism in his 1956 essay “Liberalism in America” reflects this desire for de facto validity – for Schlesinger the New Deal sought to build its policies based on the social practices of Americans, not based on a theory that failed to investigate how society actually functioned.⁵³

Second, according to Habermas, legal and political norms need to have “*legitimacy*,” which he says requires a rational justification based on accepted procedural rules, such as approval by a legislature, or derived from philosophical explanations, such as pragmatism, ethics, or morality.⁵⁴ Put simply, Habermas argues legal and political norms are only legitimate when they are based on a philosophical justification that is rational. A foundational belief in

⁵¹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: M.I.T. Press, 1998), 29.

⁵² Habermas writes: “The *de facto validity* of legal norms is determined by the degree to which such norms are acted on or implemented, and thus by the extent to which one can actually expect the addressees to accept them.” Emphasis in original, *ibid.*, 29-30.

⁵³ Schlesinger, 69.

⁵⁴ Habermas asserts: “On the other hand, the *legitimacy* of statutes is measured against the discursive redeemability of their normative validity claim – in the final analysis, according to whether they have come about through a rational legislative process, or at least could have been justified from pragmatic, ethical, and moral points of view.” Emphasis in original, Habermas, 30.

rationality is necessary when discussing legal and political norms – as well as philosophical principles in general – because debating the validity of different norms presupposes the notion that reason can be applied to determine which norm is preferable.⁵⁵ In law and politics, skepticism toward the necessity of rationality may lead one to believe that might makes right, and that law and politics simply reflect the domination of powerful individuals or groups over weaker people.⁵⁶ For liberals, incredulity toward rationality is untenable because reason forms a core element in their assumptions about the nature of human beings.⁵⁷

Thus, from the 1930s to the early 1960s, the difficulties faced by the members of the Riesman club – and American liberal thinkers in general – were twofold. First, the rise of the Nazis in the 1930s and the solidification of the Communist Soviet bloc during the Cold War indicated that liberalism might not have de facto validity, because so many people across the globe were willing to embrace illiberal political systems. Describing American liberalism and Soviet Communism during the Cold War, historian David Engerman observes: “Leaders on each side believed that history itself was on their side, but at the same time exhibited a certain impatience with the workings of history; neither side was willing to stand aside and let history

⁵⁵ The philosopher Thomas Nagel offers an instructive discussion of the necessity of reason. He gives the example of Kantianism as a school of thought that accepts the need for reason, but his argument applies more generally to any school of philosophy that recognizes the need for reason: “A defender of the Kantian method must claim that it is legitimate to ask for justifying reasons for a contingent social practice in a way in which it is not legitimate to turn the tables and call reason itself into question by appealing to such a practice. The asymmetry arises because any claim to the rightness of what one is doing is automatically an appeal to its justifiability, and therefore subject to rational criticism. All roads lead to the same court of appeal, a court to which all of us are assumed to have access. Reason is universal because no attempted challenge to its results can avoid appealing to reason in the end [...]” Thomas Nagel, *Other Minds: Critical Essays 1969-1994* (New York: Oxford University Press, 1995), 212-13.

⁵⁶ For example, David Luban notes that U.S. Supreme Court Justice Oliver Wendell Holmes, Jr., shared with his contemporary Friedrich Nietzsche an incredulity toward the importance of reason, which led them both to believe the most important drives for human society were the desire for power and the use of force. David Luban, “Justice Holmes and the Metaphysics of Judicial Restraint,” *Duke Law Journal* 44, no. 3 (Dec. 1994): 500. For a critique of Holmesian skepticism, including skepticism toward rationality, see Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: The University of Chicago Press, 2000), 190-94.

⁵⁷ Gerstle, 1046, 1070.

take its course.”⁵⁸ This is to say, if American liberal and Soviet Communist leaders truly believed that their political philosophy had de facto validity – meaning their thinking was self-evident and universally accepted across the globe – they would not have felt the need to steer the path of history themselves. As will be seen in the following chapters, the German and American thinkers discussed here frequently had difficulty explaining whether the tenets of liberalism were broadly accepted by all people. Indeed, by the early 1970s Telford Taylor argued it was unclear during the Vietnam War whether the United States was even following the liberal international law it had helped build during the Nuremberg Trials of the 1940s.⁵⁹

Second, because some groups of people did not spontaneously accept liberalism, intellectuals and policymakers in United States had two courses of action they could take to demonstrate liberalism’s legitimacy. They could either use rational debate to convince people of the validity of liberal political theory based on reason, or they could force nations to adopt liberalism – the latter was a problematic course if the liberal project sought to primarily use reason and to minimize the use of force. The task of formulating a rational political theory of liberalism was particularly difficult because of the pluralistic nature of American society.⁶⁰ In pluralistic cultures there is often substantial disagreement, even about what constitutes

⁵⁸ Engerman, 23.

⁵⁹ Taylor’s analysis will be described in detail in Chapter 3.

⁶⁰ The debate over the nature of American society was especially fraught in the context of religion. For an analysis of the dispute between Catholics, Protestants, and secular liberals from the 1920s to the 1950s over the relationship between church and state in the United States, see Philip Gleason, “Pluralism, Democracy, and Catholicism,” *Review of Politics* 49, no. 2 (Spring 1987): 208-30. Historian David Hollinger describes the transformation of American politics and culture away from Christianity toward greater religious pluralism in the twentieth century, with an emphasis on the role of Judaism in this process. David A. Hollinger, *Science, Jews, and Secular Culture: Studies in Mid-Twentieth-Century American Intellectual History* (Princeton: Princeton University Press, 1999), 17-41. Hollinger also explores the separation between liberal Protestantism and evangelical Protestantism that emerged in 1940s and describes how this affected American religion, politics, and culture. David A. Hollinger, *After Cloven Tongues of Fire: Protestant Liberalism in Modern American History* (Princeton: Princeton University Press, 2013), 18-55. Many of the consensus liberals of the 1950s argued that American society sufficiently accommodated differing value systems, downplaying the divisions in the U.S. that could create challenges for pluralism. Allen J. Matusow, *The Unraveling of America: A History of Liberalism in the 1960s* (New York: Harper & Row, 1984), 7.

rationality, because people in such societies often hold competing, and sometimes incommensurate, views of what constitutes rational procedural rules, ethics, and morals.⁶¹

As the following chapters illustrate, the German and American intellectuals who tried to develop a coherent liberal philosophy frequently disagreed with each other about the nature of liberalism and about the types of domestic and international policies they believed a liberal state ought to carry out. While the splintering of American society and culture is often located in the 1960s and 1970s, for liberal thinkers in the United States, the cracks in liberal political theory were already becoming apparent in the 1930s, 1940s, and 1950s.⁶² Efforts to find a cohesive framework of American liberalism became increasingly pressing by the 1960s, when vocal and influential radical movements in the United States challenged liberalism, driven especially by younger Americans.⁶³ Opposition to American politics and policies also spread globally by the late 1960s as the influence of these radical movements spilled over to places like Europe, where many youth reacted negatively to American involvement in the Vietnam War.⁶⁴

These themes of translation, politics in practice versus politics in theory, and pluralism appear throughout this work. They form some of the most important challenges that the German

⁶¹ Philosopher Alasdair MacIntyre describes a variety of sources from which the idea of justice may be derived: “[W]hat many of us are educated into is, not a coherent way of thinking and judging, but one constructed out of an amalgam of social and cultural fragments inherited both from different traditions from which our culture was originally derived (Puritan, Catholic, Jewish) and from different stages in and aspects of the development of modernity (the French Enlightenment, the Scottish Enlightenment, nineteenth-century economic liberalism, twentieth-century political liberalism.” Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988), 2. This diversity can create debate over what constitutes rationality, as MacIntyre notes: “Fundamental disagreements about the character of rationality are bound to be peculiarly difficult to resolve. For already in initially proceeding in one way rather than another to approach the disputed questions, those who so proceed will have had to assume that these particular procedures are the ones which it is rational to follow. A certain degree of circularity is ineliminable.” Ibid., 4. For a critique of MacIntyre’s possible relativism, see Nagel, 203-9.

⁶² Daniel T. Rodgers, *Age of Fracture* (Cambridge, MA: Belknap Press, 2011), 4-6; Matusow, xiv.

⁶³ Gerstle, 1073; Howard Brick and Christopher Phelps, *Radicals in America: The U.S. Left Since the Second World War* (New York: Cambridge University Press, 2015), 111-20.

⁶⁴ Martin Klimke, *The Other Alliance: Student Protests in West Germany and the United States in the Global Sixties* (Princeton: Princeton University Press, 2010), 4-5, 6-7.

and American expositors of liberalism in the United States faced as they sought to create a universally applicable political and legal theory in the mid-twentieth century. That they may have fallen short in many ways is not so much evidence of their own deficiencies as it is a testament to the tremendous difficulty in answering many of the deep philosophical and legal questions they sought to solve. By understanding their history, from their blind spots to their triumphs, perhaps we will better comprehend and maybe even resolve the challenges liberalism faces in our own time.

CHAPTER 1

Berlin to Buffalo: **The Creation of a Weimar Émigré Community in America**

The most striking element of the ornate Harvard undergraduate dormitory Dunster House was its white clocktower topped with a red cupola, which rose high above the banks of the meandering Charles River. The clocktower was designed after the Christ Church, Oxford, bell tower known as “Big Tom,” though in constructing the façade of Dunster House, the architects had used red brick rather than Oxford-style stone.¹ Dunster was one of several Houses built by Harvard in the 1920s under the guidance of Harvard President Abbot Lawrence Lowell, who sought to push for more social interaction between wealthy and less affluent undergraduates.² Harvard College students were required to live and dine in the new Houses, which caused significant controversy at the time.³

One of the early undergraduate residents of Dunster House was David Riesman, who began his studies at Harvard College in 1927.⁴ Riesman and his classmate Benjamin West Frazier III, while reporting for the Harvard newspaper, the *Crimson*, had stumbled upon the plan for the Harvard Houses, but held back from publishing an article about it after they learned from Lowell that Harvard had not finished buying up the necessary property.⁵ According to Riesman, he “wholeheartedly supported the Plan,” but he said “[a]mong my friends I was alone in this judgment.”⁶ Nevertheless, the Houses proved popular, and Riesman noted that when he moved

¹ Benjamin J. Sacks, “Harvard’s ‘Cultural Utopia’ and the Culture of Deception: The Expansion toward the Charles River, 1902-1932,” *New England Quarterly* 84, no. 2 (June 2011): 314-15.

² David Riesman, “Education at Harvard,” *Change* 5, no. 7 (Sept. 1983): 25.

³ *Ibid.*, 25.

⁴ David Riesman, “Becoming an Academic Man,” in *Authors of Their Own Lives: Intellectual Autobiographies by Twenty American Sociologists*, ed. Bennet M. Berger (Berkeley: University of California Press, 1990), 30; Riesman, “Education at Harvard,” 25.

⁵ Riesman, “Becoming an Academic Man,” 29.

⁶ *Ibid.*, 30.

into Dunster, which first opened for his senior year of 1930 to 1931, enrollment was “oversubscribed.”⁷ Riesman later recalled that he and his roommate “were delighted to be selected for Dunster House and to find ourselves in a corner room overlooking the Charles.”⁸

While living in Dunster, Riesman encountered and befriended non-resident House tutor Carl Joachim Friedrich, who worked in Harvard’s Department of Government.⁹ Born in Germany, Friedrich had studied under sociologist Alfred Weber, the younger brother of Max Weber, at the University of Heidelberg, receiving his Ph.D. in 1930 after researching the politics and economics of the United States.¹⁰ In Germany, Friedrich had been instrumental in the founding of the *Deutscher Akademischer Austauschdienst* (“German Academic Exchange Service”), also known as the DAAD, which began in 1924, helping to select German students and professors to send to Cornell, Columbia, Yale, and Johns Hopkins, and choosing Americans to send to the University of Heidelberg in Germany for a year to study.¹¹ Friedrich moved to Harvard in 1926; according to Riesman, Friedrich “had come to Harvard as part of a small group of German exchange students in the mid-1920s; he had not intended to stay, but at some point Professor Arthur Holcombe invited him into the Department of Government as an instructor.”¹²

Throughout the 1930s and 1940s, Riesman increasingly interacted with German emigrants to the United States in addition to Friedrich. Over time, a group of émigré intellectuals began to coalesce around Riesman – creating what could be called the “Riesman

⁷ Ibid., 30.

⁸ Ibid., 30.

⁹ Ibid., 30.

¹⁰ Udi Greenberg, *The Weimar Century: German Émigrés and the Ideological Foundations of the Cold War* (Princeton: Princeton University Press, 2014), 29-30; Riesman, “Becoming an Academic Man,” 30.

¹¹ Greenberg, *The Weimar Century*, 42. This exchange program was implemented through the Institute of International Education, which was funded by the Rockefeller Foundation. Ibid., 42.

¹² Ibid., 30; Riesman, “Becoming an Academic Man,” 30.

Club.”¹³ These émigrés, many of whom had fled Nazi Germany, brought over intellectual influences from Weimar Germany.¹⁴ During the Weimar Republic, before their emigration, many of these German thinkers had been critical of the Weimar Constitution, which they believed was an ineffective document for uniting German society into a cohesive political order.¹⁵ Many of these émigrés blamed the deficiencies of the Weimar political system for the rise of the National Socialists in Germany, which had forced so many of them to flee Europe for the United States.¹⁶ By the 1940s the critical analysis of Weimar society and politics offered by these German intellectuals began to influence American thought, as seen in Riesman’s writings. Riesman developed a critique of American liberalism by drawing on the writings of his German colleagues. He was worried that liberalism in the United States was inadequately prepared for the threats of fascism and Communism, and he sought to develop a legal and political theory that would more effectively protect liberal democracy in America.

This chapter has two goals. First, it will focus on Riesman’s intellectual voyage from the late 1920s to the early 1940s. Interwoven with this story will be a discussion of the German émigré intellectuals he encountered in the United States during this time, placing emphasis on the intellectual development of these émigrés during the Weimar Republic in Germany in the 1920s and early 1930s. In addition to Friedrich, the emigrant intellectuals Riesman interacted with included the jurists Ernst Fraenkel, Otto Kirchheimer, and Franz Neumann, as well as the psychoanalyst Erich Fromm.

¹³ I borrow this phrase from Louis Menand’s work on influential American thinkers living in Cambridge, Massachusetts, in the late nineteenth century. Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (New York: Farrar, Straus and Giroux, 2001).

¹⁴ Greenberg, *The Weimar Century*, 14-16.

¹⁵ Ibid., 16. Greenberg argues that the émigrés brought positive political theories out of Weimar, which is undoubtedly true, but they tended to view Weimar as a failure that needed to be reckoned with. Ibid., 16.

¹⁶ Ibid., 13-14.

Second, this chapter will explain the influence these German thinkers increasingly had over Riesman's legal theories by the early 1940s. This intellectual history will elucidate how Riesman adopted émigré theories as he tried to explain the Nazi legal system, which he believed might threaten the rule of law in the U.S. as time wore on. Additionally, this chapter will clarify Riesman's theory of civil liberties, which was also deeply indebted to émigré legal and political theory. In his discussion of civil liberties, Riesman criticized classical liberalism's framework of constitutional rights and instead sought to develop a democratic theory of civil liberties, which he believed would better protect American law and constitutionalism from left-wing and right-wing political extremism. Ultimately, this chapter seeks to illuminate the synthesis of German and American thought that emerged in the 1930s and 1940s after the resettlement of German émigré intellectuals in the United States.

I. An Early Emigrant: Carl J. Friedrich at Harvard University

Carl Friedrich stood out against Riesman's other professors at Harvard College. While at Harvard, Riesman said he was a "biochemical sciences major" because "[m]istakenly I thought my parents sensible when they encouraged me to study subjects at Harvard that could only be pursued in an academic setting, and that meant the natural sciences, for one could always read books."¹⁷ Though Riesman noted "[a]t Harvard College I soon found myself for the first time in a place where I wanted to be," he also observed wryly that "[t]he science teaching I experienced, including that of James B. Conant, was routine until in my senior year I encountered Lawrence J. Henderson's magnificent course, focused on the physiology of blood."¹⁸ Riesman said "I did enjoy reading history, and as a sophomore I petitioned Arthur Schlesinger, Sr., for permission to

¹⁷ Riesman, "Becoming an Academic Man," 27. This was unsurprising because Riesman's father, who was born in Germany and who emigrated to Portsmouth, Ohio, ultimately graduated with a degree in medicine in 1892 from the University of Pennsylvania. Ibid., 22-23.

¹⁸ Ibid., 26, 27.

take his course on American social history, open to juniors and seniors,” but stated derisively “[i]t was a disappointment, for although Schlesinger was a fine person and an admired mentor of graduate students, he was a poor lecturer and did not seem to me to be a penetrating scholar.”¹⁹ In contrast, Friedrich had a profound influence on Riesman’s intellectual development – as Riesman declared: “Friedrich was primarily responsible for my becoming an academic man.”²⁰

After graduating from Harvard College, Riesman enrolled in Harvard Law School, saying “since my primary purpose was to stay put, Harvard Law School was the obvious choice,” and he noted “[s]taying put, moreover, had the great advantage of allowing me to continue my association with the magnetic Friedrich.”²¹ Riesman was an accomplished law student – as he later stated: “I not only was on the law review but also had led my class.”²² Riesman and Friedrich maintained their close relationship during Riesman’s time in law school. He and Friedrich purchased a farm together in Vermont, because Riesman noticed that “[i]n the depths of the Depression, Vermont farms were cheap” and “[m]any had been purchased with Federal Land Bank mortgages at very low interest.”²³

Riesman graduated from law school in 1934 and went to Washington, D.C., to interview with several U.S. Supreme Court Justices for a clerkship, including Benjamin Cardozo and Louis

¹⁹ Ibid., 27.

²⁰ Ibid., 30.

²¹ Ibid., 32.

²² Ibid., 35. At the time, a position on law review was viewed as a necessary stepping-stone for legal academics, which Riesman observed when discussing a debate he set up at Harvard Law School between Karl Llewellyn and Zechariah Chafee, Jr., sardonically entitled “What’s Wrong with the Harvard Law School?” Ibid., 38. Unsurprisingly, Riesman said “I had offended Dean Roscoe Pound” with this talk. Ibid., 38. Describing Chafee, Riesman noted that he “still suffered, despite his national distinction as a civil libertarian, from not having made law review.” Ibid., 38. Riesman and Llewellyn stayed in contact throughout Riesman’s legal career. In a letter from Riesman to Carl Friedrich, dated October 13, 1940, Riesman wrote that he had requested references from Friedrich, Max Lerner, Henry Hart, and Karl Llewellyn for his application for a Guggenheim fellowship. Correspondence from David Riesman to Carl Friedrich, October 13, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, David Riesman Papers, Harvard University Archives, Harvard University, Cambridge, Massachusetts (hereafter referred to as the Riesman Papers).

²³ Riesman, “Becoming an Academic Man,” 37.

Brandeis, as well as former Justice Oliver Wendell Holmes, Jr.²⁴ Riesman told Felix Frankfurter, then a professor at Harvard Law and later a Supreme Court Justice, that Brandeis was too much like Riesman's severe father and that he preferred Cardozo.²⁵ Nevertheless, Frankfurter recommended Riesman take a clerkship with Brandeis, which Riesman ultimately accepted.²⁶

Before his clerkship with Brandeis, it was expected that Riesman would spend another year doing academic work at Harvard Law.²⁷ This proved to be problematic because, as Riesman noted, "[t]he person designated as the Brandeis clerk usually worked with Frankfurter on a thesis."²⁸ However, Riesman said: "I intended to work with Friedrich; I held my ground, and Frankfurter, to his credit, said that though he distrusted Friedrich I could work with him if that was my preference during this post-law school year."²⁹ During this time, Riesman assisted Friedrich prepare his book *Constitutional Government and Politics*, and Riesman felt "Friedrich looked at America with an enthusiastic new-comer's eye."³⁰

According to Riesman, Frankfurter, "had formed a strong dislike of Friedrich," because "[h]e suspected this blond Teuton of being a secret sympathizer of the Nazis, and in addition I think he was jealous of Friedrich's influence over me."³¹ Later in life, Riesman noted Frankfurter's impression of Friedrich might have been correct, at least in the early 1930s. In a

²⁴ Daniel Horowitz, "David Riesman: From Law to Social Criticism," *Buffalo Law Review* 58, 4 (2010): 1008.

²⁵ Melvin I. Urofsky, *Louis D. Brandeis: A Life* (New York: Pantheon, 2009), 471. Holmes had retired from his position on the Supreme Court in 1932. Katie Louchheim, ed., *The Making of the New Deal: The Insiders Speak* (Cambridge, MA: Harvard University Press, 1983), 20.

²⁶ Urofsky, *Louis D. Brandeis*, 471; Riesman, "Becoming an Academic Man," 38.

²⁷ *Ibid.*, 38.

²⁸ *Ibid.*, 38.

²⁹ *Ibid.*, 38.

³⁰ David Riesman, "On Discovering and Teaching Sociology: A Memoir," *Annual Review of Sociology* 14 (1988): 5; Carl Joachim Friedrich, *Constitutional Government and Politics: Nature and Development* (New York: Harper & Brothers, 1937).

³¹ Riesman, "Becoming an Academic Man," 38.

letter from August 22, 1961, Riesman wrote to psychologist and anthropologist Michael Maccoby stating bluntly: “Friedrich’s always presented himself to me as a strong anti-Nazi. When we bought the farm together in 1933 and 1934 it was in part his declaration of independence from Germany, yet Karl Loewenstein told me that he was talking pro-Nazi in 1936. He then swung of course violently anti-Nazi and was one of the founders of the Council for Democracy, a pro-democratic, anti-fascist, interventionist group with which I also worked.”³²

However, it appears that in the 1930s Riesman held no such view about Friedrich. Indeed, he even went so far as to ask his mentor for advice about his personal life. Riesman noted that “Brandeis’s law clerks were forbidden to marry.”³³ However, Riesman asked Evelyn Hastings to marry him prior to his clerkship, and he called on Friedrich to counsel him on whether he and Evelyn should celebrate their nuptials before he started working for Brandeis.³⁴ In a letter from April 27, presumably 1935, Friedrich wrote to Riesman, telling his mentee: “Personally, I think that you are making a great mistake not to speak to the Justice about it, if you wish to marry in June. It will come as a very disagreeable surprise to him.”³⁵

Frankfurter’s complaints to Riesman about Friedrich caused consternation on Friedrich’s part, though Friedrich’s annoyance was sometimes more with Riesman than Frankfurter. Friedrich once wrote to Riesman stating: “You will remember what you told me about Felix’

³² Correspondence from David Riesman to Michael Maccoby, August 22, 1961, HUG(FP) 99.12, Box 10, Friedrich, Carl J. thru 1971, Riesman Papers; Daniel Geary, “Children of *The Lonely Crowd*: David Riesman, the Young Radicals, and the Splitting of Liberalism in the 1960s,” *Modern Intellectual History* 10, no. 3 (2013): 614-15. Karl Loewenstein was a German émigré and political theorist who was best known for creating the concept of “militant democracy,” a theory that argued liberal governments ought to deny protections such as free speech to radical elements who sought to overthrow the government. Greenberg, *The Weimar Century*, 170.

³³ Riesman, “Becoming an Academic Man,” 40.

³⁴ *Ibid.*, 40.

³⁵ Correspondence from Carl Friedrich to David Riesman, April 27, HUG(FP) 99.12, Box 10, Friedrich, Carl J. thru 1971, Riesman Papers. This letter appears to be from 1935 – Riesman married Evelyn in July 1936 but noted in his essay “Becoming an Academic Man” that they “had become engaged the previous summer [...]” which would have been 1935. Riesman, “Becoming an Academic Man,” 41, 40. Thus, it seems Riesman was discussing with Friedrich whether he should marry Evelyn in 1935 or wait until after the conclusion of his clerkship in 1936.

remarks regarding me. You can be sure that he would not approve of your doing so; yet you did, out of whatever seemed right reasons to you. Did I run back to Felix to complain?”³⁶

Several years later, the frosty relationship between Frankfurter and Friedrich would start to thaw. In a letter dated October 10, 1937, Friedrich wrote to Riesman: “Last Wednesday I had a very nice luncheon with Frankfurter. I guess at long last your efforts at effecting a reconciliation are bearing fruit. He brought me his *The Public and Its Government* and with a very kind inscription. He commenced by explaining his conduct during the past few years by what he heard about my attitude toward the Nazis, seemed inclined to brush my protestations aside, and said he could understand. I did not press the issue then, but hope to have it out with him some day, if I get to know him better.”³⁷ Frankfurter and Friedrich discussed literature that sought to explain the rise of fascism: “We instead talked about many topics related to the university. Also books. He spoke very enthusiastically about Borgese, Goliath which delighted me, because I have a very warm regard for Borgese. I got the book for review, and think it is great. Please read it, or have [your wife] Evey read it and spread the word.”³⁸

Riesman and Justice Brandeis also had a rather strained relationship. Riesman’s family was of German-Jewish extraction, but although his parents were both Jewish, this was not an important part of Riesman’s life growing up, as he noted: “My parents were agnostic rationalists

³⁶ Correspondence from Carl Friedrich to David Riesman, April 27, HUG(FP) 99.12, Box 10, Friedrich, Carl J. thru 1971, Riesman Papers.

³⁷ Correspondence from Carl Friedrich to David Riesman, October 10, 1937, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers; Felix Frankfurter, *The Public and Its Government* (New Haven, CT: Yale University Press, 1930). Friedrich also noted in this letter that he was about to take his naturalization test for American citizenship: “Thursday, Lenore, William Elliott, Louise Elliott and I are going to troop down to the Naturalization Office, to have me examined on the American government and constitution. We’ll celebrate afterwards.” Ibid. William Elliott was William Yandell Elliott, another professor in the Government Department at Harvard, and who would become Henry Kissinger’s advisor. Niall Ferguson, *Kissinger: 1932-1968: The Idealist* (New York: Penguin, 2015), 228-29.

³⁸ Correspondence from Carl Friedrich to David Riesman, October 10, 1937, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers; G. A. Borgese, *Goliath: The March of Fascism* (New York: Viking Press, 1937).

without religion. Being Jewish was not a theme discussed at home or elsewhere. It was certainly no asset to be Jewish, but neither did it make itself felt as a liability. For me a sense of Jews as in some respects different entered my consciousness most strongly when I went to Harvard Law School.”³⁹ At one point Riesman took a decidedly confrontational position with Justice Brandeis, stating: “I said to him very early on that I thought Zionism was Jewish fascism.”⁴⁰ According to Riesman: “He was furious, and he said in his austere way, you don’t know Jewish history, and this is a subject we should not discuss again.”⁴¹ Riesman later recalled: “My year with Brandeis at the Supreme Court did little to turn me toward an academic career and did even less for my self-esteem. I did not think I served the justice well.”⁴² In particular, Riesman was displeased that Justice Brandeis “ignored the real story” to achieve the policy outcome he favored in particular cases.⁴³

In 1936, when Riesman’s clerkship ended, he dismissed Justice Brandeis’ advice that he work for the Tennessee Valley Authority in Tupelo, Mississippi; instead Riesman went to work for a Boston law firm and attended a graduate seminar run by Friedrich.⁴⁴ Riesman was then invited by Francis Shea, Dean of the University of Buffalo Law School, a graduate of Harvard

³⁹ Riesman, “Becoming an Academic Man,” 22-24, 25-26.

⁴⁰ David Riesman, “Clerks on the Justices,” in *The Making of the New Deal: The Insiders Speak*, ed. Katie Louchheim (Cambridge, MA: Harvard University Press, 1983), 74; Urofsky, *Louis D. Brandeis*, 471.

⁴¹ Riesman, “Clerks on the Justices,” 74. According to historian Melvin Urofsky, Zionism was not an influential idea in the assimilated American Jewish community until 1914, after which the ravages of World War I inspired American Jewish leaders to help assist European Jews through Zionism. Melvyn I. Urofsky, *American Zionism: From Herzl to the Holocaust* (Lincoln, NE: University of Nebraska Press, 1995), 2. Over time after 1914, Zionism was adopted and cultivated by many leading Jewish thinkers, including Justice Brandeis. *Ibid.*, 2. The argument between Riesman and Brandeis reflects this division in the Jewish community in the early decades of the twentieth century.

⁴² Riesman, “Becoming an Academic Man,” 38.

⁴³ *Ibid.*, 39.

⁴⁴ *Ibid.*, 40-43. That being said, Riesman and Justice Brandeis maintained a genial enough relationship after the clerkship that Brandeis sent Riesman one hundred dollars to assist in the resettlement of European refugees in the United States. Correspondence from David Riesman to Carl Friedrich, December 12, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers.

Law, and former pupil of Felix Frankfurter, to teach at Buffalo, in an effort to transform it into a national law school.⁴⁵ Riesman accepted and became a professor of criminal and property law.⁴⁶

II. Refugee Resettlement and the Long Shadow of Nazi Germany

During this time, Friedrich and Riesman began assisting refugees from Germany seeking resettlement in the United States. Throughout the 1930s, the situation in Germany for Jews and political foes of the Nazi regime became increasingly dire. On April 7, 1933, the Law for the Restoration of the Professional Civil Service sought to disqualify people accused of being enemies of the National Socialists from government service in Germany – targeting the Communists and a substantial portion of Jews, who were deemed “non-Aryan.”⁴⁷ The Nazis’ anti-Semitism became increasingly virulent. On September 15, 1935, Hitler announced the creation of what became known as the “Nuremberg Laws,” which stripped German Jews of their citizenship and prohibited marriages and sexual relations between Jews and those persons now considered German.⁴⁸ Attacks on Jews in Germany only continued to worsen, as seen in the vicious anti-Semitic violence that occurred during *Kristallnacht* on November 9 and 10, 1938.⁴⁹ Because of this bigotry and increasing brutality, from 1933 to 1941 approximately half a million people fled Germany, the vast majority of them Jewish.⁵⁰

In a letter dated January 7, 1940, Friedrich wrote to Riesman from the Council for Democracy on Madison Avenue in New York City, discussing his efforts with the Emergency

⁴⁵ Riesman, “Becoming an Academic Man,” 43.

⁴⁶ Ibid., 44.

⁴⁷ Saul Friedländer, *The Years of Persecution: Nazi Germany and the Jews 1933-1939* (London: Phoenix, 1997), 27-28; Reinhard Zimmermann, “‘Was Heimat hieß, nun heißt es Hölle’: The Emigration of Lawyers from Hitler’s Germany: Political Background, Legal Framework, and Cultural Context,” in *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth Century Britain*, ed. Jack Beatson and Reinhard Zimmermann (Oxford: Oxford University Press, 2007), 5-6.

⁴⁸ Friedländer, 141-42.

⁴⁹ For an analysis of this horrible outbreak of violence carried out by the Nazi regime, see *ibid.* 269-79.

⁵⁰ Zimmermann, 25.

Rescue Committee, located on East 42nd Street, to assist émigrés fleeing Europe.⁵¹ On January 27, 1940, Riesman reported back to Friedrich about his own efforts to obtain funds for refugees to support their studies or their work at institutions of higher learning across the United States.⁵² The resettlement effort took place in fits and spurts, depending on funding. On July 17, 1940, Riesman said in a letter to Friedrich: “Applications keep coming in, many of them from desperate people who have been only a few days in the country, and who had earlier written me from abroad. I am answering them all now that we have no more funds as it does not seem at all likely that we can help them.”⁵³ Similarly, in a letter dated November 18, 1940, Friedrich noted to Riesman the difficulties they encountered meeting the demand for resettlement: “As for the various refugee moneys, it seems to be essential at the moment not to enter into any further commitments to anyone until we have all the money to cover present commitments. I think it is simply out of the question to add new ones.”⁵⁴

The resettlement was also contingent on the refugees’ desire to accept these positions, as some of the refugees were quite picky. In a letter dated October 8, 1940, Riesman told Friedrich:

⁵¹ Correspondence from Carl Friedrich to David Riesman, January 7, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers. Friedrich told Riesman: “I hate to bother you with it, but under the circumstances I must appeal to you for another affidavit of support from you, unless your affidavit was made out within the last six months.” Ibid.

⁵² Correspondence from David Riesman to Carl Friedrich, January 27, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers. These included confirmed and likely pledges of funding from the University of Chicago, the University of Pennsylvania, Southern Methodist University, Columbia University, the University of Buffalo, Yale University, the University of Iowa, the University of Cincinnati, the University of Wisconsin, Duke University, and New York University. Ibid. Riesman was also working to procure funding from the University of Colorado, Indiana University, the University of Pittsburgh, Cornell University, Catholic University, Fordham University, Ohio State University, Wake Forest, George Washington University, and the University of Toledo. Ibid. It was truly a cross-country effort.

⁵³ Correspondence from David Riesman to Carl Friedrich, July 17, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers.

⁵⁴ Correspondence from Carl Friedrich to David Riesman, November 18, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers. Despite these issues, Riesman remained passionate about the resettlement efforts, noting in a post-script to a letter dated December 20, 1940: “P.S. – I suppose you have seen the success of our campaign in P.M. for the refugees. My friend Teddy Petrain has had a series of articles, and there have been editorial thrusts at Breckenridge Long and the other State Department dopes. I wonder if it will have any effect.” Correspondence from David Riesman to Carl Friedrich, December 20, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers.

“I have been having a devil of a time trying to find refugees to fill opportunities which have opened up at the last minute. I sent a very excellent man, Dr. Behrendt, to Toledo but he got there only to turn around and come home again on the ground that the school was not good enough.”⁵⁵ Moreover, the émigrés faced difficulties adjusting to American political discourse, which Riesman made clear in a letter to Friedrich dated November 15, 1940: “I have had several distressing letters from Peter Franck at Berkeley. I do not recall whether I spoke to you about his problem. As a result of a speech he made before a church group, a stupid [*sic*] American Legionnaire accused him [*sic*] of being a fifth columnist and the university authorities, always timid, have called him on the carpet. Nothing could be further from the truth. Peter Franck is one of the very small handful of political refugees.”⁵⁶

On December 10, 1940, Friedrich wrote to Riesman describing the struggle to create a “committee trying to place refugee scholars in law schools.”⁵⁷ Efforts were also made to introduce European lawyers to the American legal community. In a letter dated December 10, 1940, Riesman wrote to Friedrich, stating: “Philip Jessup of Columbia has written me asking for a list of refugee lawyers in international law who are in the United States. He is running a conference in Washington in April in which he hopes to bring together American international

⁵⁵ Correspondence from David Riesman to Carl Friedrich, October 8, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers.

⁵⁶ Correspondence from David Riesman to Carl Friedrich, November 15, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers. According to Riesman: “He gave up a promising career in the Ministry of Justice simply on the grounds of conscience. His wife, who died you recall in tragic circumstances during the summer, went to Spain to help the Loyalists. Peter’s many letters to me, which sometime I think you would be interested in seeing, are recurrent testimony to his unconquerable spirit. He has been anxious to work for the Council for Democracy and wrote for one of its representatives a draft of plans of the Nazis concerning South America taken from Nazi sources and from correspondence with refugees in Cuba and Haiti.” Ibid.

⁵⁷ Correspondence from Carl Friedrich to David Riesman, December 10, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers. For an in-depth analysis of the resettlement process of German émigrés to the United States that focuses on their placement in American law schools, see Kyle Graham, “The Refugee Jurist and American Law Schools, 1933-1941,” *American Journal of Comparative Law* 50, no. 4 (Fall 2002): 777-818.

lawyers with their European confreres.”⁵⁸ According to Riesman, this was to be done in part for pragmatic reasons: “Through this he hopes to give some encouragement to the Europeans who have not yet made any American contacts and hopes that some chances of employment might be offered by such contacts. I am writing you now for suggestions of names which I might submit to him which happen to be in your files of young men.”⁵⁹

One of the lawyers Riesman and Friedrich assisted was Ernst Fraenkel, who had fled Nazi Germany in 1938, traveling first to the United Kingdom and then to the United States.⁶⁰ Riesman was the secretary for the Committee for the Re-education of Refugee Lawyers, and he and Friedrich helped resettle Fraenkel and several other German refugees as students at the University of Chicago Law School, although some administrators at Chicago were not particularly enthusiastic about accepting them.⁶¹ In light of his resettlement work, Riesman received an update on the academic progress of these émigrés.⁶² Riesman wrote to Friedrich on March 17, 1940, saying the émigrés were some of the best law students: “I have just learned that Dr. Ehrenzweig was top man of his class at Chicago and that Fraenkel also did very well in the mid-year examination. Moeller, who is in his second year, has not written a mid-year examination but his term paper in Conflict of Laws was the best in the class.”⁶³

⁵⁸ Correspondence from David Riesman to Carl Friedrich, December 12, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers.

⁵⁹ Ibid.

⁶⁰ Greenberg, *The Weimar Century*, 90-91.

⁶¹ Graham, 815; Correspondence from Carl Friedrich to David Riesman, November 21, 1939, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers.

⁶² Correspondence from David Riesman to Carl Friedrich, March 17, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers.

⁶³ Ibid.

Fraenkel, a Jewish émigré, was born in Cologne, Germany, in 1898.⁶⁴ His elder brother and then his father both died in 1909, followed by his mother, who died in 1915.⁶⁵ Fraenkel decided to become a soldier during World War I, joining the German armed forces in 1916, and serving until April 1918 when a grenade seriously wounded him.⁶⁶ After his military service, he studied law at the University of Frankfurt with Hugo Sinzheimer, a member of the socialist Social Democratic Party (SPD), completing his doctorate in 1923 with a focus on labor law.⁶⁷ While at Frankfurt, Fraenkel met the socialist Franz Neumann, who also studied with Sinzheimer, and they later became law partners starting in 1927 or 1928, practicing in Berlin.⁶⁸ Fraenkel became an influential member of the SPD – the heads of the SPD thought about selecting him for the position of German justice minister in 1930.⁶⁹

Despite the fact that the Nazis stripped many Jewish jurists in Germany of their ability to practice law following the April 7, 1933, Law on the Admission to the Bar, Fraenkel was able to continue practicing because of his military service during the First World War.⁷⁰ Fraenkel defended people charged with political crimes and at the same time he began writing a book on his theory of law in Nazi Germany, which would ultimately be titled *The Dual State*.⁷¹

⁶⁴ Douglas G. Morris, *Legal Sabotage: Ernst Fraenkel in Hitler's Germany* (Cambridge: Cambridge University Press, 2020), 1, 6; Greenberg, *The Weimar Century*, 80.

⁶⁵ Morris, *Legal Sabotage*, 6.

⁶⁶ *Ibid.*, 6.

⁶⁷ Greenberg, *The Weimar Century*, 80-81; Morris, *Legal Sabotage*, 29.

⁶⁸ Greenberg, *The Weimar Century*, 80; Douglas G. Morris, "Write and Resist: Ernst Fraenkel and Franz Neumann on the Role of Natural Law in Fighting Nazi Tyranny," *New German Critique* 42, no. 3 (Nov. 2015): 202; Karsten Olson, "Franz L. Neumann's *Behemoth*: A Materialist Voice in the *Gesamtgestalt* of Fascist Studies," in *The SAGE Handbook of Frankfurt School Critical Theory*, vol. 1, ed. Beverley Best, Werner Bonefeld, and Chris O'Kane (Los Angeles: SAGE Publications, 2018), 89; Simone Ladwig-Winters, *Ernst Fraenkel: Ein Politisches Leben* (Frankfurt, Germany: Campus, 2009), 47. There is some disagreement about when Fraenkel and Neumann began practicing law together in Berlin – Douglas Morris and Simone Ladwig-Winters say 1927 while Karsten Olson says 1928. Morris, "Write and Resist," 202; Ladwig-Winters, 47; Olsen, 89.

⁶⁹ Greenberg, *The Weimar Century*, 81.

⁷⁰ Douglas G. Morris, "The Dual State Reframed: Ernst Fraenkel's Political Clients and his Theory of the Nazi Legal System," *Leo Baeck Institute Year Book* 58 (2013): 6; Greenberg, *The Weimar Century*, 90.

⁷¹ Morris, "The Dual State Reframed," 6.

However, by the late 1930s, the situation in Germany had become untenable for him – in 1938 he was informed that the Nazis intended to detain him, so Fraenkel emigrated to the United Kingdom and subsequently to the University of Chicago in the United States.⁷²

When Riesman first helped resettle Fraenkel, he was skeptical of Fraenkel's academic ability. In a letter dated November 29, 1939, Riesman reported to Friedrich his negative view toward Fraenkel's writing, likely referring to a draft of *The Dual State* Fraenkel had sent him: "After receiving approval of Dr. Frannkel [sic] I received the manuscript of his book and have been reading it. Had I seen it first, I would have been more hesitant in recommending him, since it seems to me interesting for its material but badly organized and not at all profound – mainly, perhaps, because i[t] lacks in its confinement to Germany the perspective that could come only from a comparative study. He wrote me that you had read it and I wonder what you think of it."⁷³ Nevertheless, Fraenkel's work grew to influence Riesman's own writing over time, as did the theories developed by the other émigrés Riesman began to encounter.

III. Erich Fromm Introduces Riesman to Psychoanalysis

In 1939, Riesman also began taking bi-monthly trips from Buffalo to New York City to meet with his psychoanalyst, Erich Fromm, for two weekend sessions that lasted two hours each.⁷⁴ Riesman underwent psychoanalysis with Fromm upon the recommendation of his mother's psychoanalyst, Karen Horney, who Riesman noted "had said of me that I was a rather

⁷² Greenberg, *The Weimar Century*, 90-91.

⁷³ Correspondence from David Riesman to Carl Friedrich, November 29, 1939, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers. This is likely a reference to Ernst Fraenkel, despite the misspelling of Fraenkel's name, because Riesman knew him and the date of this letter corresponds with Fraenkel's drafting of *The Dual State* – Fraenkel had already written a German-language version of the book by September 1938 and ultimately published an English-language version in 1941. Morris, "The Dual State Reframed," 6.

⁷⁴ Riesman, "On Discovering and Teaching Sociology," 5,7; Riesman, "Becoming an Academic Man," 43, 45.

resigned person, and this struck me as perceptive.”⁷⁵ Riesman’s self-description is rather surprising, due to his numerous accomplishments in his career up to that point.⁷⁶

Fromm was born to a Jewish family in 1900 in Frankfurt, Germany, and in his youth hoped to become a rabbi.⁷⁷ In Frankfurt, he became close with Rabbi Nehemiah Nobel, who was heavily influenced by the Hasidic Jewish tradition.⁷⁸ Over time, Fromm helped to create a group of Nobel followers, which included Leo Loewenthal, Ernst Simon, and the philosopher Franz Rosenzweig.⁷⁹ Fromm also assisted in the establishment of the Free Jewish Teaching Institute, whose members included the theologian Martin Buber, as well as Jewish philosophers Gershom Scholem and Leo Baeck.⁸⁰ Fromm began his studies in jurisprudence at the University of Frankfurt, but after two semesters moved to the University of Heidelberg in May 1919.⁸¹ At Heidelberg, similar to Carl Friedrich, Fromm worked with Alfred Weber – in a letter dated December 23, 1915, Fromm told Weber that “studies with you were one of the most fertile experiences [of] my life; not only in what I learned but also through your personality as a model.”⁸² Weber oversaw Fromm’s dissertation on the relationship between Jewish ethics and group unity in the Karaite, Reform, and Hasidic Jewish traditions.⁸³

Fromm discovered psychoanalysis through his association with Frieda Reichmann, his future wife, and in 1923 began assisting in a sanatorium for Jewish people created by Reichmann

⁷⁵ Ibid., 45.

⁷⁶ Ibid., 45.

⁷⁷ Lawrence J. Friedman, *The Lives of Erich Fromm: Love’s Prophet* (New York: Columbia University Press, 2013), 4; Kieran Durkin, “Erich Fromm: Psychoanalysis and the Fear of Freedom,” in *The SAGE Handbook of Frankfurt School Critical Theory*, vol. 1, ed. Beverley Best, Werner Bonefeld, and Chris O’Kane (Los Angeles: SAGE Publications, 2018), 56.

⁷⁸ Friedman, 10.

⁷⁹ Ibid., 11. Loewenthal would later break up Fromm’s engagement to Golde Ginsburg, with Loewenthal later marrying Ginsburg. Ibid., 18.

⁸⁰ Ibid., 11.

⁸¹ Durkin, 56; Friedman, 12.

⁸² Ibid., 12-13, 346 n. 19.

⁸³ Ibid., 13.

in Heidelberg.⁸⁴ He then traveled to Munich, Frankfurt, and Berlin for training in psychoanalysis and set up his own practice in Berlin in 1928.⁸⁵ Starting in 1929, Fromm began working at the newly established Frankfurt Psychoanalytical Institute and he sought to construct a theory of psychoanalysis that combined Karl Marx's socialism with Sigmund Freud's psychoanalysis.⁸⁶ Fromm came to know Max Horkheimer, of the Institute for Social Research, sometime in the mid- to late-1920s, and the two formed a close bond by 1931.⁸⁷ The Institute for Social Research and the Frankfurt Psychoanalytical Institute were located in the same structure in Frankfurt.⁸⁸ In the early 1930s, Fromm also began his studies of Max Weber, Alfred Weber's brother, particularly Max's work *The Protestant Ethic and the Spirit of Capitalism*.⁸⁹

In autumn 1933, Fromm left Germany with Karen Horney to attend talks at the Chicago Psychoanalytic Institute.⁹⁰ While in the United States, the Columbia University Department of Sociology attempted to have Fromm enter their employ – when Fromm said he wanted to remain loyal to his fellow members of the Institute for Social Research, Columbia University proposed the relocation of the Institute and its associates to New York City.⁹¹ Fromm settled into New York's Morningside Heights neighborhood in May of 1934.⁹² But after Horkheimer ceased remunerating Fromm for his work with the Institute in autumn 1938, Fromm ended his involvement with the Institute, though he stayed connected with some of his colleagues from it.⁹³

⁸⁴ Durkin, 57.

⁸⁵ Ibid., 57.

⁸⁶ Ibid., 58-59.

⁸⁷ Ibid., 60; Friedman; 30. Kieran Durkin asserts that Horkheimer and Fromm came to know each other sometime between 1926 and 1928, while Lawrence Friedman argues that they met in 1929. Durkin, 60; Friedman, 30.

⁸⁸ Durkin, 60.

⁸⁹ Friedman, 39.

⁹⁰ Ibid., 45.

⁹¹ Ibid., 45-46.

⁹² Ibid., 55.

⁹³ Thomas Wheatland, *The Frankfurt School in Exile* (Minneapolis: University of Minnesota Press, 2009), 83-84.

Although Riesman sought help from Fromm, he was initially skeptical of some of Fromm's intellectual proclivities. As Riesman later wrote: "When I went to see Fromm for the first time at his apartment on New York's West Side, I noticed a large shelf of the collected works of Marx and Engels. I assumed that a Marxist or Leninist would seek to propagandize me."⁹⁴ However, when Riesman discussed this with his psychoanalyst, Riesman said "Fromm amusedly reassured me that he had no intention of converting me to Marxism."⁹⁵

As time went by Fromm won over Riesman as a disciple. Riesman said "we often talked as if he were my teacher rather than my analyst," noting that "[w]e discussed the study of society and the work on social character that he had done with Ernst Schachtel, whom I also met and admired, when Fromm was part of the Frankfurt group."⁹⁶ Schachtel knew Fromm from their time together in Heidelberg and later joined the Institute for Social Research.⁹⁷ Riesman and Fromm's discussions turned into more formal training, as Riesman wrote: "Later, I was to attend seminars in New York for analysts in training, given by both Fromm and Harry Stack Sullivan at the William Alanson White Institute, and lectures by Schachtel and Fromm at the New School."⁹⁸ Fromm, Karen Horney, and Harry Stack Sullivan came to be identified as neo-

⁹⁴ Riesman "Becoming an Academic Man," 45.

⁹⁵ Ibid., 46.

⁹⁶ Ibid., 46.

⁹⁷ Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute for Social Research 1923-1950* (Berkeley: University of California Press, 1996), 131.

⁹⁸ Riesman "Becoming an Academic Man," 46. Fromm later met Riesman's family. When Riesman's father passed away, Fromm sent condolences in a letter dated June 14, 1940, stating: "I should like to express my warmest sympathy for the loss you have suffered. I remember so well the time, almost a year ago, when I had the privilege of meeting Dr. Riesman. I was particularly impressed by the great range of his interest and knowledge and by the vivacity with which he pursued them, thus showing a great vitality." Correspondence from Erich Fromm to Mrs. David Riesman, June 14, 1940, Erich Fromm Papers, New York Public Library Archives & Manuscripts, New York Public Library, New York, NY (hereafter referred to as the Fromm Papers), Reel 2. In this letter, Fromm recalled that the Riesman family had also spent time with his friends: "I also remember a very gracious gesture of his in giving a bunch of flowers to Mrs. Schachtel when we all had lunch together at the shore." Ibid.

Freudians, who emphasized the importance of social relations and individuality in their psychoanalytic theory, eschewing their American peers' emphasis on biology.⁹⁹

In addition to psychoanalysis, Riesman and Fromm would also discuss legal concerns during their time together – in a letter dated November 28, 1940, Riesman mentioned to Fromm “my talk with you about the freedom of assembly [...]”¹⁰⁰ Over time, Fromm began to loom as large as Friedrich in Riesman's intellectual development. Their similarities were not lost on Riesman, who wrote: “Fromm, who had, like Friedrich, a Ph.D. from Heidelberg, was widely read in history and biography. Like Friedrich also, he greatly assisted me in gaining confidence as well as enlarging the scope of my interest in the social sciences.”¹⁰¹ Moreover, Riesman's connections with Fromm and Friedrich served as a major influence on the evolution of his work, which Riesman himself recognized: “If one recalls that my parents were Francophile and Italophile in culture and Anglophile in manner, then my interest in contemporary German – that is, Weimar – culture was a way of finding my own direction as distinct from theirs – a direction facilitated not only by Friedrich and Fromm but also by the many refugees I met through both those men and through my own concerns.”¹⁰²

IV. Otto Kirchheimer and Franz Neumann Critique Weimar Constitutionalism

While the University of Buffalo, Riesman met other German émigrés as a result of his legal scholarship. In addition to Friedrich and Fromm, Riesman's affiliation with the émigré lawyers Otto Kirchheimer and Franz Neumann would play a key role in Riesman's legal

⁹⁹ Neil G. McLaughlin, “Why Do Schools of Thought Fail? Neo-Freudianism as a Case Study in the Sociology of Knowledge,” *Journal of the History of the Behavioral Sciences* 34, no. 2 (Spring 1998): 115-16. As Neil McLaughlin asserts: “The consequence of this perspective [of Fromm, Horney, and Sullivan] was a stress on sociological, not biological, factors, a major break with both classical Freudian theory and the increasingly medically oriented American psychoanalytic establishment.” *Ibid.*, 116.

¹⁰⁰ Correspondence from David Riesman to Erich Fromm, November 28, 1940, Fromm Papers, Reel 2.

¹⁰¹ Riesman, “Becoming an Academic Man,” 46.

¹⁰² *Ibid.*, 46.

scholarship on liberalism. Despite Kirchheimer and Neumann's socialist politics, they had found common ground with the conservative German lawyer Carl Schmitt in the 1920s and 1930s – all three took a critical stance toward the Weimar Constitution by emphasizing the challenges constitutional law faced when it was forced to wrestle with social change.¹⁰³

Kirchheimer was born into a German-Jewish family in the Southwestern portion of the German Empire on November 11, 1905, in the city of Heilbronn in the state of Württemberg.¹⁰⁴ He was peripatetic in his schooling, studying Neo-Kantian philosophy in 1924 at the University of Münster, then traveling to the University of Cologne in 1925 to study with Max Scheler, the renowned sociologist, and finally settling at the University of Berlin to work with Rudolf Smend and Hermann Heller on law, with a focus on constitutional law.¹⁰⁵ Smend became known in the Weimar Republic for his constitutional “theory of integration,” explained in his 1928 book *Constitution and Constitutional Law (Verfassung und Verfassungsrecht)*.¹⁰⁶ Heller was born in

¹⁰³ For a discussion of the complex intellectual between Neumann, Kirchheimer, and Schmitt, see William E. Scheuerman, “Introduction,” in *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, ed. William E. Scheuerman (Berkeley: University of California Press, 1996), 2-11.

¹⁰⁴ “OTTO KIRCHHEIMER [curriculum vitae],” November 15, 1942, Box 1, Vitae, Personal History Statement, Publications, Folder 1, Otto Kirchheimer Papers, German and Jewish Intellectual Emigre Collection, M. E. Grenander Department of Special Collections and Archives, University Libraries, University at Albany, State University of New York, Albany, NY (hereafter referred to as the Kirchheimer Papers); Frank Schale, Lisa Klingsporn, and Hubertus Buchstein, “Otto Kirchheimer: Capitalist State, Political Parties and Political Justice,” in *The SAGE Handbook of Frankfurt School Critical Theory*, vol. 1, ed. Beverley Best, Werner Bonefeld, and Chris O’Kane (Los Angeles: SAGE Publications, 2018), 105.

¹⁰⁵ Schale, et al., 106; “OTTO KIRCHHEIMER [curriculum vitae],” November 15, 1942, Box 1, Vitae, Personal History Statement, Publications, Folder 1, Kirchheimer Papers.

¹⁰⁶ Stefan Koriath, “Rudolf Smend: Introduction,” in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobsen and Bernhard Schlink, trans. Belinda Cooper (Berkeley: University of California Press, 2000), 208; Rudolf Smend, *Verfassung und Verfassungsrecht* (Munich: Duncker & Humblot, 1928). The foundation of Smend’s analysis was the Hegelian philosophy of Theodor Litt. Koriath, 209. In Smend’s theory of integration, “the constitution was the legal ordering of the process of integration; its purpose was to stimulate and channel this process, keep open opportunities for further development, and finally, normativize values upon which citizens agree – among which Smend included, especially, guarantees of basic rights.” Koriath, 210.

Smend’s theory was adopted after World War II by the West German Federal Constitutional Court under the name “values jurisprudence,” though this adoption was not without controversy. Ernst-Wolfgang Böckenförde, *State, Society and Liberty: Studies in Political Theory and Constitutional Law*, trans. J. A. Underwood (New York: Berg, 1991), 190. One critic was Ernst-Wolfgang Böckenförde, a member of the German Federal Constitutional Court from December 1983 to May 1996. Mirjam Künkler and Tine Stein, “State, Law, and Constitution: Ernst-Wolfgang Böckenförde’s Political and Legal Thought in Context” in Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings*, ed. Mirjam Künkler and Tine Stein (Oxford: Oxford University Press,

Austria-Hungary, and fought on the front lines for the Austro-Hungarian Empire during World War I.¹⁰⁷ He then traveled to Germany for his studies and fought against the right-wing Kapp Putsch, which sought to destroy the newly formed Weimar Republic.¹⁰⁸ Heller was an important socialist constitutional theorist in the Republic who, according to legal theorist David Dyzenhaus, argued that “only ethical and political principles, based on social and cultural practices, can serve as a foundation for a *Rechtsstaat* [rule of law state].”¹⁰⁹

When Kirchheimer was living in Berlin Smend convinced him to go to the University of Bonn to work with Carl Schmitt; Kirchheimer completed his doctoral work with Schmitt in 1928, graduating *magna cum laude*, with a dissertation about socialist and Bolshevik constitutional thought.¹¹⁰ Starting in 1930, Kirchheimer began writing for *The Society (Die Gesellschaft)*, the journal of the SPD, Germany’s socialist party.¹¹¹ He returned to Berlin in

2017), 1. According to Böckenförde, the problem with values jurisprudence, is that it “makes everything depend on a question of value and evaluation, the job of answering which Smend sees the basic rights as laying on ‘the moral and cultural value judgment of the time,’ from which he takes that answer.” Böckenförde, 190. According to Böckenförde, Smend’s premise is questionable because it means that “[t]he liberties enshrined in the basic rights are thus in effect exposed to the action of the currently predominate – and in the experience of the twentieth century rapidly changing – value-consciousness of society [...]” Ibid., 190.

¹⁰⁷ David Dyzenhaus, “Hermann Heller: Introduction,” in Arthur J. Jacobsen and Bernhard Schlink, eds., *Weimar: A Jurisprudence of Crisis*, trans. Belinda Cooper (Berkeley: University of California Press, 2000), 249.

¹⁰⁸ Ibid., 249.

¹⁰⁹ Ibid., 249-250, 253. Dyzenhaus explains that Heller’s reading of law is a controversial one: “Heller’s argument is at the very least difficult, and, according to many, impossible. He wants ethical foundations for law and the state that will provide a theory of legitimacy, but a theory that remains immanent. For some, the insight that all we have is our practices, so that justification is always immanent, is evidence that it is high time to abandon the search for foundations or justifications. Others argue that our ultimate values cannot be made dependent on what is internal to our practices: These values must be found beyond, whether in some divine source or in principles of rationality that transcend practice.” Ibid., 253. For a discussion of Heller’s theory, see David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Herman Heller in Weimar* (Oxford: Oxford University Press, 1997), 161-217.

¹¹⁰ Schale, et al., 106; “OTTO KIRCHHEIMER [curriculum vitae],” November 15, 1942, Box 1, Vitae, Personal History Statement, Publications, Folder 1, Kirchheimer Papers.

¹¹¹ “OTTO KIRCHHEIMER [curriculum vitae],” November 15, 1942, Box 1, Vitae, Personal History Statement, Publications, Folder 1, Kirchheimer Papers; Franz Neumann, *Behemoth: The Structure and Practice of National Socialism 1933-1944*, 2nd ed. (New York: Oxford University Press, 1944), 32.

1930, working in Ernst Fraenkel and Franz Neumann's law office.¹¹² In 1932, Kirchheimer was admitted to the Berlin Bar as a lawyer.¹¹³

Kirchheimer was one of the leading socialist critics of the constitutional order in the Weimar Republic, as exemplified by his 1930 article entitled "Weimar – and What Then?" ("Weimar – und was dann?").¹¹⁴ In this piece, Kirchheimer criticized the Weimar Constitution that had governed Germany since 1919 as fundamentally flawed:

But herein lies the basic and irreparable error of this constitution: it did not come to a decision; it fell prey to the misconception that the principles of democracy alone constitute the principles of a specific social or ideational order; it forgot that democracy cannot do more than articulate already existing conditions. What a democracy can do is to give external expression to an existing social order and to represent it meaningfully.¹¹⁵

Kirchheimer's negative assessment of the Weimar Constitution was rooted in a deeper criticism of democracy because he believed democracy could never truly alter the foundations of the social order, even when such change was necessary. According to Kirchheimer, democracy by its nature always reflects the social order since a democracy seeks to include all the diverse elements of society in the hope that they can legislate together.

Kirchheimer believed that democracy's neutrality toward different elements in society became problematic when an imperfect society needed to undergo a radical transformation, which for Kirchheimer was a shift toward socialist equality: "It was the tragic fate of the Weimar Constitution that at its birth the German proletariat could not muster the will power to accomplish the task of creating a real socialist democracy free from all radical phrase-mongering

¹¹² Schale, et al., 106.

¹¹³ OTTO KIRCHHEIMER [curriculum vitae], November 15, 1942, Box 1, Vitae, Personal History Statement, Publications, Folder 1, Kirchheimer Papers.

¹¹⁴ Schale, et al., 107; Otto Kirchheimer, *Politics, Law, and Social Change: Selected Essays of Otto Kirchheimer*, ed. Frederic S. Burin and Kurt L. Snell (New York: Columbia University Press, 1969), 33.

¹¹⁵ Kirchheimer, *Politics, Law, and Social Change*, 72. The discussion of "decision" is an allusion to Carl Schmitt's theories of law, discussed in further detail in the next chapter.

and yet ready to do the historically necessary.”¹¹⁶ When Kirchheimer discussed his desire for “socialist democracy,” this was not a neutral democratic order, but one which required all of its members to embrace socialism as their political ideal. For this reason, Kirchheimer declared: “Only a socialist politics, based on a knowledge of the grave fact that the gulf between these positions is indeed unbridgeable, would not seek to evade the problem by providing the mere appearance of a solution.”¹¹⁷ For Kirchheimer, democracies in general, including the Weimar Republic, were destined to fail in fundamentally divided societies unless pretenses toward neutrality were abandoned and a decision was made to embrace a particular political ideal.

“Weimar – and What Then?” was similar to an April 1928 essay published by Kirchheimer’s mentor, the influential Weimar constitutional theorist Carl Schmitt, entitled “The Liberal Rule of Law” (“Der bürgerliche Rechtsstaat”) – though Schmitt was a conservative, not a socialist.¹¹⁸ In his essay, Schmitt defined what he viewed as the essential elements of political liberalism: “Both principles of the state based on the liberal rule of law – freedom of the individual and separation of powers – are apolitical.”¹¹⁹ According to Schmitt, this apolitical order required an apolitical state, and he declared that “[t]he typical form in which rule-of-law liberalism appears is the parliamentary system,” which he stated, “is the form created by the bourgeoisie to protect itself from the state – that is, an anti-political form, just as the liberal bourgeoisie is itself something apolitical.”¹²⁰ Schmitt noted that this created a problem, because how could an apolitical philosophy underpin a political order? He asserted:

The task of a parliament consists in integrating political unity – that is, constantly renewing the political unity of a mass of people heterogenous in class, interests, culture,

¹¹⁶ Ibid., 73.

¹¹⁷ Ibid., 74.

¹¹⁸ Carl Schmitt, “The Liberal Rule of Law,” in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper (Berkeley: University of California Press, 2000), 294; Scheuerman, 3.

¹¹⁹ Schmitt, “Liberal Rule of Law,” 296.

¹²⁰ Ibid., 296.

and religion. A certain uniformity – a homogeneity – is necessary for a people to achieve its political existence in a state. A state's institutions have the function of making this uniformity possible and reproducing it anew every day.¹²¹

According to Schmitt, for a state to effectively cohere, some element had to unify the numerous individual citizens and their disparate interests. Here, the parallels between Schmitt's 1928 essay and Kirchheimer's 1930 essay became clear. Both believed that the Weimar Constitution's pluralist framework had created a government that sought to be apolitical toward the diverse elements of German society, but both argued that this neutral position was untenable, because German society would become increasingly divided if it lacked a political ideal around which the nation would be united.

Despite the similarities in their thinking, by the early 1930s Kirchheimer and Schmitt's relationship had deteriorated as the ideological divide between them became too vast. Schmitt increasingly aligned himself with authoritarian leaders in German politics. In the Prussian state parliament (*Landtag*) elections of April 24, 1932, the ruling SPD and Catholic Center Party coalition, both of which supported the Weimar Constitution, failed to gain a majority against the anti-Republican Communist and Nazi parties.¹²² Nevertheless, since a new ruling coalition could not yet be formed, the SPD and Center Party were permitted to continue governing in accordance with the rules of the state parliament.¹²³ After a brutal clash broke out in Altona between the Communists and Nazis, the authoritarian German Chancellor Franz von Papen ousted the SPD-Center Party government – a stunning defeat for the two parties.¹²⁴ Papen's

¹²¹ Ibid., 297.

¹²² Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham, NC: Duke University Press, 1997), 164. These elections were significant because of Prussia's massive size and population – as historian Richard Evans notes: "Prussia, cover[ed] more than half of the territory of the Reich, with a population greater than that of France [...]." Richard J. Evans, *The Coming of the Third Reich* (New York: Penguin, 2005), 286.

¹²³ Caldwell, 164.

¹²⁴ Ibid., 164-65; Evans, *The Coming of the Third Reich*, 285-86.

actions were brought before the State Court (*Staatsgerichtshof*), which dealt with constitutional questions, with Schmitt arguing in favor of Papen.¹²⁵

Along with Schmitt's sympathy for authoritarianism, he also became anti-Semitic in his rhetoric. On November 6, 1932, Kirchheimer and Schmitt went to Zoo Station in Berlin to talk about Kirchheimer's upcoming article in which he discussed Schmitt's book *Legality and Legitimacy* (*Legalität und Legitimität*).¹²⁶ That book, published in 1932, was among Schmitt's last major works of the Weimar Republic; it dealt with his criticisms of the Weimar Constitution and parliamentarianism more generally.¹²⁷ Kirchheimer published his article "Legality and Legitimacy" ("Legalität und Legitimität") in 1932 in the SPD journal *The Society* and published a review of Schmitt's book in 1933 in the *Archive for Social Science and Social Policy* (*Archiv für Sozialwissenschaft und Sozialpolitik*).¹²⁸ In his diary entry for November 6, 1932, Schmitt wrote: "[A]t breakfast with [Ernst Rudolf] Huber, afterward Kirchheimer came, [spoke] with him about his essay, in which he discusses my book, the instrumentalization of democratic formulas and <...>. We went to Zoo Station, there is no point in speaking with him, he simply does not want to see anything. Atrocious, this Jew."¹²⁹ Schmitt joined the Nazi Party on May 1,

¹²⁵ Caldwell, 147, 165, 171-72; Volker Neumann, "Carl Schmitt: Introduction," in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobsen and Bernhard Schlink, trans. Belinda Cooper (Berkeley: University of California Press, 2000), 280-81.

¹²⁶ Carl Schmitt, *Tagbücher: 1930 bis 1934*, ed. Wolfgang Schuller and Gerd Giesler, (Berlin: Akademie Verlag, 2010), 231.

¹²⁷ Carl Schmitt, *Legalität und Legitimität* (Munich, Germany: Duncker & Humblot, 1932); Carl Schmitt, *Legality and Legitimacy*, trans. Jeffrey Seitzer (Durham, NC: Duke University Press, 2004).

¹²⁸ Otto Kirchheimer, "Legalität und Legitimität," *Die Gesellschaft* 9, vol. 2, no. 7 (1932): 8-26; Otto Kirchheimer, "Legality and Legitimacy," in *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, ed. William E. Scheuerman (Berkeley: University of California Press, 1996), 44-63; Otto Kirchheimer, "Remarks on Carl Schmitt's *Legality and Legitimacy*," in *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, ed. William E. Scheuerman (Berkeley: University of California Press, 1996), 64-98.

¹²⁹ "[M]it Huber gefrühstückt, nachher kam Kirchheimer, mit ihm über seinen Aufsatz, in dem er mein Buch bespricht, die Instrumentalisierung der demokratischen Formeln und <...>. Wir gingen zum Bahnhof Zoo, es hat keinen Zweck mit ihm zu sprechen, er will einfach nichts sehen. Scheußlich, dieser Jude." Schmitt, *Tagbücher*, 231. All translations are my own unless otherwise stated. See also Schale et al., 106. Ernst Rudolf Huber, who studied under Schmitt, was a jurist who aligned himself with Nazism. Reinhard Mehring, "Epilogue: The Decline of Theory: Introduction," in Arthur J. Jacobsen and Bernhard Schlink, eds., *Weimar: A Jurisprudence of Crisis*, trans.

1933, and his academic publications vociferously supported Nazism during the early years of the regime.¹³⁰ He became perhaps the leading jurist in Nazi Germany from 1933 to 1936.¹³¹

Schmitt's ire and anti-Semitic remarks were a harbinger of what Kirchheimer was to endure after Hitler was appointed German Chancellor on January 30, 1933.¹³² Kirchheimer was detained by the Gestapo in March 1933, and was only liberated because of a request from a United Press reporter working for the *New York Times* named Paul Kecskemeti.¹³³ Kecskemeti and Kirchheimer were cellmates, and when Kecskemeti was set to be freed he requested Kirchheimer also be released, allowing Kirchheimer to leave Germany and travel to Paris, France.¹³⁴ In Paris, Kirchheimer became involved in the Société Internationale de Recherches Sociales, a branch of the Institute for Social Research set up after the rise of the Nazi regime; he was then forced to flee to the United States in 1937 as conditions worsened in Europe.¹³⁵ Another émigré, Franz Neumann, helped Kirchheimer find limited employment through the Institute for Social Research in Morningside Heights in New York City.¹³⁶

Neumann was born in 1900 in Kattowitz, in what is now Poland, into a German-Jewish family.¹³⁷ He participated in the revolutionary activities that overthrew the German Empire at the end of World War I and began his studies in law at the University of Frankfurt in 1919,

Belinda Cooper (Berkeley: University of California Press, 2000), 314; Michael Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany* (Chicago: The University of Chicago Press, 1998), 97.

¹³⁰ Neumann, "Carl Schmitt: Introduction," 281; Stolleis, *The Law Under the Swastika*, 97.

¹³¹ Michael Stolleis, *A History of Public Law in Germany 1914-1945*, trans. Thomas Dunlap (Oxford: Oxford University Press, 2004), 340. Schmitt's reputation was tarnished among the Nazis after he was attacked by the *Schutzstaffel*, or SS, in 1936. Neumann, "Carl Schmitt: Introduction," 281.

¹³² Evans, *The Coming of the Third Reich*, 307, 442.

¹³³ Schale et al., 106.

¹³⁴ Ibid., 106.

¹³⁵ Ibid., 106; Stefan Müller-Doohm, *Adorno: A Biography*, trans. Rodney Livingstone (Cambridge: Polity Press, 2005), 174. For a discussion of the Institute's branches after Nazi seizure of power in Germany in 1933, see Jay, 30.

¹³⁶ Schale et al., 106.

¹³⁷ Olson, 89.

where he completed his doctorate in 1923 under the labor law expert Hugo Sinzheimer.¹³⁸ As noted above, in Frankfurt Neumann met Ernst Frankel, who had also come to study with Sinzheimer, and together they opened a law practice in Berlin in the late 1920s, employing Otto Kirchheimer for a time.¹³⁹ In 1928, Neumann began teaching at the German Academy for Politics (*Deutsche Hochschule für Politik*) in Berlin.¹⁴⁰ The Academy had numerous ties to the United States, including to the Carnegie Endowment for International Peace, which sought to solidify European peace in the aftermath of World War I, and the Rockefeller Foundation, which supported the Academy's work in political science, a discipline foreign to higher education in Germany.¹⁴¹ During his time in Berlin, Neumann became acquainted with Carl Schmitt as early as 1930, when Neumann was involved in Schmitt's seminar on constitutional theory at the Commercial College (*Handelshochschule*) in Berlin during the 1930 to 1931 winter term, as well as Schmitt's seminar in summer 1931.¹⁴² Neumann was appointed the attorney for the SPD in summer 1932 – perhaps the height of his political power in Germany.¹⁴³

Similar to Kirchheimer, Neumann was interested in Schmitt's criticisms of the Weimar Constitution. In a letter from Neumann to Schmitt dated September 7, 1932, Neumann

¹³⁸ Ibid., 89-90; Herbert Marcuse, "Preface," in Franz Neumann, *The Democratic and Authoritarian State: Essays in Political and Legal Theory*, ed. Herbert Marcuse (Glencoe, IL: The Free Press, 1957), vii. For a discussion of the November 1918 revolutionary activities that led to the abdication of the German Kaiser and the end of the German Empire, see Mark Jones, *Founding Weimar: Violence and the German Revolution of 1918-1919* (Cambridge: Cambridge University Press, 2016), 27-30.

¹³⁹ Morris, "Write and Resist," 202; Olson, 90; Ladwig-Winters, 47; Marcuse, "Preface," vii; Schale, et al., 106. Around this time Neumann also met Leo Loewenthal. Olson, 90.

¹⁴⁰ Marcuse, "Preface," vii.

¹⁴¹ Steven D. Korenblat, "A School for the Republic? Cosmopolitans and Their Enemies at the Deutsche Hochschule für Politik, 1920-1933," *Central European History* 39, no. 3 (Sept. 2006): 394-95.

¹⁴² Reinhard Mehring, *Carl Schmitt: A Biography*, trans. Daniel Steuer (Cambridge: Polity Press, 2014), 204, 591 fn. 41. Schmitt held Hugo Preuß's former position at the Commercial College beginning in 1928 – Preuß had been the most influential drafter of the Weimar Constitution. Neumann, "Carl Schmitt: Introduction," 280; Stolleis, *A History of Public Law*, 53-60. Preuß's constitutional theory is discussed in greater detail in Chapter 4. Kirchheimer was also involved in Schmitt's constitutional theory seminar. Mehring, *Carl Schmitt*, 204.

¹⁴³ Rolf Wiggershaus, *The Frankfurt School: Its Theories, and Political Significance*, trans. Michael Robertson (Cambridge, MA: M.I.T. Press, 1995), 224.

demonstrated that he was well-versed in Schmitt's writings, declaring: "My most sincere thanks for the friendly transmission of your newest book 'Legality and Legitimacy,' which I have already read twice with the greatest excitement."¹⁴⁴ Neumann also indicated his own deep skepticism toward the sustainability of the Weimar Constitution: "In particular, if one takes the position that the fundamental political antagonism in Germany is the economic antagonism, that the decisive friend/enemy-grouping in Germany is the grouping of labor and property ownership, thus it is clear that parliamentarianism cannot govern under such a political dichotomy."¹⁴⁵ Neumann, who was a socialist like Kirchheimer, believed there was a fundamental fracture in German politics between labor and capitalist property owners, which limited the effectiveness of parliamentary governance in the Weimar Republic.

Neuman's discussion of the "friend/enemy-grouping" referred to an idea developed by Schmitt in his book *The Concept of the Political* (*Der Begriff des Politischen*), published in 1932.¹⁴⁶ In *The Concept of the Political*, Schmitt sought to distill political motivations into a simplistic dualism, declaring: "The specific political distinction to which political actions and motives can be reduced is that between friend and enemy."¹⁴⁷ Schmitt continued with his explanation: "This provides a definition in the sense of a criterion and not as an exhaustive definition or one indicative of substantial content. Insofar as it is not derived from other criteria, the antithesis of friend and enemy corresponds to the relatively independent criteria of other

¹⁴⁴ Rainer Erd, ed., *Reform und Resignation: Gespräche über Franz L. Neumann* (Frankfurt am Main: Suhrkamp, 1985), 79; "Meine aufrichtigsten Dank für die freundliche Übersendung Ihres neuesten Buches 'Legalität und Legitimität', das ich mit größter Spannung bereits zweimal gelesen habe." Ibid., 79.

¹⁴⁵ "Stellt man sich nämlich auf der Standpunkt, daß der grundlegende politische Gegensatz in Deutschland der ökonomische Gegensatz ist, daß die entscheidende Freund/Feind-Gruppierung in Deutschland die Gruppierung Arbeit und Eigentum ist, so leuchtet ein, daß bei einer solchen politischen Gegensätzlichkeit parlamentarisch nicht mehr regiert werden kann." Ibid., 79.

¹⁴⁶ Carl Schmitt, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien* (Berlin: Duncker & Humblot, 1963); Carl Schmitt, *The Concept of the Political: Expanded Edition*, trans. George Schwab (Chicago: The University of Chicago Press, 2007).

¹⁴⁷ Schmitt, *Concept of the Political*, 26.

antheses: good and evil in the moral sphere, beautiful and ugly in the aesthetic sphere, and so on.”¹⁴⁸ In his 1932 letter to Schmitt, Neumann applied Schmitt’s friend/enemy dichotomy to Weimar Germany through a socialist lens.¹⁴⁹ Neumann explained why he believed the continued enmity between labor and property owners likely doomed the existence of the Weimar Republic:

But if they [labor and property owners] conclude without a compromise, the principle of equal chance certainly does not mean that one day is governed socialistically and another day capitalistically.

In other words – if one does not want to stabilize a standing state authority, seemingly between the classes, through any constitutional investiture (corporative state, Upper House, changes to suffrage), only the aspiration of political autocracy remains for the two battling groups, with the best willpower, not to relinquish their rule, even with the alteration of the parliamentary system. That however means the end of the parliamentary system.”¹⁵⁰

Drawing on Schmitt, Neumann argued that only a major change to the Weimar Constitution – involving the creation of a corporative form of governance, altering the legislature, or changing how elections were structured – could effectively resolve the conflict between socialist laborers and capitalist property owners. Otherwise, Neumann asserted, the two groups would vie to take control of the government, fighting to command the state’s power in order to eliminate their political enemy. This was reminiscent of Schmitt’s argument in *Legality and Legitimacy*, in which he declared that “[a]s [the Weimar] constitution now stands, it is full of contradictions.”¹⁵¹

¹⁴⁸ Ibid., 26.

¹⁴⁹ Erd, 79. Schmitt recognized a form of this dichotomy in *The Concept of the Political*, writing: “The most conspicuous and historically the most effective example is the antithesis formulated by Karl Marx: bourgeoisie and proletariat. This antithesis concentrates all antagonisms of world history into one single final battle against the last enemy of humanity. It does so by integrating the many bourgeois parties on earth into a single order, on the one hand, and likewise the proletariat on the other. By doing so a mighty friend-enemy grouping is forged.” Schmitt, *Concept of the Political*, 74.

¹⁵⁰ “Schließen sie aber keinen Kompromiß, so kann das Prinzip der gleichen Chance keinesfalls bedeuten, daß ein Tag sozialistisch ein anderer Tag kapitalistisch regiert wird.

“Mit anderen Worten – will man nicht die eine, scheinbar zwischen den Klassen stehende Staatsgewalt durch irgendwelche verfassungsrechtliche Einkleidungen (Ständestaat, Oberhause, Wahlrechtsänderung), stabilisieren, so bleibt für die beiden kämpfenden Gruppen nur das Steben nach politischer Alleinherrschaft übrig, mit dem besten Willen, auch bei Änderung der parlamentarischen Situation diese ihre Herrschaft nicht abzugeben. Das aber bedeutet das Ende des parlamentarischen Systems.” Erd, 79-80.

¹⁵¹ Schmitt, *Legality and Legitimacy*, 94.

Schmitt proclaimed that unless the contradictions inherent in the German constitutional order were resolved, then “it will meet a quick end along with the fictions of neutral majority functionalism that is pitted against value and truth.”¹⁵² Neumann, much like Kirchheimer and Schmitt, believed the Weimar Constitution had become ineffective because it was unable to provide a means through which fundamental societal divisions could be resolved.

After the Nazi seizure of power in 1933, Neumann was arrested in April 1933 and was jailed for a month, after which he left Germany to go to the United Kingdom, living in exile in London until he traveled to the United States.¹⁵³ In America, Neumann attained a position with the Institute for Social Research in New York, where he would work from 1936 to 1940.¹⁵⁴ Although the Weimar Republic was no more, both Kirchheimer and Neumann brought many of the ideas they inherited from that time to the United States. Kirchheimer and Neumann’s fascination with explaining whether it was possible for a constitutional system to resolve fundamental disagreements between competing social groups – an interest they shared with Schmitt – would play an important role in their legal discussions with Riesman in the 1940s.

V. Building an Intellectual Community in America

Riesman was often uncertain about these German émigrés when he first encountered them, similar to his initial meeting with Fromm. In the November 1940 issue of the *Columbia Law Review*, Riesman published a critical review of *Punishment and Social Structure*, a book written by Kirchheimer and Georg Rusche.¹⁵⁵ Rusche started writing the book in 1931 and

¹⁵² Ibid., 94.

¹⁵³ Evans, *The Coming of the Third Reich*, 307, 442; Olson, 90. The German philosopher Herbert Marcuse wrote, though this was perhaps apocryphal, that Neumann fled Germany because “Franz Neumann was one of the first whom the Hitler government deprived of citizenship.” Marcuse, “Preface,” vii. Neumann’s time in the United Kingdom is discussed in greater detail in Chapter 2.

¹⁵⁴ Olson, 90; Wiggershaus, 226-227.

¹⁵⁵ David Riesman, Jr., review of *Punishment and Social Structure*, by Georg Rusche and Otto Kirchheimer, *Columbia Law Review* 40, no. 7 (Nov. 1940): 1297-1301; Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (New York: Columbia University Press, 1939). Interestingly, by 1940, it appears that Riesman was

Kirchheimer completed it for the Institute for Social Research, publishing it in 1939.¹⁵⁶ Riesman was skeptical of the radical politics Kirchheimer and Rusche applied to criminal law: “It is obvious that the drift of the book is fatalistic: nothing can be done about crime or punishment without a radical change in the entire social system. Penal reform is a mirage. The Nazi farewell to reform is equally illusory.”¹⁵⁷ Riesman was unconvinced by Rusche and Kirchheimer’s assertion that sweeping reform to the entire system of criminal law could eliminate criminality altogether.¹⁵⁸ Instead, Riesman argued that while an idealistic zeal might sometimes be admirable, a more modest approach to criminal law reform was preferable.¹⁵⁹

In particular, Riesman believed Rusche and Kirchheimer erred when they claimed modern capitalism under Nazism had created conditions that would destroy the liberal rule of law: “When Drs. Rusche and Kirchheimer come to deal with Nazi penal methods, the extremism of their approach is more readily demonstrated. They argue that since capitalism has now become monopolistic, that is, administrative, calculability of judicial action is no longer essential

already seeking to connect his ideas about American law with German sociology, including the writings of Max Weber. In an October 13, 1940, letter from Riesman to Friedrich, Riesman wrote: “In fact, life has been inordinately hectic since my return. I have been making a study of the federal convention for my class in constitutional law. It is interesting to see the parallel between the early federalists and the interventionists and between the anti-federalists and the isolationists. The federalists were the men of wealth and influence but they were also less parochial, more patriotic, and more concerned with law and order. Many of their letters about the gloomy state of affairs in, say, 1785, and many of the letters of anti-federalists about how things were all right and why they should, after fighting one tyranny, establish another, have a familiar sound. I have been working very hard but I have born in mind some of your remarks at our talk with Mr. Causey about the values of Puritan asceticism which I can stand in waves.” Correspondence from David Riesman to Carl Friedrich, October 13, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers. The discussion of Puritan asceticism is very likely an allusion to Max Weber’s theory in *The Protestant Ethic and the Spirit of Capitalism*. Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (London: Routledge Classics, 2001).

¹⁵⁶ Jay, 149.

¹⁵⁷ Riesman, review of *Punishment*, 1300.

¹⁵⁸ As Riesman wrote: “In the first place, it is not likely that persons other than some criminologists take crime seriously enough to be willing to risk a change to a new social order simply in the hope of getting rid of deviational conduct.” *Ibid.*, 1300.

¹⁵⁹ Riesman continued: “In the second place, a fatalistic attitude towards the penal problem is not wholly warranted. Of course, self-interest and idealism must combine to get anything done. But marginal improvements can be made, and, as the Nazis show, marginal reactions too. Failure to attempt such improvements or oppose such reactions would have repercussions beyond the criminal field. We are all of a piece, and a fatalistic or brutal attitude toward any sector of our problems must have carry-overs in all other sectors as well.” *Ibid.*, 1300.

to the working of the economic machine.”¹⁶⁰ Riesman observed that Rusche and Kirchheimer contended capitalism under Nazism had completely destroyed the liberal order in Germany: “It follows that liberal procedural and substantive guarantees have been completely overthrown, with law and punishment determined from case to case, under the screen of folk-conscience.”¹⁶¹

Riesman was dissatisfied with this argument, because he believed it did not accurately describe the social realities of Nazi Germany. To support his criticism, Riesman invoked a theory of Nazi law developed by the German émigré attorney Ernst Fraenkel: “These assumptions are challenged by Dr. Ernst Fraenkel, a lawyer in Berlin until 1938, whose book, *The Dual State*, is fully documented.”¹⁶² His approval of Fraenkel’s work here is rather surprising in light of Riesman’s earlier criticism of it in a November 29, 1939, letter to Carl Friedrich.¹⁶³ However, in his book review of *Punishment and Social Structure* Riesman said he agreed with Fraenkel’s view in *The Dual State* that the courts maintained their autonomy from the Nazi regime.¹⁶⁴ Ultimately, Riesman found Rusche and Kirchheimer’s analysis to be too economically deterministic to be convincing.¹⁶⁵

Despite this negative appraisal, Riesman wrote to Carl Friedrich on December 20, 1940: “You will be interested that after my review of Kirchheimer’s book appeared I had a very nice

¹⁶⁰ Ibid., 1299-1300.

¹⁶¹ Ibid., 1300.

¹⁶² Ibid., 1300. Neumann debated Fraenkel’s interpretation, as discussed in further detail in Chapter 2.

¹⁶³ Correspondence from David Riesman to Carl Friedrich, November 29, 1939, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers.

¹⁶⁴ As Riesman wrote: “Dr. Fraenkel shows that the Nazis have carefully preserved the independence of the regular courts for the ordinary run of cases; this has been precisely because life, including economic life, could not go on without a measure of predictable guarantees. The Nazis have, to be sure, set up side-by-side with the traditional system of courts and prisons an administrative system of secret police and concentration camps, but within their sphere, the judges have often courageously insisted on the right to follow the old statute law rather than the declared wishes of party officials.” Riesman, review of *Punishment*, 1300.

¹⁶⁵ Riesman asserted: “Moreover, Nazi brutality, like post-medieval brutality, has roots in insecurities which are only partially economic. Totalitarianism has intensified secular deflation of individual personality inaugurated by modern science and urbanism; the scapegoats are the same as four centuries earlier – outlaw criminals and Jews. And Hitler has encouraged his officials in sadism as a means of binding them to his regime by feelings of guilty participation.” Ibid., 1300.

letter from him, suggesting some further considerations and enclosing an article he had just written for the *Studies in Philosophy and Social Science*. In view of the stringency of my review, I thought that this act of his was a fine one, and as he has offered to stop off here [in Buffalo] on his way back from Chicago I am looking forward to the chance of meeting him.”¹⁶⁶

Several weeks later, in a letter dated January 9, 1941, Riesman again wrote to Friedrich, describing Kirchheimer’s visit to Buffalo: “You will be interested to know that Kirchheimer stopped off here for a day on his way back from Chicago. I had him talk to my class in criminal law. He did relatively well, but was too troubled with language difficulties to be able to get a wholly adequate sense of the group before him.”¹⁶⁷ Riesman also met Neumann in New York during this time.¹⁶⁸ Through Fromm, Kirchheimer, and Neumann, Riesman had stumbled upon the exiled members of the Institute for Social Research.¹⁶⁹

Riesman’s connections with this group of émigrés continued to develop. In a letter dated January 27, 1941, Riesman told Friedrich that he was likely to attain a fellowship at Columbia University, and that he planned to live in Morningside Heights in New York City.¹⁷⁰ This fellowship at Columbia Law School lasted from 1941 to 1942.¹⁷¹ During that time, Kirchheimer,

¹⁶⁶ Correspondence from David Riesman to Carl Friedrich, December 20, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers. This appears to be a reference to Kirchheimer’s article “Criminal Law in National-Socialist Germany,” published in 1939. Otto Kirchheimer, “Criminal Law in National-Socialist Germany,” *Studies in Philosophy and Social Science* 8 (1939): 444-63.

¹⁶⁷ Correspondence from David Riesman to Carl Friedrich, January 9, 1941, December 20, 1940, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers.

¹⁶⁸ Riesman, “Becoming an Academic Man,” 49.

¹⁶⁹ For a discussion of the Frankfurt School’s relocation to the U.S. from Germany, see Wheatland, xv-xxi.

¹⁷⁰ Correspondence from David Riesman to Carl Friedrich, January 27, 1941, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers. In his letter, Riesman wrote: “The Columbia fellowship about which I spoke to you now seems to be going through. The scheme that Evey and I are considering is to leave her and the children in Vermont and I will take a small apartment near the Columbia library, going up to Vermont for long week-ends and Evey coming down to the city. I am not fond of this prospect of separation but I do not see how we can afford to live in New York City with three children and I cannot relish the prospect of a home in one of the distant suburbs. Suburbia, perhaps because of family background, has never appealed to me.” Ibid. Riesman told Friedrich the fellowship was finalized in a letter dated April 1, 1941. Correspondence from David Riesman to Carl Friedrich, April 1, 1941, HUG(FP) 99.12, Box 10, Prof. C. J. Friedrich Correspondence, Riesman Papers.

¹⁷¹ Riesman, “Becoming an Academic Man,” 49.

Neumann, and Fromm began to exert a greater influence over Riesman's legal research. Indeed, Riesman became close enough with them that when Kirchheimer was asked in a 1942 employment application to name several people he knew in the U.S., he included Riesman alongside Institute members Leo Loewenthal, and Friedrich Pollock (spelled "Frederik" in the application), listing Riesman as his first reference.¹⁷²

VI. Creating a German and American Synthesis

While at Columbia from 1941 to 1942, Riesman prepared a series of articles focusing on constitutional rights – a 1942 article entitled "Civil Liberties in a Period of Transition," and three articles on defamation law published in 1942 in the *Columbia Law Review*.¹⁷³ Of the three *Columbia Law Review* pieces Riesman published while he worked at Columbia Law, his September 1942 article entitled "Democracy and Defamation: Fair Game and Fair Comment I" exhibited the influence of the German emigrants most clearly.¹⁷⁴ Friedrich, for instance, provided feedback on this essay for Riesman.¹⁷⁵

In his September 1942 and November 1942 articles, Riesman compared defamation law in several European countries with defamation law in America – the first article focused on Germany, France, and England, while the second focused on the U.S.¹⁷⁶ Riesman later recalled: "What I wanted to understand in comparative perspective was themes in the scattered American

¹⁷² "APPLICATION FOR EMPLOYMENT AND PERSONAL HISTORY STATEMENT," November 15, 1942, Box 1, Vitae, Personal History Statement, Publications, Folder 1, Kirchheimer Papers; Wheatland, xvii.

¹⁷³ Riesman, "Becoming an Academic Man," 49; David Riesman, "Civil Liberties in a Period of Transition," in *Public Policy: A Yearbook of the Graduate School of Public Administration, Harvard University*, ed. C. J. Friedrich, Edward S. Mason, and Pendleton Herring (Cambridge, MA: Graduate School of Public Administration, 1942), 33; David Riesman, "Democracy and Defamation: Control of Group Libel," *Columbia Law Review* 42, no. 5 (May 1942): 780; David Riesman, "Democracy and Defamation: Fair Game and Fair Comment I," *Columbia Law Review* 42, no. 7 (Sept. 1942): 1123; David Riesman, "Democracy and Defamation: Fair Game and Fair Comment II," *Columbia Law Review* 42, no. 8 (Nov. 1942): 1282.

¹⁷⁴ Riesman, "Democracy and Defamation: Fair Game and Fair Comment I," 1085.

¹⁷⁵ Riesman noted: "The subject of this paper was discussed before the Communications Seminar of the Harvard Graduate School of Public Administration on April 30, 1942. I am indebted to the members of the Seminar, and especially to its chairman, Professor C. J. Friedrich, for helpful suggestions." *Ibid.*, 1123.

¹⁷⁶ *Ibid.* 1085; Riesman, "Democracy and Defamation: Fair Game and Fair Comment II," 1282-1318.

case law concerning defamation, that is, libel (written) and slander (oral).”¹⁷⁷ In his September 1942 *Columbia Law Review* article, he explained that he sought to trace different trends in defamation law because “[t]oday, these doctrines find themselves in the midst of acrid political controversy in which defamation, and the law of defamation, have become important factors in the struggle between democracy and fascism.”¹⁷⁸ He believed defamation law could be used to help protect liberal democracies, such as the United States, against fascist opponents.¹⁷⁹

Riesman emphasized the role of defamation in the rise of the Nazis and the collapse of the Weimar Republic, arguing that “in Germany libel law was one of the cumulative factors in the Nazi triumph [...]”¹⁸⁰ For Riesman, Germany was an important example of a regime that failed to effectively challenge fascist defamation, so he included a substantial discussion of the German law of defamation in his article.¹⁸¹ In this segment, he specifically thanked his émigré associates from the Institute for Social Research: “This section on the German law has been read by Dr. Otto Kirchheimer, formerly a member of the Berlin Bar, and now of the Institute for Social Research, and by Dr. Franz Neumann, formerly of the Berlin Bar where he specialized in the law of the press, and now a lecturer at Columbia University. I am indebted to them for helpful comments as well as to Dr. Erich Fromm, formerly a member of the *Institut für Sozialforschung* [Institute for Social Research], University of Frankfurt [*sic*], and now of the New School for Social Research, for comments on the psychological materials.”¹⁸² Indeed, the émigré influence could be seen throughout Riesman’s analysis of Nazism.

¹⁷⁷ Riesman, “Becoming an Academic Man,” 48.

¹⁷⁸ “Democracy and Defamation: Fair Game and Fair Comment I,” 1085.

¹⁷⁹ Describing both “Democracy and Defamation” and “Civil Liberties in a Period of Transition,” the latter of which is discussed in further detail below, Riesman noted: “I was prepared to speculate concerning the public policy that might permit freedom of opinion while exploring how the intimidation of opinion through defamation, as well as suits for defamation, might be prevented.” Riesman, “Becoming an Academic Man,” 48-49.

¹⁸⁰ Riesman, “Democracy and Defamation: Fair Game and Fair Comment I,” 1090.

¹⁸¹ *Ibid.*, 1092-1111.

¹⁸² *Ibid.*, 1092.

In particular, Riesman drew on Ernst Fraenkel's study of Nazi law in *The Dual State*.¹⁸³ Fraenkel divided the Nazi legal system into the "Prerogative State" and the "Normative State" – hence the title *The Dual State*.¹⁸⁴ As he defined these: "By the Prerogative State we mean that governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees, and by the Normative State an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of courts, and activities of the administrative agencies."¹⁸⁵ Legal historian Douglas Morris explains what Fraenkel meant by these categories: "On the one hand, the normative state consisted of the legal order itself, which, in turn, consisted of both traditional law and newly enacted National-Socialist law. On the other hand, the prerogative state consisted of the realm of arbitrary power and official violence against which citizens enjoyed no legal protection."¹⁸⁶ As Morris notes, Fraenkel "viewed the National-Socialist legal order as not simply a static structure but rather as a dynamic developing system" in which the prerogative and normative states were intertwined.¹⁸⁷ This meant "[t]he entangled growth of this dual state explained the way the National Socialist rule had politicized the legal system, recasting the old liberal legal order into the new National-Socialist legal order and replacing the rule of law with National-Socialist politics."¹⁸⁸

¹⁸³ Ibid., 1103; Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, trans. E. A. Shils, Edith Lowenstein, and Klaus Knorr (New York: Oxford University Press, 1941). In addition to Fraenkel's book, Riesman's May 1942 article "Democracy and Defamation: Control of Group Libel" indicated that he was also aware of Neumann's book analyzing Nazism, entitled *Behemoth*. Riesman, "Democracy and Defamation: Control of Group Libel," 729 fn. 12; Neumann, *Behemoth*, 20-23. Fraenkel and Neumann's works are often interpreted as offering two fundamentally different explanations for the structure of the Nazi state. Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford: Oxford University Press, 2018), 28-29; Morris, "Write and Resist," 197-230. The difference between their two theories will be analyzed in detail in Chapter 2.

¹⁸⁴ Fraenkel, xiii.

¹⁸⁵ Ibid., xiii.

¹⁸⁶ Morris, "The Dual State Reframed," 7. For an excellent analysis of how Fraenkel's legal practice as a criminal defense attorney in Nazi Germany contributed to his theory in *The Dual State*, see Morris, *Legal Sabotage*, 93-104.

¹⁸⁷ Morris, "The Dual State Reframed," 7.

¹⁸⁸ Ibid., 7.

Riesman applied Fraenkel's categories when discussing how the Nazis transformed German defamation law after they took control of the government. For instance, Riesman said truth had previously been a defense in German defamation cases going back to 1871, but noted that "[t]he *Memorandum on National Socialist Penal Law*, published in the fall of 1933, restricted the defense of truth [in defamation cases] to cases where the defendant acted to protect a 'legitimate interest.'"¹⁸⁹ Riesman indicated this was an example of the legal statutes enacted by the Nazis under the "Normative State" described by Fraenkel: "[T]he Nazis did not rely entirely on law enforcement by the 'normative state,' to borrow the term employed by Ernst Fraenkel to designate the legal and administrative system which the Nazis inherited, which, despite or perhaps because of its prior reactionary slant, insisted in many cases on sticking to the law as written even against the Party interests in a particular case."¹⁹⁰

However, Riesman observed that the Nazis soon moved beyond simply altering the "Normative State," saying "[t]hey turned increasingly to the 'prerogative state,' Fraenkel's term for the Gestapo and other branches of the Nazi bureaucratic system."¹⁹¹ Riesman explained that a number of defamation cases began exhibiting the arbitrariness of the "Prerogative State," though he noted this was difficult to track because "[m]ost 'prerogative' actions, of course, remain unreported."¹⁹² The increasing unpredictability of Nazi law could be seen "when a Mrs. Höfer sued a local Nazi leader in the Palatinate who had accused her of having shown friendliness to the French during the occupation by doing chores for French officers, [and] she, her daughter, and a witness were taken into custody 'to insure their personal safety'" as well as "[a] year later,

¹⁸⁹ Emphasis in original, Riesman, "Democracy and Defamation: Fair Game and Fair Comment I," 1094, 1102-3.

¹⁹⁰ Ibid., 1103.

¹⁹¹ Ibid., 1103.

¹⁹² Ibid., 1103.

[when] a summary court in Cologne sentenced an Evangelical pastor to a year's imprisonment for 'insulting the Führer.'"¹⁹³

Thus, during his fellowship at Columbia Law, Riesman was absorbing émigré theories and adapting them to his thinking. Riesman's integration of his own theory of law and politics with those developed by his émigré colleagues could be seen most clearly in "Civil Liberties in a Period of Transition," another article he developed at Columbia Law and published in 1942.¹⁹⁴

VII. Toward a Fusion of Theories: Riesman's Critique of Liberalism

In "Civil Liberties in a Period of Transition," Riesman critiqued liberalism's focus on individual rights and argued that protecting civil liberties could be more effectively undertaken through government support of pro-democracy organizations. In doing so, Riesman developed a theory that no longer took for granted the belief that liberalism was a self-evident way of life, but instead contended that liberalism was an ideal which needed to be protected. While Riesman's argument was not always convincing, as he himself later admitted, this article again exhibited the growing influence of German émigré thought on his legal scholarship.¹⁹⁵ Riesman was guided by his association with Friedrich and Fromm in particular – sometimes explicitly and other times implicitly. He was also indirectly influenced by Weimar-era scholarship, such as Carl Schmitt's theory of dictatorship.

¹⁹³ Ibid., 1103.

¹⁹⁴ Riesman, "Civil Liberties," 33. While the publication order for Riesman's essays during his year at Columbia Law is unclear, in "Civil Liberties in a Period of Transition" he noted: "This is the introduction to a series of studies on questions of civil liberties. Articles are in preparation on freedom of assembly, wire tapping, group libel [see 'Democracy and Defamation: Control of Group Libel,' (1942) 42 *Columbia Law Review* 727], and political defamation." Ibid., 33. Thus, it is likely that Riesman published "Civil Liberties in a Period of Transition" first, followed by his series of *Columbia Law Review* articles (his article "Democracy and Defamation: Control of Group Libel" may not have been officially published when "Civil Liberties in a Period of Transition" was first printed). David Riesman, *Individualism Reconsidered and Other Essays* (Glencoe, IL: Free Press, 1954), 510.

¹⁹⁵ Describing "Civil Liberties in a Period of Transition" and "Democracy and Defamation," Riesman later conceded: "I did not then, and do not now, believe that I have found a 'solution' to these again vexing problems, but at least I did not approach them on the basis of flat American contemporaneity." Riesman, "Becoming an Academic Man," 49.

In “Civil Liberties in a Period of Transition,” Riesman indicated his own uncertainty over the ability of American liberalism to adjust to social and technological change:

In the field of civil liberties, we are ill-prepared for a crisis. We have been the proud but uncritical inheritors of a great liberal tradition, and liberals have been inclined on the whole neither to challenge the tradition nor to seek to adapt it to the radically new conditions which confront us. When critical issues arise – wire tapping, freedom of assembly for anti-democratic groups, organized anti-Semitic propaganda, conscription, and other war measures – discussion does not rise above the level of inherited slogans, which are bandied about as if they could give answers to the problems.¹⁹⁶

There was no indication that Kirchheimer or Neumann influenced this argument. Nevertheless, Riesman’s critique of what he perceived as complacency among American liberals in the face of significant societal transformation is striking because it parallels the criticism Kirchheimer and Neumann had levelled against the Weimar Constitution, which they believed did not effectively adapt to rapid social and economic change in Germany.¹⁹⁷

Riesman argued that “[t]he natural-rights view of civil liberty, which was carried by the English colonists to America, was the Protestant, Lockian [*sic*] derivative of much earlier intellectual strains.”¹⁹⁸ In support of this argument, Riesman cited to an unpublished 1935 work by Neumann, entitled *The Function of Law in Rousseau’s Philosophy*.¹⁹⁹ Riesman then defined the liberal understanding of rights:

This view maintained that each man is endowed by nature with the capacity to think, to speak, and to employ the simple natural resources; that these are his natural rights, neither derived from communal society nor dependent on it. The function of the state toward the exercise of these rights was simply to provide order in society for their enjoyment. Faith in natural law and in man’s rationality made it seem evident that the individual would be

¹⁹⁶ Riesman, “Civil Liberties,” 33.

¹⁹⁷ Riesman believed that civil liberties law, as it existed in the U.S. at the time, was inadequately prepared for the threats posed by American Communists and fascists, especially Nazis, because these groups sought to make use of the freedoms granted by civil liberties to subvert the American constitutional order. *Ibid.*, 55-56.

¹⁹⁸ *Ibid.*, 63.

¹⁹⁹ *Ibid.*, 63 fn. 93. Elsewhere, Riesman cited to Kirchheimer’s work, such as his 1941 article “Changes in the Structure of Political Compromise” originally published in *Studies in Philosophy and Social Science*. *Ibid.*, 46, fn. 40; Kirchheimer, *Politics, Law, and Social Change*, 131-59.

sensible in his employment of these resources and capacities, and the American pioneer experience seemed to give support to that faith.²⁰⁰

According to Riesman, the early American liberal tradition was rooted, first, in the belief that human beings were rational, and second, that nature endowed individuals, not communities, with natural rights. This meant individual rights were not contingent on any form of organized government.

Riesman asserted that this theory of liberalism was rarely challenged throughout American history, even by newcomers to the United States: “With few exceptions, each new generation of immigrants felt as if it had left behind all of Europe’s age-old repressions and was glad to accept as unalterable that pattern of political freedom which seemed permanently guaranteed in the American way of life.”²⁰¹ However, he contended that “[t]oday this once revolutionary position has become conservative” and said the liberal assumptions of the eighteenth century had been fundamentally challenged as time marched on.²⁰²

First, Riesman argued the liberal insistence on the primacy of individualism was no longer tenable: “Today we have become aware not only of the extent to which thinking and expression of thought are social processes, not an affair of individuals, but also of many cultural factors in opinion formation which operates more or less independently of economic relationships.”²⁰³ Riesman claimed that in modern times it was impossible to divorce an individual’s beliefs and actions from the social and cultural connections that influenced them.

²⁰⁰ Riesman, “Civil Liberties,” 63-64.

²⁰¹ Ibid., 66.

²⁰² Ibid., 68.

²⁰³ Ibid., 70. To support his argument Riesman cited to, among others, the 1937 edition of American sociologist Talcott Parsons’s book *The Structure of Social Action* and the 1936 English-language translation of European sociologist Karl Mannheim’s book *Ideology and Utopia*. Ibid., 70 fn. 122. For later editions of these works, see Talcott Parsons, *The Structure of Social Action: A Study in Social Theory with Special Reference to a Group of Recent European Writers*, vol. 1 (Free Press: New York, 1968); Talcott Parsons, *The Structure of Social Action: A Study in Social Theory with Special Reference to a Group of Recent European Writers*, vol. 2 (Free Press: New York, 1968); Karl Mannheim, *Ideology and Utopia: Collected Works*, vol. 1 (London: Routledge, 1997). Parsons’

Moreover, he thought some people wanted to actively abandon individualism altogether: “[M]any social groups, after one hundred and fifty years of freedom from religious, feudal, or even state supervision, are anxious to go back to some secure and restricting fold where no choices or freedoms can be exercised.”²⁰⁴ He explained why he believed this to be the case: “Authoritarian characters, found in all walks of life but especially among the cramped lower-middle classes, that lacked both the prestige of competitive success and the solidarity of union membership, wish to rule with an iron hand and to be ruled.”²⁰⁵ According to Riesman, those people who had been unable to obtain individual wealth through liberal capitalism and who lacked the communitarian values of organized labor were willing succumb to movements with tyrannical tendencies. He asserted: “For them the burden of individualism has become too great to bear, and the freedom of choice which liberal societies avow has either been illusory in their life experience because of their limited social and economic resources or it has been lost in aimlessness because no adequately pervasive value-scheme existed to serve them as a guide.”²⁰⁶ Riesman believed some people saw individual freedom under liberalism as an experience that offered empty promises of personal satisfaction it could not fulfill, and they instead embraced authoritarianism because it offered them a framework for certainty and meaning that they craved.

book became increasingly influential in American sociology in the 1950s following the publication of a new, though barely altered, edition of his book in 1949. Uta Gerhardt, *Talcott Parsons: An Intellectual Biography* (Cambridge: Cambridge University Press, 2002), 3. Mannheim first worked in Hungary, then in Weimar Germany from 1919 to 1933, and settled in the United Kingdom in the 1930s. Colin Loader, *The Intellectual Development of Karl Mannheim: Culture, Politics, and Planning* (Cambridge: Cambridge University Press, 1985), 1. In Germany at the University of Heidelberg, Mannheim had been a disciple of Alfred Weber, under whom Riesman’s Harvard mentor Carl Friedrich had also studied. Colin Loader, “Free Floating: The Intelligentsia in the Work of Alfred Weber and Karl Mannheim,” *German Studies Review* 20, no. 2 (May 1997): 217; Greenberg, *The Weimar Century*, 29-30. A discussion of Carl Friedrich’s critique of individualism, likely influenced by Alfred, can be found in Chapter 4.

²⁰⁴ Riesman, “Civil Liberties,” 72.

²⁰⁵ *Ibid.*, 72.

²⁰⁶ *Ibid.*, 72.

To make this argument, one of the books Riesman cited was Erich Fromm's 1941 work *Escape from Freedom*.²⁰⁷ In this book, Fromm used psychoanalysis to try to explain the emergence of and support for Nazism in Germany.²⁰⁸ Describing the main thesis of *Escape from Freedom*, Fromm wrote: "This discussion will always be centered around the main theme of this book: that man, the more he gains freedom in the sense of emerging from the original oneness with man and nature and the more he becomes an 'individual,' has no choice but to unite himself with the world in the spontaneity of love and productive work or else to seek a kind of security by such ties with the world as destroy his freedom and the integrity of his individual self."²⁰⁹ Here, Fromm's influence on Riesman can be seen – both argued that some people found the existential task of self-definition in a society that valued individualism too overwhelming, and instead welcomed a dictatorial system that would take over this mission for them.

Riesman found the willingness to embrace authoritarianism troubling, because he thought it was a tendency that existed not only in Europe but also in the United States despite its history of liberalism.²¹⁰ He argued the U.S. was not as individualistic as it seemed: "Americans, too, are self-repressed to some degree, often unconsciously, in fear on the one hand of 'the neighbors' and 'what people will think,' and in hopes on the other of winning friends and influencing people."²¹¹ According to Riesman, Americans were often concerned with how they were

²⁰⁷ Ibid., 72 fn. 128. For a reprinted edition that appears to be based on the 1941 text, see Erich Fromm, *Escape from Freedom* (New York: Holt, Rinehart, and Winston, 1964). Riesman also cited to theologian Reinhold Niebuhr's *The Nature and Destiny of Man* and an article in the *Harvard Law Review*. Ibid., fn. 128; Reinhold Niebuhr, *The Nature and Destiny of Man: A Christian Interpretation: Human Nature*, vol. 1 (London: Nisbet & Co., 1941), 65-92. However, as will be shown, Fromm's influence on Riesman's thinking is apparent.

²⁰⁸ Neil McLaughlin, "Critical Theory Meets America: Riesman, Fromm and *The Lonely Crowd*," *American Sociologist* 32, no. 1 (Spring 2001): 9-10.

²⁰⁹ Fromm, 22-23.

²¹⁰ As Riesman wrote: "We may smugly feel that fascism is a European form of this new tactic of reaction, which cannot happen in countries with a long liberal tradition and without a feudal past. But Americans have their own subtle and pervasive form of avoiding the full utilization of the civil liberties they theoretically possess." Riesman, "Civil Liberties," 72.

²¹¹ Ibid., 73.

perceived by their peers, which dramatically limited the individual independence that was so central to liberalism. He conceded that the U.S. was not as repressive as the fascist nations of Europe.²¹² But Riesman was still worried: “Yet the very fact that we are seldom made as dramatically aware of the regressive tendencies of public opinion as we are aware of the Gestapo and OGPU helps to hide the long-run seriousness of our problem.”²¹³ The Gestapo was the Nazi state police service and the Soviet OGPU was the precursor to the KGB and NKVD.²¹⁴ Riesman was concerned that a lack of overt repression might make Americans complacent about the erosion of individualism in the U.S., which he believed would increasingly undermine the stability of American liberalism.

In addition to the challenges facing individualism, Riesman argued the liberal belief in rationality was also increasingly being questioned because some people “have experienced understandable, but excessive, reactions from the eighteenth-century faith in a God-given, intuitive reason and a Rousseauistic common will, and they are equally dubious whether there is any ‘truth,’ and if so, what difference it actually makes.”²¹⁵ He said Marxist and Freudian ideas had helped to undermine the belief in reason, because “[f]or the Marxists, the process of reasoning has become class rationalism, and all ideology is a mere superstructure for the modes of economic production” while “[f]or the Freudians, reason has all but vanished; it is a sublimation or rationalization of irrational, instinctual drives.”²¹⁶ Riesman’s connections with

²¹² Riesman stated: “Of course these apparently petty and often anonymous forms of control are radically different from the vicious and open brutalities of Fascist *Gleichschaltung*.” Emphasis in original, *ibid.*, 73. This referred to the Nazi policy of coordination of all aspects of life into the state. Evans, *The Coming of the Third Reich*, 381.

²¹³ Riesman, “Civil Liberties,” 73.

²¹⁴ Richard J. Evans, *The Third Reich in Power* (New York: Penguin, 2005), 96; Sheila Fitzpatrick, “Ascribing Class: The Construction of Social Identity in Soviet Russia,” *Journal of Modern History* 65, no. 4 (Dec. 1993): 763.

²¹⁵ Riesman, “Civil Liberties,” 74.

²¹⁶ *Ibid.*, 74. As noted in the Introduction, Thomas Nagel observes that skepticism toward reason itself is epistemologically problematic “because any claim to the rightness of what one is doing is automatically an appeal to its justifiability, and therefore subject to rational criticism. Reason is universal because no attempted challenge to its

the socialist members of the Institute for Social Research, such as Kirchheimer and Neumann, and the neo-Freudian psychoanalyst Fromm may informed his perspective on rationality here.

What interested Riesman was not so much the philosophical justifications for reason but instead the popular perception of reason: “[W]hat matters here, as everywhere, is not only the facts but the beliefs about them. So long as men see manipulation or rationalization where previously they saw the operation of divine inspiration or natural laws, public policy cannot rest securely on the traditions of the Enlightenment or the Utilitarians. And so, while some people have clung tenaciously to earlier patterns of liberalism, and others have fled from them into one of the many varieties of modern absolutist cults, vast numbers have given up in despair of a solution, though continuing to give lip service to liberty.”²¹⁷ According to Riesman, if a large proportion of society was skeptical of rationality, or downright hostile toward the notion of reason, this dramatically undermined the vitality of American liberalism, which assumed a fundamental belief in human rationality.

Riesman averred that the dissolution of confidence in eighteenth-century liberal assumptions required a fundamental reassessment of the relationship between civil liberties and government authority: “The concept which sees the problem of political power raised only by tension between ‘the individual’ and ‘the state’ fails to recognize that political power is not a monopoly of the state and that the enjoyment of civil liberties depends on group affiliations and hostilities.”²¹⁸ According to Riesman, the groups to which people belonged formed the foundation for civil liberties and democracy – civil liberties were not based on a dichotomy between individuals and the government.

results can avoid appealing to reason in the end [...]” Thomas Nagel, *Other Minds: Critical Essays 1969-1994* (New York: Oxford University Press, 1995), 212-13.

²¹⁷ Riesman, “Civil Liberties,” 74.

²¹⁸ *Ibid.*, 83.

This idea was reminiscent of Riesman's mentor, Friedrich, whose political theory centered on the notion that associations of people, rather than individuals, formed the foundations of the political order.²¹⁹ While Riesman did not discuss Friedrich here, he observed "[b]oth political science and social psychology have tended to emphasize the group nature of society" and then cited to Harold Laski's 1919 work *Authority in the Modern State* and Frederick M. Watkins' 1934 work *The State as a Concept of Political Science*, among others.²²⁰ Throughout Laski's career, his political theory focused on explaining the relationship between the social groups he believed made up a nation and the individual actors whose decisions guided these groups – the government, according to Laski, did not define the nation as a whole but was merely one of its component groups.²²¹ Likewise, the notion of group association was key to Watkins' theory – he argued "[t]he state is a sovereign association" – and although he noted elsewhere that he and Friedrich differed on some ideas, Watkins said "this fact should not be permitted to obscure a profound indebtedness which pervades the entire study."²²² Thus, Friedrich's influence, especially his focus on the role of social groups in the political order, was

²¹⁹ This will be discussed in significantly greater detail in Chapter 4, particularly the German roots of Friedrich's theory of association. Historian Udi Greenberg notes that in Friedrich's political thought "[t]he individual did not constitute the basic unit in this model but in fact 'disappeared' within it, gaining importance only through his participation in groups." Udi Greenberg, "The Limits of Dictatorship and the Origins of Democracy: The Political Theory of Carl J. Friedrich from Weimar to the Cold War," in *The Weimar Moment: Liberalism, Political Theology, and Law*, ed. Leonard V. Kaplan and Rudy Koshar (Lanham, MD: Lexington Books: 2012), ProQuest Ebook Central; see also Greenberg, *The Weimar Century*, 31-33.

²²⁰ Riesman, "Civil Liberties," 83 fn. 155; Harold Laski, *Authority in the Modern State* (New Haven, CT: Yale University Press, 1919), 19-122; Frederick Mundell Watkins, *The State as a Concept of Political Science* (New York: Harper & Brothers, 1934). Watkins acknowledged Friedrich's influence in his 1934 book: "The following study is the outgrowth of extended discussions between Professor Carl J. Friedrich and myself [...]." *Ibid.*, v.

²²¹ David Nicholls, *The Pluralist State: The Political Ideas of J. N. Figgis and his Contemporaries*, 2nd ed. (New York: St. Martin's Press, 1994), 85.

²²² Watkins, *The State*, 49, v. Watkins described one of their key differences: "It is true that I have ultimately been led to adopt a position which differs in certain respects from that of Professor Friedrich. He finds himself, for example, unable to sympathize with my use of the concept of political sovereignty, feeling that the legalistic connotations of the word sovereignty render it permanently unavailable for the purposes of political science." *Ibid.*, v. Friedrich's understanding of sovereignty will be described in Chapter 4.

likely present in Riesman's discussion of civil liberties and group association, even if this influence was not directly attributed.

Riesman argued that group association, which had previously been limited by liberalism's emphasis on individual autonomy against the state, was essential to the continued protection of civil liberties.²²³ In place of individual rights, he proposed that the government encourage the formation of associations and safeguard them: "What is involved in these situations is first, the need for governmental supervision of the freedom of groups to form and act within society, and second, protection of the members of the groups acting in relation to each other within the group structure."²²⁴ This could create a dilemma, Riesman conceded, because "the freedoms of assembly and association can today be used and have been used for organizing totalitarian tyranny [...]."²²⁵ To ensure these groups would protect civil liberties, Riesman explained that the government should place restrictions on the content these associations could support: "Vigorous governmental policy in the protection of free assembly and association cannot therefore be a generalized and 'equal' protection of the laws for all associations, without reference to the purposes of the particular association, any more than freedom of assembly can properly blanket assemblies of organized stormtroopers."²²⁶

Riesman's argument created a substantial problem, however – what guidelines would the government follow to determine which associations were permitted and which were not? According to Riesman: "Governmental policy must be selective and discriminating. It must name the names of the groups needing protection, on the basis of an over-all judgment of the

²²³ As Riesman argued: "In spite of this crucial quality of the right of free association for democracy, the formal recognition of the right has developed slowly. It was retarded by reaction from entrenched guilds and feudal orders and by the individualistic shibboleths originally associated with democracy." Riesman, "Civil Liberties," 87.

²²⁴ Ibid., 87.

²²⁵ Ibid., 87-88.

²²⁶ Ibid., 88.

social forces which favor democracy [...].”²²⁷ Thus, he believed the government should simply exclude those groups that did not support democracy.

However, finding a principle to determine which groups were democratic and which were not was significantly more difficult than Riesman let on. In Germany in the late nineteenth century, the socialist thinker Eduard Bernstein supported democracy but argued that when socialists achieved power by democratic means, they would eliminate capitalism.²²⁸ Would a political party formed around these principles be excluded under Riesman’s model? A similar issue could arise with religion. In the 1928 U.S. Presidential election, Al Smith, the Democratic candidate for U.S. President, was routinely derided as authoritarian and accused of holding greater loyalty to the Vatican than to the American government due to his Catholicism.²²⁹ Would Riesman allow for the exclusion of certain religions that were popularly seen as undemocratic? Even some pro-democracy organizations might face an uphill battle in gaining government approval, particularly groups battling racism. The National Association for the Advancement of Colored People (NAACP), which sought to guarantee rights for African Americans, faced violence against its Southern chapters in the 1920s.²³⁰ Could Riesman’s framework of government gatekeeping effectively prevent a racially biased majority from depriving racial minorities of their freedom of assembly?

²²⁷ Ibid., 88.

²²⁸ Manfred Steger, “Historical Materialism and Ethics: Eduard Bernstein’s Revisionist Perspective,” *History of European Ideas* 14, no. 5 (Sept. 1992): 648.

²²⁹ Finbarr Curtis, “The Fundamental Faith of Every True American: Secularity and Institutional Loyalty in Al Smith’s 1928 Presidential Campaign,” *Journal of Religion* 91, no. 4 (Oct. 2011): 520-22.

²³⁰ Simon Topping, “‘Supporting Our Friends and Defeating Our Enemies’: Militancy and Nonpartisanship in the NAACP, 1936-1948,” *Journal of African American History* 89, no. 1 (Winter 2004): 17; Dorothy Autrey, “‘Can These Bones Live?’: The National Association for the Advancement of Colored People in Alabama, 1918-1930,” *Journal of Negro History* 82, no. 1 (Winter 1997): 6; Ramona Houston, “The NAACP State Conference in Texas: Intermediary and Catalyst for Change, 1937-1957,” *Journal of African American History* 94, no. 4 (Fall 2009): 510.

Ironically, despite his criticism of authoritarian sympathizers, Riesman fell back on a theory of dictatorship to explain why the government could support associations it deemed democratic and exclude those it regarded as undemocratic. He lauded a 1940 article by Watkins, entitled, “The Problem of Constitutional Dictatorship,” which Riesman noted “outlined a theory of constitutional dictatorship as a method of defending the Constitution in a period of temporary crisis.”²³¹ In Friedrich’s 1937 book *Constitutional Government and Politics*, which Riesman had helped prepare, Friedrich said Watkins’ article was “[o]riginally conceived as a translation of [Carl] Schmitt’s work” – specifically Schmitt’s book *The Dictatorship (Die Diktatur)*, though Friedrich derided this work.²³² Nevertheless, Schmitt’s analysis had clearly made its way across the Atlantic to influence Watkins and, indirectly, Riesman. After describing how Watkins traced the history of dictatorship from ancient Rome to the Weimar Republic, Riesman elucidated Watkins’ theory of dictatorship: “Watkins believes that these historical experiences indicate the necessity of sometimes constitutionally suspending certain guarantees in order to preserve the main core of constitutionalism.”²³³ Schmitt made a similar argument in the appendix to *The Dictatorship*, arguing that the Weimar President had significant – though not unlimited –

²³¹ Riesman, “Civil Liberties,” 94; Frederick M. Watkins, “The Problem of Constitutional Dictatorship,” in *Public Policy: A Yearbook of the Graduate School of Public Administration, Harvard University*, ed. C. J. Friedrich and Edward S. Mason, vol. 1 (Cambridge, MA: Harvard University Press, 1940), 324-79.

²³² Friedrich, 534-35; Riesman, “On Discovering and Teaching Sociology,” 5; Carl Schmitt-Dorotić, *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (München: Duncker & Humblot, 1921). Although Friedrich cited to the 1928 second edition, the 1921 edition is cited here. Friedrich, 534. Schmitt published the 1921 edition using his own name and the name of his first wife. Mehring, *Carl Schmitt*, 41-43, 59. For an English-language translation of *The Dictatorship*, see Carl Schmitt, *Dictatorship*, trans. Michael Hoelzl and Graham Ward (Cambridge: Polity, 2014).

Although Friedrich did not give a specific title for this Watkins article in *Constitutional Government and Politics*, it is highly likely that this was a reference to what became Watkins’ 1940 work “The Problem of Constitutional Dictatorship” because in the 1941 (and 1946) editions of *Constitutional Government and Democracy* in the chapter “Constitutional Dictatorship and Emergency Powers,” Friedrich cited to this article by Watkins. Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Boston: Little, Brown, 1941), 627; Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Boston: Ginn and Company, 1946), 627. The relationship between Friedrich, Watkins, and Schmitt is analyzed further in Chapter 4.

²³³ Riesman, “Civil Liberties,” 94.

authority to suspend a substantial portion of the Weimar Constitution's provisions so long as he did not alter the essence of the constitutional system.²³⁴

Interestingly, Riesman criticized Watkins' theory of dictatorship because he did not think it went far enough: "Although I recognize the value of Watkins's work, I am inclined to feel that even his concept of emergency, improved as it is over traditional ones, leans somewhat too heavily toward the temporary side."²³⁵ Riesman said that Watkins was "thinking in terms of civil war or of obvious disorder, as in the late years of Weimar Germany," but Riesman argued "the problem of civil liberties that confronts us seems to me neither temporary in these ways nor permanent: it is transitional."²³⁶ He believed there was a substantial paradigm shift taking place in the political foundations of American society, which would take a long time to resolve: "Nationalism, capitalism, liberalism are in the crucible; it may take years before a new amalgam of social forces emerges which can give promise of some stability and peace."²³⁷

Because of this ongoing emergency, Riesman concluded: "If we are to avoid the authoritarian solutions which spring from despair or from fear or hatred of the masses, democrats must be fully aware of the strength of the social forces which have paralyzed man's potentialities. We must then use governmental power aggressively to combat these forces and to excavate and strengthen latent social forces which favor man's development. This is the program that is required in this period of transition."²³⁸ According to Riesman, the government

²³⁴ Jeffrey Seitzer and Christopher Thornhill, "An Introduction to Carl Schmitt's *Constitutional Theory*: Issues and Context," in Carl Schmitt, *Constitutional Theory*, ed. Jeffrey Seitzer, trans. Jeffrey Seitzer (Durham, NC: Duke University Press, 2008), 447-48 fn. 48. For the text of this appendix to *The Dictatorship*, see Schmitt, *Dictatorship*, 180-226.

²³⁵ Riesman, "Civil Liberties," 95.

²³⁶ *Ibid.*, 95.

²³⁷ *Ibid.*, 95.

²³⁸ *Ibid.*, 95-96.

needed to step in to determine which organizations should continue to exist and which should be extirpated in order to ensure that liberal democracies would not be destroyed from within.

While it would be challenging to enforce the boundaries of Riesman's proposal for government approval and oversight of associations, his analysis encapsulated many of the concerns his German émigré colleagues also articulated. Riesman and his émigré contemporaries were especially worried that many twentieth century liberals continued to place too much emphasis on individualism. In contrast, fascism and Communism sought to weaponize group identity, and Riesman and his émigré associates were concerned that liberalism had ceded the notion of group association to these ideological rivals. Instead, Riesman and the German émigrés tried to explain how groups could play a central role in liberal societies, while at the same they continued to recognize the importance of individualism in liberal law and politics.

VIII. Conclusion

Riesman continued grappling with these problems and in the 1940s he began moving away from the democratic theory he had inherited from Friedrich; instead, he started placing a greater emphasis on individual autonomy, likely because of Fromm's influence.²³⁹ Indeed, in Riesman's 1951 essay "Individualism Reconsidered," he declared that individual autonomy was central to his thinking: "I am insisting that no ideology, however noble, can justify the sacrifice of an individual to the needs of the group. Whenever this occurs, it is the starkest tragedy, hardly

²³⁹ As Fromm biographer Lawrence Friedman notes, Fromm's 1941 book *Escape from Freedom* emphasized "the positive use of the 'freedom to,' that is, the ability to act autonomously to fulfill life's purpose, including the ability to act ethically and creatively." Friedman, 99. Neil McLaughlin observes that Fromm's book *Escape from Freedom* and his 1947 book *Man for Himself* were strong influences on Riesman's seminal work *The Lonely Crowd* – though many of the conclusions Riesman drew were often different from Fromm's. Neil McLaughlin, *Erich Fromm and Global Public Sociology* (Bristol, U.K.: Bristol University Press, 2021), 86-92, 95-97. For a reprinting of the 1947 edition of *Man for Himself*, see Erich Fromm, *Man for Himself: An Inquiry into the Psychology of Ethics* (New York: Holt, Rinehart and Winston, 1964). Indeed, Riesman indicated that Fromm had influenced much of his own theory in *The Lonely Crowd*. Friedman, 111. Chapter 5 addresses the intellectual relationship between Riesman and Fromm in the late 1940s and into the 1950s, with a particular emphasis on Riesman's political thought.

less so if the individual consents (because he accepts the ideology) to the instrumental use of himself....”²⁴⁰ Yet, at the same time, Riesman did not uncritically laud individualism – he continued to state that individualism could sometimes cause more harm to society than good.²⁴¹

Much like Riesman, his emigrant colleagues sought to elucidate whether the individual liberty emphasized by liberal thought was still tenable in the mid-twentieth century. Some, like Neumann, moved away from the socialist politics of their Weimar-era writing, and instead reassessed the ways classical liberalism could be more finely tuned to effectively fight off Nazism’s nihilistic political tendencies. Others, like Friedrich, increasingly rejected liberalism in favor of democratic political theories – though Friedrich continued to embrace certain constitutional norms that were more aligned with liberalism than pure democracy. Despite all of their differences, the German émigrés and their American colleagues hoped to discover and nurture a set of ideas that would sustain their society as it faced the dual challenges of Nazism and Communism.

²⁴⁰ Riesman, *Individualism Reconsidered*, 508, 38.

²⁴¹ *Ibid.*, 26.

CHAPTER 2

The Rise and Fall of the Behemoth: Franz Neumann's Visions of Weimar Constitutionalism and De-Nazification

The year 1942 was Franz Neumann's *annus mirabilis*. In addition to publishing his massive work on Nazism, entitled *Behemoth: The Structure and Practice of National Socialism*, Neumann's influence in Washington, DC, also increased dramatically that year.¹ Neumann passed FBI scrutiny and in spring of 1942 he obtained employment with the Board of Economic Warfare as chief consultant.² In August 1942, he began working for the Intelligence Division of the Office of the U.S. Chief of Staff as chief economist.³ He was then hired by the Research and Analysis Branch of the Office of Strategic Services (OSS) in early 1943, working in the Central European Section as deputy chief.⁴ In March 1943, fellow Frankfurt School member Herbert Marcuse was hired by the OSS, and in early July 1943 Otto Kirchheimer, another Frankfurt School colleague, started as a consultant with the OSS.⁵

What explains Neumann's meteoric rise in the U.S. government? Tracing his journey is particularly important because he influenced the American understanding of the Nazi state during World War II.⁶ Indeed, Neumann's analysis of the Nazi state and society continues to

¹ Franz Neumann, *Behemoth: The Structure and Practice of National Socialism* (London: Victor Gollancz, 1942). In this chapter, the 1944 second edition of *Behemoth* will be cited rather than the 1942 first edition. Franz Neumann, *Behemoth: The Structure and Practice of National Socialism 1933-1944*, 2nd ed. (New York: Oxford University Press, 1944). The 1944 second edition was significantly expanded with the inclusion of an appendix, which Neumann noted "brings the development of National Socialism up to date." *Ibid.*, xii. However, the main text appears to be the same in both editions.

² Raffaele Laudani, "Introduction," in Franz Neumann, Herbert Marcuse, and Otto Kirchheimer, *Secret Reports on Nazi Germany: The Frankfurt School Contribution to the War Effort*, ed. Raffaele Laudani (Princeton: Princeton University Press, 2013), 2; David Kettler and Thomas Wheatland, *Learning from Franz Neumann: Law, Theory and the Brute Facts of Political Life* (London: Anthem Press, 2019), 329. Laudani misidentifies this as the "Board of Economic Welfare" rather than the Board of Economic Warfare. Laudani, 2.

³ *Ibid.*, 2.

⁴ *Ibid.*, 2; Kettler and Wheatland, 329; Barry M. Katz, *Foreign Intelligence: Research and Analysis in the Office of Strategic Services 1942-1945* (Cambridge, MA: Harvard University Press, 1989), 32.

⁵ *Ibid.*, 32-33.

⁶ Henry J. Kellermann, "Settling Accounts – The Nuremberg Trial," *The Leo Baeck Institute Year Book* 42, no. 1 (Jan. 1997): 338, 346.

hold contemporary relevance in the historiography of Nazi Germany.⁷ Even those scholars who are critical of Neumann's theory of National Socialism admit that he is one of the foundational scholars in this area.⁸ Central to this story is Neumann's legal and economic analysis of monopolies, which helps explain why he transformed from a socialist in Weimar Germany in the 1920s and 1930s into an American intellectual who was sympathetic to neo-liberalism in the 1940s – though he remained somewhat critical of such thinking.⁹ Indeed, intellectual historian Alfons Söllner describes Neumann “as a skeptic with undeclared bias or as a neo-liberal against his better judgment.”¹⁰

In contrast to American law, German law from the nineteenth century onward supported the creation of monopolies, and antitrust regulation was still minimal during the Weimar

⁷ Raul Hilberg, “The Relevance of *Behemoth* Today,” *Constellations* 10, no. 2 (2003): 256-63.

⁸ Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford: Oxford University Press, 2018), 28.

⁹ Other pieces have discussed Neumann's contribution to antitrust law, including Kim Christian Priemel's excellent historical work. Kim Christian Priemel, “‘A Story of Betrayal’: Conceptualizing Variants of Capitalism in the Nuremberg War Crimes Trials,” *Journal of Modern History* 85, no. 1 (Mar. 2013): 69-108; see also Doreen Lustig, “The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann's Concept of *Behemoth* at the Industrialist Trials,” *New York University Journal of International Law and Politics* 43, no. 4 (Summer 2011): 965-1044. However, these pieces focus largely on Neumann's contribution to prosecution at the first Nuremberg Trial, while this chapter seeks to place Neumann's antitrust work in the broader context of American politics during the New Deal and World War II. David Kettler and Thomas Wheatland's intellectual biography of Neumann is another outstanding resource for understanding the trajectory of Neumann's theories. However, Kettler and Wheatland focus more on Neumann's discussion of cartels in Weimar, Germany, rather than contextualizing his shifting notion of antitrust more broadly within American intellectual and legal history. Kettler and Wheatland, 45-48. Similarly, Duncan Kelly, William Scheuerman, and Martin Jay place Neumann's thought within the intellectual context of German history rather than American history. Kelly focuses on the relationship between Neumann, Max Weber, and Carl Schmitt. Duncan Kelly, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt, and Franz Neumann* (Oxford: Oxford University Press, 2003), 258-97. Schuerman discusses the relationship between Neumann, Schmitt, and Otto Kirchheimer. William E. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge, MA: M.I.T. Press, 1994), 97-119, 123-155. And Jay focuses on Neumann's analysis of Nazism in the context of the Frankfurt School. Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research 1923-1950* (Berkeley: University of California Press, 1996), 143-69. Rolf Wiggershaus has an excellent biographic section on Neumann but does not delve into the legal underpinnings of Neumann's thought. Rolf Wiggershaus, *The Frankfurt School: Its Theories, and Political Significance*, trans. Michael Robertson (Cambridge, MA: M.I.T. Press, 1995), 223-36.

¹⁰ Alfons Söllner, “Franz L. Neumann's Place in the History of Political Thought: A Sketch,” in *German Scholars in Exile: New Studies in Intellectual History*, ed. Axel Fair-Schulz and Mario Kessler (Lanham, MD: Lexington Books, 2011), 110.

Republic in the 1920s and 1930s.¹¹ Even advocates for social democracy in Germany supported the establishment of business monopolies, and in the 1920s and 1930s Neumann largely followed this conventional thinking on monopolistic enterprises.¹² This changed after the Nazi seizure of power in 1933 – Neumann fled Germany and increasingly saw German monopolies as a major force behind the rapid consolidation of Nazi power. Over the course of the 1930s and early 1940s, Neumann developed a new critique of monopolies that often drew on classical liberalism, which he elucidated most fully in *Behemoth*. His analysis of German monopolies was a useful tool for American policymakers who wanted to reenergize antitrust law to stabilize capitalism in the U.S. However, as Neumann became increasingly involved in American policymaking during World War II, he ran into difficulties translating his anti-monopoly theories into practice, often proposing plans that were at odds with the liberal theories of law he had espoused in *Behemoth*. The inability to reconcile theory with practice in Neumann’s work exposed the difficulties American liberals and their German émigré partners faced as they laid plans for rebuilding in the aftermath of the Second World War.

This chapter begins by describing the historical development of the antitrust regime created in the United States in the late nineteenth century and compares it with the German legal system at the time. It then explains how Neumann’s sympathy toward monopolies during the Weimar Republic in the 1920s and early 1930s changed dramatically after the Nazis gained control of Germany. After this, Neumann developed a critical theory of monopolies, drawing on liberal notions of legal equality and free market economics when making his arguments. His analysis of German monopolies dovetailed with the New Deal’s antitrust regime in the late

¹¹ Knut Wolfgang Nörr, “Law and Market Organization: The Historical Experience in Germany from 1900 to the Law Against Restraints of Competition (1957),” *Journal of Institutional and Theoretical Economics (JITE)/ Zeitschrift für die gesamte Staatswissenschaft* 151, no. 1 (Mar. 1995): 6-13.

¹² *Ibid.*, 9.

1930s, which created new opportunities for Neumann in the U.S. government. New Deal officials sought to differentiate constructive elements of American antitrust law from destructive aspects of German corporate law, which they believed enabled the rise of Nazism. Neumann's thinking was a convenient resource for American bureaucrats, and he continued analyzing German monopolies as an intelligence analyst with the OSS. Yet even as the war effort heated up, cracks began to emerge in the theories that Neumann had worked so hard to explain.

I. A Tale of Two Systems: American and German Antitrust Laws Compared

In 1890, with the support of U.S. President Benjamin Harrison, the Sherman Act created an antitrust regime in the United States.¹³ The Sherman Act prevented businesses from implementing trade restraints and prohibited the creation of monopolies and trusts.¹⁴ This was followed in 1903 by the creation of the Department of Commerce's Bureau of Corporations, which had investigatory power over large corporations, although the Bureau had no means to directly enforce antitrust law.¹⁵ In 1914, the Clayton Act augmented the antitrust power of the Sherman Act, and the Federal Trade Commission Act created a federal agency, the Federal Trade Commission (FTC), with enforcement authority over these antitrust statutes.¹⁶ Then, in 1919, U.S. Attorney General A. Mitchell Palmer restructured the Department of Justice and created the Antitrust Division, another agency tasked specifically with antitrust enforcement.¹⁷

Until the end of World War II, the United States was an outlier in its antitrust legislation and litigation – Japan, as well as many European nations, including Germany, Austria, France, and the United Kingdom, actively supported the creation of business cartels, particularly in the

¹³ Barak Orbach and Grace Campbell Rebling, "The Antitrust Curse of Bigness," *Southern California Law Review* 85, no. 3 (Mar. 2012): 618.

¹⁴ *Ibid.*, 618.

¹⁵ Daniel A. Crane, "Antitrust Antifederalism," *California Law Review* 96, no. 1 (Feb. 2008): 18-19.

¹⁶ *Ibid.*, 21.

¹⁷ Gregory J. Werden, "Establishment of the Antitrust Division of the U.S. Department of Justice," *St. John's Law Review* 92, no. 3 (Fall 2018): 428.

1920s and 1930s.¹⁸ In Germany, the drive toward business cartelization began in the 1880s.¹⁹ Despite the fact that the 1918 German Revolution, which overthrew the German Empire and created the Weimar Republic, was largely socialist, cartelization was not abolished but instead continued throughout the Republic.²⁰

Legal historian Knut Wolfgang Nörr argues that cartelization was seen as justified by four main factors during the German Empire and the Weimar Republic. First, a historical and juridical analysis viewed organized markets as evolutionarily superior to free market competition.²¹ Second, there was a belief that cartels reflected positive cultural connotations associated with “collectivism” and “organization” in society rather than individualism, justified in the law by influential thinkers such as the jurist Otto von Gierke.²² Third, cartels were viewed as useful tools for supporting an increase in German power in the international market.²³ Finally, “a de-legalizing” occurred in Germany, in which legal justifications were based less on rationality and more on social power and special interest, meaning, according to Nörr, “[t]he benefit of the cartels for the state, for the national economy, and for the large groups of interested

¹⁸ Jeffrey Fear, “Cartels,” in *The Oxford Handbook of Business History*, ed. Geoffrey G. Jones and Jonathan Zeitlin (Oxford: Oxford University Press, 2008), 268, 275-79; Priemel, 77.

¹⁹ Nörr, 6.

²⁰ *Ibid.*, 9.

²¹ *Ibid.*, 6-7.

²² *Ibid.*, 7-8. Gierke’s legal thought will be discussed more extensively in Chapter 4. Anthony Black notes that Gierke “proposed a kind of community or common life (*Gemeinwesen*) expressed by the moral and legal concept of fellowship (*Genossenschaft*).” Emphasis in original, Anthony Black, “Editor’s Introduction,” in Otto von Gierke, *Community in Historical Perspective: A Translation of Selections from Das deutsche Genossenschaftsrecht* (The German Law of Fellowship), ed. Anthony Black, trans. Mary Fischer (Cambridge: Cambridge University Press, 1990), xiv. This notion of *Genossenschaft*, which can be translated as association, fellowship, guild, or cooperative, emphasized the social and legal importance of non-state groups rather than individuals, as Black explains further: “Gierke is known in jurisprudence and political theory for his concept of fellowship (*Genossenschaft*) and of corporate group personality (*Gesamtpersönlichkeit*) – which, since it reflected the central role of associations in a normal social life and ensured their moral independence from the state, he regarded as the cornerstone of a just constitution and legal system – and also for his notion of an area of ‘social law’ standing between public and private law. This would include industrial laws, laws relating to real estate and tenants’ rights [...]” *Ibid.*, xiv.

²³ Nörr, 8.

parties was the prime concern, and the infringement of rights of all those who had had unfavorable experiences with the cartels was only of secondary importance.”²⁴

Oversight of cartels in Weimar Germany began in November 1923 with the Cartel Ordinance, issued by Chancellor Gustav Stresemann, but the antitrust regime was disorganized.²⁵ The Ordinance of 1923 did not forbid cartels, but only sought to stop them from misusing their economic capacity.²⁶ Moreover, the Ordinance gave the authority to regulate cartels to both the Reich Minister of Economics and to the Cartel Court – the latter was an administrative agency that often functioned in a judicial manner.²⁷ According to legal scholar Ivo Schwartz: “The theory underlying the division of jurisdiction was that the Cartel Court decided cases where the position of an individual member of a cartel or of an individual outsider was controversial, whereas the Minister of Economics decided cases where the position and actions of the cartel as a whole were at stake.”²⁸ But the German supreme court in the Weimar Republic, known as the *Reichsgericht*, also had the power to hear cartel cases, and often contradicted the decisions of the Cartel Court.²⁹ Additionally, civil courts had jurisdiction to hear some cartel cases in instances authorized by the German Civil Code (*Bürgerliches Gesetzbuch*), Sections 138 and 826, in matters regarding “good morals,” and by the Law Against Unfair Competition, Section 1.³⁰

II. A Conventional Socialist: Franz Neumann’s Antitrust Analysis in Weimar

Although Franz Neumann focused on labor law, he became interested the complexities of cartelization in the Weimar era – he wrote several articles on German cartel law because

²⁴ Ibid., 8.

²⁵ Ibid., 10.

²⁶ Ibid., 10; Ivo E. Schwartz, “Antitrust Legislation and Policy in Germany – A Comparative Study,” *University of Pennsylvania Law Review* 105, no. 5 (1957): 638.

²⁷ Ibid., 638.

²⁸ Ibid., 639.

²⁹ Nörr, 7, 11.

³⁰ Schwartz, 639; Nörr, 11.

organized labor often had an interest in regulating corporate structure.³¹ Neumann published an article in 1928 in the journal *Labor: Journal for Trade Union Politics and Economics (Die Arbeit: Zeitschrift für Gewerkschaftspolitik und Wirtschaftskunde)* entitled “Societal and State Administration of Monopolistic Enterprises.”³² Neumann gave rather modest suggestions for reforms to cartel law and monopoly regulation; he did not advocate abolishing monopolies, but instead argued for the creation of a cartel law that stated the specific legal forms cartels could take and favored the participation of labor unions in management of monopolies.³³

By 1928, Germany was dealing with economic contractions, which worsened in the coming years.³⁴ To escape the hyperinflation that reached almost inconceivable levels by 1923, German businesses relied heavily on foreign investments, particularly from United States, but by 1928 long-term loans from the U.S. started decreasing and by 1929 foreign investment increasingly made use of short-term loans.³⁵ This was coupled with U.S. efforts to maintain gold reserve levels, which reduced American foreign investment.³⁶ Thus, from 1928 to 1929 German industry saw little growth.³⁷ Then came the American stock market collapse of “Black Thursday” on October 24, 1929, which plunged the world into the Great Depression.³⁸ The

³¹ Kettler and Wheatland, 45-46.

³² Franz Neumann, “Gesellschaftliche und staatliche Verwaltung der monopolistischen Unternehmung,” *Die Arbeit: Zeitschrift für Gewerkschaftspolitik und Wirtschaftskunde* 5, no. 7 (1928): 393-406; Kettler and Wheatland, 77-78 n.6.

³³ Neumann, “Gesellschaftliche und staatliche Verwaltung,” 398, 401. For a further discussion of this article, particularly Neumann’s emphasis on labor union involvement in the corporate governance of monopolized industries, see Kettler and Wheatland, 45-47.

³⁴ Richard J. Evans, *The Coming of the Third Reich* (New York: Penguin, 2005), 234.

³⁵ Ibid., 103-5, 233-34; Adam Tooze, *The Wages of Destruction: The Making and Breaking of the Nazi Economy* (New York: Viking, 2007), 14. For a discussion of the relationship between American foreign investment in Weimar Germany, the German economic recovery from hyperinflation, and the German payment of World War I reparations, see Adam Tooze, *The Deluge: The Great War and the Remaking of the Global Order* (New York: Penguin, 2014), 453-61; Frank C. Costigliola, *Awkward Domination: American Political, Economic, and Cultural Relations with Europe, 1919-1933* (Ithaca: Cornell University Press, 1984), 111-39.

³⁶ Evans, 234.

³⁷ Ibid., 234.

³⁸ Ibid., 234-37.

German government headed by Chancellor Hermann Müller, a member of the SPD, resigned on March 27, 1930.³⁹ German President Paul von Hindenburg responded by appointing a “cabinet of experts” to replace the coalition government, using the presidential emergency powers to govern rather than working with the Reichstag parliament.⁴⁰

Article 48, paragraph 2, of the Weimar Constitution granted the German President emergency powers: “The President [Reichspräsident] can, if the public safety and order in the German Realm [Reiche] are substantially disturbed or endangered, arrange the necessary measures to restore public safety and order, [and] if necessary intervene with the help of armed force.”⁴¹ These emergency powers were expanded to include economic measures because of the economic and currency problems of 1923, and were furthered by five enabling laws in the 1920s in which the Reichstag undermined its own power by granting the government legislative authority in certain instances.⁴²

President Hindenburg purposefully avoided appointing members of the powerful SPD to his new cabinet because he did not want to give them emergency powers, although this deprived the government of majority support in the Reichstag.⁴³ Instead, he appointed Heinrich Brüning, a member of the Catholic Center Party, as Chancellor.⁴⁴ Brüning was an avowed monarchist

³⁹ Ibid., 247.

⁴⁰ Ibid., 250.

⁴¹ “Der Reichspräsident kann, wenn im Deutschen Reiche die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird, die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung nötigen Maßnahmen treffen, erforderlichenfalls mit Hilfe der bewaffneten Macht einschreiten.” Weimarer Reichsverfassung, Art. 48(2), in Heinrich Triepel, *Quellensammlung zum Deutschen Reichsstaatsrecht*, 5th ed. (Tübingen, Germany: J. C. B. Mohr (Paul Siebeck), 1931), 53. All translations are my own, except where otherwise noted.

⁴² Arthur J. Jacobsen and Bernhard Schlink, “Introduction: Constitutional Crisis the German and the American Experience,” in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobsen and Bernhard Schlink, trans. Belinda Cooper (Berkeley: University of California Press, 2000), 12-13. For a discussion of the scholarly and judicial interpretation of Article 48 in the Weimar Republic, see Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham, NC: Duke University Press, 1997), 145-70.

⁴³ Evans, 250.

⁴⁴ Ibid., 250.

who used the government's emergency powers both to salvage the wreckage of the German economy and to cut back on civil liberties.⁴⁵ In the midst of this economic crisis, the Emergency Ordinance to Meet Financial, Economic and Social Emergencies of July 26, 1930, was created to further expand the Reich Minister's authority to oversee cartels.⁴⁶

In 1930, Neumann published another article on cartel law in the journal *Labor*, entitled "The Draft of a Cartel and Monopoly Law."⁴⁷ Neumann voiced his concerns over cartels in this article, arguing that they were a threat to the republican order: "The owners exercise a monstrous social and economic power as owners, if the owners organize themselves in the different forms of cartels, concerns, or trusts. Because all of these organizational forms pursue the monopoly, aim for domination [Herrschaft], for mastery not only of other private social forces, but also for the mastery of the state."⁴⁸ According to Neumann, if the state did not exert mastery over monopolies, it gave up its foundational sovereign power: "A state [Staat] that tolerates it, that exercises within its territory uncontrolled monopolistic domination [Herrschaft], gives up on itself. Such a state gives up piece for piece its sovereignty [Souveränität], is hallowed out little by little by the trade associations."⁴⁹ Ultimately, Neumann concluded: "If the essential feature of the state is sovereignty and if sovereignty represents a unity through action and decision [Wirkungs- und Entscheidungseinheit], thus the need for a state control of monopolies follows

⁴⁵ Ibid., 250-52.

⁴⁶ Schwartz, 639.

⁴⁷ Franz Neumann, "Der Entwurf eines Kartell- und Monopolgesetzes," *Die Arbeit: Zeitschrift für Gewerkschaftspolitik und Wirtschaftskunde* 7, no. 12 (1930): 773-91; Kettler and Wheatland, 78 n.7. This edition of *Labor* appears to be from December 1930. There were twelve issues of the journal in the year 1930, and if a new issue was published each month, the twelfth issue would have been published in December 1930.

⁴⁸ "Der Eigentümer übt als Eigentümer eine ungeheure soziale und ökonomische Macht aus, dann vor allem, wenn die Eigentümer sich in den verschiedenen Formen des Kartells, des Konzerns oder des Trusts organisieren. Denn alle diese Organisationsformen streben nach dem Monopol, zielen ab auf Herrschaft, auf Beherrschung nicht nur der anderen privaten sozialen Gewalten, sondern auch auf Beherrschung des Staates." Neumann, "Der Entwurf," 774-75.

⁴⁹ "Ein Staat, der es duldet, dass innerhalb seines Gebietes unkontrolliert Monopole Herrschaft ausüben, gibt sich selbst auf. Ein solcher Staat gibt Stück für Stück seine Souveränität ab, wird nach und nach von den Wirtschaftsverbänden ausgehöhlt." Ibid., 775.

from this insight.”⁵⁰ If monopolies threatened the sovereignty of the Weimar Republic, according to Neumann, the Republic would have to exert its sovereign power to control cartels, trusts, and monopolistic industries.

One of the main problems Neumann found in German antitrust law was its underenforcement. As he noted: “The § 4 of the cartel regulation [Kartellverordnung] gives the Realm Economic Minister extraordinarily expansive rights [Rechte] and the emergency regulation [Notverordnung] gives him even stronger rights. But he has hardly ever made use of them.”⁵¹ Neumann then compared the German antitrust regime to the American legal system: “Thus we have a similar situation as it existed in America after the introduction of the Sherman Antitrust Act of 1890, under the leadership [Herrschaft] of Presidents Harrison and Mac Kinley [sic]. Because the Sherman Antitrust Act also granted extraordinarily expansive rights [Rechte] in its extensive prohibition of the restraint of free trade in the United States, but these two Presidents would also only make the slightest use of it.”⁵² However, Neumann did not advocate

⁵⁰ Wenn das wesentliche Merkmal des Staates Souveränität ist und wenn Souveränität eine Wirkungs- und Entscheidungseinheit darstellt, so folgt aus dieser Einsicht die Notwendigkeit einer staatlichen Kontrolle der Monopole.” Ibid., 775. Neumann’s use of the phrase “Wirkungs- und Entscheidungseinheit,” translated here as “a unity through action and decision,” likely comes from Hermann Heller, who used this phrase in his writing. Mirjam Künkler and Tine Stein, “State, Law, and Constitution: Ernst-Wolfgang Böckenförde’s Political and Legal Thought in Context,” in Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings*, vol. 1, ed. Mirjam Künkler and Tine Stein, trans. Thomas Dunlap (Oxford: Oxford University Press, 2016), 10. I follow David Dyzenhaus’s translation of this phrase. Künkler and Stein, 10-11 fn.29; Hermann Heller, “The Essence and Structure of the State,” in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobson and Bernhard Schlink, trans. David Dyzenhaus (Berkeley: University of California Press, 2000), 272. At the time Neumann published this piece, Heller was an important socialist legal scholar at the University of Berlin. David Dyzenhaus, “Hermann Heller: Introduction,” in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper (Berkeley: University of California Press, 2000), 250. Heller would later teach in Frankfurt, and in 1933 traveled to England for a lectureship under the support of Harold Laski. Ibid., 250. Heller was stripped of his professorship by the Nazis and instead began work at the University of Madrid. Ibid., 250. After this, he was supposed to travel to the University of Chicago, but he died before he could do so. Ibid., 250.

⁵¹ “Der § 4 der Kartellverordnung gibt dem Reichswirtschaftsminister ausserordentlich weite Rechte und die Notverordnung ihm noch stärkere Rechte. Aber er hat kaum jemals von ihnen Gebrauch gemacht.” Neumann, “Der Entwurf,” 783.

⁵² “Wir haben also einen ähnlichen Zustand, wie er in Amerika nach der Einführung des Sherman-Antitrustgesetzes von 1890 bestand, unter der Herrschaft der Präsidenten Harrison und Mac Kinley [sic]. Denn auch das Sherman-Antitrustgesetz gewährte in seinem weitgehenden Verbot der Beschränkung der Handelsfreiheit den Vereinigten

the adoption of an American antitrust enforcement regime. In the conclusion of his article, he explained how Germany should approach antitrust efforts: “Examining the relationship between the state [Staat] and cartels demonstrates four stages of development [Entwicklungsstufen], that take place similarly in the relationship of the state to trade union [Gewerkschaft] and of the state into political party.”⁵³ Neumann described the lowest level of these stages of development: “In the first stage the state destroys cartels, if it fights them, then it forcibly dissolves them.”⁵⁴ He provided a model for this: “Example: the American legislation [Gesetzgebung].”⁵⁵ Although Neumann saw the regime created by the Sherman Antitrust Act in the U.S. as salubrious, he also perceived it as an incipient form of antitrust.

His next few recommendations did not criticize cartelization, but instead sought to integrate cartels into the economic order. When Neumann discussed the subsequent stage of development, he wrote: “In a second state it ignores them, it tolerates them, but it does not provide to the cartels legal [rechtlichen] means, in order to protect their existence.”⁵⁶ Thus, in this stage, the state takes a neutral stance toward cartel creation. He chose a European example to reflect this: “Example: § 4 of the Austrian Coalition Statute.”⁵⁷ Section 4 of the Coalition Statute of 1870 allowed cartel members to bring civil suits against one another and to invalidate certain provisions of cartel agreements.⁵⁸

Staaten ausserordentlich weite Rechte, ohne dass diese beiden Präsidenten auch nur den geringsten Gebrauch davon gemacht hätten.” Ibid., 783.

⁵³ “Bei der Prüfung des Verhältnisses von Staat und Kartellen lassen sich vier Entwicklungsstufen aufzeigen, die ähnlich verlaufen wie das Verhältnis vom Staat zur Gewerkschaft und vom Staat zur politischen Partei.” Ibid., 785.

⁵⁴ “Im ersten Stadium vernichtet der Staat Kartelle, bekämpft er sie, löst er sie zwangsweise auf.” Ibid., 785.

⁵⁵ “Beispiel: die amerikanischen Gesetzgebung.” Ibid., 785.

⁵⁶ “In einem zweiten Stadium ignoriert er sie, er duldet sie, aber er gibt den Kartellen keine rechtlichen Mittel in die Hand, um ihre Existenz zu sichern.” Ibid., 785.

⁵⁷ “Beispiel: § 4 des österreichischen Koalitionsgesetzes.” Ibid., 785.

⁵⁸ Andreas Resch, *Industriekartelle in Österreich vor dem Ersten Weltkrieg: Marktstrukturen, Organisationstendenzen und Wirtschaftsentwicklung von 1900 bis 1913* (Berlin: Duncker & Humblot, 2002), 81-82.

The third stage of development went even further – actively embracing cartels in the economic system: “In a third stage the state recognizes the cartels as possible organizational forms of the economy.”⁵⁹ According to Neumann, this was the system that existed in contemporary Germany, and one that he endorsed: “Example: the prevailing cartel regulation [Kartellverordnung] and the present draft.”⁶⁰

Lastly, according to Neumann, the fourth stage of development embraced nationalization of cartels: “And finally in a last stage the state incorporates the cartels into itself, it creates official self-governing bodies [Selbstverwaltungskörper] for the management of particular branches of industry.”⁶¹ He noted that this already existed in Germany: “Example: approaches in Coal- and Potash-Economic Acts.”⁶² Potash and coal production, and for a time steel, were forced to cartelize by the early Weimar government.⁶³ This government had been largely controlled by the SPD, including German President Friedrich Ebert.⁶⁴ Yet as Knut Wolfgang Nörr observes, the socialists who created these government-mandated cartels “shrank from abolishing private ownership of the means of production; instead, it was to be incorporated into an organization consisting of self-governing bodies which were politically controlled.”⁶⁵ This process was known as *Gemeinwirtschaft* or “public economy.”⁶⁶ Neumann’s conclusion was a reflection of this *Gemeinwirtschaft* philosophy:

These last approaches are most important to us. Only an incorporation, a classification of cooperative [genossenschaftlichen] corporations (to which cartels belong) under equal

⁵⁹ “In einem dritten Stadium erkennt der Staat die Kartell als mögliche Organisationsformen der Wirtschaft an.” Neumann, “Der Entwurf,” 786.

⁶⁰ “Beispiel: die geltende Kartellverordnung und der vorliegende Entwurf.” Ibid., 786.

⁶¹ “Und schliesslich in einem letzten Stadium inkorporiert sich der Staat die Kartelle, schafft er öffentliche Selbstverwaltungskörper zur Bewirtschaftung bestimmter Industriezweige.” Ibid., 786.

⁶² “Beispiel: Ansätze in Kohlen- und Kaliwirtschaftsgesetz.” Ibid., 786.

⁶³ S. SUBCOMM. ON MONOPOLY OF THE SELECT COMM. ON SMALL BUS., 82D CONG., 2D SESS., REP. OF THE DEP’T OF ST., FOREIGN LEGIS. CONCERNING MONOPOLY AND CARTEL PRAC., at 32 (Subcomm. Print 1952); Nörr, 9.

⁶⁴ Evans, 80, 88.

⁶⁵ Nörr, 9.

⁶⁶ Ibid., 9.

participation of employees is capable of bridging the chasm that grows today politically between those standing at the top of the Reichstag and the Realm government and the people [Volk]. Only through the intervention of self-governing bodies [Selbstverwaltungskörpern], that are certainly not individualistic self-governing bodies, but whose representatives are appointed by organizations, only a collective self-management in business law as well is capable of making the economy into a community matter [Angelegenheit der Allgemeinheit]. The present draft is a small step on the way to this provisional goal: the legal realization of economic democracy.⁶⁷

Neumann advocated for the incorporation of cartels into the structure of the German government, arguing in favor of self-governing bodies that included laborers alongside employers in order to nationalize and socialize the cartels. He was not against cartels – he favored them and followed the *Gemeinwirtschaft* belief that cartels could be used to create a socialist society in Germany.

III. German Monopolies and the Collapse of the Weimar Republic

Neumann's dreams of German socialism proved to be illusory. In 1930, Brüning's government sought to deflate the German currency and introduced new taxes in an effort to shore up the economy.⁶⁸ In the late 1920s and early 1930s, German banks collapsed and industry faced drastic reductions in demand, and by 1932 about one third of all German workers were unemployed.⁶⁹ This was made worse by reductions in unemployment benefits after 1931, which drove many Germans further into destitution.⁷⁰ During this time, the Nazi Party's power increased considerably – in the September 1930 German election, the Nazi share of the vote increased from 2.5 percent to 18.3 percent.⁷¹ The next election, in July 1932, the Nazi vote

⁶⁷ "Diese letzten Ansätze sind uns am wichtigsten. Nur eine Inkorporierung, eine Einordnung der genossenschaftlichen Korporationen (zu denen Kartelle gehören) unter paritätischer Beteiligung der Arbeitnehmer vermag die Kluft zu überbrücken, die sich heute politisch zwischen dem an der Spitze stehenden Reichstag und der Reichsregierung und dem Volk auftut. Nur durch die Einschaltung von Selbstverwaltungskörpern, die allerdings keine individualistischen Selbstverwaltungskörper sind, sondern deren Vertreter benannt werden von Organisationen, nur eine kollektive Selbstverwaltung auch im Wirtschaftsrecht vermag die Wirtschaft zu einer Angelegenheit der Allgemeinheit zu machen. Der vorliegende Entwurf ist ein kleiner Schritt auf dem Wege zu diesem vorläufigen Ziel: der rechtlichen Verwirklichung der Wirtschaftsdemokratie." Neumann, "Der Entwurf," 786.

⁶⁸ Tooze, 17.

⁶⁹ Evans, 235-36.

⁷⁰ Ibid., 252.

⁷¹ Tooze, 17.

increased again, this time to 37.4 percent.⁷² A small coterie of conservatives convinced German President Hindenberg to appoint Adolf Hitler German Chancellor on January 30, 1933.⁷³ The Nazis and their Nationalist allies attained 51.9 percent of the vote in the March 1933 German election.⁷⁴ After this, the Nazis unleashed a wave of terror on their political rivals, arresting thousands of Social Democrats.⁷⁵ Among those arrested was Neumann, who was detained in April 1933 and soon after fled Germany to the United Kingdom.⁷⁶ In October 1933, not long after his arrest, Neumann published an article entitled “The Decay of German Democracy,” in which he sought to explain the role of cartels in Weimar Germany.⁷⁷ He began to blame German business monopolies, among others, for the destruction of the Weimar state.

Neumann described the Weimar order as an uneasy balance: “This system somewhere between Socialism and capitalism could exist as long as no economic crisis intervened. During the boom years 1924-1928 the development of social services in Germany was enormous.”⁷⁸ However, he accused an amorphous group of capitalist elements in German society of hostility toward the Weimar system: “But capitalism, the real owner of power in every non-socialist State, could only make social concessions up to a certain point, to the point where profit ceases.”⁷⁹ Over time, Neumann argued, this capitalist movement used the Weimar state to vex socialist efforts: “In regard to Germany it must be added that it was not enough to stop social progress in

⁷² Evans, 293.

⁷³ Ibid., 81-82, 305-07.

⁷⁴ Ibid., 339.

⁷⁵ Ibid., 347.

⁷⁶ Karsten Olson, “Franz L. Neumann’s *Behemoth*: A Materialist Voice in the *Gesamtgestalt* of Fascist Studies,” in *The SAGE Handbook of Frankfurt School Critical Theory*, vol. 1, ed. Beverley Best, Werner Bonefeld, and Chris O’Kane (Los Angeles: SAGE Publications, 2018), 90.

⁷⁷ Franz Neumann, “The Decay of German Democracy,” *The Political Quarterly* 4, no. 4 (Oct. 1933): 525-43; Priemel, 80.

⁷⁸ Neumann, “Decay,” 531.

⁷⁹ Ibid., 531.

order to make the State safe for capitalism. A retrograde movement was necessary and, in addition, all the forces of the State had to be used to save capitalism.”⁸⁰

As Neumann asserted: “State intervention in one form or the other is always necessary if free competition no longer exists, if the economic doctrines of *laissez faire* have been superseded by the structure of monopolization. Capitalism knew that a state in the hands of a Socialist Government would and must use its power to create a new distribution of wealth either by taxes or by socialization.”⁸¹ Neumann took a more critical approach to monopolies than in his Weimar writings. Unlike his earlier work, which saw monopolies as a necessary evil, he now argued that monopolies were responsible for the demise of capitalism in Germany, because free markets were hampered by the impediments monopolies placed on competition. Yet he still drew upon some of his Weimar analysis, continuing to advocate for socialization of monopolized industries. Ultimately, Neumann believed monopolies had recognized the threat of nationalization and had taken steps to undermine the Weimar Republic to prevent the rise of socialism.⁸²

⁸⁰ Ibid., 531.

⁸¹ Emphasis in original, *ibid.*, 532.

⁸² Priemel, 80. Historian David Abraham asserts that German industrial and agricultural leaders sought to undermine the fragile political and economic gains the working class had made during Weimar Republic. David Abraham, *The Collapse of the Weimar Republic: Political Economy and Crisis* (Princeton: Princeton University Press, 1981), 9-10. He argues this led these economic leaders to embrace fascism, with the goal of creating a cohesive society in Germany that could integrate industrial and agrarian proprietors along with the working class – though this was untenable. *Ibid.*, 10-11.

Historian Henry Ashby Turner lambasted Abraham’s book soon after its publication. Jonathan R. Zatlin, “Gerald D. Feldman (1937-2007),” *Central European History* 41, no. 2 (June 2008): 285. In Turner’s book *German Big Business and the Rise of Hitler*, published not long after Abraham’s, he argues that although German big business was hostile to many aspects of the Weimar Republic, including its social programs, on the whole it was not an important element in the emergence of the Nazi regime. Henry Ashby Turner, *German Big Business and the Rise of Hitler* (New York: Oxford University Press, 1985), 340-49. Turner was later joined by historian Gerald Feldman in attacking Abraham’s work (which indeed included some translation and citation mistakes). Zatlin, 285. The resulting controversy, known as the “Abraham affair,” left Abraham ostracized from the historical profession – he instead went to law school and became a law professor. *Ibid.*, 285-86. Historian Jonathan Zatlin believes the vociferous criticism of Abraham’s work may have been because “Abraham’s argument represented a sophisticated attempt to refine left-wing explanations of the relation between economy and politics and, more specifically, demonstrate that National Socialism was the political expression of German capitalism’s economic needs.” *Ibid.*, 286.

Turner’s response to Abraham’s work is rather puzzling because Turner himself admitted that even if German industrial leaders were not directly responsible for the emergence of Nazism, they did not challenge the

IV. Neumann in London: Creating a New Analysis of Monopolies in Germany

As Neumann entered exile, his understanding of the role of monopolies in capitalist society began to change. During his time in London, Neumann studied under Harold Laski at the London School of Economics (LSE).⁸³ Neumann met Laski before Hitler's rise in 1933 because Laski had visited Berlin to build ties between the British Labour Party and the German Social Democrats.⁸⁴ During his lifetime, Laski was a larger-than-life figure. Donald Hiss, brother of Alger Hiss, who worked for Justice Oliver Wendell Holmes, Jr., after his 1932 retirement from the U.S. Supreme Court, noted that Laski was one of the Justice's "most frequent correspondents during his retirement."⁸⁵ Indeed, Laski corresponded with Holmes until the latter's death.⁸⁶ When Joseph P. Kennedy asked Felix Frankfurter for recommendations regarding schooling for

Nazi regime because it often benefitted them. As Turner wrote: "[M]ost men of big business viewed Nazism myopically and opportunistically. Like many other Germans whose national pride had been wounded by the unprecedented loss of the [First World] war and by a humiliating [Versailles] peace treaty, they admired Nazism's defiant nationalism and hoped it could be used to help reassert what they regarded as their country's rightful place among the great powers. Preoccupied as they were with domestic economic issues, they also hoped that Nazism could be used against their long-standing adversaries, the socialist parties and the trade union movement. That hope waxed and waned as the Nazis shifted their political tactics. During the last half year preceding Hitler's appointment as chancellor, it subsided to low ebb. But few spokesmen of big business spoke out publicly against the NSDAP [Nazi Party]. Viewing it in terms of narrow self-interest, most failed to perceive the threat it posed to the very foundations of civilized life. Therein lay their heaviest guilt, one they shared, however, with a large part of the German elite." Turner, 349. Unfortunately, it appears that Turner focused more on his differences with Abraham's interpretation rather than their points of agreement.

⁸³ Herbert Marcuse, "Preface," in Franz Neumann, *The Democratic and Authoritarian State: Essays in Political and Legal Theory*, ed. Herbert Marcuse (Glencoe, IL: The Free Press, 1957), vii.

⁸⁴ Alfons Söllner, "Neumann als Archetypus – die Formierung des *political scholar* im 20. Jahrhundert," in *Kritische Theorie der Politik: Franz L. Neumann – eine Bilanz*, ed. Matthias Iser and David Strecker (Baden-Baden, Germany: Nomos, 2002), 48.

⁸⁵ G. Edward White, *Alger Hiss's Looking-Glass Wars: The Covert Life of a Soviet Spy* (Oxford: Oxford University Press, 2004), 7; Donald Hiss, "Clerks on Justice Holmes," in *The Making of the New Deal: The Insiders Speak*, ed. Katie Louchheim (Cambridge, MA: Harvard University Press, 1983), 32.

⁸⁶ Mark DeWolfe Howe, ed., *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916-1935*, vol. 1 (Cambridge, MA: Harvard University Press, 1953); Mark DeWolfe Howe, ed., *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916-1935*, vol. 2 (Cambridge, MA: Harvard University Press, 1953). According to David Riesman, he took Laski to meet Justice Brandeis during his time as a Supreme Court clerk. David Riesman, "Clerks on the Justices," in *The Making of the New Deal: The Insiders Speak*, ed. Katie Louchheim (Cambridge, MA: Harvard University Press, 1983), 74.

his children, Frankfurter replied: “I know what I would do. I would send them to London to spend a year with Harold Laski, who is the greatest teacher in the world.”⁸⁷

While in London, Neumann completed a doctoral dissertation entitled “The Governance of the Rule of Law,” which he submitted in 1936.⁸⁸ It was a tour de force through Western political thought, including Aquinas, Bodin, Grotius, Pufendorf, Hobbes, Spinoza, Locke, Rousseau, Kant, Fichte, and Hegel.⁸⁹ Neumann then turned toward an analysis of the political economy of the liberal state as it transitioned from laissez-faire capitalism toward what he called *monopoly capitalism*.⁹⁰ Here, Neumann expanded upon his arguments from “The Decay of German Democracy” with its increasingly critical view toward corporate monopolies and their relationship with government.

In his dissertation, Neumann discussed the relationship between the law, as enforced by the government, and a nation’s economy: “Interventions of the State may consciously aim at altering the economic structure, or they may functionally lead to such transformation. A law forbidding unfair competition will undoubtedly perform fundamentally different functions in a competitive and in a monopolistic society. In the latter, the fairness of the methods used in the economic struggle is not determined by competition but by the monopolists themselves.”⁹¹ The law, according to Neumann, could be profoundly influenced by the background social and

⁸⁷ Michael O’Brien, *John F. Kennedy: A Biography* (New York: Thomas Dunne Books, 2005), 76. Kennedy sent his eldest son, Joe, to London from 1934-35, and Laski knew Joe personally. Ibid., 77. Joseph Kennedy also sought to send his son John F. Kennedy to study under Laski starting in 1935, and John’s application for admission noted: “Professor Laski personally knows the family. No letters of reference read.” Sue Donnelly, “LSE’s Almost Alumnus – John Fitzgerald Kennedy,” *The London School of Economics and Political Science*, published November 25, 2015, <https://blogs.lse.ac.uk/lsehistory/2015/11/25/the-almost-alumnus-john-fitzgerald-kennedy-1917-1963/>. John F. Kennedy left London soon after courses began due to a bout of hepatitis. O’Brien, 77.

⁸⁸ Franz Neumann, “The Governance of the Rule of Law: An Investigation into the Relationship between the Political Theories, the Legal System, and the Social Backgrounds in the Competitive Society” (Ph.D. diss, The London School of Economics and Political Science, 1936).

⁸⁹ Ibid., vi-xvii.

⁹⁰ Ibid., 515.

⁹¹ Ibid., 376.

economic norms of a particular nation.⁹² Thus, a shift in the fundamental norms of society could lead to a profound change in how the law operates in that society. As an example, Neumann discussed the enforcement of American antitrust laws in a laissez-faire economic system compared to a monopolistic economic system: “In the United States, the history of the interpretation of the Sherman Act of 1890, offers an excellent example. Article I of that Act, clearly stated that ‘Every contract ... in restraint of trade ... is hereby declared illegal.’ Whereas the first judgments based upon the statute rigidly applied that provision, the latter decisions only declared illegal unreasonable restraint of trade. It follows, therefore, that in the realm of monopoly law the legal standards of conduct throughout serve the interests of the monopolists.”⁹³ Neumann viewed the U.S. Supreme Court’s tendency to loosely construe the text of the Sherman Antitrust Act, thereby limiting the statute’s enforcement power, as serving the very monopolists the Act was created to rein in.

Neumann found this troubling because it fundamentally changed the nature of law: “The irrational norms are calculable for the monopolists, as they are strong enough to dispense, if necessary, with formal rationality. The monopolist cannot only do without calculable law,

⁹² Indeed, when Neumann discussed his preferred method of legal analysis, he stated: “Functional legal thought, which lies at the bottom of all our investigations, starts from the assumption that law is not a substance in itself, but a function of society. Law serves interests and ideas, but it is of no value in itself.” Ibid., 554. Thus, Neumann saw law as being influenced by the social structure in which it existed. For this reason, Neumann argued that functional legal thought “does not believe that free discretion is always progressive, and the strict binding of the judge of [*sic*] the law always reactionary.” Ibid., 554. Neumann continued: “Rather, [functional legal thought] investigates the social conditions leading to the prevalence of the doctrine of the school of free discretion, and considers the reasons for the various theories. It does not believe that the reification of undertakings is always progressive, but takes into account the question whether such doctrines fulfil [*sic*] progressive social functions.” Ibid., 554. According to Neumann’s functional method of analysis, law was progressive only insofar as it referred to extralegal ideals – likely in his case this meant socialist ideals. Neumann found that free discretion could be problematic if it gave certain judges too much power, for example monarchist judges could be empowered to create regressive legal precedent. In contrast, Neumann believed strict judicial binding to statutes or precedent could be progressive if these earlier laws or legal decisions were created to achieve a progressive goal, such as statutes written by an SPD-dominated Reichstag. Ultimately, both examples refer to extralegal political thought, in the former, the political theories of monarchists, in the latter, the political and economic theories of socialists. Of course, this is a strong assumption – it could easily be argued that the law shapes human society as much as human society shapes the law.

⁹³ Footnotes omitted, *ibid.*, 548.

formal rationality is even a fetter to the full development of his power.”⁹⁴ In monopoly capitalism, law was no longer the rational instrument it had been in the free-market economy of the liberal state. Neumann defined what he meant by “rationality,” stating: “The rational law has, as we have tried to show, not only the function of rendering exchange processes calculable, it has an equalising function also. It protects the weak.”⁹⁵ According to Neumann, rationality in the liberal state allows prices to be determined by the free market, rather than a guild or a monopoly. It also places individuals on equal legal footing. For example, if a contract term is broken, the weaker party can go to court to have the contract enforced against the stronger party.

In contrast to liberalism’s free-market economics, in monopoly capitalism “[t]he monopolist can dispense with the aid of the courts; he does not go to the courts. His power of command is a sufficient substitute for the coercive power of the state. By his economic power he is able to impose upon customers and workers, in the form of a free contract, all the conditions he thinks fit.”⁹⁶ Neumann believed the resources of monopolized industries gave these businesses the economic power to largely abandon or ignore the law, because monopolies could set the terms of contracts they entered into. Likewise, monopolies could abandon rationality because only their decisions mattered – such as unilaterally fixing prices at a level they preferred. As Neumann asserted: “The standard contracts of monopolists shift practically all conceivable risks on to the shoulders of the non-monopolist, whereas the latter has to fulfill all obligations of the law and the monopolist is able to compel him to do so without the help of the court. In such situations, the monopolist attempts to abolish freedom of contract, freedom of trade and the formal rationality of law.”⁹⁷ In Neumann’s eyes, monopolies were allowed to create lopsided

⁹⁴ Ibid., 548.

⁹⁵ Ibid., 548.

⁹⁶ Ibid., 548-49.

⁹⁷ Ibid., 549.

contracts of adhesion that supported the monopolized industry's economic and legal interests, rather than the interests of those on the other side of the contract.

The role of monopolistic industry became increasingly integrated into the organization of the state in Nazi Germany. Neumann turned to the writings of his former acquaintance Carl Schmitt when discussing this process. After Hitler gained power in Germany, Schmitt became a leading theorist of National Socialist law.⁹⁸ By 1936, the same year Neumann completed his dissertation at LSE, Schmitt was relegated by rival Nazi jurists within the *Schutzstaffel*, or SS, although he continued to produce works on Nazi law.⁹⁹

Neumann's analysis returned to the friend/enemy division that Schmitt had explored in *The Concept of the Political* – a theory Neumann had praised in a 1932 letter to Schmitt.¹⁰⁰ However, in contrast to his earlier relationship with Schmitt, Neumann's analysis in his 1936 dissertation had a trenchant edge. Neumann began by describing Schmitt's friend/enemy dichotomy: "According to Carl Schmitt – the Crown Jurist of National Socialism – the State is the work of politics, and the notion of 'the political' is not determined by the state. 'The political' means, however, according to Carl Schmitt, the relations between friend and foe. Only where such antagonism exists, only where people stand in the relation of friend and foe, are we able to speak of politics. Harmony, collaboration and competition have nothing to do with politics."¹⁰¹ Schmitt argued, according to Neumann, that politics only existed where there was a divide between friends and enemies.

⁹⁸ Reinhard Mehring, "Epilogue: The Decline of Theory," in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobsen and Bernhard Schlink, trans. Belinda Cooper (Berkeley: University of California Press, 2000), 314, 315-16.

⁹⁹ *Ibid.*, 316.

¹⁰⁰ Carl Schmitt, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien* (Berlin: Duncker & Humblot, 1963); Carl Schmitt, *The Concept of the Political: Expanded Edition*, trans. George Schwab (Chicago: The University of Chicago Press, 2007); Rainer Erd, ed., *Reform and Resignation: Gespräche über Franz L. Neumann* (Frankfurt am Main: Suhrkamp, 1985), 79.

¹⁰¹ Neumann, "The Governance of the Rule of Law," 565.

However, Neumann noted that the Nazi program was largely one of societal integration: “The central idea of National Socialism is the abolition of the class war. The National Socialist ideology does not recognise any antagonism between the various groups in the State. Its central idea is that of ‘the community of the people’. Consequently, in Carl Schmitt’s terms, there could be no politics in Germany to-day, as there exists no constellation of friend and foe.”¹⁰² In his 1932 letter to Schmitt, Neumann argued that the division between property owners and laborers created the friend/enemy divide that had riven Weimar Germany.¹⁰³ In his 1936 dissertation, Neumann explained that Nazism sought to eliminate the most pervasive societal division in Germany: class division. This was the divide that monopoly capitalism had most exacerbated.

Yet Nazism did not create a peaceful utopia – the kind a socialist like Neumann would have expected after class divide was relegated to the dustbin of history. Instead, Neumann observed that Nazism sought to create new divisions: “But as the State is entirely the work of politics and politics are indispensable, an enemy must be created. This enemy is the alien race, which for all practical purposes, means the Jews. The existence of the Jews is the essential factor for the preservation of political life in Germany.”¹⁰⁴ Nazism maintained Schmitt’s idea of politics by reframing the friend/enemy dichotomy – it did so by seeking to weaponize anti-Semitism. As Neumann continued: “The conception of the nation is valueless [to the Nazis] as it implies – as we have already pointed out – certain liberal and democratic consequences, and the idea of the race serves, therefore, as a means of integration of the National Socialist society. It further serves to differentiate that society from others, and finally, to preserve politics, apart from its function in foreign policy.”¹⁰⁵ Nazism had abandoned the idea of the nation-state, Neumann

¹⁰² Ibid., 565.

¹⁰³ Erd, 79.

¹⁰⁴ Neumann, “The Governance of the Rule of Law,” 565.

¹⁰⁵ Ibid., 565-66.

argued, which had a history replete with liberal and democratic ideals. Instead, National Socialism sought to integrate German society through a new, racialized form. This integration simultaneously differentiated Germany's "friends" – those identified as racial Germans – from its "enemies," most importantly Jewish people.¹⁰⁶

Neumann explained a dramatic example of this division: "The new Nuremberg laws of September 15, 1935 are the culmination of that development toward integration and differentiation of the National Socialist society."¹⁰⁷ The Nuremberg laws were passed on September 15, 1935, by the Reichstag in Nuremberg after the conclusion of the National Socialist party congress.¹⁰⁸ These laws included the Citizenship Law and the Law for the Defense of German Blood and Honor.¹⁰⁹ The Citizenship Law divided "citizens," from "subjects."¹¹⁰ Jewish people were deemed "subjects," and were shorn of civil and political rights.¹¹¹ The Law for the Defense of German Blood and Honor included numerous anti-Jewish provisions, including a prohibition on marriage between German citizens and Jewish people.¹¹²

With the creation of a Jewish enemy and the establishment of a "racial" society in Nazi Germany, Neumann argued that the idea of the individual against the government should have melted away under National Socialism: "Totality, however, means the universality of the aims of the State, the reversal of the liberal relationship between the State and the individual, the transformation of all important social spheres to public and political spheres."¹¹³ Unlike liberal political theory, which centered its attention on the individual prior to, and sometimes against the

¹⁰⁶ Neumann himself was Jewish. Olson, 89.

¹⁰⁷ Ibid., 566.

¹⁰⁸ Saul Friedländer, *The Years of Persecution: Nazi Germany & the Jews 1933-1939* (London: Phoenix, 2007), 141.

¹⁰⁹ Ibid., 142.

¹¹⁰ Ibid., 142.

¹¹¹ Ibid., 142.

¹¹² Ibid., 142.

¹¹³ Neumann, "The Governance of the Rule of Law," 566.

state, Nazism was totalizing because it sought to lead the individual to identify wholly with the actions and decisions of the state. According to Neumann, this totalizing should prevent individual action in all aspects of life, including economics: “This totality, however, is opposed to a faith, as strongly expressed, in private initiative in the economic sphere. The most important institution is undoubtedly that of property, particularly property in the means of production.”¹¹⁴ Thus, Neumann noted that a truly totalizing state would absorb private economic production: “If, therefore, one takes the idea of totality seriously, one ought to socialise.”¹¹⁵ This totalizing should include the nationalization of large cartels and monopolized industries. However, Neumann observed that a totalizing of economic production had not occurred in Nazi Germany: “The converse, however, is true. The economic policy in Germany as well as in Italy may not be actually liberal, but it is quite surely based on the institution of private property. In all National Socialist pamphlets and books dealing with this problem, the postulate of totality is immediately followed by that of private enterprise. How are these two postulates to be reconciled?”¹¹⁶

To answer this question, Neumann discussed a strange argument made by Carl Schmitt in a 1932 address before the Langnam Verein, a German industry association.¹¹⁷ Neumann noted that in Schmitt’s speech “he distinguished between two kinds of totality a quantitative and a qualitative one.”¹¹⁸ According to Schmitt, Neumann wrote: “The quantitative totalitarian state is a phenomenon of Romanism; it interferes in every sphere of activity. The qualitative totalitarian state is a specifically Germanic phenomenon. It is a strong state, but it does not intervene in all spheres of activity. The realm of economics is left free. It is satisfied with providing regulations

¹¹⁴ Ibid., 567.

¹¹⁵ Ibid., 567.

¹¹⁶ Ibid., 567.

¹¹⁷ Ibid., 567.

¹¹⁸ Ibid., 567.

for the ‘political’ sphere.”¹¹⁹ Schmitt’s invocation of Germanic law against Roman law is telling. In Germany, scholars of Roman law tended to be more cosmopolitan, and were more likely to be Jewish, compared to scholars of Germanic law, which tended to have a nationalist streak.¹²⁰ Schmitt’s argument in favor of totalizing in the political but not economic areas of society appeared to be ideological rather than scholarly, seeking to justify the regime’s choices rather than admitting to Nazism’s inconsistencies.

Indeed, Neumann concluded that Schmitt’s arguments were both unoriginal and unconvincing: “It [was], in fact, nothing but the doctrine of [Vilfredo] Pareto, who postulated the abolition of all political liberties and combined this with the postulate of a free economic system. It remains a mystery how the notion of totality can be qualitative. If something is total it must necessarily embrace the whole. The idea of totality can only be a quantitative notion.”¹²¹ Accordingly, Neumann believed there was no reason to exclude private property from the ideological totalization of the Nazi state other than the preference of the Nazi leadership. What did this mean for monopolized industry in Germany? Neumann asserted:

In so far as National Socialism or Fascism seeks to realize corporative or an estate order, we must apply the same criticism as we have used against the medieval estate order. In the same way as the estates of the Middle Ages veiled the rôle of landed ownership, corporations and estates hide the domination of monopoly capitalism. The worker is fettered, and his rise as a class prevented, by any kind of estate organisation.¹²²

¹¹⁹ Ibid., 567-68.

¹²⁰ Michael Stolleis, *Law Under the Swastika: Studies on Legal History in Nazi Germany*, trans. Thomas Dunlap (Chicago: The University of Chicago Press, 1998), 43. Michael Stolleis argues: “It is obvious that the Germanists were far more susceptible to the conglomeration of emotionally charged words that was made up of ethnic-national, corporatist, authoritarian, and totalitarian elements and was establishing itself as the ideology of the state.” Ibid., 44. As Nazism began its integration process in Germany, Stolleis observes: “Romanists saw a warning light in point 19 of the Nazi party program (which called for the replacement of Roman law by ‘German common law’) and therefore had to be at least professionally suspicious of the new regime. Germanists, by contrast, saw the Third Reich as the fulfillment of their frequently expressed longing for a revitalization of the national community and ‘Führerdom,’ of the cooperative idea, as well as of the organic structure of the totality of the nation and the ethic-national character of the law.” Ibid., 44.

¹²¹ Neumann, “The Governance of the Rule of Law,” 568.

¹²² Ibid., 568.

For Neumann, the Nazi efforts to eliminate class conflict between property owners and labor were merely rhetorical. It attempted to smooth over preexisting social conflicts to integrate German society under the Nazi movement and to create a new enemy – the Jewish people. According to Neumann, Nazi economics were still dominated by monopolies, as had been the case under the Weimar constitution. They had simply put new wine into old wineskins.

V. Neumann in America: German Monopolies and New Deal Antitrust Law

After his sojourn in London, Neumann attained a position with the Institute for Social Research in New York City with the assistance of Laski, where he would work from 1936 to 1940.¹²³ These were difficult years for Neumann. In October 1936, Max Horkheimer, one of the leaders in the Institute, sent him to Buenos Aires to provide legal assistance to Felix Weil.¹²⁴ Neumann then procured a lectureship through the Extension Division of Columbia University, teaching about totalitarianism in winter 1936-1937; he also worked as the attorney for the Institute and began analyzing the legal theory of Nazi Germany as early as 1939, but his livelihood was precarious.¹²⁵ Nevertheless, by the late 1930s, Neumann started to gain influence in Washington, D.C., because of his work on German political economy. In 1938 and 1939, Neumann assisted Thurman Arnold, who had just been appointed in 1938 to lead the Antitrust Division of the Department of Justice.¹²⁶

Born in Laramie Wyoming in 1891, Arnold studied at Wabash College in Indiana in 1907 before transferring to Princeton.¹²⁷ He then attended Harvard Law School, graduating in

¹²³ Olson, 90; Wiggershaus, 226-227.

¹²⁴ Ibid., 227.

¹²⁵ Ibid., 228.

¹²⁶ Neumann, *Behemoth*, x; Spencer Weber Waller, "The Antitrust Legacy of Thurman Arnold," *St. John's Law Review* 78, no. 3 (Summer 2004): 569.

¹²⁷ Alan Brinkley, "The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold," *Journal of American History* 80, no. 2 (Sept. 1993): 559.

1914.¹²⁸ He went back to Wyoming but Harvard Law Dean Roscoe Pound recommended Arnold for the deanship at the University of West Virginia Law School in 1927, after which Arnold left Wyoming for good.¹²⁹ In 1930, Yale Law School Dean Charles Clark offered Arnold a law professor position, which Arnold welcomed, largely due to the rising influence of the Legal Realist movement at Yale.¹³⁰ Around the same time, Arnold turned down a position at Harvard.¹³¹ Among Arnold's friends was future Supreme Court Justice William O. Douglas, who was also a faculty member at Yale Law.¹³² In the 1930s, Arnold became involved in New Deal efforts and came to know Felix Frankfurter, Robert Jackson, and Jerome Frank.¹³³ When Jackson left the Antitrust Division of the Justice Department to become Solicitor General, he recommended that Arnold replace him.¹³⁴ Jackson and Neumann first met through Arnold.¹³⁵

Neumann's introduction to the Washington scene was caused by shifts in President Franklin Roosevelt's New Deal program. When the New Deal began several of its key programs, including the National Industrial Recovery Act (NIRA) and the Agricultural Adjustment Administration (AAA), these programs made use of industry codes structured largely by businesses that set price controls, restricted production, and reduced competition.¹³⁶ Antitrust laws were downplayed, and although the Department of Justice created the Antitrust Division in 1933, its work focused mainly on administering NIRA and AAA industry codes.¹³⁷

¹²⁸ Ibid., 559; "Arnold, Thurman Wesley," History of the Federal Judiciary, Judges, Federal Judicial Center, accessed July 28, 2021, <https://www.fjc.gov/node/1377276>.

¹²⁹ Brinkley, 559-60.

¹³⁰ Ibid., 560.

¹³¹ Ibid., 560.

¹³² Ibid., 562.

¹³³ Ibid., 562-63.

¹³⁴ Ibid., 563; Waller, 573.

¹³⁵ Priemel, 81.

¹³⁶ Waller, 571-72.

¹³⁷ Ibid., 572.

However, over time these early New Deal programs fell out of favor. In 1935, the Supreme Court found in *A. L. A. Schechter Poultry Corp. v. United States* that “the code making-authority [that Section 3 of the National Industrial Recovery Act] conferred is an unconstitutional delegation of legislative power,” effectively gutting NIRA.¹³⁸ Moreover, the recession of 1938 brought a sea change to New Deal policies for economic recovery. Working for the Secretary of Agriculture, Gardiner Means wrote *Industrial Prices and Their Relative Inflexibility*, arguing that markets with fixed prices were problematic when demand decreased.¹³⁹ When this occurred, Means asserted that purchasing power diminished, which could help explain lack of economic recovery.¹⁴⁰ One of President Roosevelt’s solutions to the recession was an attack on industry monopolies, blaming price setting for American economic difficulties.¹⁴¹

The Antitrust Division had slowly increased its enforcement under Robert Jackson in 1937 and 1938.¹⁴² However, Arnold’s appointment led Antitrust enforcement actions to skyrocket – as historian Alan Brinkley notes: “In 1938, the division had instituted 11 new cases; in 1940, it initiated 92. In 1938, 59 major investigations were begun; in 1940, 215. The Justice Department filed 923 complaints in 1938 and 3,412 in 1940.”¹⁴³ This rise in monopoly enforcement actions also coincided with a belief, held by both Roosevelt and Arnold, that industry monopolies played a role in the emergence of European fascism.¹⁴⁴ In his 1940 work,

¹³⁸ *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935); Waller, 573; Priemel, 78.

¹³⁹ Charles S. Maier, *In Search of Stability: Explorations in Historical Political Economy* (New York: Cambridge University Press, 1987), 131. Neumann was aware of Means’ earlier work on corporate structure, written with Adolf Berle. Neumann, “The Governance of the Rule of Law,” 515, 546; Adolf A. Berle, Jr., and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1933).

¹⁴⁰ Maier, 131.

¹⁴¹ *Ibid.*, 131; Waller, 573.

¹⁴² Waller, 573.

¹⁴³ Brinkley, 565.

¹⁴⁴ Maier, 131-32.

The Bottlenecks of Business, Arnold connected monopolies with the rise of Hitler.¹⁴⁵ Arnold cited approvingly a passage from Gustav Stolper's work *German Economy*, which stated:

To understand the scope of deflationary policy as inaugurated by [German Chancellor Heinrich] Brüning's government, it is well to remember that in Weimar Germany already, not only later in Hitler Germany, prices and wages were largely controlled by the state or by organizations under direct or indirect state influence. *Prices were largely 'political prices,' wages largely 'political wages.'* Tied up as the price system was with government decisions on the one hand and with monopolistic organizations or companies on the other hand, it had lost much of the flexibility that prices display in a free capitalistic economy.¹⁴⁶

Thus, Arnold drew on Stolper's writing to argue that Hitler's rise to power was caused, in part, by price-fixing and wage-fixing set by both the German government and by German monopolies.

Soon after, Arnold elaborated his positions on the relationship between monopolies and fascism to the New Dealer David Lilienthal, a leader of the Tennessee Valley Authority (TVA), who described in a journal entry from May 22, 1941, a conversation he had with Arnold in Washington while Arnold was still head of the Antitrust Division.¹⁴⁷ Lilienthal set forth Arnold's personal philosophy: "He believes that in every period of history in which groups in society seek to establish and maintain their status, seek to create stability for their position, something comes along and levels things out, and we start all over again."¹⁴⁸ Lilienthal observed that Arnold often saw himself at odds with many New Deal programs: "His pet complaint against the New Deal (he is a long way from being a New Dealer if acceptance of many of its programs is a test, as I guess it is) is that it seeks to protect the status of groups; the agricultural

¹⁴⁵ Thurman W. Arnold, *The Bottlenecks of Business* (New York: Reynal & Hitchcock, 1940).

¹⁴⁶ Emphasis in original, *ibid.*, 289, 290; Gustav Stolper, *German Economy: 1870-1940 Issues and Trends* (New York: Reynal & Hitchcock, 1940), 194-95.

¹⁴⁷ David Ekbladh, "'Mr. TVA': Grass-Roots Development, David Lilienthal, and the Rise and Fall of the Tennessee Valley Authority as a Symbol for U.S. Overseas Development, 1933-1973," *Diplomatic History* 26, no. 3 (Summer 2002): 340, 342; David E. Lilienthal, *The Journals of David E. Lilienthal: The TVA Years 1939-1945*, vol. 1 (New York: Harper & Row, 1964), 321-27; Maier, 132. Lilienthal had attended Harvard Law School and was appointed a director of the TVA in 1933; in 1941 he became the chair of the TVA. Ekbladh, 340, 342.

¹⁴⁸ Lilienthal, 324.

program is criminal because it fixes prices and output; the labor program is vicious and wrong because it protects groups that by rules, etc., restrict production and gives power over the economic system to limited groups.”¹⁴⁹

Arnold was emphatic that protection of particular groups was the cause of the rise of fascism in Germany, Lilienthal noted: “All of these things – social legislation, etc., says he, with a significant look at me, are the things that the Weimar Republic in Germany was doing just before Hitler. Incidentally, the Weimar Republic came in a good many times and so did France just before it was defeated, and the French Revolution had to stand for a good deal of punishment in the same discussion. There isn’t any one solution, though I gathered that the wave of the future would take care of all this with some unpleasantness but quite inevitably.”¹⁵⁰ Arnold saw a direct relationship between price and wage fixing of any kind by the government, labor, or monopolies, and the rise of fascist tendencies. These views help explain why Arnold brought on Neumann at the Department of Justice to write a memorandum for him and to address the Department’s Antitrust Division in 1938 and 1939 on issues concerning German cartels.¹⁵¹

VI. Behemoth and the Political Economy of Monopolies

Neumann continued to expand his analysis of cartelization in Germany in his 1942 book *Behemoth*. This work was widely read – between 1942 and 1945 *Behemoth* was reviewed in at least sixteen academic journals, sometimes more than once, including by Neumann’s fellow émigrés Waldemar Gurian and Sigmund Neumann.¹⁵² Not everyone found Neumann’s analysis

¹⁴⁹ Ibid., 324.

¹⁵⁰ Ibid., 324.

¹⁵¹ Neumann, *Behemoth*, x.

¹⁵² Waldemar Gurian, “On National Socialism,” *Review of Politics* 4, no. 3 (July 1942): 347-52; George H. Sabine, review of *Behemoth: The Structure and Practice of National Socialism*, by Franz Neumann, *Philosophical Review* 51, no. 4 (July 1942): 432-35; Maxine Yapple Sweezy, review of *Behemoth: The Structure and Practice of National Socialism*, by Franz Neumann, *Annals of the American Academy of Political and Social Science* 222 (July 1942): 195-96; Oscar Jászi, review of *Behemoth: The Structure and Practice of National Socialism*, by Franz Neumann and *The Roots of National Socialism*, by Rohan D’O. Butler, *American Political Science Review* 36, no. 4 (Aug. 1942):

of Nazism convincing – in a letter dated June 8, 1949, David Riesman wrote to Hannah Arendt with notes on a draft of her book *The Origins of Totalitarianism*: “I was reminded of the arguments I used to have with Franz Neumann when I was at Columbia. My opposition to his over-rational view of Nazism and his simplistic Marxist approach. All these things come back to me in your own work.”¹⁵³ Riesman’s critiques of Neumann’s socialism reflect a criticism that has continued to follow *Behemoth* long after its publication.

Indeed, contemporary legal scholar Jens Meierhenrich rejects Neumann’s work in *Behemoth* on these grounds, arguing: “Neumann’s [political economy of dictatorship] was indebted to the Marxist understanding of political economy.”¹⁵⁴ As Meierhenrich asserts: “What their 1930s representatives, from Friedrich Pollock and Max Horkheimer to Neumann and Otto Kirchheimer, believed central to accounting for the political and economic malaise of the interwar period was ‘an epochal transformation of capitalism’: ‘The general analysis by these theorists of contemporary historical changes in the relation of state and society was, in part,

771-774; Joseph L. Kunz, review of *Behemoth: The Structure and Practice of National Socialism*, by Franz Neumann, *American Political Science Review* 39, no. 2 (Apr. 1945): 375-77; Paul M. Sweezy, review of *Behemoth: The Structure and Practice of National Socialism*, by Franz Neumann, *Science & Society* 6, no. 3 (Summer 1942): 281-86; Koppel S. Pinson, review of *Behemoth: The Structure and Practice of National Socialism*, by Franz Neumann, *Political Science Quarterly* 57, no. 3 (Sept. 1942): 441-43; Sigmund Neumann, “Roots of Totalitarianism,” *Virginia Quarterly Review* 18, no. 4 (Autumn 1942): 610-15; Dwight E. Lee, review of *Behemoth: The Structure and Practice of National Socialism*, by Franz Neumann, *American Historical Review* 48, no. 2 (Jan. 1943): 337-38; Charles B. Robinson, review of *Behemoth: The Structure and Practice of National Socialism*, by Franz Neumann, *Journal of Politics* 5, no. 1 (Feb. 1943): 70-72; C. H. Pegg, review of *Behemoth: The Structure and Practice of National Socialism*, by Franz Neumann, *Social Forces* 21, no. 3 (Mar. 1943): 364; Arthur Schweitzer, review of *The Dual State*, by Ernst Fraenkel and *Behemoth*, by Franz Neumann, *Journal of Legal and Political Sociology* 1, no. 3 & 4 (Apr. 1943): 157-60; Robert A. Brady, review of *Behemoth: The Structure and Practice of National Socialism*, by Franz Neumann, *American Economic Review* 33, no. 2 (June 1943): 386-89; Frederick H. Cramer, review of *Behemoth: The Structure and Practice of National Socialism*, by Franz Neumann, *Journal of Modern History* 15, no. 2 (June 1943): 156-57; James Elliott Walmsley, review of *Behemoth: The Structure and Practice of National Socialism*, by Franz Neumann, *Social Science* 18, no. 3 (July 1943): 144; M. J. Bonn, review of *Behemoth: The Structure and Practice of National Socialism*, by Franz Neumann, *Journal of Political Economy* 51, no. 4 (Aug. 1943): 371; E. E. Aubrey, review of *Behemoth: The Structure and Practice of National Socialism*, by Franz Neumann, *Journal of Religion* 23, no. 4 (Oct. 1943): 299.

¹⁵³ Correspondence from David Riesman to Hannah Arendt, June 8, 1949, General, 1938-1976, n.d. – Riesman, David – 1947-1956, Hannah Arendt Papers, Manuscript Division, Library of Congress, Washington, DC (hereafter referred to as the Arendt Papers).

¹⁵⁴ Meierhenrich, 29.

consonant with mainstream Marxist thought. The new centralized bureaucratized configuration of polity and society was seen as a necessary historical outcome of liberal capitalism, even if this configuration negated the liberal order that generated it.’ The principle argument in *Behemoth* reflects this general way of seeing the world.”¹⁵⁵ Therefore, according to Meierhenrich, Neumann’s analysis in *Behemoth* boils down to a simple Marxist argument, in which liberal capitalism had created the conditions for its own demise.

Meierhenrich claims that Neumann believed Nazism was a consequence of capitalist development: “For Neumann, the Third Reich was the natural and ‘pragmatic’ outgrowth of a particular variety of capitalism: monopoly capitalism. He identified the monopolization of business and the cartelization of politics as the twin social mechanisms that gave birth to the Nazi behemoth.”¹⁵⁶ Yet Meierhenrich’s critique of Neumann’s discussion of Nazism and monopoly capitalism is problematic for two reasons.

First, lest Neumann’s analysis be criticized as hackneyed Marxism, it is important to note that his analysis of monopoly capitalism shared substantial similarities with the thinking of the Austrian émigré Friedrich Hayek.¹⁵⁷ Hayek dedicated his 1944 work *The Road to Serfdom* with the backhanded note: “To THE SOCIALISTS OF ALL PARTIES.”¹⁵⁸ Despite his disdain for socialism, Hayek wrote: “[T]he impetus of the movement toward totalitarianism comes mainly from the two great vested interests: organized capital and organized labor.”¹⁵⁹ He argued these two dangers posed a grave threat because of their support for monopolization: “They do this

¹⁵⁵ Ibid., 29. Here, Meierhenrich quotes Moishe Postone, “Critique, State, and Economy,” in *The Cambridge Companion to Critical Theory*, ed. Fred Rush (Cambridge: Cambridge University Press, 2004), 165, 166.

¹⁵⁶ Meierhenrich, 29-30.

¹⁵⁷ For a discussion of Hayek’s efforts to revive liberalism, see Alan Ebenstein, *Friedrich Hayek: A Biography* (New York: Palgrave, 2001), 122-27. This is discussed further in Chapter 4.

¹⁵⁸ Emphasis in original, Friedrich A. Hayek, *The Road to Serfdom* (Chicago: The University of Chicago Press, 1972), ii.

¹⁵⁹ Ibid., 194.

through their common, and often concerted, support of the monopolistic organization of industry; and it is this tendency which is the greatest immediate danger. While there is no reason to believe that this movement is inevitable, there can be little doubt that if we continue on the path we have been treading, it will lead us to totalitarianism.”¹⁶⁰

In particular, Hayek voiced his disdain for industrialists who supported monopolization: “This movement is, of course, deliberately planned mainly by the capitalist organizers of monopolies, and they are thus one of the main sources of this danger. Their responsibility is not altered by the fact that their aim is not a totalitarian system but rather a sort of corporative society in which the organized industries would appear as semi-independent and self-governing ‘estates.’”¹⁶¹ Thus, Neumann’s critique of monopolization was not merely a Marxist idiosyncrasy but was shared by émigrés ideologically opposed to socialism.

Second, while Neumann did indeed blame monopoly capitalism for the emergence of Nazism, he did not view monopoly capitalism “as a necessary historical outcome of liberal capitalism” as Meierhenrich believes.¹⁶² Neumann’s writings on cartelization in the Weimar Republic evinced his belief that monopolization would lead to the emergence of nationalized industries and ultimately socialism in Germany. However, by the time Neumann wrote *Behemoth*, he believed monopoly capitalism was one possible outgrowths of liberal capitalism – though not a necessary outcome. Neumann increasingly defended the liberal, capitalist order, even as he remained critical of the economic inequality he thought it could create. Indeed,

¹⁶⁰ Ibid., 194.

¹⁶¹ Ibid., 194-95.

¹⁶² Meierhenrich, 29.

contemporary historians such as Adam Tooze and Raul Hilberg take Neumann's analysis of National Socialism seriously, especially his discussion of business cartels in Nazi Germany.¹⁶³

In *Behemoth*, Neumann focused on explaining the strenuous Nazi efforts to cartelize German industries. A National Socialist statute created on September 5, 1934, endowed the Minister of Economics with strong economic powers, including the ability to create "compulsory cartels."¹⁶⁴ Neumann argued that this statute was significant because it endowed monopolies with special status in Nazi Germany: "Private organizations for restricting capacity and for subordinating whole industries to the wishes and commands of the monopolistic rulers have thereby received official sanction."¹⁶⁵ In turn, this meant the Nazis embraced the theory of cartelization that had long dominated German corporate law: "The National Socialist state thus brought to its logical conclusion a development initiated many decades ago, namely that the organization of industry in cartels is a better and higher form of industrial organization."¹⁶⁶

However, National Socialist support for cartelization did not mean the elimination of capitalism in Germany. As Neumann argued: "At this stage we need only show that markets and competition have by no means been abolished. The conflicts are reproduced on a higher level and the incentives of competition remain operative."¹⁶⁷ Neumann drew on the economic fortunes of Thyssen Steel in Germany to support this conclusion in *Behemoth*: "The defeat of

¹⁶³ Historian of Germany Adam Tooze asserts, with regard to the investigation of the Nazi government's relationship with German cartels, "[t]he best discussions are still [...] F. Neumann, *Behemoth: The Structure and Practice of National Socialism 1933-1944* (New York, 1944), 261-73." Tooze, 108, 704 fn. 39. For an analysis of Neumann's influence on studies of National Socialism more broadly, see Hilberg, 256-63.

¹⁶⁴ As Neumann noted: "On the same date [September 5, 1934,] a second cartel statute was enacted, introducing compulsory cartelization. The federal minister of economics was given the power to create compulsory cartels, to compel outsiders to attach themselves to existing cartels, to prohibit the erection of new enterprises and the extension of existing enterprises either in size or capacity, and to regulate the capacity of existing plants. No indemnification is allowed for damages arising out of such acts." Neumann, *Behemoth*, 265.

¹⁶⁵ *Ibid.*, 266.

¹⁶⁶ *Ibid.*, 266.

¹⁶⁷ *Ibid.*, 291.

Thyssen is a major example. His economic decline was an accomplished fact long before his flight from Germany, which, in reality, may have been merely the consequence of his defeat by his competitors, Friedrich Flick and the Göring combine.”¹⁶⁸

Fritz Thyssen was an important steel industrialist connected with Vereinigte Stahlwerke (“United Steelworks”).¹⁶⁹ Worldwide, Vereinigte Stahlwerke was second only to U.S. Steel in size.¹⁷⁰ Thyssen had been a strong supporter of Hitler beginning in the early 1930s and hoped to realize corporatist industrialism wherein employers and laborers were coordinated together.¹⁷¹ Friedrich Flick was a major steel industrialist who had formerly owned a portion of Vereinigte Stahlwerke.¹⁷² Though a major steel company, Vereinigte Stahlwerke wrangled for market share against Flick, Krupp, and other major German steel corporations.¹⁷³ Over time, this competition was further complicated by the emergence of state-based industrial combines, including the “Reichswerke ‘Hermann Göring’” (“Imperial Works Hermann Göring”), which was, according to historian R. J. Overy, “the state holding company [...] first set up in the summer of 1937 to exploit Germany’s low-grade domestic iron ores.”¹⁷⁴ Over time, the Göring combine absorbed preexisting industrial production and created new enterprises for military output.¹⁷⁵ Early on under Nazi rule, Thyssen fell afoul of the regime, which caused him to be shut out of the New Plan industrial structure set up in 1934-35.¹⁷⁶ This New Plan, created by Hjalmar Schacht and the Reichsbank, placed enormous limits on foreign imports into Germany to help support

¹⁶⁸ Ibid., 291.

¹⁶⁹ Tooze, 121.

¹⁷⁰ Ibid., 120.

¹⁷¹ Ibid., 121.

¹⁷² Ibid., 105.

¹⁷³ Ibid., 120.

¹⁷⁴ R. J. Overy, *War and Economy in the Third Reich* (Oxford: Clarendon Press, 1994), 145.

¹⁷⁵ Ibid., 145.

¹⁷⁶ Tooze, 121.

German rearmament.¹⁷⁷ In 1939, Thyssen fled Germany and the Göring combine then seized his holdings, justifying this under a 1934 law allowing for state seizure of Communist property.¹⁷⁸

Market competition still existed in Germany but simply under conditions of undersupply, as Neumann noted: “Competition is even intensified by the scarcity of raw materials, and the state itself is drawn into the struggle between the competing combines. Cartellization and monopolization are not the negation of competition, but only another form of it.”¹⁷⁹ As historian Adam Tooze observes, the New Plan’s substantial curtailment of imports “was only possible in the short term because producers were able to draw on accumulated stocks of raw materials.”¹⁸⁰ Under conditions such as the New Plan, large industrial producers, including the steel combines, were forced to compete for dwindling resources. Later, this included competition between private cartels and state-based combines, such as the Göring combine. This competition benefitted large industrial cartels, combines, and monopolies, that could outlast smaller corporations that lacked easy access to raw materials. Neumann argued that private monopolies were as powerful as the nationalized industrial combines: “Following some National Socialist economists, we may distinguish three types of economics existing within Germany: a competitive economy, a monopolistic economy, and a command economy; and, on the basis of our material, we may agree with their conclusion that the monopolistic economy is at least as powerful an element as the command economy.”¹⁸¹

Rather than nationalize the steel industry, the Nazi economy hinged on an oligopolistic market, based on the ability of a firm to outcompete its rivals. According to Neumann, the Nazi

¹⁷⁷ Ibid., 91-92.

¹⁷⁸ Overy, 147.

¹⁷⁹ Neumann, *Behemoth*, 291.

¹⁸⁰ Tooze, 91.

¹⁸¹ Neumann, *Behemoth*, 291-92.

economy benefitted private industry, it did not undermine it: “Entrepreneurial initiative is not dead; it is vital as ever before and perhaps even more so.”¹⁸² But this entrepreneurial initiative disproportionately benefitted large industrial combines: “The motivating power of is profit. The structure of the German economy is one of a fully monopolized and cartellized economy.”¹⁸³

VII. Neumann’s Theory of Liberal Law in *Behemoth*

For Neumann, this acceleration in cartelization and monopolization, which benefitted both private monopolies and state monopolies, had profound political implications, because it challenged the foundational premises of liberal law. Neumann found these topics deeply interrelated. He had addressed these issues in his dissertation “The Governance of the Rule of Law,” and he set forth his clearest defense of liberal political theory in *Behemoth*.¹⁸⁴

Neumann began his definition of law in *Behemoth* by differentiating law from what he called “technical rules [...]”¹⁸⁵ Among these technical rules were the laws and regulations specifying that “[t]raffic must move to the right or left; houses are to be painted green or white; groups and chambers may raise this or that fee.”¹⁸⁶ He argued: “Two notions of law must be distinguished, a political and a rational notion.”¹⁸⁷

¹⁸² Ibid., 292.

¹⁸³ Ibid., 292. Neumann concluded that even the state-based industries could be analogized to private monopolies, rather than treating them as public entities.

¹⁸⁴ Scheuerman, 101-3.

¹⁸⁵ Neumann, *Behemoth*, 440.

¹⁸⁶ Ibid., 440.

¹⁸⁷ Ibid., 440. Neumann largely set forth this argument as a critique of his former law partner, Ernst Fraenkel: “An excellent and detailed analysis of the National Socialist legal system is Ernst Fraenkel, *The Dual State*, trans. by E. A. Shils, E. Lowenstein, and K. Knorr, New York, 1941. I do not agree with the theoretical analysis of Fraenkel, as can readily be seen. The material and many discussions make the book valuable.” Neumann, *Behemoth*, 440, 516 fn.63; see also Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, trans. E. A. Shils, Edith Lowenstein, and Klaus Knorr (New York: Oxford University Press, 1941). For an excellent comparison of Neumann and Fraenkel’s analyses of National Socialist law, see Douglas G. Morris, “Write and Resist: Ernst Fraenkel and Franz Neumann on the Role of Natural Law in Fighting Nazi Tyranny,” *New German Critique* 42, no. 3 (Nov. 2015): 197-230. A more detailed discussion of Fraenkel’s theory can be found in Chapter 1.

Neumann criticized Frankel’s theory after discussing legal rules governing traffic or house colors: “These and thousands of other questions are dealt with rationally, even in the so-called ‘prerogative’ state – the S.S., the S.A. and the Gestapo. But they are, in the words of my late teacher Max E. Mayer, ‘culturally indifferent rules’ of a predominately technical character. They may acquire political or economic relevance at any moment (for instance,

On the one hand was the political notion of law: “In a political sense, law is every measure of a sovereign power, regardless of its form or content. Declarations of war and peace, tax laws and civil laws, police measures and court attachments, court decisions and legal norms applied in the decisions, all these are law simply because they are expressions of sovereignty.”¹⁸⁸ For Neumann, this notion was problematic because “[l]aw is then will and nothing else.”¹⁸⁹ In contrast, Neumann emphasized the rational notion of law as his preferred ideal: “The rational concept of law, on the other hand, is determined by its form and content, not by its origin. Not every act of the sovereign is law.”¹⁹⁰ According to rational law, law was not legitimate because the sovereign propagated it – law in its process and substance had to be subject to reason in order to be valid.¹⁹¹ Neumann argued in *Behemoth* that with the emergence of democracy and social

traffic rules may play a considerable role in the economic struggle between the railroad and the automobile), but in normal cases they are culturally neutral.” Neumann, *Behemoth*, 440; Max Ernst Mayer, *Rechtsnormen und Kulturnormen* (Breslau: Schletter’sche Buchhandlung, 1903), 27. As legal historian Douglas Morris explains, Fraenkel categorized Nazi law as falling under the “Normative State” or the “Prerogative State,” to which Neumann referred.” Morris elucidates what Fraenkel meant by these: “On the one hand, the normative state consisted of the legal order itself, which, in turn, consisted of both traditional law and newly enacted National-Socialist law. On the other hand, the prerogative state consisted of the realm of arbitrary power and official violence against which citizens enjoyed no legal protection.” Douglas G. Morris, “The Dual State Reframed: Ernst Fraenkel’s Political Clients and his Theory of the Nazi Legal System,” *Leo Baeck Institute Year Book* 58 (2013): 7. According to Mayer, legislation required a delicate balance between existing cultural traditions and the need for positive social change. Mayer, 25. Through Neumann’s reading of Mayer, technical rules do not go to the core of what defines law – they are irrelevant to the first principle of what is the nature of law. Thus, even if the Nazi “Prerogative State” continued to create predictable technical rules under Fraenkel’s analysis, according to Neumann because these were merely surface-level rules that do not go to the fundamentals of what defines the legal order, they do not demonstrate that law existed in any philosophical sense in the Nazi state outside of trifling regulations.

¹⁸⁸ Neumann, *Behemoth*, 440.

¹⁸⁹ Ibid., 440.

¹⁹⁰ Ibid., 440.

¹⁹¹ Ibid., 440. As Neumann asserted: “Law in this sense is a norm, comprehensible by reason, open to theoretical understanding, and containing an ethical postulate, primarily that of equality.” Ibid., 440. Drawing on natural law, Neumann noted: “Law is reason and will. Many natural-law theorists will even go so far as to divorce law completely from will of the sovereign. For them, law is a system of norms which is valid even if the positive law of the state ignores it.” Ibid., 440. Neumann was not a natural law thinker, although he sympathized with the rational aspects of its project: “There are two ways of determining the reason inherent in law: the material and the formal. The one is that of natural law, which postulates that law should correspond to certain material demands: freedom, equality, security. The other maintains that law can be expressed only in general, universal terms.” Ibid., 441. Neumann argued that “[n]atural law began to disappear at the beginning of the liberal era [...]” Ibid., 441. As a result, he privileged “formal” law, drawing upon Max Weber’s philosophy. Kettler and Wheatland, 313.

contract theory in Europe from the seventeenth century to the nineteenth century, liberalism became ascendant as a political theory, placing the notion of formal, rational law at its center.¹⁹²

What defined the characteristics of liberal law? According to Neumann, liberal law was made up of three essential elements. First: “In the liberal era, the general character of law is that element which alone embodies reason. The reasonableness of law is no longer determined by the reasonableness of the society in which the law operates, as in Thomistic natural law, but by its formal structure. Reasonableness thus becomes rationality, but a rationality that is formal and technical, that is to say, predictable and calculable.”¹⁹³ As an example of liberalism’s abstract, predictable laws, Neumann cited Jean-Jacques Rousseau’s theory of the general will, in which a society sought to create general laws that transcended each individual’s particular interest.¹⁹⁴

Next, Neumann described the second element of liberal law: “Rousseau’s determinant is insufficient, for the generality must be formulated in specific terms. In order to develop the second element, a distinction is to be drawn between legal rules (*Rechtssätze*) and the general legal principles or legal standards of conduct (*Generalklauseln*).”¹⁹⁵ To clarify what he meant by this, Neumann explained: “Contracts which are against public policy, unreasonable, or against good morals are void.”¹⁹⁶ As an example of a statute describing public policy, reasonableness,

¹⁹² Neumann, *Behemoth*, 441. Neumann asserted that liberal law emphasized procedural law as much as substantive law: “The formal structure of law became decisive. If rights may be infringed upon only within the framework of the law or by due process of law, and if, as liberal constitutional theory never tires of repeating, law itself is nothing but an infringement upon freedom and property then it must follow that the form of the infringement is as relevant as its content.” Ibid., 441.

¹⁹³ Ibid., 441.

¹⁹⁴ Neumann quoted Rousseau: “‘When I say that the object of laws is always general,’ wrote Rousseau, ‘I mean that law considers subjects *en masse* and actions in the abstract, and never a particular person or action. Thus the law may indeed decree that there shall be privileges, but cannot confer them on anyone by name. It may set up several classes of citizens, and even lay down the qualifications for membership of those classes, but it cannot nominate such and such persons as belonging to them . . .’” Emphasis in original, *ibid.*, 441; Jean-Jacques Rousseau, *Discourse on Political Economy and The Social Contract*, trans. Christopher Betts (Oxford: Oxford University Press, 1994), 74.

¹⁹⁵ Neumann, *Behemoth*, 441.

¹⁹⁶ Ibid., 441.

and good morals, he quoted a Nazi penal statute: “One who performs an act which the statute declares to be punishable or which is deserving of punishment according to the healthy racial feeling shall be punished (Section 2 of the German penal code in the formulation of 28 June 1935).”¹⁹⁷ While this statute’s language appeared to be in general terms, Neumann explained that it lacked true generality because it singled out particular groups for criminal punishment:

Such sentences are not legal rules, for they are not rational and they represent a false universality despite the general character of the formulation. There can often be no agreement in contemporary society whether any given action is against good morals or is unreasonable, whether a punishment corresponds to a healthy racial sentiment or not. In other words, these concepts lack an unequivocal content. A legal system that constructs the basic elements of its rules out of these so-called general principles or legal standards of conduct is only a shell covering individual measures.¹⁹⁸

Thus, the second key element of liberal law was that laws must retain their generality even when encoded into a statute. Laws could not rely on subjective principles, by which Neumann meant the ideas of good morals, reasonableness, or perverse notions of healthy racial sentiment, that could not be agreed upon in a society of diverse opinions.

Finally, the third element of liberal law: “The formal structure of the general rule – this is the third element of universality – must contain a minimum of material concreteness. It guarantees the judge a minimum degree of independence, because it does not subordinate him to individual measures of the sovereign.”¹⁹⁹ By this, Neumann meant that the law must be applied autonomously of the lawmaker – by a judiciary that acts independently of sovereign lawmaker, such as the legislature. According to Neumann, this judicial independence comes with an important responsibility: “The corollary of such a theory of the formal structure of law is a specific theory of the relation of the judge to the law. When the law rules and rules alone, the

¹⁹⁷ Ibid., 441-42.

¹⁹⁸ Ibid., 442. Kettler and Wheatland have a discussion of this section but place less emphasis on the relationship between liberal free market capitalism and monopoly capitalism. Kettler and Wheatland, 314.

¹⁹⁹ Neumann, *Behemoth*, 442.

judge's sole function is to perceive the law."²⁰⁰ To illustrate this theory of judicial analysis, Neumann quoted the Baron de Montesquieu: "In Montesquieu's formulation, the judge is nothing more than 'the mouth which announces the word of the law, in an inanimate being.' Judicial acts are therefore 'in a certain sense nil.'"²⁰¹ Despite judicial independence from the sovereign lawmaker, which allows judges to act impartially compared with legislators, judges are not permitted to remake the law once it reaches their courtroom. Instead, judges are bound to apply the letter of the law.²⁰² Ultimately, Neumann asserted that the core of liberal law was the belief that the state ought to maintain neutrality toward differing visions of the good life in society. Neumann thought liberalism would be increasingly poisoned by fascist tendencies if the state failed to maintain this position of neutrality.

VIII. The Relationship Between Liberal Law and Monopoly Capitalism in *Behemoth*

Neumann argued that these three elements had important "social significance" beyond politics, extending into the economic sphere.²⁰³ Here is where Neumann's analysis of law converged with his interest in monopoly capitalism in *Behemoth*, where he described how liberal legal principles dovetailed with the development of laissez-faire capitalism. Liberal law, Neumann argued, allowed for the foundations of the capitalist free market: "The rule of law is

²⁰⁰ Ibid., 442.

²⁰¹ Ibid., 442. See also Montesquieu, *The Spirit of the Laws*, ed. Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone, trans. Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone (Cambridge: Cambridge University Press, 1989), 163. I have been unable to find the second quotation from Montesquieu.

²⁰² This was particularly important, according to Neumann, because "[t]his 'phonographic' doctrine, as Morris Cohen calls it, is closely tied up with the theory of the separation of powers, with the doctrine that the creation of law is identical with legislation and that law cannot be created outside the process of legislation, either by judges or by private lawmaking bodies." Ibid., 442. Cohen discussed his "phonograph" theory on page 113 of his work, though Neumann cites to page 112. Ibid., 516 fn.66; Morris R. Cohen, *Law and the Social Order: Essays in Legal Philosophy* (New York: Harcourt, Brace and Company, 1933), 113. Regarding the separation of powers, Neumann noted that liberal law was founded on the notion of legislative supremacy: "The doctrine of separation of powers, it must be remembered, does not imply an equality among the three powers [legislative, executive, and judiciary] but rather the supremacy of the legislative. The right of judicial review of statutes was denied throughout most of the nineteenth century (in Germany until 1919). The legal system of liberalism is supposedly a complete system which the judge need merely apply." Neumann, *Behemoth*, 442.

²⁰³ Ibid., 442.

necessary to satisfy the needs of a competitive capitalist system which seeks to create profit through continuous rational capitalist undertaking.”²⁰⁴ Neumann noted free markets required general laws.²⁰⁵ This free-market competition required formal legal equality.²⁰⁶ Finally, free-market competition in selection of materials, laborers, and firms one chose to do business with and to enter into contracts with, meant this formal law needed to be applied predictably for markets to properly function.²⁰⁷

To demonstrate how the three elements of liberal law created the foundations for free-market capitalist competition, Neumann discussed freedom of contract: “The primary task of the state is to create a legal system that will guarantee the fulfilment of contracts. The expectation that contracts will be fulfilled must be calculable.”²⁰⁸ First, contract law had to be sufficiently general to apply to the vast swath of competitive firms with foreseeable results, without differentiating between different firms: “When there are many competitors of approximately equal strength, general laws are necessary for predictability.”²⁰⁹ Second, these general contract laws needed to be codified in a manner specific enough for them to be enforced without judicial discretion on issues such as morals, reasonableness, or public policy: “The laws must be sufficiently specific within their abstraction to limit the discretion of the judge as much as possible. The judge must not fall back upon general principles.”²¹⁰ The third and final element of liberal law required the separation of powers, to prevent the legislator from also acting as the

²⁰⁴ Ibid., 442-43.

²⁰⁵ “Free competition requires general law because that represents the highest degree of formal rationality.” Ibid., 443.

²⁰⁶ “Free competition rests upon the existence of a large number of more or less equal competitors who meet on a free market.” Ibid., 443.

²⁰⁷ “Freedom of the commodity market, freedom of the labor market, free selection within the entrepreneur group, freedom of contract, and above all calculability of the of the administration of justice are the essential requirements.” Ibid., 443.

²⁰⁸ Ibid., 443.

²⁰⁹ Ibid., 443.

²¹⁰ Ibid., 443.

judge: “Finally, the judge himself must be independent, that is, the various powers in the state must be completely separate.”²¹¹

As a corollary to Neumann’s discussion of the enforcement of law, he argued that when creating and applying these laws, the state had to undertake its actions predictably:

When the state interferes with liberty and property, the interference must also be calculable. It must not be retroactive, for then it would nullify already existing expectations. The state must not interfere without law, for then the interference would not be predictable. Interference by individual measures is intolerable because it destroys the basic equality of the competitors.²¹²

According to Neumann, the state could not enact *ex post facto* laws or act independently of law because that would defy the assumptions made when contracts were created – thereby destroying predictable market conditions. Moreover, the state could not create laws that differentiated between different firms, either preferentially or detrimentally, because this would eliminate the parity needed for firms to enter into contracts on relatively equal footing, with both sides knowing their contractual obligations would be enforced.

These elements began to erode with the emergence of large cartels, which challenged the principles of liberal law: “Legal theory and practice both undergo a decisive change in the period of monopoly capitalism. The rule of general law is no longer possible.”²¹³ Neumann explained why general principles were inapplicable once monopolies were ascendant: “When the state is confronted with but one party, a monopoly, it is meaningless to set up a general norm. The individual measure becomes the only appropriate expression of the sovereign. It does not destroy the principle of equality before the law, for the legislator is faced with an individual situation.”²¹⁴ He believed the legislature could no longer deal in generalities because lawmakers

²¹¹ Ibid., 443.

²¹² Ibid., 443.

²¹³ Ibid., 445.

²¹⁴ Ibid., 445.

were forced to deal with specific cartels and monopolies. This became particularly important when monopolized businesses were too big to fail, causing a systemic collapse of the German economy when these businesses were in distress. As an example, Neumann noted:

German legislation in the Weimar period therefore introduced special measures for specific monopolistic enterprises, as in the Reich president's emergency decree of 13 July 1931, prohibiting the application of bankruptcy proceedings against the Darmstädter Bank. A special measure was introduced for one powerful monopoly because this bank alone was in danger and its continued existence was considered necessary.²¹⁵

Neumann was referring to the Darmstädter- und Nationalbank, also known as the DANAT Bank, created in 1922 after the merger of the Darmstadt-based Bank für Handel und Industry (Bank for Trade and Industry) and the Berlin-based Nationalbank für Deutschland (National Bank for Germany).²¹⁶ Largely as a result of the foundering of World War I reparations negotiations between France and Germany, foreign depositors began withdrawing their money from German banks, including the DANAT Bank.²¹⁷ When the DANAT Bank failed on July 13, 1931, provoking a bank run, the Weimar government took it over.²¹⁸ From July 14, 1931, to August 5, 1931, a bank holiday was instituted and the DANAT Bank was forced to fuse with the Dresdner Bank, with the Weimar government controlling nearly all of their combined capital.²¹⁹ Neumann was incensed by the German government bailout of the DANAT Bank, because it indicated to him the preferential treatment of an individual corporation, vitiating the general laws he believed were required in a liberal regime.

²¹⁵ Ibid., 445.

²¹⁶ Theo Balderston, "German Banking between the Wars: The Crisis of the Credit Banks," *The Business History Review* 65, no. 3 (Autumn 1991): 562-63. The DANAT Bank was headed by, among others, Hjalmar Schacht. Ibid., 563.

²¹⁷ Ibid., 581; Tooze, 19. The DANAT Bank collapse was further caused by the mismanagement of the Nordwolle fabric company. Balderston, 582; Gerald D. Feldman, *Allianz and the German Insurance Business, 1933-1945* (Cambridge: Cambridge University Press, 2001), 17.

²¹⁸ Tooze, 19; Feldman, 26.

²¹⁹ Balderston, 596, 597. As historian Theo Balderston notes: "91 percent of their joint share capital was in the hands of the state." Ibid., 597.

The destruction of these liberal rules in the era of monopoly capitalism accelerated under Nazi rule. Neumann asserted that monopolized businesses abandoned rational law as applied by independent courts and instead looked to use the law for their own self-serving purposes.²²⁰ Connecting Nazi law with law under monopolized industry, he stated: “National Socialism completely destroys the generality of the law and with it the independence of the judiciary and the prohibition of retroactivity. Legal standards of conduct acquire greater significance than before because even the restrictions set up by parliamentary democracy against the demands of monopoly, insufficient as they may have been, have been removed.”²²¹ Neumann explained that the clarity of rational, general laws was no longer useful to either monopolists or Nazi leaders.²²² Likewise, the independence of the judiciary was eliminated under Nazism, meaning “[t]he judge has been reduced to the status of a police official.”²²³

Ultimately, law in Nazi Germany replaced the self-interested law of monopolized capitalism with a law based on total subjectivity. According to Neumann, this subjective law was rooted simply on the caprice of one man – Adolf Hitler:

Since law is identical with the will of the Leader, since the Leader can send political opponents to their death without any judicial procedure, and since such an act is glorified as the highest realization of justice, we can no longer speak of a specific character of law. Law is now a technical means for the achievement of specific political aims. It is merely the command of the sovereign. To this extent, the juristic theory of the fascist state is

²²⁰ At this point in *Behemoth*, Neumann largely restated one of the arguments he offered earlier in “The Governance of the Rule of Law”: “Legal standards of conduct serve the monopolists. The individual norm is calculable for the monopolist because he is strong enough to dispense with formal rationality. Not only is rational law unnecessary for him, it is often a fetter upon the full development of his productive force, or more frequently, upon the limitations that he may desire; rational law, after all, serves also to protect the weak. The monopolist can dispense with the help of the courts since his power to command is a satisfactory substitute. His economic power enables him to impose his wishes upon consumers and workers even within the contract form. The standard monopolistic contracts transfer all conceivable risks to the consumer, who must fulfil all the obligations of the law.” Neumann, *Behemoth*, 446-47. Compare with Neumann, “The Governance of the Rule of Law,” 548-49.

²²¹ Neumann, *Behemoth*, 447.

²²² “By its very vagueness, the legal standard of conduct serves to bring pre-National Socialist positive law into agreement with the demands of the new rulers.” *Ibid.*, 447.

²²³ *Ibid.*, 447. As Neumann argued: “National Socialism postulates the absolute subjugation of the judge to the law, but the standards of conduct make it possible for him to introduce political elements even when they conflict with positive law.” *Ibid.*, 447.

decisionism. Law is merely an *arcanum dominationis* [secret of domination], a means for the stabilization of power.²²⁴

Law in Germany was now merely an act of will, not of rationality. The will of the monopolies had been replaced by the will of the leader, Hitler. The will of the leader was the sovereign authority in all of Germany, and law was relegated to a mere instrument for the stabilization of Hitler's power over Germany's people.²²⁵ In *Behemoth*, Neumann embraced political and economic liberalism, despite his continued admiration for socialism, because he believed liberalism offered a historical advancement from the past, with a promise for greater rationality and freedom, despite its limitations on economic equality. Neumann would rather live with the injustices of liberal law than the retrograde irrationality and soullessness of Nazism: "National Socialism is, we repeat, incompatible with any rational political philosophy, that is, with any doctrine that derives political power from the will or the needs of man."²²⁶

²²⁴ Ibid., 447-48. The decisionism that Neumann derided here almost certainly referred to the writings of Carl Schmitt. After this paragraph in *Behemoth*, Neumann discussed Schmitt. Ibid., 448. Likewise, earlier in *Behemoth*, Neumann explicitly identified Schmitt with the doctrine of decisionism, which was rooted in "a demand for a strong government, culminating in the slogan, 'All power to the president'" who "should have the legislative and executive powers concentrated in his hands." Ibid. 44-45. From this, Neumann argued: "The underlying sentiment that came forth was thus the decisionism of Carl Schmitt, the demand for action instead of deliberation, for decision instead of evaluation." Ibid., 45. As political theorist Duncan Kelly observes, Neumann's opprobrium toward Schmitt's decisionism emerged as early as "The Governance of the Rule of Law." Kelly, 282. In that work, Neumann wrote: "Decisionistic legal thought has, in fact, nothing to do with law. In this kind of legal thinking, law is nothing but a technique for transforming the political will into legal form. In decisionism law is nothing but an *arcanum* for the maintenance of power. It is an *arcanum dominationis*, and it is characteristic that in political theory the doctrine of the arcana arose at the time when theology lost its dominating influence." Neumann, "The Governance of the Rule of Law," 554. Neumann cited to Schmitt's work *Die Diktatur* (*The Dictatorship*) in a footnote to this. Ibid., 554 fn.1; Carl Schmitt, *Die Diktatur: von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*, 2nd ed. (Munich: Duncker & Humblot, 1928), 13. Schmitt discussed the idea of the "*arcanum dominationis*" in *The Dictatorship*. Carl Schmitt, *Dictatorship*, trans. Michael Hoelzl and Graham Ward (Cambridge: Polity Press, 2014), 11.

²²⁵ For Neumann's discussion of Hitler's role in Nazi society, particularly the power of his "charismatic authority," see Neumann, *Behemoth*, 83-97. Historian Ian Kershaw notes that Neumann's argument regarding Hitler's charismatic authority "can be taken as useful in helping to depict the bonds with Hitler forged by various social and political forces, enabling the form of personalised power which he represented to free itself from all institutional constraints and to legitimise the destructive dynamic intrinsic to the Nazi gamble for European hegemony through war." Ian Kershaw, "'Working Towards the Führer': Reflections on the Nature of the Hitler Dictatorship," *Contemporary European History* 2, no. 2 (July 1993): 118; Ian Kershaw, *Hitler: 1889-1936: Hubris* (New York: W. W. Norton, 2000), xxvi.

²²⁶ Neumann, *Behemoth*, 463.

IX. Wartime in Washington: The Problem with Applying Theory to Practice

Yet Neumann ran into difficulties when he tried to apply his anti-monopoly theory to policymaking. In spring of 1942, Neumann became a consultant for the Board of Economic Warfare, and after *Behemoth* was published that same year he was increasingly involved in policy work in Washington, D.C.²²⁷ There, he continued to focus on the role of monopolized industry in Germany and its implications for the American economy.

The Board of Economic Warfare had succeeded the Economic Defense Board, created on July 30, 1941, by Executive Order, which coordinated interagency oversight of international trade to and from the U.S., including the purchases of militarily important goods.²²⁸ On December 17, 1941, after the Japanese attack on Pearl Harbor, the Economic Defense Board was renamed the Bureau of Economic Warfare and was restructured.²²⁹ During his time with the Bureau of Economic Warfare, Neumann brought his expertise to several U.S. Senate subcommittees. In October 1942, the Senate Subcommittee on Technological Mobilization held hearings on a bill proposed by Senator Harley M. Kilgore of West Virginia.²³⁰ The bill sought to create an Office of Technological Mobilization to coordinate American war efforts.²³¹ According to Senator Kilgore “when this war was suddenly thrust upon us last year, we discovered to our amazement that in the science and technology of warfare the Axis Nations had far outstripped us. We cannot tolerate such backwardness.”²³²

²²⁷ *Technological Mobilization: Hearings on S. 2721 Before the S. Subcomm. of the Comm. on Mil. Aff.*, vol. 1, 77th Cong., 2nd sess. 229-30 (1942) (statement of Franz Neumann, Consultant, Board of Econ. Warfare); Laudani, 2. Laudani mistakenly calls the Board of Economic Warfare the “Board of Economic Welfare.” Ibid., 2.

²²⁸ Donald G. Stevens, “Organizing for Economic Defense: Henry Wallace and the Board of Economic Warfare’s Foreign Policy Initiatives, 1942,” *Presidential Studies Quarterly* 26, no. 4 (Fall 1996): 1128.

²²⁹ Ibid., 1130.

²³⁰ *Technological Mobilization: Hearings on S. 2721*, ii, 1-6.

²³¹ Ibid., 1.

²³² Ibid., 5.

Neumann was among the experts who provided a report to the subcommittee, which Senator Kilgore submitted on October 27, 1942.²³³ Neumann continued drawing on his theory of monopoly capitalism in his analysis, asserting: “Technological progress is and always has been bound up with private enterprise. As long as our economic system was largely competitive, we could safely trust the competitive mechanisms to produce a sufficient number of new technological processes and to utilize the new technologies to the fullest. This, however, has fundamentally changed under conditions of monopoly.”²³⁴

According to Neumann: “The relation between monopolies and technological progress is very ambivalent.”²³⁵ Monopolies possessed “greater facilities to conduct research,” which was particularly important as “the more synthetic industries move into the foreground” because “[r]esearch that is concerned with substitute material is extremely costly and can be carried out only by rich corporations.”²³⁶ However, he noted that “the most severe handicaps are presented by the monopolistic structure of the economy” because “[c]ombines represent heavy capital investment that may be depreciated rapidly if a new technological process is invented.” Thus, monopolies were disincentivized to create new technology that would render their capital investments obsolete.²³⁷ Neumann noted that “[t]his ambivalent attitude has been recognized by the Germans,” which “led to a systematic coordination of technological research by the State and the Federal Government which, in conjunction with industry, organized large scale chemical, physical, and biological research.”²³⁸ But unlike in Germany, there was hope in the United

²³³ Ibid. 172.

²³⁴ Ibid., 229.

²³⁵ Ibid., 229.

²³⁶ Ibid., 229.

²³⁷ Ibid., 230.

²³⁸ Ibid., 230. As Neumann observed: “Technological research in Germany is thus conducted (a) Privately, (b) by universities and technical colleges, (c) by agencies attached to the ministries and under their supervision, (d) independent State and Federal institutions.” Ibid., 230.

States that increased cartelization could be staved off: “The more technology progresses, especially in industries engaged in the manufacture of substitute materials, the more rapid will be the process of concentration and monopolization – unless the government intervenes.”²³⁹

How should the government step in to prevent monopolization? Neumann argued: “We know from Germany that new combines arise and small and middle business loses out not because they are conquered financially by big business – but because big business establishes a technological supremacy.”²⁴⁰ Because “[g]ood engineers and construction men are scarce,” many could “go into big business where the financial awards are higher and where they can rise in the corporation hierarchy.”²⁴¹ Neumann advocated preferential treatment of small and mid-sized businesses rather than monopolies, arguing for the creation of federal government intermediaries that could coordinate with smaller firms: “Management corporations, financed and controlled by the Federal Government, can be set up. These corporations should hire first-class engineers and lease their services to small and middle businessmen at reasonable fees.”²⁴²

Yet argument was inconsistent with Neumann’s theory in *Behemoth*. Advocating for assisting small and mid-sized firms to prevent them from being overtaken and absorbed by large corporations during the War might help stave off monopolization in the U.S. But doing so would give special treatment to small and moderately sized firms, which violated Neumann’s argument in *Behemoth* that a truly liberal legislature could only enact laws based on generally applicable

²³⁹ Ibid., 230. Neumann drew this conclusion based on the Nazi creation of the Reichsvereinigung Iron and Steel “a kind of compulsory national peak cartel that integrates the whole iron and steel industry into one single body.” Ibid., 230. As Neumann argued, this organization sought “[t]o further technological progress” because it would be “compelling the members of the association to exchange information, thus abolishing all plant secrets and by giving the president of the association the right to request employees of any member firm to take up work for specific purposes in any one plant of another member.” Ibid., 230.

²⁴⁰ Ibid., 230.

²⁴¹ Ibid., 230.

²⁴² Ibid., 230.

norms.²⁴³ Neumann had criticized legislation passed by the Weimar Reichstag when it singled out the DANAT Bank as too big to fail, but he had simply flipped that situation on its head when he called for giving special assistance to firms he believed were too small to fail.²⁴⁴ This policy could be illiberal according to Neumann's own thinking because it focused on the particularities of certain firms rather than speaking in general terms. Indeed, a fundamental problem for Neumann was connecting his theory with practical policymaking – he failed to explain how general norms could be applied to specific situations without violating his theory's tenets.

Despite these obstacles Neumann continued contributing to American policymaking efforts during the War. He worked with Institute of Social Research members Arkadij Gurland and Otto Kirchheimer on a 1943 report entitled *The Fate of Small Business in Nazi Germany* for the U.S. Senate Special Committee to Study Problems of American Small Business.²⁴⁵ This committee was created in 1940 by Senator James Murray, a Democrat from Montana.²⁴⁶ Murray had also been a member of the Senate Subcommittee on Technological Mobilization, to which Neumann had contributed his research.²⁴⁷ The report offered by the three thinkers in 1943 was similar to the arguments Neumann made in his earlier work, laying much of the blame for the challenges faced by small businesses in Nazi Germany on the monopolization of industry in the

²⁴³ Neumann, *Behemoth*, 441-42, 444-45.

²⁴⁴ *Ibid.*, 445.

²⁴⁵ S. SPECIAL COMM. TO STUDY PROBLEMS OF AM. SMALL BUS., 78TH CONG., 1ST SESS., A. R. L. GURLAND, OTTO KIRCHHEIMER, AND FRANZ NEUMANN, *THE FATE OF SMALL BUSINESS IN NAZI GERMANY*, at iii (Comm. Print 1943). Gurland would work alongside Neumann and Kirchheimer in 1945 at the OSS for a short period. Hubertus Buchstein, "Arkadij Gurland: Political Science as Critical Theory," in *The SAGE Handbook of Frankfurt School Critical Theory*, vol. 1, ed. Beverley Best, Werner Bonefeld, and Chris O'Kane (Los Angeles: SAGE Publications, 2018), 270.

²⁴⁶ McGee Young, "The Political Roots of Small Business Identity," *Polity* 40, no. 4 (Oct. 2008): 458; Jonathan J. Bean, *Beyond the Broker State: Federal Policies Toward Small Business, 1936-1961* (Chapel Hill, NC: University of North Carolina Press, 1996), 102.

²⁴⁷ U.S. Congress, *Technological Mobilization*, ii.

Weimar Republic.²⁴⁸ In addition, the report blamed collusion between the Nazi Party and industrial combines for the wartime situation in Europe.²⁴⁹

In 1943, Neumann started working for the Research and Analysis Branch of the OSS.²⁵⁰ There, he analyzed an array of policy concerns regarding the German effort – but he continued to maintain a special interest in German monopolies and combines. He took a more restrained approach to these industrial combines in the draft of a report entitled “German Cartels and Cartel-Like Organizations,” which he prepared likely sometime from 1943 onward.²⁵¹ Here, Neumann discussed the end of the war and the process of de-Nazification he believed German cartels would need to undergo: “[T]he prime characteristic of Nazi policy was to subject cartels and other business associations to State control through the establishment of new organizations, the consolidation of existing organizations, and the introduction of compulsory membership and leadership principles. The principle aim of AMG [Allied Military Government], therefore, is the elimination of the new organizations (wherever their functions are redundant) and the coercive measures applied to the traditional associations.”²⁵² This de-Nazification process would eliminate Nazi Party members from business cartels.²⁵³ It would also require continued monitoring of cartels to ensure Nazi sympathizers did not use them as a means of obstructing the

²⁴⁸ S. SPECIAL COMM. TO STUDY PROBLEMS OF AM. SMALL BUS., 1-2.

²⁴⁹ “The trend of developments in Nazi Germany thus becomes clearer every day. Two groups divide among themselves the whole power of the people: the National Socialist Party and big business. It is they who control the fate of Germany and of occupied Europe.” Ibid., 116.

²⁵⁰ Katz, 32; Laudani, 3.

²⁵¹ Franz Neumann, “German Cartels and Cartel-Like Organizations,” in Franz Neumann, Herbert Marcuse, and Otto Kirchheimer, *Secret Reports on Nazi Germany: The Frankfurt School Contribution to the War Effort*, ed. Raffaele Laudani (Princeton: Princeton University Press, 2013), 264. The draft report was probably written after September 1943, because it discusses Speer’s armaments efforts during that month. Ibid., 274.

²⁵² Ibid, 280.

²⁵³ “This policy must be accompanied by the ousting and detention of all active Nazis, and continued control to insure that Nazi influence is not restored through the election of Nazis or the infiltration of Nazism through persons under their direction.” Ibid., 280.

Allied occupiers.²⁵⁴ According to Neumann: “This could be done by requiring all business associations to register with AMG their by-laws, officers, employees and members, as well as periodic financial statements.”²⁵⁵

Neumann also noted more radical proposals for cartel de-Nazification had been offered:

It is contended that AMG ought to go further and forbid cartels outright. This policy is urged for two reasons:

1. The unique opportunity afforded by the military collapse, it is claimed, should be utilized to foster whatever tendencies toward competition and free enterprise exist in Germany. If cartels are not to be completely outlawed, at the very least their activities should be strictly controlled to prevent their engaging in conventional restrictive marketing practices.
2. The elimination of cartels would strike a blow at the power of industrialists who, it is contended, have been guilty as a class of fostering Nazism and militarism in Germany.²⁵⁶

Neumann had long blamed Germany’s monopolies and cartels for enabling the rise and consolidation of National Socialism, so it is unsurprising that he would discuss this suggestion.

But surprisingly Neumann asserted unequivocally that “[t]his policy must be rejected [...]”.²⁵⁷

He offered three reasons for repudiating the proposed ban on German cartels.

First, he noted pragmatically that the Allied Military Government would be poorly equipped to oversee and enforce cartel oversight in occupied Germany.²⁵⁸ Second, he asserted: “The right of association cannot be taken from businessmen as a class without applying the same policy to other groups. Except for Nazi groups, AMG must promote rather than suppress

²⁵⁴ “Cartels must be prevented from serving as disguises for Nazi political organizations or covert means of sabotaging other policies which AMG may choose to adopt, such as an anti-combine program.” Ibid., 280.

²⁵⁵ Ibid., 280.

²⁵⁶ Ibid., 280-81.

²⁵⁷ Ibid., 281.

²⁵⁸ “AMG will not be in a position to enforce competition in Germany. Not only will it be lacking in staff for such a job, but effective enforcement of the program in the German courts would be impossible. The Weimar Republic was well equipped with broad legislative powers to control, restrain, or even to dissolve cartels, if only the will to invoke the power and to see the litigation through had been present. The Nazis, to be sure, did in a sense achieve effective control of cartel organizations, but it was directed to war purposes and was achieved only under the compulsion of an apparatus of terror.” Ibid., 281.

freedom of association in order to facilitate the growth of a political organization leading to the establishment of a domestic indigenous German Government.”²⁵⁹ Although much of Neumann’s theory had railed against cartelization, here he recognized that anti-monopoly rules might threaten another key liberal ideal, the notion of freedom of association.²⁶⁰ Indeed, limitations on freedom of association might also be used to limit labor unions, of which Neumann was likely aware.²⁶¹ He had trouble explaining how general, neutral laws could be used to differentiate between large organizations he viewed positively, such as trade unions, and large organizations he viewed negatively, particularly monopolies. Yet again, Neumann had difficulty applying his theoretical criticisms of monopoly capitalism to specific government policies aimed at the postwar rebuilding of Germany.

He then explained his third objection to the complete elimination of cartels:

The political power of industrialists resides essentially in their wealth and control of large corporations. To some extent cartels have been used as instruments through which this power has been exercised, but any program to eliminate the fundamental economic foundations of German aggression would involve profound changes in the entire structure of individual and corporate property in Germany. Should an anti-combine program be adopted by AMG, then steps should be taken to prevent cartels from being used to sabotage or circumvent such a policy.²⁶²

Neumann argued the influence of monopolies in Germany was merely a symptom of a broader economic inequality between wealthy elites and the rest of the population. He appeared to advocate a complete restructuring of the German economic order, but what would this look like?

²⁵⁹ Ibid., 281.

²⁶⁰ Neumann also noted in “The Governance of the Rule of Law”: “[T]here appear the so-called political rights to freedom. These are fundamental rights which refer to types of behavior arising out of the living together of men in the state. To this category belong freedom of association, of the press, of meeting, and secrecy of the ballot.” Neumann, “The Governance of the Rule of Law” 66. According to Neumann: “Without freedom of discussion, of press, of association and of meeting, a genuinely freely chosen decision is impossible.” Ibid., 66-67.

²⁶¹ In “The Governance of the Rule of Law,” Neumann asserted: “By the right of association the workers and their employers are given the right to join together for the pursuit of certain ends. This right prevents, as we have already shown, public and private powers from hindering such association.” Ibid., 76.

²⁶² Neumann, “German Cartels,” 281.

Would anti-cartel policies tend toward neo-liberalism, socialism, or perhaps another route such as Christian democracy? Here, Neumann offered little guidance.

Neumann's position later shifted in a report entitled "The Treatment of Germany," dated October 11, 1944, in which he discussed the Allied postwar plans for the occupation of Germany – though this proposal was not accepted by the Joint Intelligence Committee of the Joint Chiefs of Staff.²⁶³ Neumann again blamed industrialists, alongside Junker aristocrats, military leaders, and bureaucrats, as the parties responsible for the rise of Nazism in Germany.²⁶⁴ Offering up plans for Allied occupation, Neumann argued that "[t]he occupation troops may be withdrawn and part of the Allied control machinery be disestablished when: [...] b. [t]his government must have furnished adequate proof that it has seriously undertaken the elimination of aggressive elements from German society. This should include: [...] d) [t]he elimination of the power of big business from economic, social, and political life, even to the extent of nationalizing the most powerful industrial and financial corporations."²⁶⁵ Neumann had come almost full-circle back to his Weimar-era writings, again advocating nationalization.

²⁶³ Franz Neumann, "The Treatment of Germany," in Franz Neumann, Herbert Marcuse, and Otto Kirchheimer, *Secret Reports on Nazi Germany: The Frankfurt School Contribution to the War Effort*, ed. Raffaele Laudani (Princeton: Princeton University Press, 2013), 436.

²⁶⁴ Neumann asserted that these four groups created a reactionary faction against the German defeat in World War I: "German imperialism is not solely the product of the Nazi Party. If this were the case, the dissolution of the Party and the elimination of Nazis from political, economic, and cultural life would be adequate. Germany's aggressiveness, however, antedates the rise of Nazism, which is merely the current manifestation of the reaction to the defeat suffered by Germany's aggressive forces in 1918. These forces were then composted of the Junkers, the industrial and financial leadership, the German Officers Corps and the high bureaucracy, all of which formed the German ruling class. The four groups were united by bonds of marriage and material interest. They were actively supported by the majority of the petty bourgeoisie and were during the First World War upheld by the larger part of German labor which, however, turned against the ruling groups after 1917." Ibid., 440. He thought these groups enabled the Nazis' rise: "These four groups helped Nazism into power; its most important financial and industrial corporations prepared rearmament and financed the Party; the Junkers placed their estates and manpower at the disposal of racialist and paramilitary organizations for use as training grounds; the Officers Corps encouraged and led reactionary, racialists, and Nazi groups as auxiliaries for the fight against Germany's democratic forces and to facilitate the rearming of Germany; highly placed bureaucrats and judges protected the anti-democratic forces in their efforts to undermine the forces of democracy." Ibid., 440. Here, Neumann was restating an argument he made in *Behemoth*. Hilberg, 257; Peter Hayes, "Introduction," in Franz Neumann, *Behemoth: The Structure and Practice of National Socialism 1933-1944* (Chicago: Ivan R. Dee, 2009), vii-viii.

²⁶⁵ Neumann, "The Treatment of Germany," 445.

However, the issue of nationalization posed an important question for Neumann – would such a policy violate the liberal requirement of general norms he advocated for in *Behemoth*? Neumann did not offer a framework for assessing whether an institution had become a monopoly. Singling out certain large firms for nationalization created a danger that members of the legislature would simply fall back on their own subjective preferences, creating an illiberal regime in which legislators categorized organizations they disliked as monopolies and exercised their sovereign authority to control them. Would the same thinking also extend beyond corporations to other organizations, such as trade unions or other civil society groups? Perhaps nationalization could be foisted upon an entire industry, but again, it was unclear what neutral principle differentiated one industry from another. While Neumann had effectively described the Nazi regime in *Behemoth*, his policy work during World War II demonstrated the difficulties he faced in trying to create programs for the postwar rebuilding of German industry that would fit effectively within the liberal framework he had defended so vociferously.

X. Conclusion

Franz Neumann's experience as an émigré profoundly influenced his intellectual transformation. While he started his career as a rather conventional socialist lawyer in Germany, his exile forced him to reconsider his fundamental beliefs. Of particular importance was his early confidence in the necessity of monopolies for the realization of socialism. After he escaped Germany, Neumann became critical of the role cartels and monopolies played in the Weimar Republic; he began to explain how these businesses allowed for opportunistic political movements, like the Nazis, to seize upon the legal trends emerging in Germany. According to Neumann, this legal shift occurred because the liberal rule of law was increasingly undermined by big business, which had little or no need for courts or the legal system.

Neumann's analysis of the dangerous role of monopolies in Germany was something that American lawyers and politicians, including Thurman Arnold in the Antitrust Division of the Department of Justice, and Senators in the U.S. Congress, found convincing and profoundly troubling. These Americans believed monopolization undermined business and politics, and that the experiences Germany had gone through might also threaten the foundations of American law. Writing for an American audience in *Behemoth*, Neumann explained the connections he saw between the collapse of liberal law in Germany and the rise of monopoly capitalism. In *Behemoth* he also offered his clearest defense of liberal law and economics, arguing that the tenets of liberalism's philosophy were progressive and far preferable to the dark turn that had occurred in German politics under Nazism. Neumann continued to apply this analysis in his work for the OSS, examining how German industrialists were culpable in enabling the destruction of Europe wrought by the Nazis.

Neumann's political and legal theory, particularly in *Behemoth*, focused on finding the boundaries of liberal law. He presumed that law was fundamentally based on rationality, asserting that "[l]aw [...] is a norm, comprehensible by reason, open to theoretical understanding, and containing an ethical postulate, primarily that of equality."²⁶⁶ Neumann was fixated on determining the border between groups that accepted this ideal and movements that wholly abandoned rationality – which he believed included monopoly capitalists and the Nazis. For Neumann, these irrational movements lay outside the limits of acceptable legal and political discourse and could perhaps be excluded from a liberal political order. In a sense, this argument reflected the friend/enemy duality that Neumann's former associate Carl Schmitt had developed, but unlike Schmitt Neumann made use of this dichotomy to defend liberalism and to ostracize its

²⁶⁶ Neumann, *Behemoth*, 440.

illiberal enemies. However, Neumann struggled when he tried to turn his defense of liberalism and his criticisms of monopoly capitalism and Nazism into concrete policies – he was especially vexed by the problem of how to exclude extremist groups while simultaneously protecting individual autonomy and freedom of association in a liberal society.

Ultimately, Neumann's legal and economic thinking exemplified important incongruities in liberal theory during World War II. While defenders of liberalism, such as Neumann, offered incisive critiques of illiberal political movements, especially fascism and Nazism, they often struggled to coherently connect their liberal theory with their own policy proposals. Creating a rational link between liberal theory and practice became even more pressing for liberal thinkers in the United States after World War II as they sought to reconstruct much of the globe and defended their political ideals against a new ideological enemy during the Cold War.

CHAPTER 3

National Sovereignty or International Law? **The Evolution of International Criminal Justice from Nuremberg to Vietnam**

When Franz Neumann published *Behemoth* in 1942 in the midst of World War II, he argued that many well-intentioned liberal international lawyers were mistaken about the source of the conflict: “Liberal international lawyers are accustomed to blame the present world chaos on unlimited national sovereignty.”¹ According to Neumann, these lawyers thought fascism would be destroyed only when the notion of state sovereignty was undermined: “They believe that a rational international order cannot be established until state sovereignty is either restricted or abolished altogether. Some even maintain that the individual citizen is already – or ought to be – a subject of international law, and is thereby bound to two organizations, the state and the international community.”² These jurists argued that limiting state sovereignty would have the salutary effect of drawing the community of nations closer together: “By creating divided loyalties, the dichotomy will provide the psychological basis for international solidarity.”³

However, Neumann disagreed profoundly with this thinking. In *Behemoth* he asserted provocatively: “The following pages might well be entitled: *In Defense of State Sovereignty*.”⁴ Neumann then offered a definition of sovereignty at the international level: “A more complete definition [...] would be the potentially highest power over a specific territory and over a specific category of people.”⁵ For Neumann, this idea of sovereignty had two essential features in international relations. First, he asserted: “If every state is sovereign, all states are equal.”⁶

¹ Franz Neumann, *Behemoth: The Structure and Practice of National Socialism*, 2nd ed. (New York: Oxford University Press, 1944), 167. The liberal theories of international law that Neumann described will be discussed in further detail below.

² Ibid., 167.

³ Ibid., 167.

⁴ Emphasis in original, *ibid.*, 167.

⁵ Ibid., 167.

⁶ Ibid., 167-68.

Neumann believed this was a legal fiction, because “[a]s a juristic category, equality is, of course incomplete and lame.”⁷ However, he argued equality among nations was beneficial insofar as “it prevents the misuse of international law for imperialist expansion.”⁸ This related to the second feature of sovereignty in international relations: “Sovereignty thus establishes formal rationality in an archaic world, creates a clear-cut delineation of the spheres of power, and subjects to the power of the state only those who live within its territory and a select few (citizens) outside.”⁹ In Neumann’s eyes, sovereignty was not the curse many international lawyers believed, even if it limited the efficacy of liberal international relations. Instead, sovereignty was a blessing: “It creates a barrier, so to speak, which, though hindering the establishment of a just international order, seriously limits the extent of state power at the same time.”¹⁰

Neumann’s arguments stood in stark contrast to the ideals of many wartime Allied leaders. On August 14, 1941, U.S. President Franklin Roosevelt and British Prime Minister Winston Churchill issued a statement that became known as the Atlantic Charter.¹¹ According to historian Elizabeth Borgwardt, the Atlantic Charter was groundbreaking because it took civil, political, and to some extent economic rights, and “suggested that the subjects of this vision included individuals as well as sovereign nation-states.”¹² As World War II progressed, this shift away from strong national sovereignty toward international institutions and laws that protected individuals would become key to President Roosevelt’s emerging plans for postwar peace.¹³

⁷ Ibid., 168.

⁸ Ibid., 168. He also argued that sovereignty was endowed in the state alone, not its constituent parts: “In international relations, sovereignty can be attributed only to the state as such, as a legal entity, never to its organs. It is logically impossible to speak of the sovereignty of the monarch or of the government.” Ibid., 168.

⁹ Ibid., 168.

¹⁰ Ibid., 168.

¹¹ Elizabeth Borgwardt, *A New Deal for the World: America’s Vision for Human Rights* (Cambridge, MA: The Belknap Press, 2005), 4.

¹² Ibid., 6.

¹³ Ibid., 71.

This would include the United Nations, the World Court, the Universal Declaration of Rights, the Genocide Convention, and the emendations to the Geneva Conventions.¹⁴

During World War II, German émigrés such as Neumann debated sovereignty with their American counterparts, but in the aftermath of the War the émigrés and Americans gradually arrived at common ground. When preparing for the first Nuremberg Trial, Neumann assisted Telford Taylor, an American lawyer and a New Dealer who would later lead the prosecution at the subsequent trials in Nuremberg.¹⁵ When these trials came to a close, Taylor and Neumann worked together on a project for the Carnegie Endowment for International Peace, hoping to analyze the importance of the Nuremberg Trials for international law.¹⁶ This project encapsulates the shared understanding of international law that the émigré Neumann and the American Taylor came to agree upon. Drawing on the American élan of Roosevelt's time, they agreed Nuremberg was a watershed moment that allowed liberal international law to exert force over the world's sovereign nation-states as never before. Yet they also recognized that Nuremberg's influence would only be effective if the Trials' legal precedents were explained and put into practice by national governments in the postwar world. This dialectic came to define the international affairs of the Cold War – international law offered more extensive protections than ever before, but this international law was often only as effectual as the nations that followed it.

¹⁴ Ibid., 71. The Soviet Union was particularly critical of the Universal Declaration of Human Rights during its ratification process, arguing that it unduly violated national sovereignty. Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2002), 167.

¹⁵ Barry M. Katz, *Foreign Intelligence: Research and Analysis in the Office of Strategic Services 1942-1945* (Cambridge, MA: Harvard University Press, 1989), 51; Jonathan A. Bush, "Soldiers Find Wars: A Life of Telford Taylor," *Columbia Journal of Transnational Law* 37, no. 3 (1999): 676-78, 679, 680-81.

¹⁶ App. H, *Toward an International Law of Belligerent Occupation*, undated, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Telford Taylor Papers, Rare Book & Manuscript Library, Columbia University, New York, NY (hereafter referred to as the Taylor Papers).

This chapter will explain the foundations of Neumann's theories of sovereignty and how they related to his understanding of the efficacy of international law. It focuses on an epistolary exchange between Neumann and Quincy Wright, a leading American theorist of international law. As discussed below, Neumann's ideas were shared by contemporary German émigrés, including Hans Morgenthau, one of the founders of the international relations school of *realism*. Neumann and Wright's debate illuminates the different background assumptions some German émigrés brought compared to their American counterparts when analyzing sovereignty and international law.¹⁷ It will demonstrate that Neumann was predisposed to a proto-realist position in international affairs, seeking to protect sovereignty against international law.

Neumann died in the 1950s, but Taylor continued writing about international law, especially during the Vietnam War following the revelation of American atrocities there. In these writings, Taylor continued to echo many of the ideas Neumann had written about in their proposal for the Carnegie Endowment. Both believed international law required effective scholarship and advocacy to convince national leaders to follow the new legal rules that were emerging in international courts and agreements. Taylor elucidated the importance of the blackletter law set forth in postwar international legal documents, particularly the Geneva Conventions. But he also recognized that such laws only had influence if those in power chose to follow them. Ultimately, Taylor recognized that the effects of international law would be limited unless the laws could be connected back to the American internationalism that defined

¹⁷ When discussing the categories of "German" and "American," I draw on the model offered by Helmut Walser Smith based on the writings of Alexander Gerschenkron. Helmut Walser Smith, "When the Sonderweg Debate Left Us," *German Studies Review* 31, no. 2 (May 2008): 236-37. The ideas, such as the notion of sovereignty, discussed by these Germans and Americans should not be essentialized as uniquely German or American. It is true that these ideas need to be situated in their particular German and American historical context in order to effectively understand the cultural background that both groups brought when discussing their interpretation of a specific idea, such as what sovereignty means. However, sovereignty is not uniquely German or American, but needs to be situated in the transnational history of the idea of sovereignty. *Ibid.*, 237. This is what my analysis seeks to do.

the spirit of the Nuremberg Trials. Paradoxically, the strength of international law rested on the willingness of the nation-state to comply – a conundrum Neumann had recognized years before.

I. Sovereignty: Protection or Prison for International Law?

Neumann's analysis of the international order demonstrated a continental European framework that differed in many ways from American international law theorists. In late 1940, Quincy Wright, a professor in Political Science at the University of Chicago, sent a draft of his article "Fundamental Problems of International Organization," to Neumann, who was at that time still a member of the Institute for Social Research.¹⁸ Wright's article was later published in *International Conciliation*, the journal of the Carnegie Endowment for International Peace.¹⁹

Born in 1890, Wright was from Medford, Massachusetts; he attended Lombard College in Galesburg, Illinois, graduating in 1912, and obtained a Ph.D. in 1915 in Political Science from the University of Illinois.²⁰ Although Wright was not trained as an attorney, he was well-versed in doctrinal questions of international law. According to one of Wright's students: "He was, like most of the scholars of his generation, originally trained as a legalist. His academic mentor, James W. Garner of the University of Illinois, was in his day one of the most distinguished scholars in international law, especially the law of war, prize law, etc. Quincy's first important scholarly study was on the relationship of international law to domestic law, particularly its enforcement in the courts."²¹ Wright held a fellowship at the University of Pennsylvania, then

¹⁸ Correspondence from Franz L. Neumann to Quincy Wright, November 23, 1940, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Quincy Wright Papers, Special Collections Research Center, The University of Chicago, Chicago, IL (hereafter referred to as the Wright Papers).

¹⁹ Quincy Wright, "Fundamental Problems of International Organization," *International Conciliation* 20, no. 369 (Apr. 1941): 468-92; correspondence from Quincy Wright to Franz L. Neumann, March 26, 1941, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers; correspondence from Franz Neumann to Quincy Wright, March 17, 1941, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers.

²⁰ Paul J. Scheips, "In Memoriam: Quincy Wright, 1890-1970," *Military Affairs* 35, no. 2 (Apr. 1971): 49.

²¹ William B. Ballis, "Quincy Wright: An Appreciation," *Journal of Conflict Resolution* 14, no. 4 (Dec. 1970): 453. Wright was later involved in the Nuremberg Trial proceedings: "In 1945, Wright became adviser on international law to Francis Biddle, the United States member of the International Military Tribunal for Germany. In a

worked as an instructor at Harvard, the University of Minnesota, and finally the University of Chicago, where he started teaching in 1923.²²

Neumann sent his comments on the article back to Wright in a letter dated November 23, 1940.²³ In his letter, he complimented Wright: “I admire the clarity of your analysis, the freshness of your approach and, above all, your courageous optimism in a phase of history which is not very conducive to the elaboration of plans for an international organization.”²⁴ However, Neumann disagreed with Wright: “I hope you will forgive me if I raise some doubts as to the problems [...] which deal with the status of the individual citizen in the international community.”²⁵ He continued: “I feel prompted to do so because this basic problem of international law has interested me for many years and, although I have taken your stand until recently, I feel now that it is no longer advisable to do so in the present situation.”²⁶

Neumann elaborated on Wright’s analysis of the relationship between the individual citizen and the international order: “You distinguish, quite rightly, between the state and its government. You believe by imputing international actions solely to the government but not to the state, that part of the population which is opposed to the government’s policy would or could be won to the support of sanctions against the government without sacrificing its fundamental loyalty to the state.”²⁷ According to Neumann, Wright argued that international law would

memorandum to Biddle, he held that the definition of crimes under which the trials were to be conducted was declaratory of preexisting law; that an individual could not avoid responsibility for his actions on the grounds that they were authorized by a government if, under international law, the government lacked the power to give such authorization; and that under international law states had no authority to resort to armed force except in self-defense or in accordance with an appropriate international procedure.” Scheips, 49.

²² Ibid., 49.

²³ Correspondence from Franz L. Neumann to Quincy Wright, November 23, 1940, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

absolve individual citizens of responsibility for their government's actions because liability for violating international law could apply to the "government" rather than the more abstract "state." This state was made up of individuals who objected to the actions taken by the government, thereby divorcing these citizens from their government's illicit acts. In Wright's mind, this would help rally critical individuals to the cause of the state against their government.²⁸ Neumann was skeptical of Wright's claims, noting: "I will not mention the methodological difficulties which militate against so radical a divorce of 'an ephemeral government' from the state. You will know them better than I."²⁹

The differences between Neumann and Wright can be explained by their divergent conceptions of state sovereignty in international law. Neumann took a position on the indissolubility of state sovereignty, rooted in European philosophy and German history. Wright, in response to Neumann, argued that state sovereignty was divisible, drawing upon American history to justify his argument. Their discussion is emblematic of the differing visions of international law that German émigrés brought compared to their American counterparts.

II. Neumann's Notion of Indivisible Sovereignty

Neumann listed four objections to Wright's assertion that the state and the government could be considered separate entities for enforcing international law. First, Neumann argued that if a government violated international law, most citizens in that country would support its acts: "I believe that this distinction will not lead to the solution of the problem if the huge majority of the

²⁸ As Wright stated in his article: "[T]he population, loyal to the State, might assist in sanctions against the government in power, found guilty of aggression, without violating their fundamental loyalties; and that, after the sanctions have been successful in depriving such a government of office or in changing its policy, the population could be more easily reconciled, because their self-respect would not have been destroyed by the implication that their loyalty had been directed to a wrong-doer. The State, before and after the application of sanctions, could be viewed as a fit object of loyalty. It was not the State, but merely an ephemeral government, which for a time betrayed the confidence both of the people and of the world community." Wright, "Fundamental Problems," 484.

²⁹ Correspondence from Franz L. Neumann to Quincy Wright, November 23, 1940, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers.

people supports acts of the government violating international obligations, as it usually does, whether there is a democratic society or a totalitarian system that is involved.”³⁰ If international law was violated by a democratic nation, it was likely that a majority of citizens would support this violation. According to Neumann, this was just as true in a totalitarian society: “It would be erroneous to assume that the violation of international treaties by Germany was the act of a dictatorial government unsupported by the huge mass of people.”³¹

Second, and most importantly, Neumann objected to Wright’s argument that there could be two sovereigns in the same geographic location on philosophical grounds. Neumann argued: “The distinction of state from government seems, inspite [*sic*] of your assertions to the contrary, to establish two loyalties and thus two sovereignties: that of the government and that of a minority claiming to represent the ‘state’ and/or the ‘international community.’ Two sovereign powers cannot co-exist in the same territory.”³² Neumann drew on continental European philosophy to make this point: “It is worthwhile to re-read Kant’s critique of the medieval right of resistance in this light (Rechtslehre [Science of Law], Translation Hastie, p. 175).”³³

This philosophical argument was the core of Neumann’s disagreement with Wright’s notion of divided sovereignty. The Kant passage Neumann cited criticized all resistance against the sovereign. Kant declared that citizens were obligated to follow their ruler: “[T]his is the meaning of the maxim, ‘All Authority is from God;’ which proposition does not express the *historical foundation* of the Civil Constitution, but an ideal Principle of Practical Reason. It may be otherwise rendered thus, ‘It is a Duty to obey the Law of the existing Legislative Power, be its

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

origin what it may.”³⁴ According to Kant, the notion that all authority was derived from the omnipotence of God did not merely have historical importance. It created a duty, based on reason, for individual citizens to follow the temporal law set down by the legislative authority, since this legislative power was originally derived from the power of the divine.

Kant argued this meant the state held no duties toward its citizens: “Hence it follows, that the Supreme Power in the State has only Rights, and no (compulsory) Duties towards the Subject.”³⁵ God held rights but not duties toward mankind – likewise the power of the state, derived from and modeled upon divine omnipotence, created rights but not duties toward its citizens. According to Kant, because citizens were required to follow the supreme power of the state, they did not have any right to resist: “Further, if the Ruler or Regent, as the organ of the Supreme Power, proceeds in violation of the Law, as in imposing taxes, recruiting soldiers, and so on, contrary to the Law of Equality in the distribution of the political burdens, the Subject may oppose *complaints* and *objections* (*gravamina*) to this injustice, but not active resistance.”³⁶ Even when the ruler violated the laws of the state, citizens could voice their concerns but could not revolt against their ruler because when the ruler was acting under the state’s supreme power, the ruler had authority analogous to God. If people could not revolt against God, citizens could not revolt against their ruler.

Kant went so far as to argue that resistance against the government was a logical contradiction, and could not be included in the state’s constitution: “There cannot even be an Article contained in the political Constitution that would make it possible for a Power in the State, in case of the transgression of the Constitutional Laws by the Supreme Authority, to resist

³⁴ Emphasis in original, Immanuel Kant, *An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, trans. W. Hastie (Edinburgh: T. & T. Clark, 1887), 175.

³⁵ Ibid., 175.

³⁶ Emphasis in original, *ibid.*, 175.

or even to restrict it in so doing.”³⁷ As Kant asserted: “For, whoever would restrict the Supreme Power of the State must have more, or at least equal power as compared with the Power that is so restricted; and if competent to command the subjects to resist, such a one would also have to be able to *protect* them, and if he is to be considered capable of judging what is right in every case, he may also publicly order Resistance. But such a one, and not the actual Authority, would then be the Supreme Power; which is contradictory.”³⁸ The people resisting the state needed to have the power both to command those in rebellion against the government and to protect those resisting citizens. If the resisters had this power they would be the ones with the supreme power of the state and thus were already the true government. Therefore, it would only be a matter of time before the resisters would overthrow the officers of the false government. In Kant’s eyes, including a provision in a state’s constitution that allowed for resistance was contradictory because two supreme powers could never exist at the same time. The superior power would always defeat the inferior power. According to Kant, and Neumann by extension, there can only be one, indivisible sovereign that holds the power of governance in a nation.³⁹

Neumann’s next two objections to Wright drew on this notion of sovereignty. In his third objection, Neumann used the failure of the Weimar Constitution as an example to bolster his argument for undivided sovereignty. He noted that problems emerged in Germany when

³⁷ Ibid., 175.

³⁸ Emphasis in original, *ibid.*, 175.

³⁹ Neumann discussed sovereignty as early as his dissertation at the London School of Economics. Franz Neumann, “The Governance of the Rule of Law: An Investigation into the Relationship between the Political Theories, the Legal System, and the Social Backgrounds in the Competitive Society” (Ph.D. diss, The London School of Economics and Political Science, 1936), 209. The history of the idea of sovereignty in philosophy is a complicated one. Legal historian Alison LaCroix notes that preeminent seventeenth-century continental European thinkers Hugo Grotius and Samuel Pufendorf supported divisible sovereignty, drawing upon experiences in European colonial projects and the Holy Roman Empire. Alison LaCroix, *The Ideological Origins of American Federalism* (Cambridge, MA: Harvard University Press, 2010), 18-20. British legal thinker William Blackstone favored indivisibility of sovereignty. *Ibid.*, 19. What matters in this chapter is the interpretations of this history of sovereignty offered by the twentieth-century legal theorists discussed here.

constitutional and international law conflicted: “It might further be useful to analyse from this aspect one phenomenon of the Weimar Republic where the clash between two loyalties became visible and the conflict between them ended with the break up of allegiance to the international community.”⁴⁰ More specifically, Neumann wrote: “I am not referring to Art 4 of the Weimar Constitution which made the universally recognized rules of international law part and parcel of the German law. I should like to draw your attention rather to the attitude of the republican authorities and the Courts to ‘treason to the country’.”⁴¹ He elaborated on this issue of treason:

Whenever democrats, liberals, socialists and pacifists in their speeches or publications denounced the secret rearmament that was taking place as a violation of international treaties and an injury to the best interests of the nation, they were indicted for treason to the country while practically nothing was done to the ‘Black Reichswehr’. A provision of the criminal code intended to protect the country against the betrayal of military secrets to foreign agents was transformed into one for punishing those who insisted upon the fulfillment of international obligations.⁴²

Article V of the Treaty of Versailles, which ended World War I, greatly reduced the size of the German military in the Weimar Republic.⁴³ However, the Weimar German government began to reach a rapprochement with the German military forces of the *Reichswehr* (the “Defense of the Realm”) after the businessman Wilhelm Cuno was appointed German Chancellor in late 1922; this accelerated after French and Belgian troops moved into the industrial Ruhr region of Germany.⁴⁴ During this time, the *Reichswehr* flouted the Versailles Treaty by helping to arm

⁴⁰ Correspondence from Franz L. Neumann to Quincy Wright, November 23, 1940, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers.

⁴¹ Ibid. Article 4 of the Weimar Constitution stated: “The generally accepted regulations of international law apply as binding elements of the German law of the realm.” In the original German: “Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts.” Weimarer Reichsverfassung, Art. 4, in Heinrich Triepel, *Quellensammlung zum Deutschen Reichsstaatsrecht*, 5th ed. (Tübingen, Germany: J. C. B. Mohr (Paul Siebeck), 1931), 46.

⁴² Correspondence from Franz L. Neumann to Quincy Wright, November 23, 1940, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers.

⁴³ “The Versailles Treaty, June 28, 1919: Part V,” The Avalon Project, Yale Law School, accessed July 28, 2021, <https://avalon.law.yale.edu/imt/partv.asp>; Gaines Post, Jr., *The Civil-Military Fabric of Weimar Foreign Policy* (Princeton: Princeton University Press, 1973), 159.

⁴⁴ F. L. Carsten, *The Reichswehr and Politics: 1918 to 1933* (Oxford: Clarendon Press, 1966), 154.

and train paramilitary forces, with pecuniary support from the German government.⁴⁵ One of these paramilitary groups was the right-wing Black Reichswehr, to which Neumann referred.⁴⁶ Elements of the Black Reichswehr, led Major Ernst Buchrucker, attempted a putsch in Berlin in October 1923 against the Weimar government, but this rebellion ended in failure.⁴⁷ Neumann discussed this situation because the “democrats, liberals, socialists, and pacifists” who defended international law by criticizing rearmament and supporting the Versailles Treaty were precisely those persons condemned by German law for treason through what Neumann believed was a twisted interpretation of the criminal code.⁴⁸ In contrast, the members of the Black Reichswehr, who attacked the Versailles Treaty and staged a coup against the government were hardly punished for their actions. Based on this, Neumann told Wright: “The lessons which I draw is that the inevitable conflict between two loyalties will always result in sacrificing international law to the needs of a government in power.”⁴⁹

Neumann’s fourth argument against Wright was based on the possibility that totalitarian nations might not be destroyed: “Finally one observation must be made which transcends the remarks in your paper. Let us assume that National Socialism will not be defeated in this war and that totalitarian states will co-exist with democratic countries within an international society.”⁵⁰ This would create problems for liberal internationalists: “If we then insist upon the duty of the citizen towards the international community even if the latter duty should collide with his allegiance towards his government, we shall, thereby, open the door far more to a rebellion of

⁴⁵ Ibid., 154-56.

⁴⁶ Ibid., 168.

⁴⁷ Ibid., 168; Arthur L. Smith, Jr., “General von Seeckt and the Weimar Republic,” *Review of Politics* 20, no. 3 (July 1958): 352.

⁴⁸ Correspondence from Franz L. Neumann to Quincy Wright, November 23, 1940, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers.

⁴⁹ Ibid.

⁵⁰ Ibid.

the Fascist groups within a democratic country than to a revolution of anti-fascist groups within the totalitarian states.⁵¹ According to Neumann, if the Nazi state continued to exist alongside democratic nations, there was a possibility that Nazism could infect the international legal order.

Neumann was worried that Nazi efforts to abolish sovereignty threatened the liberal rule of law: “It is well known that the National Socialist theory is on the way to eliminate the concept of state sovereignty and to replace it by that of the supremacy of the racial people.”⁵² Neumann believed the elimination of sovereignty would not simply serve liberalism on the international level, as liberal international lawyers assumed:

State sovereignty, regressive as this concept may be in an international community, entirely composed of democratic societies, becomes progressive if and when applied to a mixed international community. State sovereignty (and that applies to all legal concepts of liberalism) has a delimiting function. It circumscribes the sphere of power, restricting it to a specific territory. It thereby creates competences which are clearly definable and calculable, which are, in short, rational. The sovereignty of a racial people, overthrows that liberal scheme. It establishes the allegiance of all racial Germans, whatever citizenship they may have, to the racial people represented by the leader. The National Socialist doctrine of international law is, so to speak, the legal basis for the Fifth Column.⁵³

If international law were influenced both by liberal democracies and by totalitarian states, Neumann believed indivisible state sovereignty was key to protecting the liberal international order because strong state sovereignty would shield liberal democracies from Nazi racial doctrine. Neumann elaborated on this point:

Now let us assume a system of a dual allegiance with a ‘mixed’ international community. Once the duty of the citizen towards the international community is established, that duty must apply to every state. For the two-sidedness of a legal norm, expressing its equality, is the very basis upon which law rests. If we grant to the totalitarian members the right to demand, let us say, from Americans of German descent, allegiance not solely to the

⁵¹ Ibid. Neumann also noted: “It is this last consideration which has induced me to place in my book on National Socialism a chapter entitled: In Defence of State Sovereignty.” Ibid. This was, of course, a reference to *Behemoth*, though Neumann changed the title of that chapter to “The New International Law.” Neumann, *Behemoth*, 150-71.

⁵² Correspondence from Franz L. Neumann to Quincy Wright, November 23, 1940, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers.

⁵³ Ibid.

United States government but to an international order the structure of which is also determined by the totalitarian states, then, by destroying the concept of state sovereignty, we have at once prepared the way for fascist infiltration. Any such provision of international law will ultimately be of far greater benefit to National Socialism than to democracy. National Socialism is, as we now know, far superior in propaganda than a democracy can ever be.⁵⁴

According to Neumann, indivisible national sovereignty would limit the influence of international law, preventing Nazi lawyers from undermining the domestic laws in liberal nations if the Nazis implemented racial laws at the international level. Although liberal democratic lawyers could also use international law to undermine racial laws in totalitarian states, Neumann believed these efforts would be unsuccessful. Thus, he concluded: “[I]t appears ot [*sic*] me that today the insistence on the sole duty of the citizen towards its own government is far more progressive than any restriction upon this duty by international law.”⁵⁵

Neumann’s arguments were akin those offered by other German émigré thinkers, particularly the political theorist Hans Morgenthau. Morgenthau’s career has become associated with the school of international relations known as *realism*, although he disagreed with many of its tenets.⁵⁶ According to political theorist William Scheuerman, Morgenthau’s ideas “developed a hard-headed theory of international politics attuned to the dynamics of power and its tendency

⁵⁴ Ibid.

⁵⁵ Emphasis in original, *ibid.* Neumann admitted his response was as much a discussion of his own theory as it was of Wright’s: “I apologize for the length of the letter and I am concious [*sic*] of the fact that my remarks are a little removed from the proposals which you develop.” *Ibid.* He also noted: “I have given a copy of this letter to Professor Jessup, with whom I have already discussed my apprehensions on this theme.” *Ibid.* This appears to reference Philip Jessup, a faculty member at Columbia Law School and in Columbia’s Political Science Department. Oscar Schachter, “Philip Jessup’s Life and Ideas,” *American Journal of International Law* 80, n. 4 (Oct. 1986), 881. Jessup served in World War I, interrupting his undergraduate studies at Hamilton College, then attended Columbia Law but transferred to Yale Law in 1924. *Ibid.*, 879-80. He obtained his Ph.D. at Columbia, focusing on the law of the sea. *Ibid.*, 880. Jessup supported American neutrality and joined the America First Committee in 1941. *Ibid.*, 882. The America First Committee was an organization created to advocate against American involvement in World War II; it began in 1940 as the Emergency Committee to Defend America First, and included, among others, Potter Stewart and Gerald Ford. Justus D. Doenecke, “Introduction: The Origins and Activities of the America First Committee,” in *In Danger Undaunted: The Anti-Interventionist Movement of 1940-1941 as Revealed in the Papers of the America First Committee*, ed. Justus D. Doenecke (Stanford: Hoover Institution Press, 1990), 7-8. Jessup abandoned this view only after the bombing of Pearl Harbor. Schachter, 882.

⁵⁶ William E. Scheuerman, *Hans Morgenthau: Realism and Beyond* (Cambridge: Polity Press, 2009), 11.

to distort law's underlying normative aspirations. Only a realistic assessment of power relations on the global scene could sufficiently explain the actual operations of the international legal order.”⁵⁷ Morgenthau's life had many parallels to Neumann's experiences – Morgenthau was also Jewish and likewise associated with SPD labor lawyer Hugo Sinzheimer in Weimar Germany.⁵⁸ He worked for Sinzheimer's law office and helped Sinzheimer with his work at the University of Frankfurt.⁵⁹ Morgenthau developed an interest in Carl Schmitt's writings, which influenced his own theories, much like Neumann.⁶⁰

Morgenthau's analysis of sovereignty shared many similarities to Neumann's theories – though the two appear to have developed their ideas separately. In his 1948 work *Politics Among Nations*, Morgenthau criticized the notion that national sovereignty could be divided: “We shall endeavor to show that the conception of a divisible sovereignty is contrary to logic and politically unfeasible, that it is, however, a significant symptom of the discrepancy between the actual and pretended relations which exist between international law and international politics in the modern state system.”⁶¹ According to William Scheuerman, Morgenthau's disdain for the idea of divided sovereignty can be traced back to Carl Schmitt, who believed that sovereignty was defined by those with the political power to make decisions in times of exigency.⁶² Thus, Neumann's preference for indivisible sovereignty, devised by continental European philosophers such as Kant, was shared by other German legal theorists, including Schmitt and Morgenthau.

⁵⁷ Ibid., 11-12.

⁵⁸ Ibid., 2, 12.

⁵⁹ Ibid., 12-13.

⁶⁰ Ibid., 32-35.

⁶¹ Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Alfred A. Knopf, 1948), 259. He also discussed this idea in a 1948 article in the *Columbia Law Review*, see Hans J. Morgenthau, “The Problem of Sovereignty Reconsidered,” *Columbia Law Review* 48, no. 3 (Apr. 1948): 360.

⁶² William E. Scheuerman, “Carl Schmitt and Hans Morgenthau: Realism and Beyond,” in *Realism Reconsidered: The Legacy of Hans Morgenthau in International Relations*, ed. Michael C. Williams (Oxford: Oxford University Press, 2007), 83-84; 92 fn. 81.

III. Quincy Wright's Notion of Divisible Sovereignty

Quincy Wright replied soon after Neumann's November 23rd letter with a response dated November 28, 1940.⁶³ Wright's reply evinced a fundamentally different understanding of sovereignty, one that was rooted in American history. Wright conceded to Neumann that seeking to punish the government as a separate entity from the state was an imperfect solution: "I do not have any illusions that adoption of the theory that sanctions should be directed against the government and not against the state would in all cases prevent the 'police action' against such a government from having all the characteristics of war."⁶⁴ While Wright believed his theory would not completely prevent war, he argued that it was an important rhetorical tool for achieving victory: "I think, however, there would be some advantages from the propaganda point of view while the operation was going on, but particularly after the operation was over. This basis would provide superior opportunities for reconciliation and reintegration of the state whose government had been in revolt against the international order."⁶⁵ Thus, the state could be absolved of responsibility, while the government and its leaders could still be held accountable for their jingoistic acts. This would allow those citizens who had supported the state but questioned the government to be more easily reintegrated into the international community.

Why did Wright place less emphasis on the sovereign authority of the national government and more emphasis on the power of individual people? Wright turned to American history to explain his understanding of national sovereignty. In his letter to Neumann, Wright discussed the relationship between the national and state governments in America: "[O]ne can recognize that the whole system of the federal government of the United States is based upon the

⁶³ Correspondence from Quincy Wright to Franz L. Neumann, November 28, 1940, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers.

⁶⁴ Ibid.

⁶⁵ Ibid.

assumption of federal authority to operate against officers and individuals within states, rather than of a federal police power directed against states as such, although in respect to civil action the case of Virginia against West Virginia indicated that such action might be taken.”⁶⁶ Wright’s statement reflects what American lawyers and courts have come to call “dual sovereignty,” in which sovereign authority is divided between the federal government and state governments.⁶⁷

In the late seventeenth and eighteenth centuries, the English and later British conception of sovereignty held that Parliament had governing authority and that this power was singular and indivisible.⁶⁸ Into the 1770s, many Americans retained this position, especially after the publication of William Blackstone’s *Commentaries on the Laws of England*.⁶⁹ However, as the American colonists moved toward revolution, they increasingly called into question the legitimacy of Parliamentary authority.⁷⁰ As time wore on, Americans found fundamental sovereignty elsewhere, first with their colonial (and later state) legislatures and finally with the American people.⁷¹ Placing sovereignty with the people ultimately justified dual sovereignty – the American people, who held supreme political authority, could split their authority as they saw fit between various bodies of government, including the state and national governments.⁷²

⁶⁶ Ibid. There are several Supreme Court cases named *Virginia v. West Virginia*. It is likely Wright was referring to *Virginia v. West Virginia*, 246 U.S. 565 (1918), rather than *Virginia v. West Virginia*, 78 U.S. 39 (1871) or *Virginia v. West Virginia*, 220 U.S. 1 (1911), because the 1918 case most explicitly dealt with federal authority to adjudicate cases between American states. This 1918 case stated that the U.S. Congress has legislative authority over contracts between states, *Virginia*, 246 U.S. at 601-2, and that Congress could create remedies for the federal judiciary, including the Supreme Court, to enforce such contracts, *ibid.* at 603.

⁶⁷ Randy J. Holland, Stephen R. McAllister, Jeffrey M. Shaman, and Jeffrey S. Sutton, *State Constitutional Law: The Modern Experience*, 2nd ed. (St. Paul, MN: West Academic Publishing, 2016), 1.

⁶⁸ Gordon S. Wood, *The Creation of the American Republic 1776-1787* (Chapel Hill, NC: The University of North Carolina Press, 1998), 345-47.

⁶⁹ Ibid., 350.

⁷⁰ Ibid., 352.

⁷¹ Ibid., 352, 383; Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: The Belknap Press, 1992), 228.

⁷² Gregory Ablavsky, “Empire States: The Coming of Dual Federalism,” *Yale Law Journal* 128, no. 7 (May 2019): 1795. The history of sovereignty in America is complex and historians continue debating how dual sovereignty supplanted the notion of unitary sovereignty inherited from Great Britain in the eighteenth century. Gordon Wood argues that Parliamentary supremacy over unitary sovereignty in Great Britain was slowly replaced in the American colonies by the notion of state legislative supremacy over sovereignty, followed by the emergence of the belief that

In his letter to Neumann, Wright invoked the “police power,” a legal term of art in the U.S. indicating the lawmaking authority held by state governments that has not been transferred over to the federal government.⁷³ The federal government only holds power to legislate over the subject matter specifically enumerated in the U.S. Constitution.⁷⁴ Wright restated the traditional American position that the federal government’s lawmaking power is applicable to officials and individuals in the United States, but is limited in its applicability to state governments because these states retain sovereign lawmaking authority over certain subject matter. The dividing line between federal sovereignty and state sovereignty has rarely been clear.⁷⁵ This is why Wright noted that in *Virginia v. West Virginia*, the U.S. Supreme Court indicated in certain civil cases in which a state brought suit against another state, the federal government may step in to mediate between the states through legislation or to enforce judgments.⁷⁶

Wright contrasted the American understanding of dual sovereignty with the notion of sovereignty developed in Germany: “In this respect, as you know, the American Constitution is different from that of Germany, (1871) and other federations where a process of federal execution existed. Such a procedure, however, was explicitly turned down by the makers of the American Constitution for reasons which are fully explained in the Federalist.”⁷⁷ After the

the people held sovereignty around the time of the drafting of the U.S. Constitution in the 1780s. Wood, 345-47, 352, 388-89. Gregory Ablavsky asserts that the emphasis on the sovereign supremacy of colonial and later state legislatures during the early years of American independence allowed for the centralization and consolidation of diffuse colonial governance, which was followed by the emergence of dual sovereignty between the state and federal governments with the passage of the U.S. Constitution. Ablavsky, 1796. Alison LaCroix says the U.S. Constitution divides sovereignty based on legal subject matter, horizontally at the federal level, between the legislative, executive, and judicial branches, and vertically, between the federal and state governments. LaCroix, 9-10.

⁷³ Correspondence from Quincy Wright to Franz L. Neumann, November 28, 1940, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers; Santiago Legarre, “The Historical Background of the Police Power,” *University of Pennsylvania Journal of Constitutional Law* 9, no. 3 (Feb. 2007): 747-48.

⁷⁴ *Ibid.*, 778-79.

⁷⁵ Kathleen M. Sullivan and Noah Feldman, *Constitutional Law*, 19th ed. (St. Paul, MN: Foundation Press, 2016), 77-78.

⁷⁶ Correspondence from Quincy Wright to Franz L. Neumann, November 28, 1940, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers.

⁷⁷ Emphasis in original, *ibid.*

creation of the German Empire in 1871, a major legal question emerged – did the unified imperial government now hold sovereignty or did the constituent states of the Empire retain their sovereign authority?⁷⁸ According to legal historian Michael Stolleis: “The majority of thinkers in the field of the doctrine of constitutional law after 1871 took the position that the German states as a whole, and not the individual states, were sovereign because a division of sovereignty contradicts the ‘concept.’”⁷⁹ Stolleis elaborated on how this was put into practice: “Most authors were agreed that the Empire had the right to decide in all jurisdictions, and that a distribution of state functions between the Empire and the states could be harmonized with this, as could an institutionalized participation of the states in imperial affairs. This last was precisely the bridge allowing the states to take part in the (undivided) sovereignty of the whole state.”⁸⁰ Unlike in the U.S., dual sovereignty was largely rejected in Imperial German constitutional law. Instead the Germans argued that undivided sovereignty was maintained by the national government. As Wright noted, the German position was contrary to the stance taken in *The Federalist Papers* by James Madison in essay number 45, where he declared: “[T]he States will retain under the proposed Constitution a very extensive portion of active sovereignty [...]”⁸¹

In his letter to Neumann, Wright clearly preferred the American framework of divided sovereignty: “My own studies of the psychology of international relations persuade me that divided loyalties are a thing which must be worked toward.”⁸² Wright conceded that this idea of sovereignty was more difficult to maintain because it was inherently more complex: “It is of

⁷⁸ Michael Stolleis, *Public Law in Germany 1800-1914*, trans. Pamela Biel (New York: Berghahn Books, 2001), 341.

⁷⁹ Ibid., 343.

⁸⁰ Ibid., 343.

⁸¹ James Madison, “*The Federalist*, 45,” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Lawrence Goldman (Oxford: Oxford University Press, 2008), 228, 229.

⁸² Correspondence from Quincy Wright to Franz L. Neumann, November 28, 1940, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers.

course psychologically easier for individuals to accept sovereignty of a single symbol and to divert their natural ambivalences by centering all hatreds upon an external enemy.”⁸³ However, despite these issues, Wright was optimistic that the framework of multiple sovereignties could be maintained and would even help strengthen democracies:

The psychology of this mechanism has, I think, been well explained in the recent book by Durbin and Bowlby (Personal Aggressiveness in War, Columbia University Press, 1939), but the moral I would draw from it is that we must recognize the existence of divided loyalties and ambivalences in individuals and that they must effect a subjective reconciliation in every instance and not try to lead the easy life of throwing all the difficulties upon a scapegoat. The latter method is the method of despotism and dictatorship. Democracy, however, implies individual responsibility, oft assumes that the individual is a member of many groups to whom he owes a certain loyalty, whose actions he is always prepared to criticize, among which he must chose as crises arise.⁸⁴

For Wright, the democratic citizen needed to constantly assess her own identity and interests.

This self-understanding could easily conflict with other members of society and self-identity might even entail contradictions that had to be resolved. Yet such active citizenship was precisely what democracy required, and Wright believed that dual sovereignty, with all its complexities, fit well into this democratic framework. Wright conceded that the process of dividing sovereign authority between nation-states and international law would be arduous, but the American experience of dual sovereignty gave him confidence that it was possible. As he wrote to Neumann: “Of course I would agree with you that when the actual situation is that individuals devote exclusive loyalty to the government of the nation, international law is bound to suffer when a conflict arises. The point is that international law must in some way get behind it an equal measure of loyalty, in the same way that the federal law of the United States

⁸³ Ibid.

⁸⁴ Emphasis in original, *ibid.* This passage includes several hand-written edits, presumably written by Wright. See also, E. F. M. Durbin and John Bowlby, *Personal Aggressiveness and War* (New York: Columbia University Press, 1939).

eventually got behind it even more loyalty than that which people gave to the state.”⁸⁵ Even during World War II, Wright was convinced that international law, strengthened by a greater division between national and international sovereignty, could bring about the prospect of peace.

In a subsequent letter dated December 10, 1940, Neumann sent a complimentary response to Wright, replying: “Your letter of November 28th, 1940 is a masterful exposition of your ideas which has almost convinced me. I want to thank you very much for your long and thoughtful analysis.”⁸⁶ Indeed, Neumann noted that he agreed with Wright on their fundamental position: “I, too, am fully convinced that an international order (and by the way even a national order based on the rule of law), can only be constructed if we do away with blind allegiance to established authorities. The critical individual is, and must become, the final agent for responsibility.”⁸⁷ Nevertheless, Neumann observed that Wright had not changed his thinking on sovereignty: “The difference between us is thus reduced merely to a tactical one, that arises in our evaluation of the role of sovereignty in today’s international order.”⁸⁸ Neumann voiced a corollary to his critique of divided sovereignty, arguing that pluralistic definitions of sovereignty could also undermine international law:

I cannot accept complete identification of the various kinds of sovereignty. It is, in my view, not without importance whether we establish the sovereignty of a “state” or of a race. Sovereignty of the state always contains elements of rationality in international relations; while sovereignty of the racial people (of the “community”) contains none. The former is thus limited, even if it claims to be absolutistic; the latter is unlimited even if it claims to be restricted.⁸⁹

⁸⁵ Correspondence from Quincy Wright to Franz L. Neumann, November 28, 1940, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers.

⁸⁶ Correspondence from Franz L. Neumann to Quincy Wright, December 10, 1940, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

Neumann remained concerned that an elastic understanding of sovereignty in international law could give Nazi lawyers the opportunity to define sovereignty in terms of racial power. If sovereignty were merely consigned to the authority of the state, despite the limitations of such a definition, Neumann was confident this would help curb Nazi influence over international law.

Wright replied to Neumann in a letter dated December 14, 1940, pointing out where they concurred: “From your letter of December 10, I think we are in agreement as to the nature of sovereignty and the best way of defining it. An absolutistic conception of sovereignty however defined is dangerous. The critical individual, as you say, must become the final agent for responsibility.”⁹⁰ In particular, Wright believed Neumann’s idea of sovereignty was better than many alternatives: “I would agree with you that the geographical definition of sovereignty is preferable to a racial, cultural or other definition [...]”⁹¹ But Wright remained skeptical of Neumann’s geographic definition of sovereignty: “This general convenience of territorial sovereignty, however, should not blind us to the possibility of special situations where functional, cultural, racial or other groups might be given a considerable autonomy under law.”⁹² Wright set out a pluralist vision for the future of sovereign authority: “My view is that if we are to have a successful world order, we must get over thinking of any group such as the nation, the state, the race as being ‘natural.’ All groups are human constructions and are therefore artificial.”⁹³ According to Wright, if sovereignty were viewed from an international perspective, a cosmopolitan understanding of international law would follow: “We should view the world as a whole and ask what are, considering historical customs, cultural differences, administrative

⁹⁰ Correspondence from Quincy Wright to Franz L. Neumann, December 14, 1940, Box 49, Folder 1, Neumann, Franz L. 1940-1941, Wright Papers.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

convenience and other factors, the most useful boundaries to draw in the world and the most useful groups to recognize as having political and administrative powers under international law. The essential point is to incorporate in political thinking, the philosophical principle that the whole is greater than the parts. Consideration of the world as a whole deserve a priority over considerations of any particular racial, cultural or political group of the past.”⁹⁴

Although Neumann and Wright did not resolve their differences, their discussion illustrates the fruitful dialogue between German émigré jurists and their American counterparts in the 1940s. In *Behemoth*, Neumann remained critical of the position taken by Wright.⁹⁵ Yet despite his criticism, in a footnote in his book Neumann thanked Wright warmly for their discussion.⁹⁶ The aftermath of the Second World War would accelerate the importance of the ideas Neumann and Wright discussed, hastening the need to define the relationship between national sovereignty and international law, especially for international criminal law.

IV. The Nuremberg Trials: Organizing a Path for International Justice

Despite Neumann’s strong criticisms of liberal international lawyers, he soon was part of the most pivotal event in twentieth century international law. On April 29, 1945, U.S. Supreme Court Justice Robert H. Jackson indicated to U.S. President Harry Truman that he was willing to serve as the chief American prosecutor at the Nazi war crimes trial, which would become known as the Nuremberg Trial.⁹⁷ Jackson chose William J. Donovan and the agency he headed, the Office of Strategic Services (OSS), to assist in preparation for the prosecution.⁹⁸ Members of the Central European Section of the OSS Research and Analysis Branch, including Neumann and

⁹⁴ Ibid.

⁹⁵ As stated above, Neumann, *Behemoth*, 167.

⁹⁶ Ibid., 494 fn. 99.

⁹⁷ Bradley F. Smith, *The Road to Nuremberg* (New York: Basic Books, 1981), 208.

⁹⁸ Katz, 51; Douglas C. Waller, *Wild Bill Donovan: The Spymaster Who Created the OSS and Modern American Espionage* (New York: Free Press, 2011), 2.

Otto Kirchheimer, helped the Office of the Secretary of War's legal department get ready for the trial.⁹⁹ The staff for the Office included the lawyers Telford Taylor and Benjamin Kaplan.¹⁰⁰

Taylor, like Jackson, was originally from Upstate New York, born in 1908 in Schenectady.¹⁰¹ He attended Williams College, completing his studies in 1928, and then went to Harvard Law School, graduating in 1932.¹⁰² In the 1930s and 1940s he worked his way through the alphabet soup of President Roosevelt's New Deal agencies. In 1933, he began his work in Washington, D.C., first at the Department of the Interior, then at the Agricultural Adjustment Administration (AAA).¹⁰³ While at AAA he worked under Alger Hiss.¹⁰⁴ Next, Taylor was employed by the Senate Committee on Interstate Commerce, then became the Attorney General's Special Assistant.¹⁰⁵ Jackson was Attorney General for part of this time, and Taylor met him while working as Special Assistant.¹⁰⁶ Later, Taylor worked at the Department of Justice, and from 1940 to 1942 he served as the Federal Communications Commission (FCC) general counsel.¹⁰⁷ In October 1942, Taylor became a Major in the U.S. Army and worked in intelligence, leading the American contingent at the Bletchley Park codebreaking facilities in the United Kingdom.¹⁰⁸ According to Taylor, Justice Jackson sent a request to the U.S. War Department specifically requesting that Taylor work on the legal staff preparing for the trial of German war criminals.¹⁰⁹ After receiving Jackson's request, Taylor chose to join him.¹¹⁰

⁹⁹ Katz, 51.

¹⁰⁰ Ibid., 51.

¹⁰¹ "In Memoriam: Telford Taylor," *Holocaust and Genocide Studies* 12, no. 3 (Winter 1998): 520; Katie Louchheim, ed., *The Making of the New Deal: The Insiders Speak* (Cambridge, MA: Harvard University Press, 1983), 329; Philip Halpern, "Robert H. Jackson, 1892-1954," *Stanford Law Review* 8, no. 1 (Dec. 1955): 3.

¹⁰² Louchheim, 329; "In Memoriam: Telford Taylor," 520.

¹⁰³ Louchheim, 329.

¹⁰⁴ Ibid., 329.

¹⁰⁵ Ibid., 329.

¹⁰⁶ Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992), x.

¹⁰⁷ Louchheim, 329.

¹⁰⁸ Ibid., 329; "In Memoriam: Telford Taylor," 520; Taylor, *The Anatomy*, ix; Bush, "Soldiers Find Wars," 678.

¹⁰⁹ Taylor, *The Anatomy*, ix-x.

¹¹⁰ Ibid., xi.

Benjamin Kaplan was born in New York City in the Bronx in 1911.¹¹¹ After completing high school at age 14, Kaplan attended the City College of New York, followed by Columbia Law School, where he was the *Columbia Law Review* chief editor and graduated in 1933.¹¹² He went into private practice and then moved to Washington, D.C., where he worked on legal issues for the U.S. military, particularly on matters of contract law.¹¹³ He was also an early member of the prosecution team assembled by Justice Jackson. Telford Taylor noted that Kaplan was his “office neighbor” and described him as “an exceptionally able New York lawyer [...]”.¹¹⁴

In 1945, Franz Neumann helped with preliminary trial preparations, as described by David Zablodowsky in a report to William Donovan dated October 6, 1945: “On the substantive side not much has been turned out in volume simply because we have not yet been approached with firm requests for such work except by Dr. Neumann. In collaboration with his staff we have just completed a very large and complex chart on the organization of the Reich government, its structure and personnel.”¹¹⁵ When preparing for the trial, the Americans also conducted interrogations of the imprisoned German defendants in October 1945.¹¹⁶ It appears that

¹¹¹ Jonathan A. Bush, “Benjamin Kaplan Obituary,” *The Guardian*, October 26, 2010, <https://www.theguardian.com/law/2010/oct/26/benjamin-kaplan-obituary>; “Royall Professor of Law Emeritus Benjamin Kaplan [1911-2010],” *Harvard Law Today*, August 19, 2010, <https://today.law.harvard.edu/royall-professor-of-law-emeritus-benjamin-kaplan-1911-2010/?redirect=1>.

¹¹² Bush, “Benjamin Kaplan.”

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*; Taylor, *The Anatomy*, 48.

¹¹⁵ David Zablodowsky to Comdr. Donovan, “Report, Presentation Branch,” October 6, 1945, Subdivision 58, Presentation Branch, William J. Donovan Nuremberg Trials Collection, Cornell University Law Library, Cornell University, Ithaca, NY (hereafter referred to as the Donovan Papers). Although Neumann is not identified by his full name, it is likely Franz Neumann because he was identified as “Dr. Neumann,” a title he held after obtaining his Ph.D. from the University of London, and also because he was involved in Trial preparation during his time working for the OSS under William Donovan.

¹¹⁶ Ann Tusa and John Tusa, *The Nuremberg Trial* (London: Macmillan, 1983), 130-31.

Neumann assisted in preparing draft summaries of these interrogations for Donovan.¹¹⁷

Neumann was also influential in the drafting of the indictments of the defendants.¹¹⁸

The International Military Tribunal (IMT), known colloquially as the first Nuremberg Trial, began on November 20, 1945, and Justice Jackson issued his opening statement the next day, on November 21st.¹¹⁹ The court would weigh the culpability of twenty-two Nazi military and political leaders accused of war crimes during World War II.¹²⁰ Overseeing the trial were eight judges, two from each Allied nation – the U.S., U.K., France, and the Soviet Union.¹²¹ The Tribunal began issuing its decisions starting on September 30, 1946, but did not rule against the defendants themselves until October 1st.¹²² Three defendants were acquitted, and of those found guilty, eleven were given a death sentence.¹²³ After the first Nuremberg Trial, the Allied prosecutors discussed the possibility of holding additional trials starting in 1946.¹²⁴ Taylor

¹¹⁷ For examples, see Neumann, “Defendant Hermann Goering,” undated, Subdivision 62, Memorandum in Preparation of Case, Donovan Papers; Neumann, “Defendant Albert Speer,” undated, Subdivision 62, Memorandum in Preparation of Case, Donovan Papers; Neumann, “Defendant Gustav Krupp von Bohlen und Halbach,” undated, Subdivision 62, Memorandum in Preparation of Case, Donovan Papers; Neumann, “Defendant Rudolf Hess,” undated, Subdivision 62, Memorandum in Preparation of Case, Donovan Papers. These drafts are only identified as “Neumann rough draft, unedited” rather than by a full name. Franz Neumann worked for William Donovan at the OSS and specifically worked on the Nuremberg preparation, so it is likely Franz prepared these drafts.

¹¹⁸ Michael Salter, *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg: Controversies Regarding the Role of the Office of Strategic Services* (Abingdon, UK: Routledge-Cavendish, 2007), 6, 333.

¹¹⁹ Francine Hirsch, *Soviet Judgment at Nuremberg: A New History of the International Military Tribunal after World War II* (New York: Oxford University Press, 2020), 138; Tusa and Tusa, 146; *The Trial of German Major War Criminals by The International Military Tribunal Sitting at Nuremberg Germany (Commencing 20th November, 1945): Opening Speeches of the Chief Prosecutors for The United States of America; The French Republic; The United Kingdom of Great Britain and Northern Ireland; and The Union of Soviet Socialist Republics* (London: H.M. Stationary Office, 1946), 3.

¹²⁰ Hirsch, 139; Tusa and Tusa, 93. There had been plans to place the industrialist Gustav Krupp von Bohlen und Halbach on trial, but his son Alfried had actually managed the Krupp enterprises after 1943 during the War, and the elder Krupp was elderly and in very poor health. Ibid., 93-94. The IMT judges rejected attempts by the Allied prosecutors to have an *in absentia* trial for Gustav or to substitute Alfried for his father. Ibid., 139-40. The Allies had planned on trying Robert Ley, former head of the German Labor Front, but he killed himself the night of October 25, 1945. Hirsch, 53, 110-11.

¹²¹ Tusa and Tusa, 12.

¹²² Hirsch, 380-81, 384; Tusa and Tusa, 11-12.

¹²³ Hirsch, 387; Tusa and Tusa, 468-70, 472. A twelfth death sentence was handed down for the defendant Martin Bormann, but he had been tried *in absentia* by the IMT because he could not be located. Hirsch, 139, 387.

¹²⁴ Jonathan A. Bush, “The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said,” *Columbia Law Review* 109, no. 5 (June 2009): 1115.

avored further proceedings against the Germans, though there was much debate over whether they were necessary – the British government was increasingly frosty toward holding additional international trials.¹²⁵ During these deliberations, Taylor was designated as the American prosecutor for future trials, although in April 1946 Jackson emphasized the United States might withdraw from additional prosecutions.¹²⁶ In October 1946, Jackson informed Taylor that other international trials would not be forthcoming.¹²⁷ Nevertheless, in May 1946 Taylor prepared the American prosecution team for trials in the American zone of occupation in Germany.¹²⁸ These twelve trials were against an array of defendants, including industrialists in the Krupp and I.G. Farben combines, banks, government bureaucrats, and other Nazis.¹²⁹

In late 1948, Taylor sent letters to various politicians, professors, and jurists about his plans to prepare a study of international criminal law based on the Nuremberg Trials. From his office in the Pentagon, Taylor wrote to Carl Friedrich at Harvard in a letter dated December 28, 1948: “I am enclosing half a dozen copies of a memorandum which I recently prepared, and which undertakes to outline some of the more important legal and historical problems growing out of the war crimes trials. I have been following up your suggestions in our conversation in Nurnberg last fall, and prepared this as a sort of ‘sales talk’.”¹³⁰

Taylor also wrote to Sheldon Glueck at Harvard Law School on December 16, 1948.¹³¹ Glueck responded to Taylor on December 20, 1948, praising Taylor’s “Outline of the Research

¹²⁵ Ibid., 1115-17.

¹²⁶ Ibid., 1115, 1123-24.

¹²⁷ Ibid., 1130.

¹²⁸ Ibid., 1130.

¹²⁹ Bush, “Soldiers Find Wars,” 682-83.

¹³⁰ Correspondence from Telford Taylor to Carl Friedrich, December 28, 1948, Box 47, TTP-5-3-3-31: “An Outline of the Research on Publication Possibilities of the War Crimes Trials” (November 1948): Correspondence (1948-1949), Taylor Papers.

¹³¹ Correspondence from Telford Taylor to Sheldon Glueck, December 16, 1948, Box 47, TTP-5-3-3-31: “An Outline of the Research on Publication Possibilities of the War Crimes Trials” (November 1948): Correspondence (1948-1949), Taylor Papers.

and Publication Possibilities of the War Crimes Trials.”¹³² Glueck noted that the Carnegie Endowment for International Peace could be a good source of financing for this research.¹³³ Taylor responded to Glueck in a letter dated December 28, 1948, writing: “Thanks no end for your very kind and encouraging letter. In fact, I have already been in touch with the Carnegie Endowment for International Peace, and have had two or three good talks with Dr. Shotwell, who is pinch-hitting there while the Hiss-Chambers affair runs its course.”¹³⁴ He continued, stating: “As a matter of fact, your suggestion that the Carnegie Endowment take the lead in calling together a small group parallels exactly what I have had in mind – or rather in hope. At the moment, things are moving slowly – again for reasons growing out of the Hiss-Chambers affair – and the thought seems to be that nothing much can be done until Dr. Jessup gets back from Europe.”¹³⁵ The “Hiss-Chambers affair” referred to Alger Hiss, the president of the Carnegie Endowment.¹³⁶ It is possible that Taylor contacted the Endowment through Hiss because Taylor had known Hiss since 1935, when they worked together at AAA.¹³⁷

¹³² Correspondence from Sheldon Glueck to Telford Taylor, December 20, 1948, Box 47, TTP-5-3-3-31: “An Outline of the Research on Publication Possibilities of the War Crimes Trials” (November 1948): Correspondence (1948-1949), Taylor Papers.

¹³³ Ibid.

¹³⁴ Correspondence from Telford Taylor to Sheldon Glueck, December 28, 1948, Box 47, TTP-5-3-3-31: “An Outline of the Research on Publication Possibilities of the War Crimes Trials” (November 1948): Correspondence (1948-1949), Taylor Papers. Taylor also mentioned the “Hiss-Chambers” affair in his letter to Carl Friedrich. Correspondence from Telford Taylor to Carl Friedrich, December 28, 1948, Box 47, TTP-5-3-3-31: “An Outline of the Research on Publication Possibilities of the War Crimes Trials” (November 1948): Correspondence (1948-1949), Taylor Papers. James T. Shotwell was born in Canada in 1874, and after attending the University of Toronto went to study at Columbia University; he became a historian of the Middle Ages in the History and Political Science Department at Columbia in 1904. Charles DeBenedetti, “James T. Shotwell and the Science of International Politics,” *Political Science Quarterly* 89, no. 2 (June 1974): 380-81.

¹³⁵ Correspondence from Telford Taylor to Sheldon Glueck, December 28, 1948, Box 47, TTP-5-3-3-31: “An Outline of the Research on Publication Possibilities of the War Crimes Trials” (November 1948): Correspondence (1948-1949), Taylor Papers.

¹³⁶ G. Edward White, *Alger Hiss's Looking-Glass Wars: The Covert Life of a Soviet Spy* (Oxford: Oxford University Press, 2004), 44.

¹³⁷ Louchheim, 329.

Hiss was born in Baltimore, Maryland, in 1904; he graduated from Johns Hopkins in 1926 and Harvard Law in 1929.¹³⁸ He was on law review at and befriended Felix Frankfurter, who suggested to Justice Oliver Wendell Holmes, Jr., that Hiss serve as his secretary for the Supreme Court's 1929 term.¹³⁹ After working in private practice for several years, in 1933, upon Frankfurter's suggestion, Hiss went to Washington, D.C., to work for AAA.¹⁴⁰ In July 1934 Hiss started working for the Senate's Nye Committee, led by North Dakota Senator Gerald Nye, which focused on businesses dealings in munitions during the First World War.¹⁴¹ Hiss was still connected with AAA, but left in May 1935 to work primarily for the Nye Committee.¹⁴²

In August 1935, he joined the Department of Justice, and in September 1936 began working for the State Department.¹⁴³ During World War II, Hiss became close with Edward Stettinius and Dean Acheson at the State Department.¹⁴⁴ Stettinius was Secretary of State for President Roosevelt, while Acheson served as Assistant Secretary of State.¹⁴⁵ Hiss worked as the executive secretary at the Dumbarton Oaks Conference in August 1944, which served as the basis for the United Nations Charter.¹⁴⁶ He traveled with Stettinius to the Yalta Conference in February 1945, where the Americans, Soviets, and British set forth their plans for Europe after the end of the War.¹⁴⁷ In April 1945, Hiss was appointed secretary general of the United Nations Conference in San Francisco, assisting in the creation of the new international institution.¹⁴⁸

¹³⁸ Ibid., 329; White, 5.

¹³⁹ Ibid., 12-13.

¹⁴⁰ Ibid., 27-28.

¹⁴¹ Ibid., 31; Allen Weinstein, *Perjury: The Hiss-Chambers Case*, 3rd ed. (Stanford: Hoover Institution Press, 2013), 153.

¹⁴² Ibid., 164.

¹⁴³ Ibid., 164, 227.

¹⁴⁴ Ibid., 372.

¹⁴⁵ S. M. Plokhy, *Yalta: The Price of Peace* (New York: Penguin Books, 2011), 5, 8; White, 46.

¹⁴⁶ Weinstein, 372; Borgwardt, 142.

¹⁴⁷ Weinstein, 362, 386; White, 44.

¹⁴⁸ Weinstein, 374; Plokhy, 355.

The “Hiss-Chambers affair” Taylor referred to was a key moment in the Cold War. In September 1945, a Soviet embassy worker in Canada defected and indirectly implicated Hiss as a Soviet agent in a discussion with the FBI.¹⁴⁹ The FBI then contacted the State Department, providing them with a 1942 interview with Whittaker Chambers.¹⁵⁰ State Department investigators discussed the matter with Chambers in March 1945 and Chambers accused Hiss of being a Communist spy.¹⁵¹ In spring 1946, Secretary of State James Byrnes suggested that Hiss speak with the FBI about these accusations, but by autumn 1946 efforts were made to remove Hiss from the State Department.¹⁵² In February 1947, Hiss joined the Carnegie Endowment as its new president.¹⁵³ He obtained the job with the help of Dean Acheson in the autumn of 1946 – Acheson put Hiss in contact with John Foster Dulles, a board member of the Endowment.¹⁵⁴ Then, in August 1948, Chambers publicly denounced Hiss as a Communist before the Congressional House Un-American Activities Committee, and in November and December 1948 Chambers presented State Department records he said Hiss had gathered for Soviet espionage.¹⁵⁵

Despite the public scrutiny of Hiss, Taylor pressed forward with his Carnegie Endowment project, but by 1949 he also faced difficulties with war crimes prosecutions as the Allied desire for a Cold War détente with Germany was emerging and the importance of the subsequent Nuremberg Trials was waning.¹⁵⁶ It was even alleged that Taylor’s exposition of the subsequent trials might not be released by American authorities.¹⁵⁷ However, the French and

¹⁴⁹ White, 49.

¹⁵⁰ Ibid., 49.

¹⁵¹ Ibid., 49-50.

¹⁵² Ibid., 50.

¹⁵³ Ibid., 50.

¹⁵⁴ Ibid., 50.

¹⁵⁵ Plokhy, 356.

¹⁵⁶ Bush, “Soldiers Find Wars,” 683.

¹⁵⁷ Ibid., 683.

British pushed for its publication and it ultimately was issued on August 15, 1949.¹⁵⁸ When Taylor left the military in 1949, he went back to the U.S. to practice law in New York with Lloyd Garrison, a colleague from his years in the Roosevelt administration.¹⁵⁹

V. Sovereignty Transformed: The Legacy of the Nuremberg Trials

After helping prepare for the first Nuremberg Trial, Neumann returned to Columbia from 1946 to 1947 to work with the University Seminar of the State, and in 1948 he obtained a job in the Department of Public Law and Government as a visiting professor, becoming a full professor in 1950.¹⁶⁰ As early as spring 1949, Neumann played an important role in helping to organize the Carnegie Endowment project with Taylor.¹⁶¹ Taylor had held Neumann in high regard during the preparations for the first Nuremberg Trial because of Neumann's vast knowledge of the Nazi regime – Taylor believed Jackson's blunders during the Trial could be blamed on his failure to make use of the intelligence gathered by Neumann.¹⁶² By late 1949 and early 1950, Taylor's research program was gaining steam. On January 26, 1950, Taylor sent a letter to James T. Shotwell at the Carnegie Endowment discussing the financial support the Endowment agreed to provide for the "Committee on War Crimes Research" and a "Subcommittee" to outline the studies proposed.¹⁶³ Taylor noted the Subcommittee had gathered together at Harvard Law to iron out the project details – the Subcommittee included Taylor, Neumann,

¹⁵⁸ Ibid., 683; Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10* (Washington, DC: 1949).

¹⁵⁹ Bush, "Soldiers Find Wars," 683.

¹⁶⁰ David Kettler and Thomas Wheatland, *Learning from Franz L. Neumann: Law, Theory and the Brute Facts of Political Life* (London: Anthem Press, 2019), 388.

¹⁶¹ Correspondence from Franz L. Neumann to James T. Shotwell, "Agenda for War Crimes Conference," April 11, 1949, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers.

¹⁶² Salter, 372-73. Taylor worked with Neumann to call attention to the rather hands-off approach Jackson took toward choosing which defendants to indict – which ultimately caused the debacle over the indictment of Gustav rather than Alfried Krupp. Ibid., 372-73; Taylor, *The Anatomy*, 90.

¹⁶³ Correspondence from Telford Taylor to James T. Shotwell, January 26, 1950, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers.

Herbert Wechsler, Benjamin Kaplan, and David Cavers, while Carl Friedrich was also involved to some extent.¹⁶⁴ By late March of 1950, the Committee's work appeared to be in full swing.¹⁶⁵

Taylor also told Shotwell in his January 26, 1950, letter that Neumann would head a project on the international law of military occupation:

A special study of the entire problem of occupation in the light of war crimes documents and testimony and other related material. This would not be confined or even primarily directed to the legal phases of occupation [...], but would comprehend all political, social and economic aspects of the problem in the light of the enormous and varied experience of the war and post-war years, both in Europe and the Far East. Professor Neumann will formulate this project.¹⁶⁶

Taylor likely took an interest in this project because he had discussed this issue at length before.

In a memorandum dated March 28, 1949, entitled "Suggestions for Agenda for Dr. Shotwell's War Crimes Conference," Taylor asserted: "There may be considerable difference of opinion on the importance of this project; some may feel that another war is likely to be so terrible and total a conflict that the laws of war can do little to mitigate its ravages, and that therefore this topic does not deserve to be placed on the same level with those heretofore discussed."¹⁶⁷ Yet he argued that there were "subjects in this field which are of utmost importance in the event of

¹⁶⁴ Ibid. Taylor was rather ambivalent about including Friedrich because he thought Friedrich would emphasize political science too heavily. Correspondence from Telford Taylor to Ben Kaplan, January 6, 1950, Box 45, TTP-5-3-1-2: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (Jan. 1950-Apr. 1950), Taylor Papers. A set of suggestions for a cover letter to Shotwell emphasized the fact that lawyers primarily made up the Subcommittee and noted the project would have a legal emphasis. "Possible Insert after first paragraph in Taylor's covering letter to Dr. Shotwell," undated, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers.

¹⁶⁵ A March 20, 1950, letter from Neumann to Kaplan bore the official letterhead of the "Carnegie Endowment for International Peace" for the "Committee on War Crimes Research." Correspondence from Franz L. Neumann to Benjamin Kaplan, March 20, 1950, Box 1, Folder 7: Correspondence of Franz Neumann, Benjamin Kaplan Papers, Historical & Special Collections, Harvard Law School Library, Harvard University, Cambridge, MA (hereafter referred to as the Kaplan Papers).

¹⁶⁶ Correspondence from Telford Taylor to James T. Shotwell, January 26, 1950, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers.

¹⁶⁷ Emphasis in original, Telford Taylor, "Suggestions for Agenda for Dr. Shotwell's War Crimes Conference," March 28, 1949, Box 45, TPP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers.

another war, and which abundantly deserve careful study.”¹⁶⁸ According to Taylor: “The first of these is the law governing the relations between an occupying army and the population of the occupied (enemy) country.”¹⁶⁹ He wrote: “At Nurnberg the allied powers have undertaken to judge and condemn German occupation methods during the second world war. Our own occupation methods in Germany are now coming in for an increasing barrage of criticism from the Germans.”¹⁷⁰ He continued: “In the event of another war, it is certainly more than possible that the United States or its allies would eventually occupy enemy territory, in which event numerous moral, legal, and practical problems would be bound to arise.”¹⁷¹ Taylor believed that explaining the international law of military occupation was essential because the U.S. needed to ensure that it would act justly in future conflicts, following the same standards that had been used to judge Nazi soldiers at the subsequent Nuremberg Trials.

Taylor also discussed this in his 1949 article “The Nuremberg War Crimes.”¹⁷² He noted the subsequent Nuremberg Trials were more important for understanding Allied occupation policies than the first IMT trial.¹⁷³ This included international legal questions over the rules of military occupation. He conceded that “[e]xcept with respect to the status and rights of ‘partisans’ and ‘guerillas,’ the Nuremberg trials do not shed much new light on the laws of war relating to combat.”¹⁷⁴ However, he argued that “[w]ith respect to the laws of war governing the relations between civilian populations and military occupation authorities, the Nuremberg

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Telford Taylor, “The Nuremberg War Crimes,” *International Conciliation* 27 (1949): 243-371.

¹⁷³ “While the trial of Goering and his co-defendants before the IMT bore a definite relation to the quadripartite occupation of Germany under the Allied Control Council, it was not an integral part of the occupation machinery. The Nuremberg Trials under Law No. 10, however, were carried out under the direct authority of the Control Council, as manifested in that law, and their judicial machinery was established by and was part of the occupational administration for the American zone, the Office of Military Government (OMGUS).” Ibid., 272.

¹⁷⁴ Ibid., 341.

decisions have covered, in great detail, a wide variety of questions.”¹⁷⁵ Taylor advocated studying these trials to clarify these legal principles: “The records and judgments of the Nuremberg trials, containing as they do extensive testimony – both oral and documentary – by military experts and others, furnish a unique and extensive source for restating the laws of war so as to provide the maximum practical degree of protection to the civilian populations of occupied territory.”¹⁷⁶ Neumann’s project would provide much needed elucidation on how the subsequent Nuremberg Trials had changed the legal principles governing military occupation.

The portion of the Carnegie Endowment project Neumann put together was called “Appendix ‘H.’”¹⁷⁷ In a draft of Appendix H, entitled “Toward an International Law of Belligerent Occupation,” Neumann proposed his plans for studying the Nuremberg Trials.¹⁷⁸ National sovereignty was rarely invoked explicitly in his analysis, but it was foundational to his discussion of international law. World War II and the Nuremberg Trials had significantly limited a nation’s sovereign authority in occupying enemy territory, and Neumann tried to explain this new relationship between sovereign power and the requirements of international law. The uncertainties he grappled with in this project revealed the extent to which a New Deal for

¹⁷⁵ Ibid., 342.

¹⁷⁶ Ibid., 342.

¹⁷⁷ In a letter from Benjamin Kaplan to Neumann on April 4, 1950, Kaplan noted that Neumann drafted the original proposal for Appendix H and the Subcommittee made some revisions to it. Correspondence to Franz Neumann, April 4, 1950, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers. No author is listed on this letter. Correspondence to Franz Neumann, April 4, 1950, Box 1, Folder 7: Correspondence of Franz Neumann, Kaplan Papers; Correspondence to Franz Neumann, April 4, 1950, Box 45, TPP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers. Authorship can be inferred because the copy in the Telford Taylor Papers has the handwritten note: “Telford – please make additional changes. Ben.” Ibid.

¹⁷⁸ Emphasis in original, App. H, Toward an International Law of Belligerent Occupation, undated, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers. On this document, “App. H” was written in pencil, crossing out “Topic VII.” It appears to be Taylor’s edits to a draft of Appendix H. Although it is unclear whether this is Neumann’s original draft of Appendix H or if it is a subsequent revision by the Subcommittee, this chapter will refer to Neumann as the primary author because he was the driving force behind Appendix H. Indeed, this version of Appendix H seems to show Neumann’s influence because it uses British-English spelling. Neumann, who had resided in the United Kingdom, would most likely use such spelling, rather than the others who would most likely use American English.

the world had not yet been realized. However, Appendix H also demonstrated that Neumann had begun viewing international law more favorably and advocated delineating the international law of military occupation more clearly. This was a moment in which law could be used as a transformative force to improve the world by reigning in the horrors of war.

Neumann began with a provocative statement: “It is quite safe to say that, at present, there is no law of belligerent occupation.”¹⁷⁹ To explain this, Neumann discussed the historical context of German occupation policies: “This has probably been true since 1914 since the German occupation of Belgium during World War I exhibits characteristics that were scarcely compatible with the international law then considered as valid.”¹⁸⁰ This German occupation was quite harsh – as historian Isabel Hull writes: “Belgium faced stringent military administration, far-reaching economic exploitation, forced labor, and deportation.”¹⁸¹ Neumann believed Nazi occupation policies were a continuation of World War I strategies, and recognized the difficulties in explaining how such actions fit into international law: “It is, however, quite impossible to squeeze the occupation policies since 1939 into the Procrustes bed of what is considered to be international law. Clearly, the Nazis have never considered themselves to be bound by international law. They have annexed and incorporated foreign territories into the Greater German Reich with-out a peace treaty.”¹⁸² According to Neumann, the Nazis thought occupation was not ruled by international law, but believed instead that occupation was dictated by their own laws of territorial integration.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Isabel V. Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Ithaca: Cornell University Press, 2005), 230. For a discussion of the brutal attitudes of German military leaders during World War I and their relationship with international law at the time, see Isabel V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (Ithaca: Cornell University Press, 2014), 51-94.

¹⁸² App. H, Toward an International Law of Belligerent Occupation, undated, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers.

Moreover, the Nazis did not simply absorb new territories, but sought to integrate these lands into the Nazi state in all aspects of life: “They have remodelled the occupied countries from top to bottom. The cultural, economic, political, social, and religious structures were radically changed. Industrial equipment, mineral and agricultural resources were put to the use of the German Reich. There was no single phase of public or private life exempt from the law of the occupier.”¹⁸³ At the most fundamental level, this was an effort to extend Nazi Germany’s sovereign authority into occupied lands, which included legal absorption of newly occupied territory, as well as social and cultural integration, entailing *Gleichschaltung* or coordination into the Nazi state.¹⁸⁴ Historian Richard J. Evans notes that *Gleichschaltung* was “a metaphor drawn from the world of electricity, meaning that all the switches were being put onto the same circuit, as it were, so that they could all be activated by throwing a single master switch at the centre.”¹⁸⁵ This metaphor illustrates why Neumann asserted that the Nazis believed the sovereign state, not international law, held political power and legal authority in such territories. Everything about the law of Nazi occupation was intended to strengthen the centralized, sovereign power of the nation-state, not to limit it with appeals to outside authority such as international law.

For Neumann, this was troubling because he believed there were surprising parallels between Allied occupation and Nazi occupation: “Looking at Allied occupation policies, the legal picture is not much different in spite of the obvious radical distinction in the goals and methods.”¹⁸⁶ According to him this occupation was exacerbated by Cold War politics:

We have created a new state (Austria), asserting that we “liberated” it – but having recognized the “Anschluss” before. We have made decisive territorial changes

¹⁸³ Ibid.

¹⁸⁴ Richard J. Evans, *The Coming of the Third Reich* (New York: Penguin, 2005), 381.

¹⁸⁵ Ibid., 381.

¹⁸⁶ App. H, Toward an International Law of Belligerent Occupation, undated, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers.

(Eastern Germany; Korea), permitted the mass expulsion of populations, and allowed the incorporation of many territories. True, we have made the reservation that only peace treaties will finally settle the frontiers but by exempting Eastern Germany from the authority of the ACC [Allied Control Council] and permitting the social, political, economic, administrative changes to be effected, we have, for practical purposes, permitted annexation and incorporation.

We have remodelled [*sic*] the countries from top to bottom. We have broken up cartels; instituted far-reaching economic changes; created new political bodies; remade taxation; rewritten divorce and marriage legislation; remade the courts and the administrative structure.

Only in a few fields have we acted within positive international law: in regard to booty; requisitioning; and prisoners of war.¹⁸⁷

What differentiated Nazi conquest from Allied liberation under international law? Neumann wrote: “This is not to imply a criticism of Allied occupation policies, but merely intended as a statement of a legal situation which, indeed, has a trace of irony: namely, that on minor issues (booty, requisitioning) we have exhibited a scrupulous regard for the Hague Convention; whereas in all major issues, the legal base is unascertainable.”¹⁸⁸ As a lawyer, Neumann delineated this as a problem of profound importance – the Allies needed to explain what substantive international law gave them the authority to conduct their occupation policies and they also needed to clarify how this was different from the sovereign authority claimed by Nazi Germany in its occupied territories. If the Nuremberg legacy was to be secured, the Allies had to determine what the letter of the law was, and then they needed to follow it.

Neumann thought the Allied occupiers operated within the penumbra of international law. He said this was a thorny problem because it was unclear what international law governed the Allied military occupation: “The unconditional surrender formula is certainly no adequate legal base. It is, first, doubtful that a unilateral declaration of victorious powers can create new international law; it is, second, to be remembered that the instrument of the unconditional

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

surrender of May 4, 1945 was merely a surrender by the German High Command, was specifically an ‘act of military surrender.’”¹⁸⁹ According to Neumann, the agreement between victorious Allied nations was not enough to create international law governing their occupation forces. Moreover, he argued that the German surrender in May 1945 did not cede German sovereignty to the Allies because the German military had acquiesced, not the German government that had sovereign authority. Hitler had exacerbated this ambiguity – before his suicide on April 30, 1945, he appointed Karl Dönitz, German Grand Admiral, as Reich President and leader of the German military.¹⁹⁰ At the time, British intelligence debated whether Dönitz represented the German government or merely a split between the regular German military and the Nazi Party armed forces, including the SS.¹⁹¹ The Americans, British, and Soviets did not fully agree on whether Dönitz could be considered the German state’s legitimate leader.¹⁹²

Neumann also argued against a third international legal concept that dealt with the surrender of sovereignty: “Nor does the conception of debellatio lead us anywhere.”¹⁹³ In international law, *debellatio* occurs when a nation has militarily conquered another nation, and neither the conquered nation nor its allies continue to fight back – in such a case the conqueror becomes the new sovereign of the conquered territory.¹⁹⁴ Neumann pointed out: “For the Allied Powers have, at several occasions, specifically denied that Germany (or Japan) are or ever were

¹⁸⁹ Ibid.

¹⁹⁰ Richard J. Evans, *The Third Reich at War* (New York: Penguin, 2008), 736; Marlis G. Steinert, “The Allied Decision to Arrest the Dönitz Government,” *The Historical Journal* 31, no. 3 (Sept. 1988): 651.

¹⁹¹ Ibid., 653.

¹⁹² Ibid., 661-62.

¹⁹³ Emphasis in original, App. H, Toward an International Law of Belligerent Occupation, undated, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers.

¹⁹⁴ Gilad Ben-Nun, *The Fourth Geneva Convention for Civilians: The History of International Humanitarian Law* (London: I. B. Tauris, 2020), 111; Eyal Benvenisti, *The International Law of Occupation*, 2nd ed. (Oxford: Oxford University Press, 2012), 161.

in a state of debellation.”¹⁹⁵ This stands in contrast to the Nazi occupation of European territories, which Neumann considered to be examples of *debellatio*.¹⁹⁶ Because *debellatio* did not apply to the Allied occupation, and the Allies had not assumed sovereign authority over these occupied territories, the question remained: what law governed their occupation forces?

As stated earlier, Neumann was skeptical that existing international law governed the Allied occupiers: “It makes, moreover, little sense to compress the huge range of Allied policies into Articles 42-56 of the Hague Convention, that is, to raise the exception (interference with domestic laws etc. if ‘absolutely necessary’) to the rank of the general rule.”¹⁹⁷ Articles 42 to 56 of the Hague Convention of 1907 (also known as Hague IV) dealt with the “Military Authority Over the Territory of the Hostile State.”¹⁹⁸ Neumann seemed to believe that the Hague

¹⁹⁵ App. H, Toward an International Law of Belligerent Occupation, undated, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers. Some scholars now argue that *debellatio* applied to Nazi Germany – though as Neumann’s argument makes clear, this is debatable. Benvenisti, 162. In an April 11, 1949, memorandum to James Shotwell, Neumann had discussed this in the context of determining “the legal basis of the trials, particularly of the international trials at Nürnberg and Tokyo and the trials held on the basis of ACC Law No. 10.” Emphasis in original, correspondence from Franz L. Neumann to James T. Shotwell, “Agenda for War Crimes Conference,” April 11, 1949, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers. In this memorandum, Neumann explained why some theorists offered *debellatio* as the basis for the war crimes trials: “Germany was and is in a state of debellatio. The occupants are thus the sovereigns in Germany. The IMT was a German court (Francois de Menthon and Hans Kelsen).” Emphasis in original, *ibid*. By this he meant that Menthon and the Austrian émigré Kelsen had argued that because Germany was in a state of *debellatio*, it had ceded its sovereignty to the Allies, meaning the IMT was acting under the German sovereign authority that had been relinquished to them.

¹⁹⁶ As Neumann wrote: “Even where – as in the case of France – they concluded an armistice agreement – they have nevertheless incorporated French territory (Alsace-Lorraine) into the Greater German Reich. They have put other states (Norway, Holland) under so-called ‘Alliance administration.’ They have made others into Protectorates (Bohemia and Moravia); still others into colonies under indirect rule (Poland); and have applied colonial policies without a trace even of local self-government to Soviet territories. New states were created (Slovakia, Croatia); others were seemingly put under genuine military government (Belgium and Northern France). The sole legal concept that may explain these policies (but not as applied to France) is that of debellatio.” Emphasis in original, App. H, Toward an International Law of Belligerent Occupation, undated, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers.

¹⁹⁷ *Ibid*.

¹⁹⁸ “Laws of War: Laws and Customs of War on Land (Hague IV); October 18, 1907,” The Avalon Project, Yale Law School, accessed July 28, 2021, https://avalon.law.yale.edu/20th_century/hague04.asp#art42. In an April 11, 1949, piece sent to Dr. Shotwell, Neumann argued that another theory offered the basis for the first IMT trial, the Tokyo trial, and the subsequent Nuremberg Trials: “The law under which Germany is be governed is that of the Hague Convention law of belligerent occupation.” Correspondence from Franz L. Neumann to James T. Shotwell,

Convention, written in the first decade of the twentieth century, before the ravages of World War I, was too limited in its scope to effectively deal with the pressing problems presented by military occupation during World War II.¹⁹⁹

Taylor had also discussed this problem in his 1949 article “The Nuremberg War Crimes.” He observed that the subsequent Nuremberg Trials had dealt extensively with a broad array of German occupation policies that disproportionately affected civilians.²⁰⁰ This included economic manipulation: “The laws of war with respect to economic exploitation of an occupied country were reviewed and applied in numerous and diverse circumstances, brought to light in the industrialists trial.”²⁰¹ Occupation also involved more direct oppression of civilians: “The scope of responsibility for the deportation to forced labor of civilians in occupied territory was explored in nine of the trials, wherein government officials, military leaders, industrialists, the police, and the judiciary were involved.”²⁰² According to Taylor “[t]aken as a whole, these decisions constitute both a reaffirmation and a refinement of the principles laid down in the Hague Conventions.”²⁰³ However, Taylor stated that during the subsequent Nuremberg Trials, the Hague Convention was sometimes found to be too limited in scope: “Here again the most controversial ruling was made in the ‘Hostage Case,’ wherein the court reluctantly held that the

“Agenda for War Crimes Conference,” April 11, 1949, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers.

¹⁹⁹ As Neumann noted in his April 11, 1949, memorandum to James Shotwell, the capaciousness of the Allied occupation of Germany precluded applying the Hague Convention to the circumstances: “Clearly the Hague Convention cannot be applicable for the occupation of a whole country which the occupants desire to remodel from top to bottom. The problem is then one *de lege ferenda* [with a view to future law] and the views expressed during the trials as well as the judgments will provide excellent material for a solution of this most difficult problem (especially if contrasted with the German practice and the practice of the Allied Powers after 1944).” Emphasis in original, correspondence from Franz L. Neumann to James T. Shotwell, “Agenda for War Crimes Conference,” April 11, 1949, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers.

²⁰⁰ Taylor, “The Nuremberg War Crimes,” 342.

²⁰¹ *Ibid.*, 342.

²⁰² *Ibid.*, 342.

²⁰³ *Ibid.*, 342.

laws of war do not now prohibit the killing of hostages under certain specified circumstances.”²⁰⁴

Accordingly, Taylor argued that even the trial judges hoped the Hague Convention would be changed to expand its protections: “In doing so, the Tribunal practically invited revision of the Hague Conventions so as to expressly forbid the killings of hostages in the future.”²⁰⁵

Finally, in Appendix H, Neumann observed: “There exists, perhaps, a law of intervention (discussed by some German international lawyers) but if it does exist, it is certainly unascertainable.”²⁰⁶ Thus, Neumann exhausted possible legal foundations for occupation policy.

According to Neumann, resolving this issue was a matter of fundamental importance: “The problem has no mere historical interest. In any future war, involving occupation of enemy territory, similar questions are certain to arise. No principles exist which could guide the occupier. Such principles will then be devised ad hoc without benefit of the experience accumulated since 1914.”²⁰⁷ Although the role of national sovereign power over an area of occupation had diminished, the principles of international law had not caught up with enough specificity to determine what legal rules governed occupying forces. Neumann’s proposed

²⁰⁴ Ibid., 342.

²⁰⁵ Ibid., 342.

²⁰⁶ App. H, Toward an International Law of Belligerent Occupation, undated, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers. In his April 11, 1949, memorandum to James Shotwell, Neumann explained the theories of intervention in greater detail. He stated that with this theory: “The law under which Germany is being governed is a new international constitutional law of intervention which authorizes a government to interfere with the domestic affairs of any other country in order to maintain or restore liberty and democracy. This theory grants either a universal right of intervention (Western German jurists), or a limited right of intervention for the execution of the Potsdam agreement (Eastern German jurists).” Correspondence from Franz L. Neumann to James T. Shotwell, “Agenda for War Crimes Conference,” April 11, 1949, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers. Neumann stated that neither this theory, nor the Hague Convention theory, nor the *debellatio* theory were supported by the decisions of the postwar military courts: “No clear view emerges from the judgment of the various tribunals.” Ibid.

²⁰⁷ Emphasis in original, App. H, Toward an International Law of Belligerent Occupation, undated, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers.

project sought to resolve the legal questions that continued to exist in international law to prevent the use of inadequate rules in future conflicts.

Neumann tried to offer a resolution to this problem. He argued that a study of the war crimes trials was needed to determine what legal principles had emerged out of the complexities of those proceedings: “A wealth of information is, however, contained in the proceedings of the IMT and of the other war crimes trials, both German and Far East. The courts have developed certain principles regarding the conduct of the German and Japanese occupiers. The principles, as a superficial survey shows, are not always consistent. In certain instances, weighty dissenting opinions have been formulated by judges.”²⁰⁸ He believed an analysis of the war crimes trials in Germany and in Japan would illuminate the contours of current international law as it applied to occupation forces. Such a project would provide legal guidelines for military occupation, which would be increasingly important in Cold War conflicts, particularly the Korean War, in which the U.S. intervened in July 1950.²⁰⁹ As Neumann set forth his research plan:

It is proposed in this study to undertake:

- A.
 - 1. A study of German and Japanese occupation policies.
 - 2. A study of the Western Allied occupation policies in Germany and Japan.
 - 3. A study of the Eastern occupation policies, namely of the USSR (In East Prussia); Poland; Northern Korea.
 - 4. An analysis of the judgment and arguments of the various military tribunals pertaining to the validity of the occupation policies of Germany and Japan.
- B. The aim of these analyses is:
 - 1. The elaboration of the principles applied by Germany, Japan, the Western Powers, the USSR, and Poland in the occupation of various countries.
 - 2. The elaboration of the principles (and contradictions) enunciated by the military tribunals in regard to German and Japanese policies.²¹⁰

²⁰⁸ Ibid.

²⁰⁹ William Stueck, *The Korean War: An International History* (Princeton: Princeton University Press, 1995), 47.

²¹⁰ App. H, Toward an International Law of Belligerent Occupation, undated, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers.

This research would compare the Axis occupation and the Allied occupation in both Europe and Asia. It would also juxtapose American, British, and French occupation with Soviet occupation – an issue that would become increasingly important as the dividing lines of the Cold War became more sharply drawn. Finally, it would explore the specific legal principles announced by the Allied military tribunals in Germany and Japan and explain how these principles applied to international law. The bricolage of law and norms Neumann wanted to analyze indicates the tortuous legacy of the Nuremberg Trials. Unlike the Atlantic Charter, which historian Elizabeth Borgwardt argues was “an integrated vision of social and economic rights” that emerged out of the New Deal, the legal principles announced at Nuremberg were complex and at times unclear.²¹¹ For this reason, Neumann’s project was particularly important, because it would clarify, for the defeated Axis powers and the victorious Allies alike, the rules of international law that applied to military occupation forces in the context of an armed conflict.

VI. Promising Plans, Disappointing Failures

Yet trouble was on the horizon. On April 25, 1950, Neumann wrote to Benjamin Kaplan: “I had a short talk with Dr. Shotwell who informed me of the following: The trustees are likely to elect a new president of the Carnegie Endowment for International Peace at the meeting of May 4. Consequently, they will not commit themselves to the support of our project until the new president has had time to make himself acquainted with the project and to compare it with the total research program of the Carnegie Endowment.”²¹² This holdup would prove to be the project’s downfall. Joseph E. Johnson, who taught history at Williams College, was selected as

²¹¹ Borgwardt, 6. As Borgwardt states in her analysis of Nuremberg: “Signature snafus of the New Deal – ham-handed attempts to export domestic norms, personality clashes from unclear lines of authority, and haphazard, ideologically incoherent but ultimately pragmatic legal theories – were abundantly present at the [Nuremberg] trial as well.” Ibid., 239.

²¹² Correspondence from Franz L. Neumann to Benjamin Kaplan, April 25, 1950, Box 1, Folder 7: Correspondence of Franz Neumann, Kaplan Papers.

the new Endowment president; during World War II, he was employed by the State Department, attending Dumbarton Oaks and the San Francisco Conference.²¹³ Taylor told Drexel Sprecher in a June 7, 1950, letter that the new leadership would not be as supportive as Shotwell: “For your private information, we had a meeting with the new president of the Carnegie Endowment last week and my personal reaction is one of some discouragement. I saw no signs that he has either a very clear understanding of or much enthusiasm for the kind of projects we have advanced.”²¹⁴

The next day, June 8, 1950, Shotwell wrote to Dean Erwin Griswold at Harvard Law to discuss funding problems the Committee on War Crimes Research faced: “I am afraid that I have disappointing news for you. Professor Joseph Johnson, who is to succeed me as President of the Endowment on July 1 and who was present at our interview with Professors Cavers and Kaplan, went to Washington to see John Foster Dulles, Chairman of our Trustees Board, and had a talk with him and Philip Jessup.”²¹⁵ According to Shotwell, “[h]e found a negative attitude on the proposal” to continue funding Solis Horwitz, a Committee member working out of Harvard Law School on the Tokyo Trial.²¹⁶ The funding was denied by the Carnegie Endowment even though Griswold himself asked Shotwell on June 5th for money to support Horwitz’s research.²¹⁷

²¹³ J. Y. Smith, “Joseph Johnson Dies,” *Washington Post*, October 26, 1990, <https://www.washingtonpost.com/archive/local/1990/10/26/joseph-johnson-dies/c23cee97-97c7-4519-b6cc-ca8a5dfc296e/>.

²¹⁴ Correspondence from Telford Taylor to Drexel Sprecher, June 7, 1950, Box 45, TTP-5-3-1-2: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (Jan. 1950-Apr. 1950), Taylor Papers. He did note: “Franz Neumann did not altogether share my impression, and perhaps time and education will help.” Ibid.

²¹⁵ Correspondence from James T. Shotwell to Dean Erwin N. Griswold, June 8, 1950, Box 45, TTP-5-3-1-2: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (Jan. 1950-Apr. 1950), Taylor Papers.

²¹⁶ Ibid; Correspondence from Dean Erwin N. Griswold to James T. Shotwell, June 5, 1955, Box 45, TTP-5-3-1-2: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (Jan. 1950-Apr. 1950), Taylor Papers. The Tokyo Trial was officially called the International Military Tribunal for the Far East; it was the Allied military tribunal adjudicating Japanese violations of international law during World War II and was held from June 1946 to April 1948. Borgwardt, 234.

²¹⁷ Correspondence from Dean Erwin N. Griswold to James T. Shotwell, June 5, 1955, Box 45, TTP-5-3-1-2: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (Jan. 1950-Apr. 1950), Taylor Papers.

When Shotwell wrote to Taylor on June 8, 1950, he explained: “Here is a copy of the sad news. I had a talk with Dr. Johnson over the telephone, and he said that it should be made quite clear to the Harvard Law School that we would not be able to get a favorable action of the Trustees with Foster Dulles’s opposition.”²¹⁸ Dulles, who helped Hiss get his job at the Carnegie Endowment, was originally a defense witness at Hiss’ perjury trial, which started in May 1949, but was compelled to testify against Hiss.²¹⁹ Soon after the fallout of the Hiss trial, in April 1950 Dulles was appointed consultant at the State Department where he defended anti-Communist containment policies.²²⁰ It is unsurprising that Dulles was not enamored of Taylor’s project, launched during the leadership of the accused Soviet spy Hiss. While Taylor’s group tried to get funding from the RAND Corporation and the Ford Foundation, no support was forthcoming.²²¹

Dulles’ anti-Communist angst was not entirely misplaced, though he may have been unaware that it should extend beyond Hiss to also include Neumann. During World War II Neumann had made several highly illicit decisions, including in August 1942, when he was working for the Board of Economic Warfare and gave several studies to his personal friends Paul and Hede Massing, who were spies for the Soviet NKGB.²²²

²¹⁸ Correspondence from James T. Shotwell to Telford Taylor, June 8, 1950, Box 45, TTP-5-3-1-2: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (Jan. 1950-Apr. 1950), Taylor Papers.

²¹⁹ White, 66, 68, 283 fn. 3.

²²⁰ John Lewis Gaddis, *Strategies of Containment: A Critical Appraisal of American National Security During the Cold War* (Oxford: Oxford University Press, 2005), 101.

²²¹ Correspondence from Dave [Cavers] to Telford [Taylor], June 30, Box 45, Box 45, TTP-5-3-1-2: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (Jan. 1950-Apr. 1950), Taylor Papers; Correspondence from Telford Taylor to Henry Ford II, October 10, 1950, Box 45, TTP-5-3-1-2: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (Jan. 1950-Apr. 1950), Taylor Papers.

²²² Kettler and Wheatland, 329, 348; *Technological Mobilization: Hearings on S. 2721 Before the S. Subcomm. of the Comm. on Mil. Aff.*, vol. 1, 77th Cong., 2nd sess. 229-30 (1942) (statement of Franz Neumann, Consultant, Board of Econ. Warfare); Raffaele Laudani, “Introduction,” in Franz Neumann, Herbert Marcuse, and Otto Kirchheimer, *Secret Reports on Nazi Germany: The Frankfurt School Contribution to the War Effort*, ed. Raffaele Laudani (Princeton: Princeton University Press, 2013), 2; Allen Weinstein and Alexander Vassiliev, *The Haunted Wood: Soviet Espionage in America – the Stalin Era* (New York: Modern Library, 1999), 249. The Soviet intelligence files that Allen Weinstein and Alexander Vassiliev discuss contain mistakes regarding Neumann – one they cite claimed Neumann started working for the OSS in February 1942, but this was incorrect, as he started

Hede and Paul met in Frankfurt, Germany, in the late 1920s when he was a student at the Institute for Social Research.²²³ While Paul began working in Moscow in 1929, Hede remained in Germany where she was involved with the Berlin Communist movement and was recruited to be a Soviet spy by the agent Ignace Reiss, also known as “Ludwig.”²²⁴ After the Nazi seizure of power, the two fled Europe to the U.S. in the mid-1930s, where Hede remained involved in espionage – perhaps alongside Alger Hiss at the State Department.²²⁵ She became disillusioned with the Soviet regime when her Communist associates vanished during the Stalinist purges, including Reiss, who was killed in Switzerland in 1937 after criticizing Stalin.²²⁶ When the Massing couple traveled to Moscow to clarify their relationship with the now disfavored Reiss, they may have escaped death only by promising to carry out further espionage for the Soviets.²²⁷ Over time, Hede became increasingly conservative and in 1949 testified against Hiss at his second perjury trial – though she never identified Neumann as a Communist agent in her 1951 memoir *This Deception*, despite naming many others.²²⁸

In the spring of 1943, Neumann again disclosed information, including OSS documents, to the NKGB through Elizabeth Zarubina but stopped later that year around the time he became a U.S. citizen.²²⁹ David Kettler and Thomas Wheatland argue these 1943 leaks were likely motivated by Neumann’s belief that the OSS lacked a sufficient plan to contend with the

working for the OSS in 1943. Ibid., 249, 368 fn. 38; Laudani, 2; Barry Katz, *Foreign Intelligence: Research and Analysis in the Office of Strategic Services 1942-1945* (Cambridge, MA: Harvard University Press, 1989), 32.

²²³ Veronica A. Wilson, “‘Now You are Alone:’ Anticommunism, Gender, and the Cold War Myths of Hede Massing and Whittaker Chambers,” *Diplomatic History* 36, no. 4 (Sept. 2012): 701.

²²⁴ Ibid., 701-2.

²²⁵ Ibid., 702-3; White, 66-67.

²²⁶ Wilson, 703-4.

²²⁷ Ibid., 703-5.

²²⁸ Ibid., 699, 706-7; White, 66-67; Kettler and Wheatland, 348; Hede Massing, *This Deception* (New York: Duell, Sloan and Pearce, 1951). Kettler and Wheatland misidentify the title of her book. Kettler and Wheatland, 348. In addition, Veronica Wilson states that the Communist Heinz Neumann was Franz Neumann’s brother – I have been unable to find information corroborating this and believe it is likely mistaken. Wilson, 705.

²²⁹ Weinstein and Vassiliev, 249-50; Kettler and Wheatland, 348-49.

“National Committee ‘Free Germany,’” a group of German soldiers captured by the Soviets who were turned into vocal opponents of Nazism and who transmitted their anti-Nazi sentiments over Soviet radio.²³⁰ In an August 6, 1943, OSS report on “The Free Germany Manifesto and the German People,” Neumann noted his concern over possible Soviet domination of Germany: “If an understanding between the Western powers and Russia cannot be reached, the ‘Free Germany’ movement may become an instrument for power politics. The Manifesto contains a clear indication of that, in appealing to those army and party circles which may prefer a German-Russian coalition to British-American occupation. If the United Nations do not succeed in allying themselves with the genuinely anti-Nazi opposition in Germany, if they do not give the German people the chance of social as well as political reconstruction as a free democratic nation, then the Manifesto might easily become the first attempt to create a ‘National-Bolshevik’ regime in Germany.”²³¹ This gives credence to Kettler and Wheatland’s assertion that Neumann was motivated by a desire to ensure greater cooperation between the U.S., U.K., and U.S.S.R.²³²

In July 1944, Neumann made his final disclosure to the Soviets and ceased contact thereafter.²³³ The information he provided dealt with an OSS effort in Switzerland led by Allen Dulles, brother of John Foster Dulles, to create an opposition movement to Nazism organized by German conservatives, which the Soviets worried could be a possible precursor to a peace agreement excluding the U.S.S.R.²³⁴ According to Kettler and Wheatland, Neumann was likely motivated by his belief that continued collaboration between the Americans, British, and Soviets

²³⁰ Kettler and Wheatland, 348-49; Richard J. Evans, *The Third Reich at War*, 420-21.

²³¹ Franz Neumann, “The Free Germany Manifesto and the German People,” in Franz Neumann, Herbert Marcuse, and Otto Kirchheimer, *Secret Reports on Nazi Germany: The Frankfurt School Contribution to the War Effort*, ed. Raffaele Laudani (Princeton: Princeton University Press, 2013), 149, 152.

²³² Kettler and Wheatland, 348-49.

²³³ Weinstein and Vassiliev, 250-51; Kettler and Wheatland, 349.

²³⁴ Weinstein and Vassiliev, 250; Kettler and Wheatland, 349-50.; James T. Patterson, *Grand Expectations: The United States, 1945-1974* (New York: Oxford University Press, 1996), 102.

was necessary to ensure stability in Europe after the defeat of the Nazis.²³⁵ Indeed, Neumann emphasized the need for postwar cooperation between these three nations in a September 18, 1944, OSS report entitled “The Revival of German Political and Constitutional Life Under Military Government.”²³⁶ Here, Neumann argued that collaboration was important for the United States because it would allow the Americans to more effectively counter the Soviet military threat in the nations occupied by Soviet forces in Europe.²³⁷

Despite the complexities of Neumann’s internal motivations for these disclosures, his document leaks to the Soviets were criminal.²³⁸ Neumann was never caught for these illegal activities – perhaps the closest he came was when Senator Joseph McCarthy accused him of being a Communist in a Congressional speech on August 9, 1951.²³⁹ Ultimately, the only punishment Neumann faced for his crimes was poetic justice meted out by John Foster Dulles who, though perhaps ignorant of Neumann’s crimes, quashed his Nuremberg Trials study in the midst of the anti-Communist atmosphere of postwar America. Tragically, Taylor was collateral damage in this battle between ideologies, since the research project had started as his brainchild.

VII. Coda: Telford Taylor and the American Military Occupation in Vietnam

In the early 1970s, long after the failure of the Carnegie Endowment proposal and Neumann’s untimely death in Switzerland in a car accident on September 2, 1954, Taylor

²³⁵ Kettler and Wheatland, 350.

²³⁶ As Neumann stated in this report: “It is assumed that American interests demand policies of MG [military government] designed to maximize the cooperation of the US, UK, and USSR.” Franz Neumann, “The Revival of German Political and Constitutional Life Under Military Government,” in Franz Neumann, Herbert Marcuse, and Otto Kirchheimer, *Secret Reports on Nazi Germany: The Frankfurt School Contribution to the War Effort*, ed. Raffaele Laudani (Princeton: Princeton University Press, 2013), 412.

²³⁷ Neumann wrote: “The USA has a greater interest in arriving at a tripartite agreement on military government over Germany with the USSR and UK than the USSR. The military position of the USSR in Central Europe will be superior to that of any other power.” Ibid., 413.

²³⁸ Kettler and Wheatland, 350. Neumann’s leaks were likely illegal under the Espionage Act of 1917, as interpreted in the 1941 U.S. Supreme Court case *Gorin v. United States*. Espionage Act, Pub. L. No. 65-24, 40 Stat. 217 (1917); *Gorin v. United States*, 312 U.S. 19 (1941).

²³⁹ 97 CONG. REC. 9708 (1951) (statement of Sen. McCarthy).

returned to the international legal questions Neumann sought to solve in the early 1950s.²⁴⁰ The impetus for Taylor's analysis was the incendiary discord in the United States over the Vietnam War. In 1970, Taylor published a book entitled *Nuremberg and Vietnam: An American Tragedy*, connecting the lessons learned from Nuremberg to the conflict in Southeast Asia.²⁴¹ In his book, Taylor observed that the Nuremberg Trials had fundamentally altered the relationship between national and international law. The Nuremberg proceedings undermined the shield of national sovereign authority and gave prosecutors a sword to hold war criminals accountable individually: "A [...] remarkable feature of the trials was that they brought about a great expansion of the principle that individuals may be held criminally liable under international law, even though their conduct was valid under, or even required by, domestic law."²⁴²

After discussing Nuremberg, Taylor explained why international law applied to the Vietnam War: "Claiming as it does to be an intervenor only to protect South Vietnam against aggression, and to be fighting under the banner of justice and humanity, the United States cannot possibly take the position that her forces are not bound by the laws of war, whether customary or embodied in treaties to which she is signatory."²⁴³ He also noted: "To the credit of our Government, it has made no such claim, and acknowledges that its conduct of military operations

²⁴⁰ Herbert Marcuse, "Preface," in Franz Neumann, *The Democratic and Authoritarian State: Essays in Political and Legal Theory* (Glencoe, IL: Free Press, 1957), vii.

²⁴¹ Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970).

²⁴² Ibid., 82. Taylor noted: "Intrinsically, this was not a new concept, for the laws of war had always been regarded as binding on both governments and individuals, and beyond the reach of abrogation by local law." Ibid., 82. In a sense, the Nuremberg Trials had not created a shift in international law, because most nations had regarded certain principles of international law as obligatory. However, Taylor argued that the important change engendered by the Nuremberg Trials was the means through which international criminal law was enforced. The Nuremberg Trials demonstrated the enforcement of international criminal law could have teeth, particularly against national political and military leaders: "But prior to Nuremberg the individuals against whom the laws of war had been enforced were, for the most part, ordinary soldiers or officers of middling or low rank. At Nuremberg and Tokyo, on the other hand, nearly all the defendants stood at or near the top of the military or civilian hierarchy. Their punishment gave real meaning to the injunction, long written in military codes and manuals, that the primary responsibility for war crimes committed pursuant to order rests on those in authority who gave the orders." Ibid., 83.

²⁴³ Ibid., 132.

whether against North Vietnamese or Vietcong, is subject to those laws and treaties.²⁴⁴ Thus, Taylor commended the U.S. for committing to the laws of war in its conflict against North Vietnam and the Vietcong, the name given to the Vietnamese communists in South Vietnam.²⁴⁵

However, even if the United States was committed to following international law in the Vietnam War, this did not clarify what specific laws applied, particularly in South Vietnam, the primary location of the American military's ground operations starting in 1965.²⁴⁶ Taylor returned to the issue Neumann had discussed in his Carnegie Endowment proposal, explaining which principles of international law applied to military occupation. Taylor related this analysis to American military actions in South Vietnam:

The crucial difficulty is that neither at Son My, nor in most of the other actions charged against our forces, has it been clear that the victims were either North Vietnamese or Vietcong. Indeed, the basis of the charge is that often they are *not*, and that we are indiscriminately killing civilians who may be and often are South Vietnamese innocent of any hostile action against our troops. What laws of war, if any, govern the relations between those troops and the civilian population of South Vietnam?²⁴⁷

In Son My, also called My Lai, U.S. Lieutenant William Calley and members of an American infantry company killed approximately 150 people of all ages, including children, in March of 1968.²⁴⁸ What troubled Taylor about such incidents was the fact that those killed were South Vietnamese civilians rather than people who could be considered soldiers, such as North Vietnamese Army (NVA) regulars or Vietcong guerillas. Different international legal principles governed the killings at Son My compared to the deaths of regular military units under NVA command.²⁴⁹ The key questions for Taylor were: was the U.S. occupying South Vietnam? And,

²⁴⁴ Ibid., 132.

²⁴⁵ Mark Philip Bradley, *Vietnam at War* (Oxford: Oxford University Press, 2009), 86.

²⁴⁶ Ibid., 110-11.

²⁴⁷ Emphasis in original, Taylor, *Nuremberg and Vietnam*, 132.

²⁴⁸ Bradley, 119.

²⁴⁹ Taylor noted that the situation was clearer in the context of American military actions against the North Vietnamese Army. He asserted that portions of the Geneva Conventions applied to both of these forces, even if the North Vietnamese tried to debate it: "The legal situation is further complicated by the fact that the Geneva

if so, did this mean Americans were liable under international law for war crimes there? To answer these queries, Taylor focused on the international law of military occupation.

Taylor first turned to a foundational document of international law: “Before 1949, this question would have been governed by Section III of The Hague Convention of 1907, entitled ‘Military Authority over the Territory of the Hostile State,’ and reflecting in the title its basis in the customary laws of war, which apply only between belligerents.”²⁵⁰ In his Carnegie Endowment proposal, Neumann had written skeptically about the applicability of this provision of the Hague Convention to the Allied military occupation.²⁵¹ Similarly, Taylor observed in his 1949 article “The Nuremberg War Crimes Trials” that the judges in the subsequent Nuremberg Trials applied the Hague Convention narrowly.²⁵² In Taylor’s analysis of the Vietnam War in 1970, the situation had not changed much. Because the Hague Convention dealt with laws of war between belligerents, Taylor said it was unclear what portions of South Vietnamese territory could be considered belligerent against the U.S.: “The issue would generally be whether the place where the challenged action took place should be regarded as ‘friendly’ territory controlled by our allies, or ‘enemy’ territory controlled by the NLF and to which the laws of war would apply.”²⁵³ The NLF was the National Liberation Front of South Vietnam, which assisted North

Conventions as a whole apply only to ‘armed conflict ... between two or more’ signatory nations, while Article 3, containing certain ‘minimum’ prohibitions of inhuman treatment of prisoners or civilians, applies also to ‘armed conflict not of an international character occurring in the territory of’ a signatory power. Whether the Vietnamese war is a ‘civil’ or ‘international’ war is one of the points in dispute, and the phrase ‘international civil war’ is nothing but a handy verbal compromise that solves nothing. However that may be, there is no room whatsoever for a North Vietnamese contention that they are not bound at least by Article 3 and, since their regular troops are engaged with those of South Vietnam and its allies in South Vietnamese territory, there appears to be little force in their efforts to escape responsibility under the conventions in their entirety.” Taylor, *Nuremberg and Vietnam*, 131; “Geneva Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949,” The Avalon Project, Yale Law School, accessed July 28, 2021, https://avalon.law.yale.edu/20th_century/geneva03.asp.

²⁵⁰ Taylor, *Nuremberg and Vietnam*, 132-33.

²⁵¹ App. H, Toward an International Law of Belligerent Occupation, undated, Box 45, TTP-5-3-1-1a: Carnegie Endowment for International Peace – Committee on War Crimes Research: Correspondence (1948-1949), Taylor Papers.

²⁵² Taylor, “The Nuremberg War Crimes Trials,” 342.

²⁵³ Taylor, *Nuremberg and Vietnam*, 133.

Vietnamese efforts in the South through economic and social changes – as early as 1963, the NLF had met with significant success in South Vietnam.²⁵⁴ Territory under NLF control could perhaps be considered belligerent under the Hague Convention, according to Taylor.

Taylor then turned to another important document in international law: “The Geneva ‘Civilian Persons’ Convention, however, applies to ‘all cases of partial or total occupation of the territory of’ a signatory, and the persons protected by the convention include ‘those who, at a given moment ... find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.’”²⁵⁵ This was also known as Geneva Convention (IV), which was created on August 12, 1949.²⁵⁶ Taylor explained the significance of Geneva Convention (IV) in the Vietnam War: “On their face, these provisions would appear to cover the situation of South Vietnamese nationals who, like the inhabitants of Son My, find themselves ‘in the hands’ of the United States forces, but this is rendered dubious by still another provision, which excludes from the convention’s coverage ‘nationals of a co-belligerent State’ which ‘has normal diplomatic representation in the State in whose hands they are.’”²⁵⁷ Thus, there was an unresolved tension in Geneva Convention (IV). The general principles of Convention (IV) should have protected South Vietnamese civilians against violent atrocities at the hands of South Vietnam’s allies, including the Son My massacre carried out by American servicemen. However, Convention (IV) also included an exception that exempted co-belligerent nations with diplomatic ties to the occupied nation – which could discharge the U.S. from the requirements of Convention (IV) in South Vietnam.

²⁵⁴ Bradley, 94-96.

²⁵⁵ Taylor, *Nuremberg and Vietnam*, 133.

²⁵⁶ “Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949,” The Avalon Project, Yale Law School, accessed July 28, 2021, https://avalon.law.yale.edu/20th_century/geneva07.asp. Taylor and Neumann likely did not discuss the Geneva Conventions in their Carnegie Endowment proposal because these were so new at the time.

²⁵⁷ Taylor, *Nuremberg and Vietnam*, 133.

Taylor described why the Convention (IV) exemption existed: “The theory of this clause is that the inhabitants can rely on normal diplomatic processes for protection against abuse, but it is certainly doubtful whether the South Vietnamese Government is either able or disposed to furnish such protection for its nationals ‘in the hands of’ the United States.”²⁵⁸ Because South Vietnamese civilians could no longer depend on diplomatic channels for resolving problems with American forces, Taylor believed Convention (IV) should indeed apply: “On this basis it could be argued that *all* South Vietnamese nationals enjoy the protection of the Geneva Conventions *vis-à-vis* the American forces, but this conclusion is by no means clear.”²⁵⁹ Despite Taylor’s assertion that normal Convention (IV) should safeguard South Vietnamese civilians, he conceded that Convention (IV) was equivocal in its language and as a result its possible protections. Indeed, contemporary international lawyers continue to struggle with the questions that vexed Taylor, especially whether there is an international law of occupation, and, if there is, the extent to which it places concrete limitations on occupiers.²⁶⁰

Did the ambiguity of blackletter international law and its failure to protect civilians from the ravages of war tarnish the Nuremberg legacy? For Taylor this entailed deep ethical considerations that went straight to the heart of American ideals. He elucidated these principles in an article published in November 1970 in the *War/Peace Report*, entitled “Nuremberg and Vietnam: Who is Responsible for War Crimes?”²⁶¹ Taylor sympathized with the frustrating nature of the conflict American troops faced in South Vietnam: “I have stressed, and I believe rightly, the maddening difficulties and dangers that troops and commanders alike – soldiers at all

²⁵⁸ Ibid., 133.

²⁵⁹ Emphasis in original, *ibid.*, 133.

²⁶⁰ For an analysis of this problem, see Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge: Cambridge University Press, 2017), 1-16.

²⁶¹ Telford Taylor, “Nuremberg and Vietnam: Who is Responsible for War Crimes?” *War/Peace Report* (Nov. 1970): 3-10.

levels – faced in the conditions, some of our own making, that have developed in South Vietnam as our commitment deepened.”²⁶² However, Taylor’s solicitude was directed toward the common soldier rather than their commanders: “For the lower ranks, these circumstances must count powerfully in mitigation of their culpability. But in these confused, complex, and shifting circumstances, the responsibility of the higher officers for training, doctrine and practice is all the greater.”²⁶³ Taylor was concerned that American military leaders failed to comport with the moral standards expected of them.

To explain the ethical principles he believed American officers should follow, Taylor turned back to World War II and the subsequent Nuremberg Trials: “During the Second World War, the German Army in occupied Europe faced conditions that, in some countries, were not totally dissimilar to those prevailing in Vietnam, and had a like mission of ‘pacification.’ There, too, villages were destroyed and the inhabitants killed, and after the war a number of field marshals and generals implicated in the actions were brought to trial at Nuremberg in the so-called ‘High Command Case.’”²⁶⁴ After drawing parallels between the German occupation of Europe and the American occupation of South Vietnam, Taylor invoked a portion of the closing statement he himself made during the High Command Case.²⁶⁵ As Taylor quoted:

Somewhere, there is unmitigated responsibility for these atrocities. Is it to be borne by the troops? Is it to be borne primarily by the hundreds of subordinates who played a minor role in this pattern of crime? We think it is clear that that is not where the deepest responsibility lies. Men in the mass, particularly when organized and disciplined in armies, must be expected to yield to prestige, authority, the power of example, and soldiers are bound to be powerfully influenced by the examples set by their commanders. That is why ... the only way in which the behavior of the German troops in the recent war can be made comprehensible as the behavior of human beings is by a full exposure of the criminal doctrines and orders which were pressed on them from above by these

²⁶² Ibid., 8.

²⁶³ Ibid., 8.

²⁶⁴ Ibid., 8.

²⁶⁵ *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10: Nuernberg October 1946-1949*, vol. 11 (Washington, DC: U.S. Government Printing Office, 1950), 366, 374.

defendants and others. Who could the German Army look to, other than von Leeb and the other senior field marshals, to safeguard its standards of conduct and prevent their disintegration?²⁶⁶

Of fundamental importance was the role leaders played in shaping the culture around them. In the German army under Nazi rule, these military leaders had failed. By creating a culture in which German troops were permitted and even encouraged to commit atrocities, Taylor placed ultimate blame upon the Nazi military commanders. Taylor continued quoting the case:

If a decision is to be rendered here which may perhaps help to prevent the repetition of such events, it is important above all else that responsibility be fixed where it truly belongs. Mitigation should be reserved for those upon whom superior orders are pressed down, and who lack the means to influence general standards of behavior. It is not, we submit, available to the commander who participates in bringing the criminal pressures to bear, and whose responsibility it is to insure the preservation of honorable military traditions.²⁶⁷

These were men who, as superior officers, could have stood up for ethical military practices, and utterly failed to do so. In the High Command Case, Taylor argued that it was imperative to hold these German military commanders accountable to show that such failures in leadership would not only be denounced but would also be punished.²⁶⁸

Taylor was worried that apathy toward war crimes might contaminate the command structure of the U.S. armed forces. The U.S. military responded to the Son My, or My Lai, massacre with an investigation into the killings by the Peers Commission, which began its work

²⁶⁶ Taylor, "Nuremberg and Vietnam," 8-9. Taylor slightly modifies a quotation here, but otherwise the text is almost a verbatim copy of the original. *Trials of War Criminals*, vol. 11, 374.

²⁶⁷ Taylor, "Nuremberg and Vietnam," 9. Taylor makes a few slight alterations to pluralization and spelling in this quote compared to the original. *Trials of War Criminals*, vol. 11, 374.

²⁶⁸ For a discussion of the relationship between military leadership and conformity, as well as the influence these had on German troops who carried out the Holocaust, see Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York: Harper Perennial, 1998), 171-76. Browning differentiates the My Lai, or Son My, massacre from the German killings, asserting that instances such as Son My "involved a kind of 'battlefield frenzy'" but "did not represent official government policy." *Ibid.*, 160, 161. For Taylor, this was not dispositive – even if Son My did not reflect official strategy, the investigation of this incident and the response to the investigation's findings surely did reflect important governmental considerations.

in November 1969 under the leadership of Lieutenant General W. R. Peers.²⁶⁹ The Peers Commission report was issued on March 14, 1970, and it inculpated thirty members of the military for “omissions and commissions” – yet only sixteen faced charges and on March 29, 1971, First Lieutenant William Calley was the sole person convicted.²⁷⁰

In his 1970 article, Taylor noted: “When General Peers submitted his report charging several high-ranking officers with dereliction of duty in covering up Son My, the press reported sharp controversy in military circles on whether the airing of dirty linen would be ‘good’ or ‘bad’ for the Army as an institution.”²⁷¹ For Taylor, it was troubling that members of the armed forces were debating whether the issuance of the Peers Commission report was salutary for the military. Taylor was emphatic about the necessity of the Peers Commission report: “Of course, both Son My and the cover-up were indicative of serious weaknesses, but once Son My had happened, its exposure was not merely ‘good’ but essential to the integrity of the Army’s leadership.”²⁷² Keeping the Son My investigation hidden from public view could be a step toward the same dereliction of duty that the Nazi high command had taken when it failed to prevent its ranks from committing war crimes. Thus, Taylor declared: “What officer with any respect or sense for the values of the military profession could serve with pride in an organization where serious crime in the lower ranks is buried in the files on orders from above? The burying is itself an offense, known to the law as ‘misprision of felony,’ and Son My could not have been permanently covered up without infecting the higher reaches of the Army leadership with criminality.”²⁷³

²⁶⁹ “Peers Commission,” in *The Oxford Essential Dictionary of the U.S. Military* (Oxford: Oxford University Press, 2002), <https://www-oxfordreference-com.proxy.uchicago.edu/view/10.1093/acref/9780199891580.001.0001/acref-9780199891580-e-5996?rkey=1V00Yw&result=1>.

²⁷⁰ Ibid.; *Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident: The Report of the Investigation*, vol. 1 (Washington, DC: U.S. Government Printing Office, 1970), 12-4-12-35.

²⁷¹ Taylor, “Nuremberg and Vietnam,” 9.

²⁷² Ibid., 9.

²⁷³ Ibid., 9.

Despite Taylor's support for the international laws of war, his arguments echoed Neumann's criticisms of liberal international lawyers in *Behemoth*.²⁷⁴ The reduced power of national sovereignty in the wake of the Nuremberg Trials, the Geneva Conventions, and numerous postwar international agreements had helped make the world safer – but it was not a complete panacea. Although Taylor was largely responsible for the successes of the subsequent Nuremberg Trials, he knew that bringing war crimes charges and obtaining convictions often constituted an uphill battle.²⁷⁵ Liberal nations had to maintain a culture that respected and followed the rules of international law pronounced at Nuremberg. Institutions in these liberal governments, particularly the military, needed to scrupulously follow these principles. Otherwise, liberal international law would fall by the wayside as assuredly as the Axis powers had abandoned it during World War II. As Taylor stated in his 1970 article:

Whether or not individuals are held to criminal account is perhaps not the most important question posed by the Vietnam War today. But the Son My courts-martial are shaping the question for us, and they can not be fairly determined without full inquiry into the higher responsibilities. Little as the leaders of the Army seem to realize it, this is the only road for the Army's salvation, for its moral health will not be recovered until its leaders are willing to scrutinize their behavior by the same standards that their revered predecessors applied to Tomayuki Yamashita 25 years ago.²⁷⁶

Yamashita was the Japanese general in charge of occupying the Philippines, for which he was tried and executed by an American military court.²⁷⁷ Although the liberal internationalism that emerged out of the Second World War had triumphed over state sovereignty, Taylor's writings

²⁷⁴ Neumann, *Behemoth*, 167.

²⁷⁵ Legal historian Jonathan Bush observes that during these Trials: "In some cases, tribunals began to rule against the prosecution on defensible but extremely narrow legal grounds, as in the dismissal of aggressive war charges against the Krupp and I.G. Farben defendants. In other cases, tribunals ruled on what can only be described as mistaken or ideological grounds, such as the lenient Flick sentences." Bush, "Soldiers Find Wars," 682.

²⁷⁶ Taylor, "Nuremberg and Vietnam," 10.

²⁷⁷ Borgwardt, 235. The case was contentious, as Elizabeth Borgwardt notes: "Yamashita's conviction was based on a theory of 'negative criminality' – that he 'unlawfully disregarded and failed to discharge his duty as commander to control the operations and members of his command, permitting them to commit brutal atrocities.' The decision was controversial in large part because Yamashita's American opponents had successfully disrupted the general's lines of communication, only to hold him accountable later for having failed to control his troops." Ibid., 235.

on Vietnam show that this international order still relied heavily on the loyalty of the liberal nation-state to cultivate and sustain international law. Liberal international lawyers needed to recognize that international law and national sovereignty were inherently intertwined – these two frameworks were not necessarily at odds but could instead be symbiotic tools to further cultivate the liberal order across the globe.

VIII. Conclusion

In the early 1940s, Franz Neumann debated the nature of national sovereignty with Quincy Wright. While the idea of sovereignty is quite abstract, understanding the implications of different theories of sovereignty in relation to international law became urgent in the context of the Second World War. How could the liberal rule of law be restored in a world where jingoistic and brutal regimes like Nazi Germany brought bloodshed across continents?

For Neumann, the liberal nation-state was the last bastion of defense, and weakening national sovereignty only served Nazi lawyers who hoped to encode their racial theories into international law. Neumann's belief in strong national sovereignty was rooted in the Kantian assertion that sovereignty was indivisible. In contrast, Wright's theory was shaped by the American affection for dual sovereignty, in which the ultimate sovereignty of the American people was divided between the national and state governments. Wright simply applied divided sovereignty to national and international law, arguing that allocating sovereignty between these would ensure that international law could be used to bind and defeat warmongering states.

While Neumann and Wright did not resolve their debate, in the short-term Wright's arguments comported with the historical currents of the post-World War II world. With the creation of international institutions, including the United Nations, and the expanded enforcement of international criminal law, the decline of national sovereignty seemed assured.

Neumann himself assisted in preparing for the first Nuremberg Trial. This likely made him more supportive of international law, though he remained skeptical that the trials had set forth a clear list of international legal principles. In the aftermath of the Nuremberg Trials, Neumann and Telford Taylor worked together on a project for the Carnegie Endowment, trying to explain the legal rules that emerged from Nuremberg – including an international law of military occupation. However, as the Cold War ramped up, support for this project cooled and it fell by the wayside.

The Cold War reversed the collapse of national sovereignty. Powerful nations, especially the United States and Soviet Union, had significant power to determine what international laws they wanted to follow.²⁷⁸ This was, in many ways, a return to Neumann's 1940s arguments, when he asserted that the nation-state was better suited than international law to defending liberal law. Indeed, liberal international law often rested on the loyalties of these nation-states. In the 1970s, Taylor returned to this issue in the context of the Vietnam War. For Taylor, the response of the American military to the massacre in Son My was one of these foundational moments. Despite the lack of clarity in the Hague Convention and the Geneva Conventions regarding the American treatment of civilians in South Vietnam, Taylor argued this was a test for U.S. military commanders to follow the obligations of justice. In Taylor's eyes, only if American institutions – particularly the leadership of the armed forces – respected the rule of law and held its violators accountable would these institutions effectively safeguard international law, as they had done at Nuremberg. How else could the spirit of the Nuremberg Trials live on?

²⁷⁸ A useful collection of essays discussing the relationship between American global power and international law can be found in Michael Byres and Georg Nolte, eds., *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003).

CHAPTER 4

Fanfare for the Common Man: Dictatorship and Democracy in Carl Friedrich's Theory of Association

In a letter to the jurist Carl Schmitt, dated February 15, 1932, Carl J. Friedrich described his engagement with reactionary groups in the early Weimar Republic.¹ In this correspondence, Friedrich criticized the nationalist Ernst von Salomon, who had been sentenced to five years imprisonment for assisting in the 1922 murder of Walther Rathenau, the German foreign minister.² At the same time, Friedrich told Schmitt: “Incidentally, I personally stood close with a number of these people in those days (I was myself in the Eastern Border Guard [Grenzschutz Ost] in Thuringia, etc.).”³ Friedrich did not go into detail about his actions with the Eastern Boarder Guard – a voluntary militia created in 1919 that fought along the German border with the paramilitary *Freikorps*, or Free Corps, against Polish and Soviet forces.⁴ The *Freikorps* were made up of former soldiers and other men who tended to be strongly anti-Communist, were often against the armistice that ended World War I, and were hostile to the 1918 revolution that overthrew the German Empire.⁵ In the early years of the Weimar Republic the *Freikorps* were used as paramilitary forces by the Social Democrats to fight and kill militant German

¹ Correspondence from Carl Friedrich to Carl Schmitt, February 15, 1932, RW 265-4424, Landesarchiv Nordrhein-Westfalen, Abteilung Rheinland, Duisburg, Germany (hereinafter LAV NRW); Reinhard Mehring, *Carl Schmitt: A Biography*, trans. Daniel Steuer (Cambridge: Polity Press, 2014), 248, 602 fn. 66.

² Correspondence from Carl Friedrich to Carl Schmitt, February 15, 1932, RW 265-4424, LAV NRW; Martin Sabrow, *Der Rathenau-Mord: Rekonstruktion einer Verschwörung gegen die Republik von Weimar* (München: R. Oldenbourg, 1994), 8-9; Shulamit Volkov, *Walther Rathenau: Weimar's Fallen Statesman* (New Haven, CT: Yale University Press, 2012), vii.

³ “Uebrigens habe ich in jenen Tagen persönlich einer Reihe dieser Menschen nahe gestanden (ich war selber im Grenzschutz Ost, in Thüringen u.s.w.).” Correspondence from Carl Friedrich to Carl Schmitt, February 15, 1932, RW 265-4424, LAV NRW. See also Hans J. Lietzmann, *Politikwissenschaft im “Zeitalter der Diktaturen”: Die Entwicklung der Totalitarismustheorie Carl Joachim Friedrichs* (Opladen, Germany: Leske & Budrich, 1999), 19.

⁴ James M. Diehl, *Paramilitary Politics in Weimar Germany* (Bloomington: Indiana University Press, 1977), 43-46.

⁵ Ian Kershaw, *Hitler: 1889-1936: Hubris* (New York: W. W. Norton, 2000), 98; Richard J. Evans, *The Coming of the Third Reich* (New York: Penguin, 2003), 74-75.

Communists.⁶ Friedrich said to Schmitt that he ultimately spurned these groups, because he saw them as self-aggrandizing.⁷

In contrast to the reactionary groups Friedrich had supported in the early years of the Weimar Republic, by the end of World War II and in the early years of the Cold War, Friedrich vociferously supported democracy in the United States and denounced political movements he deemed totalitarian.⁸ Explaining the changes in Friedrich's thinking from the Weimar Republic to the beginning of the Cold War requires an understanding of his intellectual influences. From Weimar onward, the core of Friedrich's theory was underpinned by the writings of Otto von Gierke, a German legal scholar now largely unknown in the United States.⁹ Gierke was an important legal thinker in the German Empire of the late nineteenth century, whose theory of constitutional law was a type of "organic liberalism" according to German legal historian

⁶ Ibid., 74-75.

⁷ Friedrich wrote: "I believe that precisely my familiarity with these people causes the enthusiasm of my rejection. It was already bad enough that boyish rebelliousness and Wilhelmine vapidness in the postwar era, when suddenly the barriers of tough, mechanistic discipline had fallen, drove up that hubris (superbia [pride]), which derisively speaks of all moral requirements of our existence and life together, and that the people [Volk] themselves abolished, that is taken as supposed justification in pretension for this prank. But it is simply intolerable, if an apotheosis and self-glorification is then presented (something fundamentally repulsive to me) by one of these people to the public (!)" In German: "[I]ch glaube, dass gerade meine Vertrautheit mit den Menschen die Leidenschaftlichkeit meiner Ablehnung bedingt. Es war schon schlimm genug, dass jugendhafte Aufbegehrlichkeit und wilhelminische Geistlosigkeit in der Nachkriegszeit, als plötzlich die Schranken harter, mechanistischer Disziplin gefallen waren, jene Hybris (superbia) heraufführten, die allen sittlichen Voraussetzungen unseres Daseins und Zusammenlebens Hohn spricht, und damit das Volk selbst aufhebt, das als angebliche Rechtfertigung für diese Streiche in Anspruch genommen wird. Aber es ist einfach unerträglich, wenn dann noch eine Apotheose und Selbstverhimmelung (etwas mir im Grunde der Seele widerwärtiges) von einem dieser Leute der Öffentlichkeit (!) vorgelegt wird." Correspondence from Carl Friedrich to Carl Schmitt, February 15, 1932, RW 265-4424, LAV NRW.

⁸ Niall Ferguson, *Kissinger: 1932-1968: The Idealist* (New York: Penguin, 2015), 228-29.

⁹ Hans Lietzmann and Udi Greenberg argue that the early-modern Calvinist jurist Johannes Althusius was a key influence on Friedrich's work. Lietzmann, *Politikwissenschaft*, 51-54; Udi Greenberg, "The Limits of Dictatorship and the Origins of Democracy: The Political Theory of Carl J. Friedrich from Weimar to the Cold War," in *The Weimar Moment: Liberalism, Political Theology, and Law*, ed. Leonard V. Kaplan and Rudy Koshar (Lanham, MD: Lexington Books: 2012), ProQuest Ebook Central; Udi Greenberg, *The Weimar Century: German Émigrés and the Ideological Foundations of the Cold War* (Princeton: Princeton University Press, 2014), 30-35. Lietzmann notes that Gierke set the paradigm in Germany for analyzing Althusius' work. Lietzmann, *Politikwissenschaft*, 52. Greenberg writes that "[t]he German scholar who initiated scholarly interest in Althusius in both Germany and the U.S. was Otto von Gierke." Greenberg, "The Limits," fn. 57. However, neither Lietzmann nor Greenberg trace the intellectual history of Gierke's central influence over Friedrich's political theory.

Michael Stolleis.¹⁰ As Stolleis observes, in Gierke's organic liberalism "the state did not play the main role nor did it appear as an abstract institutional state, but rather as an 'organism' with its members, as a 'real association personality,' which could not be encompassed within the Roman law category of *persona moralis* (*persona ficta*, legal person)."¹¹ Rather than rooting liberalism in the legal person, Gierke based his constitutional theory on the notion of *Genossenschaft*, a word that could be narrowly defined as association, fellowship, or guild, or quite broadly as community, including even a national community.¹²

Gierke argued directly against the hierarchical theories of constitutional law set forth by leading Imperial German jurists Carl Friedrich von Gerber and Paul Laband, as Stolleis explains: "Gierke [...] found Gerber and Laband's reduction of the state to a legal imputation of state power, which is exclusively executed from above, to be unacceptable. The citizen as the object of state dominance, the negation of fundamental rights, the nearly thorough rejection of parliamentarianism – these were for the author of the *Genossenschaftsrecht*, who was a partisan of the description of an organically arranged 'overall personality,' not acceptable."¹³ Through the idea of *Genossenschaft*, Gierke questioned whether the state could exercise domination over its citizens. Gierke used the theory of *Genossenschaft* to challenge the top-down authority of the state and instead emphasized the importance of voluntary associations from the bottom-up.¹⁴

¹⁰ Michael Stolleis, *Public Law in Germany 1800-1914*, trans. Pamela Biel (New York: Berghahn Books, 2001), 338.

¹¹ Ibid., 337.

¹² Ibid., 337-39. The word *Genossenschaft* is difficult to translate. I will use the word "association" in this chapter because it tends to have clearer legal connotations, but the word "fellowship" perhaps better captures the emotive quality that Gierke likely sought in describing the concept of *Genossenschaft*.

¹³ Ibid., 326.

¹⁴ Ibid., 339; Anthony Black, "Editor's Introduction," in Otto von Gierke, *Community in Historical Perspective: A Translation of Selections from Das Deutsche Genossenschaftsrecht* (The German Law of Fellowship), ed. Anthony Black, trans. Mary Fischer (Cambridge: Cambridge University Press, 1990), xiv-xv.

Friedrich began his academic career as an organic liberal, and in the early 1930s his political theory was based largely on Gierke's *Genossenschaft* theory. This could have led Friedrich to argue that the people should hold more power in governance and to advocate against centralized state authority. But Friedrich believed that a society's disparate associations could only be unified through strong political leadership, for which he found support in the writings of Carl Schmitt.¹⁵ Hitler's dictatorship in the 1930s led Friedrich to question his earlier belief in the importance of a powerful political leader. By the late 1930s and early 1940s, Friedrich abandoned organic liberalism in favor of a new political theory that he called constitutionalism, which was based on limiting government power and a more democratic theory of association. However, even though Friedrich presented this theory as democratic, he never fully abandoned his belief in the necessity of forceful leadership in times of crisis. This created a profound tension in Friedrich's writing as he struggled to explain whether the creation of a proper constitutional order could emerge spontaneously from the desires of the people or from the imposition of constitutionalism by force. He failed to resolve this contradiction when he tried applying his theories of constitutionalism and association to the postwar rebuilding of Germany in the 1940s and to Cold War notions of totalitarianism and neo-liberalism in the 1950s.

This chapter will begin by tracing the influence of Gierke's theory of *Genossenschaft* on Friedrich's early arguments, explaining Gierke's ideas and exploring how they relate to Weimar legal theorists who influenced Friedrich, especially Carl Schmitt. It will then elucidate how Friedrich's theory sought to unite the seemingly disparate ideas of Gierke and Schmitt in the

¹⁵ Although Hans Lietzmann discusses Friedrich and Schmitt's relationship, he does not explain how this relates to Friedrich's use of *Genossenschaft* theory. Hans J. Lietzmann, "Von der konstitutionellen zur totalitären Diktatur. Carl Joachim Friedrichs Totalitarismustheorie," in *Totalitarismus: Eine Ideengeschichte des 20. Jahrhunderts*, ed. Alfons Söllner, Ralf Walkenhaus, and Karin Wieland (Berlin: Akademie, 1997), 182-87; Lietzmann, *Politikwissenschaft*, 243-45. Likewise, while Udi Greenberg explores the relationship between Friedrich, the association theorist Johannes Althusius, and Schmitt, this chapter contends that Gierke's writings are key to understanding the fundamentals of Friedrich's political theory. Greenberg, "The Limits."

early 1930s. Next, this chapter will turn to the crisis that Friedrich faced in the late 1930s and early 1940s as he tried to distance his work from Nazism by developing his theories of constitutionalism and democracy. Friedrich increasingly favored a democratic association theory and sought to differentiate his thinking from nascent American neo-liberalism, especially Friedrich Hayek's work. However, Friedrich's role in helping the United States restore a constitutional government in Germany led him to back away from endorsing a fully pluralistic democracy there, particularly as the threat of Communist influence in Europe loomed in the early years of the Cold War. Ultimately, Friedrich had difficulty separating his theory of democracy from his theory of dictatorship in the 1950s, as he sought to differentiate his thinking from totalitarianism and neo-liberalism, the latter of which was becoming increasingly influential in his native Germany. Similar to Franz Neumann, Friedrich sought to explain the fundamental roots of political sovereignty and the limits of political community by amalgamating German and American political thought. Many of the problems Friedrich wrestled with remain unresolved to this day – and his attempts to find answers may be instructive, even if his theory sometimes reveals roads down which political thought should no longer travel.

I. From the German Empire to the Weimar Republic: Gierke to Friedrich

Born to Calvinist Christians in Leipzig, Germany, in 1901, Friedrich received his higher education at the Universities of Marburg, Frankfurt, and Vienna, before settling at the University of Heidelberg to work on his doctorate.¹⁶ There, his academic studies were overseen by Alfred Weber, a sibling of Max Weber, who also became a sociologist.¹⁷ It is possible that Friedrich grappled with Gierke's works because of his association with Alfred. The Weber brothers had a

¹⁶ Joseph Berger, "Carl J. Friedrich Dies at 83; Influential Harvard Professor," *New York Times*, September 22, 1984, <https://www.nytimes.com/1984/09/22/obituaries/carl-j-friedrich-dies-at-83-influential-harvard-professor.html>; Greenberg, *The Weimar Century*, 29-30.

¹⁷ *Ibid.*, 29-30.

personal connection to Gierke. Starting in 1882, Alfred's elder brother Max pursued his legal education, bouncing between universities in Heidelberg, Strasbourg, Berlin, and Göttingen, until he finally settled in Berlin in 1886 to complete his legal studies with Gierke, who assessed Max's dissertation and later appraised, along with Levin Goldschmidt, Max's *Habilitation*.¹⁸ In 1890, Alfred had the opportunity to study with Gierke and Goldschmidt at Friedrich Wilhelms University in Berlin, but decided to study the economy of nations (*Nationalökonomie*) instead.¹⁹ Alfred Weber was familiar with Gierke's writings. While discussing the development of sovereignty in his 1925 work *The Crisis of the Modern Idea of the State in Europe* (*Die Krise des modernen Staatsgedankens in Europa*), Alfred noted:

And one finally had the task of theorizing the conflict between state authority [Staatsgewalt] and freedom of the will [Freiheitswillen]; what has led to the mentioned, half and half, natural-scientifically inspired modern reshaping of the theory of the treaty of the state [Staatsvertrag] that already existed in the Middle Ages and at the same time in this way ultimately toward the modern concept of the sovereignty of the people [Volkssouveränität]. The beginning of this dispute is, as we know from Gierke, the 1603 writing of Althusius, Locke's 1689 state treatise [Staatstraktat] its tentative endpoint in this epoch.²⁰

¹⁸ Gerhard Dilcher, "From the History of Law to Sociology: Max Weber's Engagement with the Historical School of Law," *Max Weber Studies* 8, no. 2 (July 2008): 166, 168. Dilcher shows Gierke wrote a positive assessment of Max's work on Germanic law for a teaching position in Marburg. Dilcher, 180-81. Wolfgang Mommsen has argued: "Max Weber also attended Gierke's [lectures in Berlin], but it can hardly be said that Gierke influenced his later political views in any significant way in comparison to his influence on Hugo Preuss. Max Weber rejected all 'organic' legal and social theories even in their most moderate form, and he rejected Gierke's theory about associations with them, even though he recognized its significance as a great achievement in legal history." Wolfgang J. Mommsen, *Max Weber and German Politics, 1890-1920*, trans. Michael S. Steinberg (Chicago: The University of Chicago Press, 1984), 11. Max later met Gierke's organic legal theory with skepticism. Mommsen, 11, fn. 44; Max Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, ed. Johannes Winckelmann, 2nd ed. (Tübingen: J. C. B. Mohr (Paul Siebeck), 1951), 35-36 fn. 1. However, Martin Riesebrodt argues Weber's theories of religion were likely indebted to Gierke. Martin Riesebrodt, "From Patriarchalism to Capitalism: The Theoretical Context of Max Weber's Agrarian Studies (1892-93)," trans. Leena Tanner, *Economy and Society* 15, no. 4 (1986): 499 fn. 9. Gierke likely played a role in Max's early legal work, but Weber's later theory was independent of Gierke, though Weber may have retained some of its elements. Indeed, Max personally signed and sent to Gierke a copy of the essay "The Protestant Ethic and the 'Spirit' of Capitalism" ("Die protestantisch Ethik und der 'Geist' des Kapitalismus"). "The Otto Friedrich von Gierke Collection," Center for Historical Social Science Literature, Hitotsubashi University, accessed July 28, 2021, <https://chssl.lib.hit-u.ac.jp/en/collection-2/gierke/>.

¹⁹ Eberhard Demm, *Ein Liberaler in Kaiserreich und Republik: Der politische Weg Alfred Webers bis 1920* (Boppard am Rhein, Germany: Harald Boldt, 1990), 20-21.

²⁰ "Und man hatte endlich die Aufgabe, die Auseinandersetzung zwischen Staatsgewalt und Freiheitswillen zu theoretisieren; was zu der erwähnten, halb und halb, naturwissenschaftlich inspirierten modernen Umprägung der schon im Mittelalter vorhanden gewesen Lehre vom Staatsvertrag und gleichzeitig auf diesem Wege schließlich zum

Weber was likely referring to Gierke's 1880 work *Johannes Althusius and the Development of the Natural Law Theory of the State* (*Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien*).²¹ Elsewhere, Weber cited Gierke's multivolume series *The German Law of Association* (*Das Deutsche Genossenschaftsrecht*), published starting in 1868.²² Like his teacher, Friedrich was knowledgeable about Gierke. After Friedrich began teaching at Harvard in 1926, he often wrote for an English-language audience.²³ He authored several entries for the *Encyclopaedia of the Social Sciences*, published in 1931, including a piece on Otto von Gierke.²⁴ Friedrich discussed Gierke's *The German Law of Association* and *Johannes Althusius and the Development of the Natural Law Theory of the State*.²⁵ He focused on Gierke's theory of association: "Gierke's concept of *Genossenschaft* (cooperative association) influenced all his work. He did not give it a rigid definition but traced its evolution in contrast with its antithesis, *Herrschaft*."²⁶ Unlike *Genossenschaft*, *Herrschaft* denoted authority and the idea of lordship or domination, which Friedrich explained: "*Genossenschaft* is found where several human beings realize the ends of the group through some form of cooperation of their several wills, while

modernen Begriff der Volkssouveränität geführt hat. Der Beginn dieser Auseinandersetzung ist, wie wir seit Gierke wissen, die Schrift des Althusius 1603, ihr vorläufiger Endpunkt in dieser Epoch der Staatstraktat von Locke 1689." Alfred Weber, *Die Krise des modernen Staatsgedankens in Europa* (Stuttgart: Deutsche Verlags-Anstalt, 1925), 29. Weber is referencing Locke's *Two Treatises of Government*. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 2013).

²¹ Otto von Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien: Zugleich ein Beitrag zur Geschichte der Rechtssystematik*, 3rd ed. (Breslau: M. & H. Marcus, 1913), ii.

²² Weber, *Die Krise*, 27 fn. 1; Stolleis, *Public Law*, 337; Otto Gierke, *Das Deutsche Genossenschaftsrecht: Rechtsgeschichte der deutschen Genossenschaft*, vol. 1 (Berlin: Weidmannsche Buchhandlung, 1868); Otto Gierke, *Das Deutsche Genossenschaftsrecht: Geschichte des deutschen Körperschaftsbegriffs*, vol. 2 (Berlin: Weidmannsche Buchhandlung, 1873); Otto Gierke, *Das Deutsche Genossenschaftsrecht: Die Staats- und Korporationslehre des Alterthums und des Mittelalters und ihre Aufnahme in Deutschland*, vol. 3 (Berlin: Weidmannsche Buchhandlung, 1881); Otto von Gierke, *Das Deutsche Genossenschaftsrecht: Die Staats- und Korporationslehre der Neuzeit*, vol. 4 (Berlin: Weidmannsche Buchhandlung, 1913).

²³ Greenberg, *The Weimar Century*, 30.

²⁴ Carl Joachim Friedrich, "GIERKE, OTTO VON," in *Encyclopaedia of the Social Sciences*, vol. 6, ed. Edwin R. A. Seligman and Alvin Johnson (New York: Macmillan, 1967), 655-56. The *Encyclopaedia* was first published in 1931 and was reissued as a reprint many times in subsequent decades.

²⁵ *Ibid.*, 655.

²⁶ Emphasis in original, *ibid.*, 655.

Herrschaft is found where group ends are realized through subordination of the wills of the group members under one or several commanding wills.”²⁷

Friedrich preferred *Genossenschaft*, associating it with German history: “Gierke attributed to the Germanic peoples a particular aptitude for *Genossenschaft* and the freedom which it helps to maintain.”²⁸ He even evinced some nationalism in celebrating Gierke: “Apart from its theoretical implications the greatness of Gierke’s work lies in the firmness with which it is rooted in the past of German legal history.”²⁹ He credited Gierke as a central figure in German law: “Upon public law his influence has been indirect but equally great, for his pupil, Hugo Preuss, was the drafter of the German constitution of 1919. With Gneist and Laband, Gierke is one of the most important founders of contemporary German constitutional law.”³⁰

Another entry Friedrich wrote for the *Encyclopaedia* focused on Johannes Althusius, a political thinker who lived from 1557 to 1638, in which Friedrich described the importance of Calvinism to Althusius’ political theory and cited Gierke’s book on Althusius.³¹ Friedrich noted Gierke was a vital expositor of Althusius.³² In 1932, Friedrich published a reprinted treatise by

²⁷ Emphasis in original, *ibid.*, 655. The concept of *Herrschaft* is associated with Max Weber’s analysis of authority or domination in his sociological studies. Stefan Breuer, “The Relevance of Weber’s Conception and Typology of *Herrschaft*,” in *The Oxford Handbook of Max Weber*, ed. Edith Hanke, Lawrence Scaff, and Sam Whimster, trans. Lawrence A. Scaff, (New York: Oxford University Press, 2019), 237-50.

²⁸ Emphasis in original, Friedrich, “GIERKE, OTTO VON,” 655.

²⁹ *Ibid.*, 655. According to Klaus von See, Gierke associated his theories with “Germanic” law: “Gierke contrasted the patrimonial and corporative-constrained freedom of Germanic thought sharply with the unconstrained, individualistic-egotistic liberalism of Roman thought.” In German: “[S]tellt Gierke die patrimonial und korporativ gebundene Freiheit des germanischen Denkens dem ungebundenen, individualistisch-egoistischen Liberalismus des romanischen Denkens scharf gegenüber.” Klaus von See, *Freiheit und Gemeinschaft: völkisch-nationales Denken in Deutschland zwischen Französischer Revolution und Erstem Weltkrieg* (Heidelberg: Winter, 2001), 150. German legal historian Michael Stolleis notes that the Nazis adapted Gierke’s Romanticism and German nationalism to suit their legal arguments. Stolleis, *Public Law*, 337; Michael Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany*, trans. Thomas Dunlap (Chicago: The University of Chicago Press, 1998), 45.

³⁰ Friedrich, “GIERKE, OTTO VON,” 655.

³¹ Carl Joachim Friedrich, “ALTHUSIUS, JOHANNES,” in *Encyclopaedia of the Social Sciences*, vol. 2, ed. Edwin R. A. Seligman and Alvin Johnson (New York: Macmillan, 1967), 13-14; David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997), 43.

³² Friedrich wrote: “It was left to Gierke to rediscover him in connection with his extensive researches into the nature of the corporation and what he termed the Germanic concept of corporation.” Friedrich, “ALTHUSIUS, JOHANNES,” 14.

Althusius, entitled *Politica Methodice Digesta of Johannes Althusius (Althaus)*, penning an extensive introduction for it.³³ He critiqued Gierke's scholarship on Althusius, but noted that in Gierke's work "[i]n no other form could the great significance of [Althusius'] ideas have been brought home equally well."³⁴ In a 1932 book review, George Sabine of Cornell said Friedrich stood on Gierke's shoulders: "Any treatment of Althusius necessarily challenges comparison with Gierke's work. Professor Friedrich's introduction is not intended to supplant Gierke but to supplement him by emphasizing another and, in Professor Friedrich's judgment, a more important aspect of Althusius' political theory."³⁵ Friedrich was deeply indebted to Gierke – but the contours of Gierke's influence on Friedrich require further elucidation.

II. Who Decides? The Contested Idea of Sovereignty in the Weimar Republic

Gierke's notion of sovereignty helps illuminate Friedrich's political theory. Much of Friedrich's political theory focused on internal sovereignty, grappling with the question of who has the authority to govern the state and society.

Gierke argued the *Genossenschaft* emerged out of ancient Germanic communities who came together first as families then as broader communal associations.³⁶ Unlike contract theories, which assert that *individuals* who make up an association determine its legal contours, Gierke argued the *communal association* of people in a *Genossenschaft* turned the association

³³ *Politica Methodice Digesta of Johannes Althusius (Althaus): Reprinted from the Third Edition of 1614 Augmented by the Preface to the First Edition of 1603 and by 21 Hitherto Unpublished Letters of the Author* (Cambridge, MA: Harvard University Press, 1932); Greenberg, *The Weimar Century*, 33-34; Greenberg, "The Limits."

³⁴ Carl Joachim Friedrich, "Introduction," in *Politica Methodice Digesta of Johannes Althusius (Althaus): Reprinted from the Third Edition of 1614 Augmented by the Preface to the First Edition of 1603 and by 21 Hitherto Unpublished Letters of the Author* (Cambridge, MA: Harvard University Press, 1932), xvi.

³⁵ George H. Sabine, review of *Politica Methodice Digesta of Johannes Althusius (Althaus)*, by Carl Joachim Friedrich, *American Political Science Review* 26, no. 5 (Oct. 1932): 942, 940. In contrast, Hans Lietzmann argues that Friedrich offered an original analysis of Althusius compared to Gierke, but much of Friedrich's thinking was clearly beholden to Gierke, as discussed in further detail below. Lietzmann, *Politikwissenschaft*, 52.

³⁶ Runciman, 51. For an excellent analysis of Gierke's legal and historical arguments about medieval German communities, and their role in the historiography of German legal history, see Susan Reynolds, *Kingdoms and Communities in Western Europe, 900-1300*, 2nd ed. (Oxford: Clarendon Press, 1997), xxvii-xxxii.

itself into an entirely new legal person with its own rights.³⁷ The theorists Gierke argued against included social contract theorists, particularly Thomas Hobbes in *Leviathan*.³⁸ Hobbes said the rights of the sovereign were derived from the rights of the individual.³⁹ In contrast to contract theories in which only individuals hold rights, in Gierke's theory both the *Genossenschaft* itself and the individuals making up the *Genossenschaft* have legal rights.⁴⁰ Gierke traced this theory of association from the writings of Althusius.⁴¹ Gierke believed Althusius' theories comported with a naturalistic "organic" understanding of politics that more effectively brought together society and state than the automaton-like state Hobbes offered.⁴²

As political theorist Miguel Vatter writes, the *Genossenschaft* had implications for the idea of sovereignty because "Gierke's point is that if every association develops a real group personality spontaneously then it is clear that no sovereign can represent it."⁴³ Eliminating a clear sovereign and endowing both individuals and associations with legal rights led to the creation of a *Rechtsstaat*, or state based upon law, as theorist David Runciman observes: "No part of the state – neither ruler nor people, individuals nor assemblies – could 'represent' or in any other way stand apart from the whole. The whole, rather, was bound up with each of its parts, individual and associated, because every part was an aspect of the whole."⁴⁴ Thus, Gierke argued against German legal theorists who endowed the state with complete authority – instead

³⁷ Runciman, 51-52.

³⁸ Ibid., 39-40; Thomas Hobbes, *Leviathan*, ed. C. B. MacPherson (London: Penguin, 1985).

³⁹ As political theorist Richard Tuck notes, Hobbes believed "[t]he sovereign's rights were purely those of any individual in the state of nature [...]." Richard Tuck, "Introduction," in Thomas Hobbes, *Leviathan: Revised Student Edition*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), xxxviii; Runciman 41.

⁴⁰ Ibid., 52.

⁴¹ Ibid., 43-44; Greenberg, "The Limits." However, Gierke believed Althusius' ideas did not effectively explain how disparate *Genossenschaften* could coalesce together into the state. Runciman, 46.

⁴² Ibid., 43-44; 39-40.

⁴³ Miguel Vatter, "The Political Theology of Carl Schmitt," in *The Oxford Handbook of Carl Schmitt*, ed. Jens Meierhenrich and Oliver Simons (New York: Oxford University Press, 2017), 251.

⁴⁴ Runciman, 52, 53.

he gave the people a more dynamic capacity in governance because they were an essential element of the state.⁴⁵ This put Gierke at odds with leading German legal thinkers of his time.⁴⁶

However, as the German Empire gave way to the Weimar Republic, Gierke's organic liberalism became increasingly influential.⁴⁷ Perhaps most importantly the jurist Hugo Preuß, one of Gierke's students and the leading influence on the Weimar Constitution, drew heavily on Gierke's theories.⁴⁸ During the German Empire, the left-leaning liberal Preuß argued in favor of greater parliamentary power for the *Reichstag* and for more democratic involvement in all aspects of governance at the local, state, and national level.⁴⁹ Anti-Jewish sentiment in the Empire left Preuß excluded from teaching at important universities, but the Weimar Republic gave him the opportunity to turn his theories into practice when he drafted the constitution.⁵⁰

Among conservative Weimar legal thinkers, Carl Schmitt grappled with Gierke's arguments in his 1921 work *The Dictatorship (Die Diktatur)*.⁵¹ Friedrich sought to obtain a copy of this book from its publishing house in 1927 and in 1929 he met Schmitt in person.⁵² In 1930,

⁴⁵ Stolleis, *Public Law in Germany*, 338. As Stolleis writes, Gierke believed "[a] person who does not understand the people as an object of domination but rather attributes to them an active role must come to a recognition of fundamental rights, a right for the judiciary to test the legality of legislation and to accept a material concept of the rule of law." Ibid., 338.

⁴⁶ Ibid., 326.

⁴⁷ Ernst Fraenkel observed that Hugo Sinzheimer, a Social Democrat who assisted in constitutionalizing labor law in the Weimar Republic, was profoundly influenced by Gierke, and Gierke positively reviewed one of Sinzheimer's works on labor law. Ernst Fraenkel, "Hugo Sinzheimer," *Juristenzeitung* 13, no. 15 (Aug. 1958): 458-59; Otto von Gierke, "Die Zukunft des Tarifvertragsrechts," *Archiv für Sozialwissenschaft und Sozialpolitik* 42 (1916/1917): 815-41; Colin Loader, *Alfred Weber and the Crisis of Culture, 1890-1933* (New York: Palgrave Macmillan, 2012), 106.

⁴⁸ Ibid., 104-5; Stolleis, *Public Law in Germany*, 340.

⁴⁹ Christoph Schoenberger, "Hugo Preuss," in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper (Berkeley: University of California Press, 2002), 111-12; Michael Stolleis, *A History of Public Law in Germany 1914-1945*, trans. Thomas Dunlap (Oxford: Oxford University Press, 2004), 54-55.

⁵⁰ Schoenberger, 110-11, 113; Stolleis, *A History of Public Law*, 56.

⁵¹ Carl Schmitt-Dorotić, *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (München: Duncker & Humblot, 1921). Schmitt published this work using his own name and the name of his first wife. Mehring, 41-43, 59. For an English-language translation of *The Dictatorship*, see Carl Schmitt, *Dictatorship*, trans. Michael Hoelzl and Graham Ward (Cambridge: Polity, 2014).

⁵² Mehring, 593 fn. 65, 208-9.

Schmitt and Friedrich discussed a possible English-language translation.⁵³ Schmitt discussed Gierke's work on Althusius in *The Dictatorship*:

According to Gierke [...] the boldness and originality of Althusius consists in that he has transferred the Absolutists' concept of sovereignty [Souveränitätsbegriff] to the sovereignty of the people [Volkssouveränität] in his quite 'cutting sharpness [schneidigen Schärfe].' That is to say, however, it is restrictive to this end, that with Althusius a *contractus reciprocus* [reciprocal contract] continues to persist, which is also bound beyond the state by natural law principles and creates reciprocal (*vicissim* [reciprocal]) obligations between prince and people, principles and representative.⁵⁴

According to Schmitt, Gierke believed that Althusius shifted sovereignty from the ruler to the people. But even with this change, Althusius continued to recognize a dialectical relationship between the leader and the people, in which both owed responsibilities to the other.

Preuß made similar arguments – like Gierke, he wanted to excise sovereignty from the German constitution, which he associated with absolutist theories.⁵⁵ During the German Empire, Preuß rejected both Hobbes' leader-based sovereignty and Jean-Jacques Rousseau's argument that the people hold total sovereignty, which Preuß believed transferred absolutist authority from the leader to the people.⁵⁶ This was untenable for a Gierke acolyte because Rousseau's theory failed to recognize that the state was not made up of individuals but also included the legal personalities of the associations that made up the state.⁵⁷ According to historian Peter Caldwell, instead of discussing sovereignty Preuß gave "paradoxical statements that (a) the *Volk* [people]

⁵³ Greenberg, "The Limits," fn. 20.

⁵⁴ "Nach Gierke (S. 151) besteht die Kühnheit und Originalität des Althusius darin, daß er den Souveränitätsbegriff der Absolutisten in seiner ganzen 'schneidigen Schärfe' auf die Volkssouveränität übertragen hat. Dazu ist jedoch einschränkend zu sagen, daß auch bei Althusius ein *contractus reciprocus* bestehen bleibt, der nach naturrechtlichen Grundsätzen auch außerhalb des Staates binden ist und gegenseitig (*vicissim*) Verbindlichkeiten zwischen Fürst und Volk, Mandanten und Mandatar schafft." Schmitt-Dorotić, 126.

⁵⁵ Peter C. Caldwell, "Hugo Preuss's Concept of the *Volk*: Critical Confusion or Sophisticated Conception?" *University of Toronto Law Journal* 63, no. 3 (Summer 2013): 368, 369.

⁵⁶ *Ibid.*, 369; Jean-Jacques Rousseau, *Discourse on Political Economy and The Social Contract*, trans. Christopher Betts (Oxford: Oxford University Press, 1994), 54-56.

⁵⁷ Caldwell, 369-70.

creates the constitution and (b) the constitution creates the *Volk*.”⁵⁸ Preuß argued governance was a dialectical process – the people could not be divorced from the constitution, nor the constitution from the people, as they were inherently intertwined in governing Germany.

Schmitt discussed Gierke and Preuß in his 1922 work *Political Theology (Politische Theologie)*.⁵⁹ A central problem for Schmitt in legal and political theory was the enforcement of the law – how can abstract, legal norms can be turned into concrete action?⁶⁰ Schmitt believed Gierke offered a solution to this conundrum.⁶¹ Schmitt said sometimes legal norms became divorced from the real world, writing that “[a] breach of the law exists during revolutionary constitutional change, a breach of legal continuity” but observed that Gierke argued “[h]owever it can be cured and a legal foundation preserved retroactively ‘through any adequate legal process for the moral consciousness of the people,’ for example a constitutional agreement or plebiscite or the hallowed power of custom [...]”.⁶² For Schmitt, the power Gierke gave the people to ratify or reject a change in the law ensured legal norms matched societal practice.

⁵⁸ Ibid., 368. In the Weimar era, *Volk* became increasingly associated with right-wing nationalism, but liberal Jewish figures Preuß and Walther Rathenau attempted to adopt the term in their own theories. Ibid., 367-68; Michael Geyer, “Insurrectionary Warfare: The German Debate about a *Levée en Masse* in October 1918,” *Journal of Modern History* 73, no. 3 (Sept. 2001): 485. For a discussion of the role of *Völkisch* politics in the rise of Nazism in Germany, see Eric Kurlander, *The Price of Exclusion: Ethnicity, National Identity, and the Decline of German Liberalism, 1898-1933* (New York: Berghahn Books, 2006).

⁵⁹ Vatter, 250-51; Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von Souveränität*, 2nd ed. (München: Duncker & Humblot, 1934). Schmitt said this version of the book was unchanged from its original 1922 edition. Ibid., 7. For an English-language version, see Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: The University of Chicago Press, 2005).

⁶⁰ Vatter, 249.

⁶¹ According to political theorist Miguel Vatter: “In *Political Theology* Schmitt admits that only one other theory could potentially provide a solution to the problem of how a system of norms links up to social life, and this was the theory proposed by Gierke [...]” Ibid., 250.

⁶² “Bei revolutionären Verfassungsänderungen liegt ein Rechtsbruch vor, eine Durchbrechung der Rechtskontinuität [...]” Schmitt, *Politische Theologie*, 34. “Doch kann er geheilt werden und nachträglich einen Rechtsgrund erhalten ‘durch irgendeinen für das Rechtsbewußtsein des Volkes ausreichenden rechtlichen Vorgang’, z. B. eine Verfassungsvereinbarung oder Volksabstimmung oder die heiligende Macht der Gewohnheit [...]” Ibid., 34; Otto von Gierke, *Die Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorien* (Tübingen: J. C. B. Mohr (Paul Siebeck), 1915), 35.

Schmitt thought Preuß pushed Gierke's theory even further: "With the arguments of the theory of association [Genossenschaftstheorie] Preuß could reject the concept of sovereignty as a residue of the authoritarian state [Obrigkeitsstaates] and could find an organization in the associational commonwealth [Gemeinwesen], built from the bottom up, which does not require a monopoly on authority [Herrschaftsmonopol] and therefore also manages without sovereignty."⁶³ It is telling that Schmitt related sovereignty with *Herrschaft* and a hierarchical authority. Replacing *Herrschaft* with *Genossenschaft* enabled Preuß to vitiate sovereignty and to build in its place a legal order founded on equality – equality between the associations that made up society and equality among the people who actively shaped these associations.⁶⁴

However, Schmitt rejected Gierke and Preuß's arguments about sovereignty and instead embraced Hobbesian ideas.⁶⁵ Schmitt argued the core of Hobbes' theory was the idea "Autoritas, non veritas facit legem" meaning "Authority, not truth makes the law."⁶⁶ According to Schmitt, Hobbes thought the authority to decide when to exercise the state's power to enforce abstract legal norms in the real world should be personalized through the decisions of a single

⁶³ "Preuß konnte mit den Argumenten der Genossenschaftstheorie den Souveränitätsbegriff als ein Residuum des Obrigkeitsstaates ablehnen und in dem genossenschaftlich von unter sich aufbauenden Gemeinwesen eine Organisation finden, die das Herrschaftsmonopol nicht braucht und daher auch ohne Souveränität auskommt." Schmitt, *Politische Theologie*, 35.

⁶⁴ In a 1925 speech Preuß delivered to a union, he declared: "[T]he republic, and the democratic principle, rest on the *cooperative* principle of organization from below. Authority is not derived from above but from the community of comrades, of citizens; it rises from narrower to even wider associations, from bottom to top. It is the cooperative structure of the state." Emphasis in original, Hugo Preuss, "The Significance of the Democratic Republic for the Idea of Social Justice," in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper (Berkeley: University of California Press, 2002), 116, 122. Preuß noted that "democratic equality cannot be equated with the fiction of complete personal equality" because "people are not equal but very unequal." Ibid., 122. However, Preuß argued in favor of the notion of legal equality: "But why, then, is the right to take part in the full electoral process, political equality in general, the basis of every democratic form of state? Because at least at today's level of social, cultural, and economic conditions, any formal difference in the allocation of political rights to individuals leads to despotism, privilege, and deprivation of rights; a just allocation of different rights according to differences in personality is impossible." Ibid., 122.

⁶⁵ "The classical representative of the (if I may develop this word) decisionistic type is Hobbes." In German: "Der klassische Vertreter des (wenn ich dies Wort bilden darf) dezisionistischen Typus ist Hobbes." Schmitt, *Politische Theologie*, 44.

⁶⁶ Ibid., 44. Here, Schmitt cites to chapter 26 of *Leviathan*, entitled "Of Civill Lawes." Hobbes, 311-34.

individual: “Hobbes also brought forward a decisive argument, which includes the connection of this decisionism with personalism and rejects all attempts to substitute the concrete sovereignty of the state with an abstractly applicable order.”⁶⁷ Unlike Gierke and Preuß, Schmitt argued a Hobbesian representative sovereign was necessary to unify the entirety of the social order and to effectively transform a community’s legal norms into concrete political action.⁶⁸ In his 1921 work *The Dictatorship*, Schmitt explained the Hobbesian process for selecting a sovereign:

If the entirety of the people [Volkes], of the populus [people], decisively confers authority [Herrschaft] to an individual, thus a monarchy is thereby developed. If the authority [Herrschaft] is conferred only for a time, thus the legal character of the emerging political force [Gewalt] is dependent upon whether or not the populus, meaning the acting totality of the citizens as a constitutional subject (that Hobbes always strongly distinguishes as a persona [person] from the shapeless mass of the multitude dissolute [disorganized crowd]), has the right [Recht] to assemble themselves during that temporary domination [Herrschaft]. If the populus can convene without or even against the will of the temporary possessor of force [Gewaltinhabers], thus he is no monarch, but only the primus populi minister [first minister of the people].⁶⁹

Schmitt averred that Hobbes differentiated between selection of a monarch and a dictator. He said that Hobbes believed the people could transfer their authority to an individual temporarily – resulting in a dictatorship – after which the people could reassert their political authority, or the people could transfer their authority to an individual forever – resulting in a monarchy. Schmitt emphasized the concept of *Herrschaft*, associating the people’s power with authority and even

⁶⁷ “Hobbes hat auch ein entscheidendes Argument vorgebracht, welches den Zusammenhang dieses Dezisionismus mit dem Personalismus enthält und alle Versuche, an die Stelle der konkreten Staatssouveränität eine abstrakt geltende Ordnung zu setzen, ablehnt.” Schmitt, *Politische Theologie*, 44.

⁶⁸ Vatter, 251-52. According to Vatter: “To Gierke’s [...] thesis that any truly representative system necessarily will reject a sovereign entity, Schmitt responds that unless a legal system is focused on the apex of sovereignty it will not be representative at all. The representative has authority because it represents to all members their unity or state; no representative as such can represent the members against the state for then they cease being a representative of the whole and become an advocate of the part.” Ibid., 252.

⁶⁹ “Wenn die Gesamtheit des Volkes, der populus, einem Einzelnen die Herrschaft endgültig überträgt, so ist damit eine Monarchie entstanden. Wird die Herrschaft nur für Zeit übertragen, so ist der rechtliche Charakter der so entstehenden politischen Gewalt davon abhängig, ob der populus, d. h. die als staatsrechtliches Subjekt handelnde Gesamtheit der Bürger (die Hobbes als eine persona von der formlosen Menge, der multitude dissoluta, immer streng unterscheidet), während jener zeitweisen Herrschaft das Recht hat, sich zu versammeln oder nicht. Kann der populus ohne oder gar gegen den Willen des zweitwilligen Gewaltinhabers zusammentreten, so ist dieser kein Monarch, sondern nur primus populi minister.” Schmitt-Dorotić, *Die Diktatur*, 30-31.

domination. He argued Hobbes' theory of dictatorship in the 1651 work *Leviathan* anticipated Oliver Cromwell's Protectorate, established in 1653 in the aftermath of the English Civil War.⁷⁰ Drawing on *Leviathan*, Schmitt asserted that Hobbes thought even democracies and republics required monarchical elements for effective governance, especially during a civil war.⁷¹

An entry Friedrich wrote for the 1931 *Encyclopaedia of the Social Sciences* was on Oliver Cromwell, and he cited Schmitt's *The Dictatorship* as one of his sources.⁷² Friedrich discussed the relationship between Cromwell's political goals and his Puritan religion, which was strongly influenced by Calvinism – this was unsurprising because Calvinism was also important in Friedrich's life: "Starting from a desire to secure toleration for the Puritan faith Cromwell developed a dictatorship resting upon a control of the army and popular acclaim."⁷³

⁷⁰ "But the impression that the experience of the English Revolution and its development toward Cromwell's Protectorate made on Hobbes is also found in his assessment of dictatorship. In *Leviathan* (1651) he calls the dictator, which he places next to the Protectorate in reference to Cromwell, a temporary monarch, with the explanation that here exists a power equal in value to the powers of the monarch." In German: "Aber der Eindruck, den die Erfahrung der englischen Revolution und ihre Entwicklung zum Protektorat Cromwells auf Hobbes machten, ist auch in seiner Beurteilung der Diktatur zu erkennen. Im *Leviathan* (1651) nennt er den Diktator, den er in Anspielung auf Cromwell neben der Protektor stellt, eine zeitweiligen Monarchen, mit der Begründung, daß hier eine der Macht des Monarchen gleich zu bewertende Macht vorhanden sei." Schmitt-Dorotić, *Die Diktatur*, 31. Historian Barry Coward describes the Protectorate as a "coup," arguing the dissolution of Parliament on December 12, 1653, and the creation of the Protectorate was likely the result of political machinations hidden from public view. Barry Coward, *The Cromwellian Protectorate* (Manchester: Manchester University Press, 2002), 12-14, 25.

⁷¹ "However, the character of the entire discussion in 'Leviathan' is generally more political than constitutional and mentions dictatorship mainly for this reason, in order to reveal that during a civil war even a democracy cannot do without monarchical institutions and that in republics the power is frequently wrested away through such an inevitable dictator or protector of the people's assembly, the coetus [assembly], as in the monarchy of a minor or a king otherwise unfit to rule through the legal guardian or deputy." In German: "Doch ist der Charakter der ganzen Erörterung wie überhaupt im 'Leviathan' mehr politisch als staatsrechtlich und die Diktatur hauptsächlich deshalb erwähnt, um zu zeigen, daß während eines Bürgerkrieges auch eine Demokratie nicht ohne monarchistische Einrichtungen auskommt und daß häufiger in Republiken durch eine solchen unvermeidlichen Diktator oder Protektor der Volksversammlung, dem coetus, die Macht entrissen wird, als in Monarchien der minderjährigen oder sonstwie regierungsunfähigen König durch den Vormund oder Stellvertreter." Schmitt-Dorotić, *Die Diktatur*, 31.

⁷² Carl Joachim Friedrich, "CROMWELL, OLIVER," in *Encyclopaedia of the Social Sciences*, vol. 4, ed. Edwin R. A. Seligman and Alvin Johnson (New York: Macmillan, 1967), 605-06. Friedrich cited to pages 131-34 of the 1928 second edition of Schmitt's book. Ibid., 606.

⁷³ Ibid., 605; Greenberg, *The Weimar Century*, 30-31. Friedrich argued Calvinism was the main motivating force for Cromwell: "It is impossible to appreciate his political thinking without taking into account his religion. He was perhaps more deeply convinced of his communion with God than any other man of action of his age." Ibid., 605. For a discussion of the importance of Calvinism to the political ideas of the English Civil War, see Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution* (London: Penguin, 1975), 151-83.

Friedrich's observation that Cromwell was a dictator but was subject to "popular acclaim" is similar to Schmitt's discussion of Hobbes and Cromwell in *The Dictatorship*. But unlike Schmitt, who drew on the idea of *Herrschaft* in his analysis of Hobbes and Cromwell, Friedrich rooted his discussion of Cromwell in the idea of *Genossenschaft*:

Because of this emphasis upon the personal element in faith he was predestined to become a builder of the Commonwealth – a concept which represents the attempt to apply the ancient tribal idea of a brotherhood or fellowship (*Genossenschaft*) to the modern national community. By insisting upon an unexplained faith in the preestablished harmony of interests of those who 'believe in God' it emphasizes the common interests which bind men together without sacrificing the personality of the member or brother (*Genosse*). This symbolical expression points to the core of the political ideas of Cromwell.⁷⁴

Here, he followed Gierke's argument that *Genossenschaft* emerged from tribal customs and said this idea was essential to Cromwell's political project. According to Friedrich, Cromwell's notion of the English nation-state was based on associations of theistic believers brought together to create a united and amicable commonwealth, though Friedrich ignored Cromwell's exclusion of certain Christians, particularly Catholics.⁷⁵ Friedrich also seemed to embrace Schmitt's call for a strong, personal political leader. Thus, Friedrich's assertion that Cromwell "was predestined to become a builder of the Commonwealth" indicated Friedrich may have believed certain individuals were, by their nature, meant to embody the totality of the nation.⁷⁶

Friedrich and his co-author Frederick Mundell Watkins offered a similar argument in the *Encyclopaedia* entry "MONARCHY."⁷⁷ They cited both Gierke's *The German Law of Association* and Schmitt's *The Dictatorship*.⁷⁸ As Friedrich and Watkins defined "monarchy":

⁷⁴ Friedrich, "CROMWELL, OLIVER," 605.

⁷⁵ Albert J. Loomie, "Oliver Cromwell's Policy Toward the English Catholics: The Appraisal by Diplomats, 1654-1658," *Catholic Historical Review* 90, no. 1 (Jan. 2004): 29-44.

⁷⁶ Friedrich, "CROMWELL, OLIVER," 605. Friedrich admitted Cromwell's attempts met with failure. *Ibid.*, 606.

⁷⁷ Carl Joachim Friedrich and Frederick Mundell Watkins, "MONARCHY," in *Encyclopaedia of the Social Sciences*, vol. 10, ed. Edwin R. A. Seligman and Alvin Johnson (New York: Macmillan, 1967), 579-84.

⁷⁸ *Ibid.*, 584.

“Broadly speaking, it designates a peculiar type of constitutional legitimacy founded upon the pure blood of a monarch who, no matter how limited may be the extent of his governing functions, is thereby enabled to represent the organic unity of the people. The monarch is the symbol of the living growth of a unified culture pattern of which the constitutional order is but an aspect.”⁷⁹ With such an argument, Friedrich and Watkins revealed a belief that royals personified a unified political and social order, thereby integrating society’s disparate elements. Indeed, Friedrich and Watkins ended their article by saying: “[M]onarchical restoration by providing executive leadership may come to be looked upon as the most promising method of reestablishing constitutional government.”⁸⁰ Thus, Friedrich embraced both Gierke’s *Genossenschaft* theory and Schmitt’s theory of personalized leadership when trying to explain how to unite society and politics.

III. Unequal Democracy: Friedrich’s Theory of Hierarchical Equality

For Preuß, it would be difficult to reconcile the *Genossenschaft* theory, which he believed vitiated sovereignty and led to democratic equality, with Schmitt’s desire for *Herrschaft* and hierarchy. Yet Friedrich saw them as compatible, perhaps in light of his teacher Alfred Weber’s theories. Weber thought an organic unity was possible within the Weimar Republic but was skeptical of egalitarian democracy.⁸¹ He favored, with regrettable prescience, *Führerdemokratie*, or leader-democracy.⁸² In his 1925 book *The Crisis of the Modern Idea of the State in Europe*, Weber argued that the emergence of mass politics replaced individualism

⁷⁹ Ibid., 579. In his 1937 book, *Constitutional Government and Politics*, Friedrich repeated this word-for-word, indicating he agreed with this definition. Carl Joachim Friedrich, *Constitutional Government and Politics: Nature and Development* (New York: Harper & Brothers, 1937), 18.

⁸⁰ Friedrich and Watkins, “MONARCHY,” 584.

⁸¹ Loader, 104-5, 106, 107.

⁸² Ibid., 139, 237 fn. 16; Lietzmann, *Politikwissenschaft*, 40 fn. 57.

with large-scale organizations.⁸³ He believed only a technocratic oligarchy could unify such disparate mass-institutions.⁸⁴ Technical expertise was not the sole ability Weber believed these elites held:

It can only be a question of how the more or less oligarchical leader class [Führerschicht] is selected and recruited, how it is composed and in particular how it is alongside the essential, purely technical elements, the elements of the purely bureaucratic professional experience [Berufspraxis], the party bosses, party fat-cats [Parteibonzen], parliamentary and other business-politicians [Geschäftspolitikern] who are just as important in these modern, democratic forms as the equally essential bureaucracy in the governmental administrative apparatus, how to bring in alongside all the truly sublime [überragende] spiritual [geistige] elements, and how the total fate, total action, the total responsibility is found to lie in their hands as the ultimately decisive ones.⁸⁵

Weber endowed these oligarchs with a spiritual quality, attributing to these elites the special ability to harmonize into a unified whole the fractured, self-interested elements of mass politics with the rational, technical bureaucracy of the modern administrative state.⁸⁶ While Weber admitted this was an oligarchy, he contended it was consonant with modern democratic politics:

⁸³ “It is to state compared to all washed-out and improperly educated earlier democratic ideologies that are based on a naïve individualism, disconnected from reality: Just as with the full upholding of the masses’ desire for freedom and self-determination after the collapse of the old individualism the only active and practically effective manifestation of these forces inherent in modernity today only go through the large-scale rational formation of the masses [Massenformation] [...]” In German: “Es ist gegenüber allen verwaschenen und nicht richtig fortgebildeten früheren demokratischen Ideologien, die auf einem naiven, mit der Wirklichkeit nicht in Verbindung gebrachten Individualismus fußen, zu konstatieren: So wie bei vollem Aufrechterhalten des Freiheits- und des Selbstbestimmungswillens der Massen nach dem Zusammenbruch des alten Individualismus die einzige Aktivierung und praktisch wirksame Äußerungsform dieser der Moderne inhärenten Kräfte heute nur noch durch die großorganisierte rationale Massenformation geht [...]” Weber, *Die Krise*, 137.

⁸⁴ “[S]ince every rationalized formation of the masses demands centralization and experienced guidance, requires particular technical ability and experience and therefore makes necessary a particular aloof, managing elite [Oberschicht] of the masses, every de-oligarchization of modern democracy is also an absurdity.” In German: “[S]o ist, da jede rationalisierte Massenformation zentralisierte und erfahrene Leitung fordert, die besondere technisches Können und Erfahrung voraussetzt und also eine besondere, von den Massen abgehobene leitende Oberschicht nötig macht, auch jede Entoligarchisierung moderner Demokratie ein Unding.” Ibid., 137.

⁸⁵ “Es kann sich nur darum handeln, wie die mehr oder weniger oligarchische Führerschicht ausgelesen und ergänzt, wie sie zusammengesetzt wird und wie sie insbesondere neben den unentbehrlichen, rein technischen Elementen, den Elementen der bloßen bürokratischen Berufspraxis, den Parteibosses, Parteibonzen, parlamentarischen und sonstigen Geschäftspolitikern, die in diesen modernen demokratischen Formen ebenso notwendig sind wie die gleichfalls unentbehrliche Bürokratie im staatlichen Verwaltungsapparat, wie neben all dem wirklich überragende geistige Elemente hineinzubringen, und wie das Gesamtschicksal und das Gesamthandeln, die Gesamtverantwortlichkeit in ihre Hände als die letztlich bestimmenden zu legen find.” Ibid., 137.

⁸⁶ On Weber’s notion of spiritual elites, see Loader, 141; Lietzmann, *Politikwissenschaft*, 40, 44.

In other words, in modern mass-relations individualistic-ideological egalitarianism can no longer come into question, but only an unegalitarian, an entirely modern leader-democracy [Führerdemokratie]. In such a system the voluntariness of organized community coalescence [Gemeinschaftszusammenballung] of those led must always go together with a real stratification of this system, a control of the leader [Führer] emerging out of this stratification through the democratic appeal for the trust that they enjoy, along with expansive independent discretion [Entscheidung] and decision-making processes for the elected pinnacle of leadership [Führerspitze]. All great private organizations, which are also ultimately built on majority decision and in this respect on the formal means of democracy, work according to this model.⁸⁷

Weber asserted individualism was moot in modern times because individuals voluntarily agreed to join massive, hierarchical organizations, such as political parties and corporations.⁸⁸ He conceded that such a society was unequal but argued these large organizations could retain a democratic quality because their leaders could be held accountable by subjecting them to a vote.⁸⁹ However, the democratic forces in *Führerdemokratie* appeared to be quite limited – they were perhaps merely plebiscitary.

Friedrich made a strikingly similar argument in his 1932 introduction to *Politica Methodice Digesta* of Johannes Althusius, in which he lionized Althusius. He said an essential element of Althusius' political theory was "that Althusius does not know and cannot know a *free will*."⁹⁰ This referred to the Calvinist doctrine of double predestination, in which God preordained who in humanity was among the elect chosen for heaven and who was damned to

⁸⁷ "Es kann, mit anderen Worten, in modernen Massenverhältnissen nicht mehr eine individualistisch-ideologisch egalitär, sondern nur noch eine unegalitär, eine ganz moderne Führerdemokratie in Frage kommen. In einer solchen muß immer Freiwilligkeit der organisierten Gemeinschaftszusammenballung der Geführten mit einer tatsächlichen Schichtung dieser, eine Kontrolle der aus dieser Schichtung hervorgehenden Führer durch demokratische Revision des Vertrauens, das sie genießen, zusammengehen mit weitgehend selbstständiger Entscheidung und Willensbildung der ausgelesenen Führerspitze. Alle großen privaten Organisationen, die ja doch letztlich auch alle auf Majoritätsbeschlüssen und insofern auf dem formalen Mittel der Demokratie aufgebaut sind, arbeiten nach diesem Muster." Weber, *Die Krise*, 137-38.

⁸⁸ Loader, 141.

⁸⁹ On Weber's desire to combine mass democracy and oligarchic leadership, see Lietzmann, *Politikwissenschaft*, 41.

⁹⁰ Emphasis in original, Friedrich, "Introduction," in *Politica Methodice Digesta*, lxix.

hell.⁹¹ A theological issue arose from this because it could be interpreted as vitiating free will.⁹² The denial of free will and the division between the elect and the damned played an important role in Friedrich's analysis of Althusius.⁹³ According to Friedrich, Althusius argued: "[J]ustice is not referring to a specific substance and content, but that it is a formal concept designating the willingness to subordinate the individual considerations to the welfare of the group, and furthermore to accept the decisions of the group as binding upon the individual."⁹⁴ For Althusius, in a just political order a person understood her role within the associations that made up society and accepted decisions dictated to her even if they were at odds with her own desires.

Unlike Preuß, who believed associations created greater civic equality, Friedrich thought associations created a hierarchy: "This notion of justice as the individual's knowledge of his place in the community, when taken together with Althusius' low opinion of the mass of human beings rising in a graduated scale to the real excellence and virtue of a few is supplemented and tempered by a keen appreciation of the diversity of human beings."⁹⁵ He argued this hierarchy was divinely constituted: "God distributed his gifts among men. He did not give everything to one person, but different abilities to different people, 'so that I need your gifts, and you mine.'"⁹⁶ Friedrich aligned double predestination with his political theory, arguing God's elect were meant to govern: "Only by succeeding in his calling, the function to which he is called, can mortal man contribute to the glory of God, can he hope to be among the select. Nothing shows as clearly as

⁹¹ Paul T. Nimmo, "The Divine Decree," in *The Oxford Handbook of Reformed Theology*, ed. Michael Allen and Scott R. Swain (Oxford: Oxford University Press, 2020), 405. John Calvin, founder of Calvinism, adopted this position in his *Institutes of the Christian Religion*. Rinse H. Reeling Brouwer, "Election," in *The Cambridge Companion to Reformed Theology*, ed. Paul T. Nimmo and David A. S. Fergusson (New York: Cambridge University Press, 2016), 46; John Calvin, *Institutes of the Christian Religion*, trans. Henry Beveridge (Grand Rapids, MI: Wm. B. Eerdmans, 1997) 214, 223-24, 237-38.

⁹² Nimmo, 405.

⁹³ Greenberg, *The Weimar Century*, 32.

⁹⁴ Friedrich, "Introduction," in *Politica Methodice Digesta*, lxxii.

⁹⁵ *Ibid.*, lxxii.

⁹⁶ *Ibid.*, lxxii-lxxiii.

this notion of one's vocation that a corporate cooperative commonwealth, a democracy, can last only among men motivated by Christian and more particularly Calvinist morality. The disappearance of these so-called puritan morals threatens the ideological foundations of modern democracy."⁹⁷ Friedrich believed some were born to rule and others were born to follow, which is why, despite his preference for the *Genossenschaft* theory, he was fond of Cromwell and Schmitt's strong, personal leader. Cromwell was Friedrich's ideal ruler: a Calvinist preordained to rule over a commonwealth based on a divinely inspired understanding of how society's associations properly fit together. Friedrich's logic was profoundly oligarchical – if there was a leader class that naturally grasped how society should be ruled, why subject them to election by people who did not understand how to govern? In the early 1930s, his argument had increasingly troubling political implications.

IV. Politics in Practice: Friedrich's View of the Rise of National Socialism

Friedrich published his article "National Socialism in Germany" in late 1931 in the aftermath of the September 1930 Reichstag elections, the German election in which the disconcerting dark cloud of popular support for the National Socialists first became apparent.⁹⁸ In contrast to the early 1920s, in the 1930 campaign Hitler pulled back on his overt anti-Semitism for a time and instead focused his speeches on unifying Germany, taming societal divisions, and building a strong, racial nation, while largely avoiding commitments to concrete policy programs.⁹⁹ The Nazis received under a million votes and won only 12 Reichstag seats in the 1928 election, but their electoral share exploded dramatically in 1930 to 6.4 million votes,

⁹⁷ Ibid., lxxiii; Greenberg, *The Weimar Century*, 32. Alfred Weber argued in 1925 that American model of Calvinism might be a resource reinvigorating German politics. Lietzmann, *Politikwissenschaft*, 50 fn. 94.

⁹⁸ Carl Joachim Friedrich, "National Socialism in Germany," *The Political Quarterly* 2, no. 4 (Oct.-Dec. 1931): 520-30; Evans, *The Coming of the Third Reich*, 259-60.

⁹⁹ Kershaw, 330-31; Evans, *The Coming of the Third Reich*, 255-59.

garnering 107 Reichstag seats and making them the second-largest party behind the Social Democrats at 143 seats.¹⁰⁰

Friedrich divided his 1931 article on National Socialism into two parts, first discussing nationalism and then socialism in the context of contemporary German politics. He took a rather jingoistic bend when describing German nationalism.¹⁰¹ Friedrich said:

French moral standards, English political institutions, American business methods, these are among the foreign influences which, to the average middle class German, seem to threaten the foundations of his national existence. Add to these powerful post-war developments the continuous agitation over 'unbearable' payments to foreign countries, over the presence of black troops on the Rhine, over the perpetual and threatening insecurity of Germany, surrounded on all sides by heavily armed neighbours, and you will not find it very difficult to appreciate the enormous impetus towards a violent Nationalism which characterises the years after the war. The material for political agitation along these lines is so abundant that it could not but attract men with a flair for political agitation.¹⁰²

Friedrich appeared to sympathize with those Germans who believed foreign powers wrongly exerted an outsized influence on Germany, exemplified by his racially charged discussion of the French deployment of colonial troops during the occupation of the Rhineland after the First World War.¹⁰³ He also sided with Germans who groused about what they perceived as an unjust

¹⁰⁰ Ibid., 259-61.

¹⁰¹ Friedrich wrote: "The untold privations which the years following 1919 inflicted upon the liberal-minded German middle classes have produced a profound scepticism, particularly among the younger generation, concerning all ideas of international co-operation. It seems to me important to keep clearly in mind the negative character of this 'Nationalism.' It is not the proud assertiveness of a nation, intensely conscious of its own individuality and the contribution it can make to the world by impressing this individuality upon it, but the bitter resentment of a beaten and humiliated people, desperately struggling to preserve its individuality against innumerable foreign influences." Friedrich, "National Socialism," 521.

¹⁰² Ibid., 521.

¹⁰³ For a discussion of race, gender, and sexuality in Germany during and after the French occupation of the Rhineland in the 1920s, see Tina Campt, *Other Germans: Black Germans and the Politics of Race, Gender, and Memory in the Third Reich* (Ann Arbor: The University of Michigan Press, 2005), 31-62; Julia Roos, "Women's Rights, Nationalist Anxiety, and the 'Moral' Agenda in the Early Weimar Republic: Revisiting the 'Black Horror' Campaign against France's African Occupation Troops," *Central European History* 42, no. 3 (Sept. 2009): 473-508.

settlement after World War I, especially the German payment of war reparations.¹⁰⁴ In doing so, he portrayed the rise of nationalism in Germany in the early 1930s as a *fait accompli*.

Similarly, Friedrich described what he saw as the inexorability of socialism: “Obviously Socialism is gaining ground in Germany all the time. National Socialists, Socialists, and Communists devote much effort to telling each other that they are not real Socialists at all. But the truth is that the majority of the German masses is definitely socialistic to-day.”¹⁰⁵ What Friedrich meant by this was “[t]he average German, too, feels, although he often does not think it, that Socialism is essentially governmental control of economic activity and, therefore, a political rather than an economic doctrine.”¹⁰⁶ He believed socialism meant significant bureaucratic control of the economy and argued this was a necessity in modern times.¹⁰⁷ Indeed, he asserted the German Revolution of 1918 that created the Weimar Republic had failed because it hindered the growth of the bureaucracy: “By weakening the government, the leaders of the revolutionary government were bound to sacrifice the extension of governmental activity, *i.e.*, Socialism. It is little short of tragic that this revolution weakened the government at the very moment when governments everywhere are tending to become more authoritative in order to handle the ever-increasing activities which a growing industrial system forces upon them.”¹⁰⁸

¹⁰⁴ Friedrich published an article strongly criticizing reparations in 1928. Carl Joachim Friedrich, “Reparation Realities,” *Foreign Affairs* 7, no. 1 (Oct. 1928): 118-31. For a discussion of reparations and American efforts to integrate Germany into a transatlantic partnership between the U.S. and Europe, see Frank Costigliola, *Awkward Domination: American Political, Economic, and Cultural Relations with Europe, 1919-1933* (Ithaca, NY: Cornell University Press, 1984), 114-27; Adam Tooze, *The Wages of Destruction: The Making and Breaking of the Nazi Economy* (New York: Viking, 2006), 12-23.

¹⁰⁵ Friedrich, “National Socialism,” 527. Friedrich’s discussion of socialist elements in the Nazi Party is erroneous. By 1930, Otto Strasser, a Bolshevik sympathizer and leader of the socialist-inclined wing of the Nazis was sidelined by Hitler as the latter consolidated party control and aligned with conservative German elements. Kershaw, 325-29.

¹⁰⁶ Friedrich, “National Socialism,” 527.

¹⁰⁷ *Ibid.*, 527. Friedrich cited to a forthcoming book he had co-written on bureaucracy. *Ibid.*, 528 fn. 2; Carl Joachim Friedrich and Taylor Cole, *Responsible Bureaucracy: A Study of the Swiss Civil Service* (Cambridge, MA: Harvard University Press, 1932). As Udi Greenberg observes, Friedrich believed bureaucracies were inherently hierarchical. Greenberg, *The Weimar Century*, 37.

¹⁰⁸ Friedrich, “National Socialism,” 528.

Friedrich hoped political shifts in Germany would restore the bureaucracy to its former glory: “The ready use of the presidential emergency power during the last two years, while temporarily justifiable because of the immediate difficulties, is reviving among the ministerial bureaucracy habits of governmental absolutism which are not as objectionable to most Germans as they themselves often think.”¹⁰⁹ He was referring to President Paul von Hindenburg’s increased use of the Weimar Constitution’s presidential emergency powers.¹¹⁰ In practice, Chancellor Heinrich Brüning exercised these powers – Brüning later admitted his actions as Chancellor were intended to reestablish a monarchy.¹¹¹ Friedrich’s assertion that “governmental absolutism” was “not as objectionable” as many Germans believed indicates he preferred Brüning’s quasi-monarchical rule by decree to rule by parliamentary consensus.¹¹²

Friedrich’s support for increasingly authoritarian rule in Germany and his hope that this would restore bureaucratic supremacy was extreme. In an essay published in 1918, Max Weber, whom Friedrich quoted approvingly on the issue of nationalism, favored expanding parliamentary control over the bureaucracy rather than keeping bureaucratic control in the monarch’s hands.¹¹³ In contrast, in his 1931 article Friedrich called for a charismatic leader to unify the disparate elements of the state and society: “There still prevails a great deal of semi-religious faith in a mysterious ‘state’ above and including all parties which is at once an

¹⁰⁹ Ibid., 529-30.

¹¹⁰ Evans, *The Coming of the Third Reich*, 250.

¹¹¹ Ibid., 250-51.

¹¹² Friedrich, “National Socialism,” 530. Brüning later went into exile and became a professor at Harvard, where he and Friedrich came to know each other. Greenberg, *The Weimar Century* 52. Greenberg asserts “Friedrich had disapproved of Brüning’s anti-parliamentary measures,” but as Friedrich’s quote above shows, this was not the case in 1931. Ibid., 52.

¹¹³ Max Weber, “Parliament and Government in Germany Under a New Political Order,” in Max Weber, *Political Writings*, ed. Peter Lassman and Ronald Speirs (Cambridge: Cambridge University Press, 1994), 130 fn. 1, 165-66. Friedrich wrote: “The great scholar and passionate republican, Max Weber, is reported to have said to a friend after examining the provisions of the Peace Treaty of Paris: ‘In ten years we shall all be Nationalists.’ The words have proved prophetic.” Friedrich, “National Socialism,” 521.

organisation of the national community and an effective instrument for realising the general welfare. National Socialism as a party, with Hitler as its most eloquent spokesman, is a manifestation of this faith.”¹¹⁴ This quasi-mystical description of a state unified by a single figure is reminiscent of Friedrich’s description of Cromwell in the *Encyclopaedia*, but horrifyingly here the figure Friedrich praised was Hitler. As Friedrich continued: “Hitler’s promises to do all that is good and to destroy all that is evil, provided the state and the power are handed over to him, are eagerly listened to by many hundred thousands who are profoundly convinced that he is the prophet of a new and a better day.”¹¹⁵ This statement ignored Hitler’s 1924 treason conviction for his role in a 1923 putsch attempt in Munich.¹¹⁶ Moreover, a core aspect of Friedrich’s political theory – his support for a strong, quasi-spiritual leader intent on unifying state and society – played a key role in his celebration of Cromwell and his uncritical praise for Hitler.¹¹⁷ This fundamentally called into question the validity of Friedrich’s political theory, particularly after Hitler was appointed Chancellor on January 30, 1933, after which Germany slouched toward dictatorship.¹¹⁸

¹¹⁴ Ibid., 530.

¹¹⁵ Ibid., 530.

¹¹⁶ Kershaw, 206-12, 216, Evans, *The Coming of the Third Reich*, 192-94. Hitler’s conviction was likely a light punishment – the Bavarian court sought to only give him a lenient sentence. Kershaw, 216-17.

¹¹⁷ This may explain why David Riesman noted in a letter dated August 22, 1961, to Michael Maccoby: “Friedrich’s always presented himself to me as a strong anti-Nazi. When we bought the farm together in 1933 and 1934 it was in part his declaration of independence from Germany, yet Karl Loewenstein told me that he was talking pro-Nazi in 1936. He then swung of course violently anti-Nazi and was one of the founders of the Council for Democracy, a pro-democratic, anti-fascist, interventionist group with which I also worked.” Correspondence from David Riesman to Michael Maccoby, August 22, 1961, HUG(FP) 99.12, Box 10, Friedrich, Carl J. thru 1971, David Riesman Papers, Harvard University Archives, Harvard University, Cambridge, MA (hereafter referred to as the Riesman Papers). At the very least, it is possible that by the late Weimar period Friedrich may have been counted among what historian Peter Gay calls the “‘rational republicans – *Vernunftrepublikaner*,’ republicans from intellectual choice rather than passionate conviction.” Peter Gay, *Weimar Culture: The Outsider as Insider* (New York: Harper & Row, 1968), 23. Friedrich quite closely follows Gay’s description of the Weimar *Vernunftrepublikaner*: “The *Vernunftrepublikaner* placed their reason in the service of reconciliation: they sought to reconcile classes with each other, parties with the state, Germany with the rest of the world – and themselves to republicanism.” Ibid., 28.

¹¹⁸ Evans, *The Coming of the Third Reich*, 307.

V. A Crisis of Faith: Friedrich Reassesses His Political Theory of Leadership

After Hitler's rise, Friedrich was forced to reconsider his political theory, developing his idea of constitutionalism and embracing more democratic thinking. In 1937, he published *Constitutional Government and Politics* with Riesman's assistance, admitting: "The doings of the Nazis make me look like a fool."¹¹⁹ Friedrich became ambivalent in his analysis of Cromwell. Writing about the process of constitutional creation, he said: "Cromwell was haunted by a sense that his arbitrary exercise of power needed a sanction."¹²⁰ Friedrich explained: "This sanction he sought to obtain from Parliaments which were elected in rapid succession. Yet since they endeavored to restrain him as well as to sanction his rule, they were dissolved one after the other."¹²¹ He stated further: "The long-drawn-out story of Cromwell's conflicts with his several Parliaments serves, therefore, as an admirable illustration of the fact that once the *de facto* government controlling power by force of arms seeks to secure the approval of the community, it will find itself confronted by demands for effective restraint."¹²² Friedrich thought the creation of a true constitution required a process through which a government based purely on power was restricted, especially by the separation of powers, federalism, legal procedures, and rights.¹²³ This was the core of Friedrich's new political theory, which can be called constitutionalism.

Friedrich's theory of constitutionalism as a mechanism for governmental restraint was "subject to one exception," which he elaborated: "If a purely formal plebiscite, that is, a vote of

¹¹⁹ Friedrich, *Constitutional Government and Politics*, xvi; David Riesman, "On Discovering and Teaching Sociology: A Memoir," *Annual Review of Sociology* 14 (1988): 5.

¹²⁰ Friedrich, *Constitutional Government and Politics*, 107.

¹²¹ *Ibid.*, 107.

¹²² Emphasis in original, *ibid.*, 107.

¹²³ As Friedrich observed later in this chapter: "The total complex of effective restraints which makes up the 'constitution' of a given community will necessarily crystallize into more or less familiar word patterns, such as 'legislative, executive, and judicial power,' 'states' rights,' 'due process,' 'freedom of speech,' and so forth. These word patterns gradually become symbols of order, and thus the constitution as a political process emerges into the constitution as a political force." *Ibid.*, 111-12.

the single subject or citizen either accepting or rejecting the government as a whole, is employed for the purpose, ‘the ayes will have it.’”¹²⁴ He argued plebiscites were problematic because deliberative discussion was needed to create constitutions: “After the preceding order has been overthrown, a measure of free speech and free assembly is necessary in order that the constituent power may work.”¹²⁵ Drawing a line from Cromwell to contemporary dictatorships, Friedrich said: “The suppression of these two conditions [of free speech and free assembly] thwarted the constituent power in Cromwell’s time as well as in our own. National Socialist, Fascist, and Communist revolutionaries are united in their opposition to free speech. It is but natural, therefore, that no constitution should have been established in those countries which are ruled by these groups.”¹²⁶ He thought none of these regimes had legitimate constitutional orders: “[S]ince the need for popular approval is still felt, these governments tend to employ plebiscite as a substitute.”¹²⁷ In contrast to his earlier writings, Friedrich argued true constitutional unity was different from the illusion of unity offered by dictatorships from Cromwell to Hitler.¹²⁸

In 1942, Friedrich connected his theory of constitutionalism with democratic ideals in his book *The New Belief in the Common Man*.¹²⁹ Here, Friedrich argued: “The belief in the common man is the core of the democratic creed. The idea of a free people is inconceivable without it.”¹³⁰ Despite praising the common man, he rejected democratic political philosophies based

¹²⁴ Ibid., 107-8.

¹²⁵ Ibid., 113; 109.

¹²⁶ Ibid., 113-14.

¹²⁷ Ibid., 114.

¹²⁸ “They feel that a constituent power ought to have brought them into power, as its leaders, rather than their merely having usurped the absolute power of government. Therefore they seek the plebiscitary semblance of wide popular acclaim. Cromwell, the two Napoleons, Mussolini, Hitler, – they all have employed this technique.” Ibid., 114. Friedrich continued to amend his theories when he revised *Constitutional Government and Politics*, publishing a new edition entitled *Constitutional Government and Democracy* in 1941, in which he removed his discussion of the monarch as the “organic unity of the people.” Friedrich, *Constitutional Government and Politics*, 8; Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Boston: Little, Brown, 1941), 6.

¹²⁹ Carl J. Friedrich, *The New Belief in the Common Man* (Boston: Little, Brown, 1942).

¹³⁰ Ibid., 3.

purely on individualism: “Historically, the rise of the common man is associated with the rise of individualism. As a result, the belief in the common man became linked with a belief in the individual common man. In that form it is impossible to maintain.”¹³¹ Instead, he continued emphasizing associations: “But why need we assert that Garbage Collector John Doe is, as an individual, better able to judge an issue confronting the country than Professor Bill Roe? We do not. But the collective judgment of all the John Does is quite a different matter.”¹³² While he no longer referred explicitly to the *Genossenschaft* theory, he presented a modified version of it:

If we leave aside for the moment the distortions of judgment resulting from special interest, using judgment becomes essentially a matter of gauging probabilities. On any matter involving common values, it stands to reason that three people consulting with one another are less likely to make an error in judgment than one, no matter who they are. There will be exceptions, of course, but by and large, that is the probable outcome. And the larger the collective group, the less frequent becomes the instances in which one person is apt to be right as against the collective judgment of all.¹³³

Although he did not refer to the group personality Gierke emphasized, Friedrich still believed it was only when individuals associated together that their collective wisdom fully emerged. As Friedrich discussed qualifications to his belief in the common man:

While a tempered belief in the common man is basic for democracy, a limitless belief in him results in the ‘revolt of the masses’ and is part and parcel of totalitarian dictatorship. Here a popularly acclaimed ‘leader’ is the final judge of everything. Hitler is the common man run amuck. He poses as the incarnation of Rousseau’s ‘general will,’ the builder of a ‘real’ democracy. It is belief turned into superstition. Limitless and without real content, the belief in the common man destroys rather than maintains constitutionalism and democracy.¹³⁴

He linked Hitler’s rule with unbound democracy, which he saw as “totalitarian.” Friedrich’s criticism of granting unlimited power to the people was consonant with his argument in

¹³¹ Ibid., 31-32.

¹³² Ibid., 32.

¹³³ Ibid., 32. For a discussion of the accuracy of collective decision-making, see Hélène Landemore, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (Princeton: Princeton University Press, 2013).

¹³⁴ Friedrich, *The New Belief*, 41-42.

Constitutional Government and Politics that constitutions are based on restraint – he believed these restraints applied both to rulers and to all citizens.¹³⁵ This was reminiscent of Preuß’ theories, which rejected giving limitless sovereignty to either a single leader or to the people.¹³⁶

Friedrich had to explain how his more egalitarian association theory could be united into a coherent political order: “[H]ow can the state unify if it is not *higher* than other associations and possessed of greater power?”¹³⁷ When answering this question, Friedrich compared “absolutism” to “constitutionalism.”¹³⁸ He explained:

[T]he only thing that can be said about both types of government is that they are ways of organizing the exercise of power in the community. But they are antithetical in the patterns which they provide. Absolutism in its various forms provides for a concentration of power, while constitutionalism in its various forms provides for a divided exercise of power. This could be put another way by saying that such sovereign associations or ‘states’ do exist at some times and in some places, but there are other times and places when there does not exist any association which can be found to be omnipotent.¹³⁹

Friedrich rejected the absolutist theory of association which held that the state stood above other associations in society and organized these associations into a unified whole. In its place he substituted his constitutionalist theory of association, arguing the constitution circumscribed the state to ensure there was no hierarchy among society’s associations. If some associations formed “sovereign associations,” the constitution guaranteed they would not hold power over others for long, reflecting the more egalitarian emphasis of Friedrich’s new association theory.

He discussed two places he believed rejected the absolutist model: “The United States and Switzerland are two countries where no such association can be shown to exist.”¹⁴⁰ He thought America and Switzerland were democratic nations that reflected the constitutionalist

¹³⁵ Friedrich, *Constitutional Government and Politics*, 111-12.

¹³⁶ Caldwell, 369.

¹³⁷ Emphasis in original, Friedrich, *The New Belief*, 53.

¹³⁸ *Ibid.*, 53.

¹³⁹ *Ibid.*, 53.

¹⁴⁰ *Ibid.*, 53.

form of association, which had implications for the idea of sovereignty: “In a democracy the people acting collectively is compounded of the people acting individually and in groups. Over any length of time no one person, but all of them together, are acting, and they do it in accordance with their own wishes – another way of saying that there is no state or sovereign involved.”¹⁴¹ For Friedrich, constitutionalist societies were largely democratic and lacked hierarchies among associations. Therefore, the state had no clear sovereign, because the composition of the government relied on the constantly shifting decisions of individuals and associations. Despite Friedrich’s break from his hierarchical thinking of the early 1930s, he continued drawing upon the association theories developed by Gierke and Preuß.¹⁴²

Nevertheless, even with this newfound egalitarianism, Friedrich was not a democratic theorist.¹⁴³ In his 1942 book, he argued: “It is unrealistic and contrary to fact to assert that a bare majority has unlimited power in a democracy. It is worse to define democracy in such terms, because such a view neglects the actual workings of democratic institutions and, if adopted,

¹⁴¹ Ibid., 54.

¹⁴² Eliminating sovereignty was a central idea to Preuß’ writings, which Friedrich likely knew. Although Friedrich did not cite to Preuß when discussing sovereignty in his 1942 book, he did in his 1941 work *Constitutional Government and Democracy* in a section on “*FEDERALISM AND THE TERRITORIAL DIVISION OF POWER*”: “A new chapter opened when Hugo Preuss, following Gierke, proposed to eliminate the concept of sovereignty in his *Gemeinde, Staat, Reich als Gebietskörperschaften* [*Municipality, State, Empire as Body Politic*].” Friedrich, *Constitutional Government and Democracy* [1941], 620; Hugo Preuss, *Gemeinde, Staat, Reich als Gebietskörperschaften: Versuch einer deutschen Staatskonstruktion auf Grundlage der Genossenschaftstheorie* (Berlin: Julius Springer, 1889). There was a tension in Friedrich’s discussion of Preuß – while Friedrich’s assertion that “a new chapter opened” indicated he thought Preuß was of great importance, Friedrich was also critical of Preuß: “This side of the literature of federalism leaves much to be desired.” Ibid., 620. Friedrich did not go into details about what was wrong with Preuß’ arguments, and cited Preuß approvingly elsewhere in his book. Ibid., 521. Because Friedrich’s argument about the absence of sovereignty in *The New Belief in the Common Man* shares an affinity with Preuß’ criticisms of sovereignty based on association theory, it is possible Friedrich wanted to differentiate his theory from a thinker to whom he owed a great intellectual debt.

¹⁴³ Classicist M. I. Finley described the ancient definition of “democracy”: “‘Democracy’ is of course a Greek word. The second half of the word means ‘power’ or ‘rule,’ hence autocracy is rule by one man; aristocracy, rule by the *aristoi*, the best people, the elite; democracy, rule by the *demos*, the people. *Demos* was a Protean word with several meanings, among them ‘the people as a whole’ (or the citizen-body to be more precise) and ‘the common people’ (the lower classes) [...]” Emphasis in original, M. I. Finley, *Democracy: Ancient and Modern*, rev. ed. (New Brunswick, NJ: Rutgers University Press, 1996), 12-13. Friedrich sought to place limitations on rule by the people.

would jeopardize their successful maintenance.”¹⁴⁴ This may seem odd because majoritarian decision-making is usually seen as the basis for democratic political theory.¹⁴⁵ But because Friedrich’s constitutionalism was based on association theory and the elimination of sovereignty, he believed no single government institution or association could have the power to decide all political questions, even if that entity decided based on majority rule: “Democratic constitutionalism recognizes the common man, acting as a member of the constituent group, as the final source of constitutional authority. It recognizes the same common man, when participating in the amending process, as the final source of governmental authority within an existing constitutional procedure. It recognizes the same common man, when participating in the election of various representatives, as the source of authority for legislative and administrative rules and regulations.”¹⁴⁶ As Friedrich noted, these institutions were distinct: “When we consider this pyramiding of processes, we are led to the conclusion that the people are not one, but several, entities, each with its own specific function.”¹⁴⁷ Although Friedrich embraced elements of democracy, his constitutionalism also sought to ensure political decision-making was never given wholly to the people, but divided between particular institutions and associations.

Moreover, Friedrich was not consistent in analyzing the relationship between the common man and constitutionalism. Discussing the reconstruction of a society after authoritarian rule, he wrote: “The constituent power is exercised by the constituent group. The constituent group can come into operation only when the government fails to function constitutionally, i.e., becomes arbitrary and tyrannical. Its function results from the residuary

¹⁴⁴ Friedrich, *The New Belief*, 122.

¹⁴⁵ Landemore, 145.

¹⁴⁶ Friedrich, *The New Belief*, 149-50.

¹⁴⁷ *Ibid.*, 150. These groups also had to follow specific procedural rules that were not universal to all groups: “The crux of the several functions appears to be the nature and weight of the decision involved and the majority required for it.” *Ibid.*, 150.

and unorganized power of resistance in the community.”¹⁴⁸ Thus, the constituent power did not need to be the majority of society after a despotic government was overthrown; the constituent power simply had to be those opposed to the former regime. This indicated an anti-majoritarian and anti-democratic element in Friedrich’s theory – but he took his argument a step further: “The more intelligent and vital members of the community are apt to take things into their own hands when the situation becomes unbearable, for these men have a natural desire for freedom.”¹⁴⁹ Here, Friedrich embraced the elitism he had celebrated in the early 1930s. He believed an enlightened group of leaders was necessary for creating a constitution – only after they had established a government could the common man play a role in politics. The tension between Friedrich’s praise for democracy’s common man and his belief that elite lawgivers were needed to generate constitutionalism would plague his political theory throughout the 1940s.

VI. Émigrés Divided: Friedrich’s Postwar Critique of Hayek’s Neo-Liberalism

As Friedrich revised his thinking, World War II raged. During this time, he helped run the Harvard School of Overseas Administration, training soldiers and emissaries for rebuilding the Axis nations.¹⁵⁰ On May 8, 1945, Nazi Germany surrendered to the Allies.¹⁵¹ Friedrich continued developing his constitutionalist theory as the challenge of the postwar reconstruction of Europe emerged. In doing so, he explicitly rejected Friedrich Hayek’s neo-liberal revival of classical liberalism – or at least Hayek’s particular understanding of classical liberalism.¹⁵² In

¹⁴⁸ Ibid., 130.

¹⁴⁹ Ibid., 130.

¹⁵⁰ Greenberg, *The Weimar Century*, 54-55.

¹⁵¹ Richard J. Evans, *The Third Reich at War 1939-1945* (New York: Penguin, 2008), 737.

¹⁵² For a discussion of Hayek’s panegyrics on classical liberalism, see Alan Ebenstein, *Friedrich Hayek: A Biography* (New York: Palgrave, 2001), 122-23. While Hayek often praised classical liberalism, his economic thinking differed profoundly from classical theorists. Hayek derived his economic theory from the work of Carl Menger. Ibid., 23-24. Menger was an Austrian lawyer turned economist who developed an economic theory known as marginal utility theory in the 1870s – contemporaneously with Léon Walras and Stanley Jevons. Janek Wasserman, *The Marginal Revolutionaries: How Austrian Economists Fought the War of Ideas* (New Haven, CT: Yale University Press, 2019), 18-19, 26-27; Ernesto Screpanti and Stefano Zamagni, *An Outline of the History of*

June 1945, Friedrich published a searing review of Hayek's 1944 book *The Road to Serfdom*, stating wryly: "As far as one can make out, this 'free society' of Hayek's is the bleak 1840's in England when Manchester exploitation reigned supreme [...]." ¹⁵³

Friedrich was irked by Hayek's discussion of the "Rule of Law," which Hayek said "means that government in all its actions is bound by rules fixed and announced beforehand [...]." ¹⁵⁴ In particular, Friedrich criticized Hayek's attempt to associate the Anglo-American rule of law with the German *Rechtsstaat*: "Equally false and misleading is Hayek's identification of the rule of law and of *Rechtsstaat*. This idea has a long history traced with masterly hand by Otto von Gierke in Chapter VI of *The Development of Political Theory* (trans. Bernard Freyd). In its various forms, it is an attempt to restrict the power of the state by the idea of an antecedent law." ¹⁵⁵ Friedrich returned to the idea developed in his 1937 *Constitutional Government and Politics* that governments needed to be restrained by law, placing emphasis on Gierke in the development of the *Rechtsstaat* doctrine. ¹⁵⁶

Economic Thought, trans. David Field and Lynn Kirby, 2nd ed. (Oxford: Oxford University Press, 2005), 164-65. As historian Janek Wasserman notes, classical economists, such as Adam Smith and David Ricardo, emphasized the labor theory of value, which "argues that the value of a good derives from the labor expended to produce that item." Wasserman, 27. This theory created a twofold problem for classical economists by the late nineteenth century – first, the labor theory of value was seen as theoretically ineffective at explaining value, and second, socialist thinkers, especially Marx, had made the labor theory of value central to their critiques of capitalism. Screpanti and Zamagni, 170-73. In response, marginal utility theorists like Menger crafted what would become known as neoclassical economics – as Wasserman explains: "Marginalists flipped classical economics on its head. Instead of focusing on the production side of economics, they turned to consumption. It is the satisfaction of wants of consumers that matters for value, not the labor required for production. What establishes the overall value of a good is the value fetched by the final unit of that item on the market. As more goods are produced, the marginal value of the last unit tends to decrease." Wasserman, 28. Thus, neoclassical economics broke away from classical economics by emphasizing microeconomics and largely abandoning political economy. Screpanti and Zamagni, 169-70. Hayek sometimes portrayed his neo-liberal thought as an extension of theorists like Smith, but such continuity is debatable considering the important break the marginal utility theorists made with classical economics. Friedrich A. Hayek, *The Road to Serfdom* (Chicago: The University of Chicago Press, 1972), 13, 34, 39.

¹⁵³ Carl J. Friedrich, review of *The Road to Serfdom* by Friedrich A. Hayek, *American Political Science Review* 39, no. 3 (June 1945): 575; Hayek, ii.

¹⁵⁴ Friedrich, review of *The Road*, 577-78; Hayek, 72.

¹⁵⁵ Emphasis in original, Friedrich, review of *The Road*, 578; Otto von Gierke, *The Development of Political Theory*, trans. Bernard Freyd (New York: Howard Fertig, 1966), 299-361. This Gierke book is a republished edition of a work printed in 1939. Ibid., 4. It is an English-language translation of Gierke's work on Althusius. Ibid., 9.

¹⁵⁶ Friedrich, *Constitutional Government and Politics*, 111-12.

Hayek tried drawing an equivalence between the rule of law and the *Rechtsstaat* to show Germany had traveled down a special path away from Anglo-American liberalism: “It is important to point out once more in this connection that this process of the decline of the Rule of Law had been going on steadily in Germany for some time before Hitler came into power and that a policy well advanced toward totalitarian planning had already done a great deal of work which Hitler completed.”¹⁵⁷ In contrast, Friedrich explained that there was a fundamental difference between the two legal theories: “While both the idea of the *Rechtsstaat* and the doctrine of the rule of law seek to confine within the narrowest possible limits the arbitrary action of government and its officials, the rule of law stresses the rôle of the judiciary, while the *Rechtsstaat* stresses that of legislative power.”¹⁵⁸ According to Friedrich, because the rule of law and the *Rechtsstaat* were not analogous and the *Rechtsstaat* was an important constitutional tool for limiting government power, it was not the cause of the rise of Nazism in Germany.¹⁵⁹

Instead, his disdain for Hayek’s neo-liberalism was a result of Friedrich’s embrace of a more democratic association theory: “In spite of his alleged concern for the freedom of the individual, Hayek shows little belief in the common man and his capacity for useful participation in the community’s common concerns. It seems a mean trick to turn the tables on him, but I cannot help feeling that *he*, rather than the socialists whom he denounces, lacks both faith in and

¹⁵⁷ Hayek, 78. For criticism of this “special path” or *Sonderweg* thesis, see David Blackbourn and Geoff Eley, *The Peculiarities of German History: Bourgeois Society and Politics in Nineteenth-Century Germany* (Oxford: Oxford University Press, 1984), 1-35.

¹⁵⁸ Emphasis in original, Friedrich, review of *The Road*, 578.

¹⁵⁹ Against Hayek, Friedrich asserted: “The argument is crucial to the whole train of thought presented by Hayek, because upon it rests the alleged prospective parallelism between developments in Germany and Austria on the one hand and England and America on the other.” *Ibid.*, 578. Instead, he argued: “Had Hayek taken greater care to determine just what were the elements of similarity in the two governmental traditions, he would have discovered the crucial fact that fascism (and sovietism) fitted into the solid administrative tradition of more than three hundred years of centralized bureaucracy. His failure to do so wrecks his whole argument.” *Ibid.*, 578. Friedrich believed Hayek ignored the true cause of Hitler’s dictatorship – the European bureaucracy. This argument was a complete about-face compared to Friedrich’s 1931 article “National Socialism in Germany,” in which he uncritically praised the German bureaucracy. Friedrich, “National Socialism,” 527-30.

understanding of the coöperative freedom that is the American conception of democracy.”¹⁶⁰ Liberal values, underpinned by a belief in individual rights, can conflict with democratic or republican values, rooted in the belief in self-governance, although they are often viewed as aligned.¹⁶¹ For example, a statute passed by a majority in the legislature may violate an individual’s rights, or a judicial decision protecting individual rights may strike down an overwhelmingly popular law. Friedrich had already developed a criticism of individual rights in 1942 in *The New Belief in the Common Man*, asserting: “We can say that anything within a society ruled by a majority can be changed as long as the proposed change does not violate nature’s laws. The idea of inalienable rights has been abandoned in favor of the idea of civil freedoms – freedoms which common men grant one another, not only because they like to have them themselves, but also because they are valuable for society as a whole.”¹⁶² He argued rights were not inviolable and instead considered all “civil freedoms” subject to some form of majority decision-making by common men.

Therefore, when Friedrich reviewed Hayek’s book, he criticized Hayek’s liberalism for being anti-majoritarian: “Hayek considers ‘misleading and unfounded’ ‘the belief that, so long as the ultimate source of power is the will of the majority, the power cannot be arbitrary.’”¹⁶³ While conceding majority decisions could be imperfect, Friedrich saw democratic decisions as the most effective means of preventing authoritarianism: “We believe that ‘a majority of common men may, in response to urgent needs, abandon one freedom for another. They may fail even to realize the full import of these freedoms. They are not apt to be satisfied for any

¹⁶⁰ Emphasis in original, Friedrich, review of *The Road*, 578.

¹⁶¹ William Rehg, “Translator’s Introduction,” in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: M.I.T. Press, 1998), xxiv-xxv.

¹⁶² Friedrich, *The New Belief*, 150.

¹⁶³ Friedrich, review of *The Road*, 579. In the original text: “[M]isleading and unfounded belief that, so long as the ultimate source of power is the will of the majority, the power cannot be arbitrary.” Hayek, 71.

length of time with the loss of all freedoms' [...]."¹⁶⁴ He concluded: "The will of the people is not the road to serfdom, but the only method for achieving such freedom as the common man has ever enjoyed."¹⁶⁵ Friedrich's constitutionalism was not liberal nor wholly democratic, but democracy was a key element in the mélange of associations and governmental institutions he believed were necessary for organizing the nation-state. Thus, Friedrich sought to shed the *Völkisch* tendencies of his earlier work and instead adapted his constitutionalism and association theory to the United States, where he believed the democratic tradition was an indelible part of American politics.

VII. Creating a New Constitutional Order in Germany

In July 1946, Friedrich arrived in Germany to work with Karl Loewenstein and General Lucius Clay – leader of the American military occupation forces – in assisting the defeated Germans draft new state (*Länder*) constitutions in Baden, Bavaria, and Hesse.¹⁶⁶ Starting in 1948, Friedrich also aided in drafting the Basic Law, or *Grundgesetz*, the constitution finalized in May 1949 for what would become West Germany.¹⁶⁷ Friedrich's constitutionalist theory faced new challenges as he helped rebuild the German government because there was a profound tension between his political theory and his policy proposals. His constitutionalism was based on the belief that associations and government institutions regulated by majority decisions of the

¹⁶⁴ Friedrich, review of *The Road*, 579; quoting Friedrich, *The New Belief*, 150.

¹⁶⁵ *Ibid.*, 579.

¹⁶⁶ R. W. Kostal, *Laying Down the Law: The American Legal Revolutions in Occupied Germany and Japan* (Cambridge, MA: Harvard University Press, 2019), 146-50; Konrad H. Jarausch, *After Hitler: Recivilizing Germans, 1945-1995*, trans. Brandon Hunziker (Oxford: Oxford University Press, 2006), 8; Greenberg, *The Weimar Century*, 66.

¹⁶⁷ *Ibid.*, 66; Erich J. Hahn, "U.S. Policy on a West German Constitution," in *American Policy and the Reconstruction of West Germany, 1945-1955*, ed. Jeffrey M. Diefendorf, Axel Frohn, and Hermann-Josef Rupieper (Cambridge: Cambridge University Press, 1993), 43-44; David P. Currie, *The Constitution of the Federal Republic of Germany* (Chicago: The University of Chicago Press, 1994), 8-10.

common man usually made correct choices, but in Germany he paradoxically called for a top-down imposition of values while arguing that such a process was democratic.

This contradictory argument could be found in “Military Government and Democratization,” an article published in 1948 in a collection analyzing the military occupation of Germany.¹⁶⁸ There, Friedrich argued: “[I]n the discussions on democratization in Germany, the expression ‘rule of law’ has been employed in a broader meaning to designate the Continental doctrine of ‘government according to law’ which the Germans traditionally refer to as *Rechtsstaat*.”¹⁶⁹ In his 1945 review of Hayek’s book, Friedrich had explicitly identified the *Rechtsstaat* with Gierke’s writings.¹⁷⁰ Perhaps because the *Rechtsstaat* reflected the importance of limiting government power through legislation, Friedrich said reestablishing the doctrine was essential to creating a democratic order in postwar Germany: “Since the idea of *Rechtsstaat* has a long and deeply rooted tradition in Germany, even under the Prussian monarchy, and since it is an obvious requisite to the establishment of constitutional democracy, the likelihood of its re-establishment is greater than any immediate prospect of ‘democratization.’”¹⁷¹

At the time, it was unclear that sowing the seeds of the *Rechtsstaat* reflected the will of the German people. Describing a series of surveys conducted in Germany by the Office of the Military Government, United States (OMGUS) in the U.S. zone of occupation, Anna Merritt and Richard Merritt write: “In eleven surveys between November 1945 and December 1946, an

¹⁶⁸ Carl J. Friedrich, “Military Government and Democratization: A Central Issue of American Foreign Policy,” in *American Experiences in Military Government in World War II*, ed. Carl J. Friedrich (New York: Rinehart, 1948), 3-22.

¹⁶⁹ Emphasis in original, *ibid.*, 10.

¹⁷⁰ Friedrich, review of *The Road*, 578.

¹⁷¹ Friedrich, “Military Government,” 10-11. Citing to Ernst Fraenkel, Friedrich argued: “The importance of the ‘rule of law’ in the sense of the *Rechtsstaat* was rightly brought out by Ernst Fraenkel, *The Dual State* (1941) where he showed the shadowy continuation of the *Rechtsstaat* tradition under the Nazis alongside the arbitrary party government.” Emphasis in original, *ibid.*, 11, fn. 12; Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, trans. E. A. Shils, Edith Lowenstein, and Klaus Knorr (New York: Oxford University Press, 1941).

average of 47 per cent [of Germans surveyed] expressed their feeling that National Socialism was a good idea badly carried out; by August 1947 this figure had risen to 55 per cent remaining fairly constant throughout the remainder of the occupation [...].”¹⁷² They continue: “Meanwhile, the share of respondents thinking it a bad idea dropped from 41 to about 30 per cent.”¹⁷³ While only a minority of those Germans living in the American occupation zone remained loyal Nazis, a substantial portion of the population continued to view aspects of Nazi doctrine positively.¹⁷⁴ A fundamental problem for the Allies was the tenuousness of the long-term prospect of eliminating Nazi tenets from German politics in the immediate aftermath of the war.¹⁷⁵

Friedrich had difficulty explaining whether most Germans were democratic or if they embraced the *Rechtsstaat*. Who constituted the reservoir of people opposed to the Nazi regime, who might form the majority of Germans the Allies could rely on to build a constitutional order? Friedrich asserted: “[I]t seems reasonable to assume that a large part of the followers of the Social Democratic, Christian Catholic, and Communist parties remained outside the Hitlerite fold.”¹⁷⁶ He described the proportion of the populace he believed these groups constituted: “Without the Communists, who present a special problem when it comes to ‘democratization,’ these Social Democrats and Catholic and Christian elements presumably constituted about a quarter of the German population, even at the low ebb of democratic prospects.”¹⁷⁷ This statement was rife with problems. He did not explain how he calculated that “a quarter of the

¹⁷² Anna J. Merritt and Richard L. Merritt, eds., *Public Opinion in Occupied Germany: The OMGUS Surveys, 1945-1949* (Urbana, IL: University of Illinois Press, 1970), 32; Jeffrey Herf, *Divided Memory: The Nazi Past in the Two Germanys* (Cambridge, MA: Harvard University Press, 1997), 204-205.

¹⁷³ Merritt and Merritt, 32.

¹⁷⁴ *Ibid.*, 38.

¹⁷⁵ This was further complicated by the uneven de-Nazification process in occupied Germany, which was undertaken most strictly by the Soviets but less extensively by the British – for instance, the British were more lenient in certain German industries because they thought it would ensure stability. Jarausch, 52-53.

¹⁷⁶ Friedrich, “Military Government,” 13.

¹⁷⁷ *Ibid.*, 13-14.

German population” had opposed the Nazi regime.¹⁷⁸ Even if these numbers were correct, twenty-five percent of the population was not close to a majority of Germans. If Friedrich’s constitutionalism was rooted in democratic ideals, how could the decisions of a quarter of the population be considered democratic?¹⁷⁹ His assessment of the Communists as a “special problem” for democracy was realistic in light of stringent Soviet efforts after 1947 to control their occupation zone and to avert the unification of the American, British, and French zones.¹⁸⁰ But if a majority of Germans in the Western zones decided to join the Communist regime in the East, it would be difficult for Friedrich to oppose this on democratic grounds.

As Cold War divisions solidified in the late 1940s, Friedrich’s constitutionalism increasingly turned away from his praise for the common man and democracy and instead embraced the latent elitism that existed in his political theory, even in his 1942 book *The New Belief in the Common Man*. Despite his aversion to the Communists, in his 1948 article “Military Government and Democratization,” Friedrich shared with them a belief that a revolutionary vanguard was necessary for reconstructing the German government – but in his mind this would be Catholics, anti-Nazi Protestants, and Social Democrats, not Communists.¹⁸¹ In his 1945 book review, Friedrich had excoriated Hayek for being insufficiently democratic: “The road to serfdom lies through the timid disbelief in the capacity of the people to rule

¹⁷⁸ While it is likely that loyal Nazis only made up a minority of Germans, the Nazi state relied heavily on willing compliance with the regime by a substantial portion of the population. Konrad H. Jarausch and Michael Geyer, *Shattered Past: Reconstructing German Histories* (Princeton: Princeton University Press, 2003), 150. In the context of the Holocaust, Christopher Browning argues that Reserve Police Battalion 101, responsible for massacring Jews in Poland, was not chosen due to ideological commitments to Nazism among its troops, but by chance. Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York: Harper Perennial, 1998), 163-65. For a discussion of the complexities of German cooperation with the Nazi regime, see Peter Fritzsche, *Life and Death in the Third Reich* (Cambridge, MA: Belknap Press, 2008), 36-38, 43-44, 56-57, 74-75; Claudia Koonz, *The Nazi Conscience* (Cambridge, MA: Belknap Press, 2003), 12-13; Robert Gellately, *The Gestapo and German Society: Enforcing Racial Policy 1933-1945* (Oxford: Clarendon Press, 1990), 253-54.

¹⁷⁹ Friedrich, *The New Belief*, 122.

¹⁸⁰ Norman M. Naimark, *The Russians in Germany: A History of the Soviet Zone of Occupation, 1945-1949* (Cambridge, MA: Belknap Press, 1995), 6.

¹⁸¹ Friedrich, “Military Government,” 13-14.

themselves.”¹⁸² By 1948, Friedrich was guilty of the same charge. He argued in favor of implementing a top-down political order, led by what was likely a minority of Germans, underpinned militarily by the Western Allies.¹⁸³ From a policy perspective, Friedrich’s proposal was reasonable because it was unclear whether the Germans had been effectively de-Nazified and whether they supported democracy in substantial enough numbers to ensure constitutional stability. But it demonstrated the inconsistencies Friedrich failed to work out in his political theory of the common man, which retained hierarchical qualities despite his rhetorical praise for democratic decision-making.

VIII. Constitutionalism and the Cold War: The Decline of Democratic Theory?

In a revised version of *Constitutional Government and Democracy*, published in 1950, Friedrich grappled with whether the new governments in the defeated Axis nations were democratic.¹⁸⁴ Discussing the rebuilding efforts, he noted: “Ever since the policy of democratization was first formulated, American criticism has been directed at it in some general terms as ‘You cannot impose democracy by force.’ Much of the best liberal and democratic tradition in the United States has been cited in support of the contention that democracy cannot develop as a healthy and lasting form of government unless the people want democracy or have fought for it.”¹⁸⁵ Friedrich disagreed with such assertions, arguing instead: “Allied policy has

¹⁸² Friedrich, review of *The Road*, 579.

¹⁸³ Udi Greenberg argues that Friedrich’s work in the 1940s was an effort to create “a new democratic elite” in Germany, particularly among those who would become bureaucrats. Greenberg, *The Weimar Century*, 67. This is correct in part, but it may give Friedrich credit for theoretical consistency where it was often lacking. It appears Friedrich was comfortable maintaining a belief both in the necessity of an elite and in the need for democratic decision-making by the common man, despite the contradictions in such thinking.

¹⁸⁴ Lietzmann, *Politikwissenschaft*, 268. Friedrich revised *Constitutional Government and Democracy* for publication in 1946. Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Boston: Ginn and Company, 1946). He revised it again for publication in 1950, adding sections that discussed his impressions of the Allied rebuilding efforts in Europe. Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America*, rev. ed. (Boston: Ginn and Company, 1950).

¹⁸⁵ Ibid., 593. For a later iteration of this statement by Friedrich, see Lietzmann, *Politikwissenschaft*, 269.

been directed in each case not toward ‘imposing democracy,’ but toward imposing restraints upon those elements of the population – demonstrably minorities – which would prevent democracy from becoming established or, if established, would undermine and eventually destroy it.”¹⁸⁶ He averred that restraints needed to be placed on certain anti-democratic minority groups to ensure the seeds of the new constitutions could bloom.

However, Friedrich had difficulty justifying excluding people from the political decision-making process under his own constitutionalist theory. In 1950, he continued emphasizing the need for discursive debate when drafting constitutions: “There is [...] another important condition which must be fulfilled, in order to render the constitutional decision genuine: the decision must be reached after mature deliberation of those who participate in the decision.”¹⁸⁷ According to Friedrich: “Neither free speech nor free assembly are ‘natural rights,’ but they are necessary concomitants of constitutional decisions. For mature deliberation of an issue by any number of people who are to act collectively presupposes an exchange of views on the issues involved in the decision. If that opportunity is not available, nothing can be decided.”¹⁸⁸ This put Friedrich in a conundrum. Because he believed in the importance of democratic deliberation, under his theory liberals and democrats in Germany needed to use debate and reason to convince those indoctrinated by Communist and Nazi ideology to embrace constitutionalism and democracy. By excluding extremist groups from deliberation – even if he fundamentally disagreed with them or found their beliefs repulsive – Friedrich, under his own theory, had to concede no constitutional decision could be fashioned.¹⁸⁹

¹⁸⁶ Friedrich, *Constitutional Government and Democracy* [1950], 593.

¹⁸⁷ Ibid., 128-29.

¹⁸⁸ Ibid., 129.

¹⁸⁹ Analyzing “caesarism” and “bonapartism,” among other concepts, Margaret Lavinia Anderson has argued that in a democracy separating out these mass movements may not be possible: “[A]t the outset let us recall that such phenomena are not themselves the negations of democracy, but among its many possible children – children no less

To get around this problem, Friedrich argued some groups violently opposed the constitutional process: “In Asia and in Europe, the policy of democratization is the spearhead of a general policy of supporting constitutional and democratic forces. Force is being employed for ‘containing’ the antidemocratic forces throughout the world. These antidemocratic forces, whether Communist or Fascist, have created in the past and continue to create a state of universal emergency throughout the world community by their appeal to force.”¹⁹⁰ This referred to the proposal for “containment” of Soviet influence developed in 1946 by the American George Kennan, a policy that shaped U.S. President Harry Truman’s foreign policy as the Cold War emerged in the late 1940s.¹⁹¹ Friedrich contended that the Western powers could use force against Communists and Fascists because these groups made an “appeal to force,” rejecting the deliberative constitutional process and allowing them to be expelled from the political order.¹⁹²

natural for being unwanted.” Margaret Lavinia Anderson, *Practicing Democracy: Elections and Political Culture in Imperial Germany* (Princeton: Princeton University Press, 2000), 20.

¹⁹⁰ Friedrich, *Constitutional Government and Democracy* [1950], 594.

¹⁹¹ Archie Brown, *The Rise and Fall of Communism* (New York: Ecco, 2011), 176-78.

¹⁹² Friedrich, *Constitutional Government and Democracy* [1950], 594. Friedrich was not alone in making these arguments. His contemporary, the émigré Karl Loewenstein, developed a theory of “militant democracy” in the late 1930s. Greenberg, *The Weimar Century*, 182-87; Karl Loewenstein, “Militant Democracy and Fundamental Rights I,” *American Political Science Review* 31, no. 3 (June 1937): 417-32; Karl Loewenstein, “Militant Democracy and Fundamental Rights II,” *American Political Science Review* 31, no. 4 (Aug. 1937): 638-58. It is likely that Friedrich was familiar with Loewenstein’s work, and vice versa, as early as 1935. Greenberg, *The Weimar Century*, 184 n. 34. To fight fascism through militant democracy, Loewenstein argued in favor of adopting anti-fascist legislation, in which “each device on which the success of fascism is grounded was met by a legislative provision which crippled it.” Loewenstein, “Militant Democracy and Fundamental Rights I,” 431. He said although at first liberal democratic opponents of militant democracy argued that “[d]emocracy stands for fundamental rights, for fair play for all opinions, for free speech, assembly, press” finally “legalistic self-complacency and suicidal lethargy gave way to a better grasp of reality.” *Ibid.*, 430, 431. Loewenstein’s militant democracy arguments were later adopted by the West German Constitutional Court, which used the theory to justify its holding that the Communist Party and all of its activities in West Germany were unconstitutional. Greenberg, *The Weimar Century*, 169; Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed. (Durham, NC: Duke University Press, 2012), 290-92. Legal scholars Donald Kommers and Russell Miller assert that it was likely West Germany’s miraculously rapid postwar economic recuperation that explained the stability of liberal democracy in West Germany, rather than the prohibition of the Communist Party. *Ibid.*, 292.

Yet this called into question whether Friedrich's notions of constitutionalism and democracy could emerge spontaneously and independently of outside imposition.¹⁹³ Despite Friedrich's protests to the contrary, he ultimately conceded that this imposed democracy by force: "[T]he policy of democratization as carried forward by the Western allies is a policy of employing emergency powers of a dictatorial kind to re-establish constitutionalism. It therefore differs only in degree from the broad policy implied in the 'hot war' against the Axis powers and in the 'cold war' against the Soviet Union."¹⁹⁴ He advocated creating constitutional dictatorships in the Allied-occupied nations; indeed, he even titled a chapter in his 1950 book "*Constitutional Dictatorship and Military Government*."¹⁹⁵ What did Friedrich mean when he aligned military government with constitutional dictatorship? He explained:

[M]ilitary government policies would be formulated and executed by men thoroughly familiar with the culture and the past traditions of the countries to be occupied. What is perhaps even more important, however, is that such policies and their execution should be in the hands of persons who would understand the nature of the world revolutionary situation and would appreciate the limits of force in dealing with a conflict of this type. This implies that they would understand the genesis and functioning of constitutional democracy and appreciate the conditions for its maintenance and growth. This prescription may sound like a twentieth-century call for the philosophers made kings. It is a fact that the constitutional dictator occupies a position which would be akin to the

¹⁹³ Describing Friedrich's theory of military governance, Lietzmann asserts: "It is no longer the positive constitution of a people, with which they legitimize the dictatorial power over themselves; it is also no longer a concept understood as natural rights, as the 'will to live' of a people expressed in normative orientations, to which the constitutional dictatorship refers. But now another people enter, another sovereign as the stage principle. This new, foreign sovereign gives the order to implement a new constitution." In German: "Es ist nicht mehr die positive Verfassung eines Volkes, mit der dieses die diktatorische Macht über sich selbst legitimiert; es ist auch nicht mehr ein naturrechtlich verstandenes Konzept, wie der in normativen Orientierungen sich ausdrückende 'Lebenswille' eines Volkes, auf den sich der konstitutionelle Diktator beruft. Sondern nun betritt ein anderes Volk, ein anderer Souverän als Auftraggeber die Bühne. Diese neue, fremde Souverän gibt den Auftrag zur Einführung einer neuen Verfassung." Lietzmann, *Politikwissenschaft*, 271.

¹⁹⁴ Friedrich, *Constitutional Government and Democracy* [1950], 594. Lietzmann argues the military occupation was dictatorial but said Friedrich avoided such language. Lietzmann, *Politikwissenschaft*, 271. But, as shown here, Friedrich did at times embrace the idea of dictatorship.

¹⁹⁵ Emphasis in original, Friedrich, *Constitutional Government and Democracy* [1950], 572; Lietzmann, *Politikwissenschaft*, 271-72; Greenberg, "The Limits." Describing constitutional dictatorship, Friedrich wrote: "Every modern constitution has recognized the problem of temporary emergencies and has sought to provide for a temporary concentration of powers to be used in overcoming such emergencies." Friedrich, *Constitutional Government and Democracy* [1950], 573. He then noted: "Constitutional dictatorship is the term we shall use to designate all such methods for the temporary concentration of powers." Ibid., 573.

Platonic guardians, were it not for the fact that he remains responsible to a democratic people at home.¹⁹⁶

The invocation of Plato is telling – in Plato’s description of Socratic philosophy, people were not alike and therefore ought to be given different amounts of political power.¹⁹⁷ Friedrich had come full circle. His hierarchical description of military government again harkened back to his celebration of the Cromwellian dictatorship in the early 1930s. According to Friedrich, the top-down imposition of policies created by an enlightened military elite was essential to rebuilding unified constitutional and democratic governments in the nations under occupation. By 1950, aspects of Friedrich’s constitutionalism increasingly rejected democracy in favor of hierarchy.

Friedrich’s discussion of constitutional dictatorship was a modified version of Carl Schmitt’s theory of dictatorship, though this was not immediately obvious.¹⁹⁸ In his 1950 book, Friedrich criticized Schmitt’s *The Dictatorship* as a text that “appears like a partisan tract [...]”.¹⁹⁹ Instead, Friedrich cited to “The Problem of Constitutional Dictatorship,” a 1940 article written by Frederick Watkins, Friedrich’s co-author for their 1931 entry in the *Encyclopaedia of the Social Sciences* on monarchy, which had been sympathetic to monarchical restoration.²⁰⁰

¹⁹⁶ *Ibid.*, 595.

¹⁹⁷ According to Allan Bloom: “In the Socratic view, political justice requires that unequal men receive unequal honors and unequal shares in ruling.” Allan Bloom, “Interpretive Essay,” in Plato, *The Republic of Plato*, trans. Allan Bloom, 2nd ed. (New York: Basic Books, 1991), 366.

¹⁹⁸ Hans Lietzmann notes that Friedrich’s constitutional dictatorship in the 1930s was derived from Schmitt’s theory of presidential dictatorship. Lietzmann, “Von der konstitutionellen,” 180, 182. Lietzmann observes that Friedrich increasingly disagreed with Schmitt about what constituted the nucleus of constitutional principles. *Ibid.*, 185. But to what extent did Friedrich break with Schmitt? John McCormick says in *The Dictatorship* Schmitt argued dictatorship was an important political tool abandoned by liberals that had only been taken up by Communists. John P. McCormick, “From Constitutional Technique to Caesarist Ploy: Carl Schmitt on Dictatorship, Liberalism, and Emergency Powers,” in *Dictatorship in History and Theory: Bonapartism, Caesarism, and Totalitarianism*, ed. Peter Baehr and Melvin Richter (Cambridge: Cambridge University Press, 2004), 198-99. It appears that Friedrich followed Schmitt when he applied the concept of dictatorship to constitutionalism, hoping to save constitutionalism from right- and left-wing notions of dictatorship through constitutional dictatorship. Greenberg, “The Limits.”

¹⁹⁹ Friedrich, *Constitutional Government and Democracy* [1950], 664.

²⁰⁰ *Ibid.*, 664; Frederick M. Watkins, “The Problem of Constitutional Dictatorship,” in *Public Policy: A Yearbook of the Graduate School of Public Administration, Harvard University*, ed. C. J. Friedrich and Edward S. Mason, vol. 1 (Cambridge, MA: Harvard University Press, 1940), 324-79; Friedrich and Watkins, “MONARCHY,” 584.

The 1937 edition of *Constitutional Government and Politics* illuminates the relationship between Schmitt, Watkins, and Friedrich. In the bibliography for a chapter entitled “Constitutional Dictatorship and Emergency Powers,” Friedrich said Schmitt’s *The Dictatorship* was an important work on the issue of constitutional dictatorship, though he reproached some elements of Schmitt’s theory, particularly Schmitt’s emphasis on the Weimar presidency.²⁰¹ As Friedrich explained: “The author [...] has profited most from a work which will shortly appear in print and which has been prepared at his suggestion by Frederick M. Watkins. Originally conceived as a translation of Schmitt’s work, the inadequacies of the latter’s essay made an independent and scientific treatment seem highly desirable.”²⁰² Although Friedrich and Watkins criticized some of Schmitt’s theory in *The Dictatorship* as inadequate, Schmitt’s work remained the urtext for their analysis of constitutional dictatorship. It is perhaps unsurprising that Friedrich largely abandoned democratic theory and settled upon elitism and hierarchy in his discussion of postwar military government and constitutional dictatorship.

IX. The Origins of Totalitarianism: Democracy Run Amuck?

In the early 1950s, Friedrich contrasted totalitarianism with constitutionalism.²⁰³ In late 1952, he sent invitations for a conference on totalitarianism through the American Academy of

²⁰¹ Friedrich wrote: “A number of treatments of contemporary unconstitutional dictatorships contain more or less extensive comments on constitutional dictatorship. Particularly, Carl Schmitt’s *Die Diktatur von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (2d ed., 1928) attempts a comprehensive synthesis, but unfortunately his theoretical analysis is marred by his preoccupation with ‘political’ considerations of the moment – at the time the justification of more extended presidential powers.” Friedrich, *Constitutional Government and Politics*, 534-35.

²⁰² Ibid., 535. As noted in Chapter 1, while Friedrich did not offer a specific article title, he was likely referring to what became Watkins’ 1940 work “*The Problem of Constitutional Dictatorship*” because in later editions of *Constitutional Government and Democracy* Friedrich cited to this article by Watkins. Friedrich, *Constitutional Government and Democracy* [1941], 627; Friedrich, *Constitutional Government and Democracy* [1946], 627.

²⁰³ Carl J. Friedrich, “Military Government and Dictatorship,” *Annals of the American Academy of Political and Social Science* 267 (Jan. 1950): 1-7; Lietzmann, “Von der konstitutionellen,” 177.

Arts and Sciences.²⁰⁴ Some academics who were invited but did not take part included John Kenneth Galbraith of Harvard, Franz Neumann who was at Columbia, and Walt Whitman Rostow of M.I.T.²⁰⁵ Nevertheless, the conference was well-attended by many influential Cold War thinkers, including Hannah Arendt, George Kennan, and David Riesman.²⁰⁶ At the conference, which took place in Boston from March 6 to 8, 1953, Friedrich presented a paper entitled “The Unique Character of Totalitarian Society.”²⁰⁷ There, he set forth the criteria he believed defined totalitarian nations, such as Nazi Germany and the Soviet Union.²⁰⁸

While Friedrich contended there were multiple causes for the rise of totalitarianism, including technology and Christianity, he asserted: “But probably more important than either is the ‘democratic’ antecedents of these totalitarian societies. Marx and Engels saw themselves as constituting the vanguard of the democratic movement of their day, and Stalin talked of the Soviet totalitarian society as the ‘perfect democracy’ with evident conviction. However, not only Marx and Engels, but Mussolini and Hitler organized parties with a program intended for mass appeal, designed to win as many adherents as possible.”²⁰⁹ Thus, Friedrich again reiterated his argument that totalitarianism was synonymous with the modern emergence of democracy.

He blamed the populism of the mass party system for enabling totalitarian movements: “[T]he carefully organized single mass party, complete with program and ideology, is a distinct

²⁰⁴ Correspondence from Carl J. Friedrich to Hannah Arendt, November 7, 1952, Organizations, 1943-1976, n.d. – American Academy of Arts and Sciences – Conference on Totalitarianism – 1952-1953, Hannah Arendt Papers, Manuscript Division, Library of Congress, Washington, D.C. (hereafter referred to as the Arendt Papers).

²⁰⁵ AMERICAN ACADEMY CONFERENCE ON TOTALITARIANISM, March 6 to 8, 1953, LIST OF PARTICIPANTS, Organizations, 1943-1976, n.d. – American Academy of Arts and Sciences – Conference on Totalitarianism – 1952-1953, Arendt Papers.

²⁰⁶ Carl J. Friedrich, ed., *Totalitarianism: Proceedings of a Conference Held at the American Academy of Arts and Sciences March 1953* (Cambridge, MA: Harvard University Press, 1954), v.

²⁰⁷ Ibid., vii; Carl J. Friedrich, “The Unique Character of Totalitarian Society,” in *Totalitarianism: Proceedings of a Conference Held at the American Academy of Arts and Sciences March 1953*, ed. Carl J. Friedrich (Cambridge, MA: Harvard University Press, 1954), 47-60.

²⁰⁸ Ibid., 52-53. An earlier version of Friedrich’s definition of totalitarianism can be found in his 1950 piece “Military Government and Dictatorship.” Friedrich, “Military Government and Dictatorship,” 1-2.

²⁰⁹ Friedrich, “The Unique Character,” 56, 57.

peculiarity of the totalitarian societies of our time.”²¹⁰ Yet mass parties were also responsible for the political movements Friedrich hoped would form the core supporters of his Cold War constitutionalism. In Germany, the Catholic Center Party (or *Zentrum*), the mass party of political Catholicism, played a key role the push for liberalism and constitutional governance from the German Empire to the Weimar Republic.²¹¹ Likewise, in the German Empire the Social Democrats built a mass party that included not just industrial workers but also a significant number of middle-class white-collar workers.²¹² In the aftermath of World War I, European socialists, especially in Germany, played an important part in supporting parliamentary regimes.²¹³ Friedrich struggled to develop a neutral theoretical principle that could differentiate between mass parties he approved of and those he identified with totalitarian tendencies.

Nevertheless, a crucial factor emerged in Friedrich’s thinking that would allow him to distinguished totalitarianism from political movements he found acceptable: “One does not have to mistake Hobbes for a totalitarian in order to recognize the connection between his failure to understand the vital role of religion and of intermediary groups in a well-ordered commonwealth and the totalitarians’ comparable blindness in these matters.”²¹⁴ Friedrich’s emphasis on “intermediary groups” alongside religion indicated that association theory remained an essential

²¹⁰ *Ibid.*, 58.

²¹¹ *Ludwig Windhorst’s leadership of the Center Party in the German Empire was defined by a concerted effort to bring about liberal reforms.* Margaret Lavinia Anderson, *Windhorst: A Political Biography* (Oxford: Clarendon Press, 1981), 402-3. During the First World War, Matthias Erzberger, an important left-leaning leader in the Center Party, brought together elements of the Center Party with Social Democrats and liberals. Klaus Epstein, *Matthias Erzberger and the Dilemma of German Democracy* (Princeton: Princeton University Press, 1959), vii. His efforts were important to ending the war and transitioning to the Weimar Republic until his murder in 1921. *Ibid.*, vii, 384-87. For a discussion of the contributions of Catholics to the rebuilding of West Germany through the Christian Democratic Union (CDU) alongside Protestants after World War II, see Noel D. Cary, *The Path to Christian Democracy: German Catholics and the Party System from Windhorst to Adenauer* (Cambridge, MA: Harvard University Press, 1996), 155-178.

²¹² Jonathan Sperber, *The Kaiser’s Voters: Electors and Elections in Imperial Germany* (Cambridge: Cambridge University Press, 1997), 68.

²¹³ Geoff Eley, *Forging Democracy: The History of the Left in Europe, 1850-2000* (Oxford: Oxford University Press, 2002), 220-22.

²¹⁴ Friedrich, “Military Government and Dictatorship,” 60.

element in his postwar theory of the constitutional state compared with the totalitarian state. He believed that in a “well-ordered commonwealth,” anti-totalitarian nations would seek to ensure that robust associations would form and flourish, thereby ensuring stability.

X. A Return to *Herrschaft* and *Gesellschaft*: Association Theory in a New Germany

The upheavals of the early years of the Cold War began to dissipate slightly with the death of Joseph Stalin on March 5, 1953.²¹⁵ The Soviet leader’s demise, coupled with the end of violent conflict in the Korean War in July 1953, were harbingers of a period of some salutary changes in the Soviet Union.²¹⁶ As European instability began to subside, Friedrich returned to his democratic notions of *Genossenschaft* as he entered into dialogue with his German academic counterparts, particularly Alexander Rüstow, a colleague Friedrich knew from the 1920s.²¹⁷ Rüstow was also a follower of Alfred Weber; in the 1920s he and Friedrich helped the Institute for Social and Political Science (*Institut für Sozial- und Staatswissenschaft*) in Heidelberg create a transatlantic exchange program between Germany and the United States for scholars and students.²¹⁸ After World War II, Friedrich assisted Weber in rebuilding the Institute and Rüstow succeeded Weber as the Institute’s head in 1948.²¹⁹

In 1955, Friedrich published the article “The Political Thought of Neo-Liberalism.”²²⁰ Although Friedrich mentioned Hayek and his newly formed Mont Pèlerin Society, he focused mainly on the German ordoliberals.²²¹ The ordoliberals included Hayek and Rüstow, among

²¹⁵ Brown, 222.

²¹⁶ Ibid., 236-38; Tony Judt, *Postwar: A History of Europe Since 1945* (New York: Penguin, 2005), 242. To some extent, Judt underestimates Cold War political volatility after these events.

²¹⁷ Greenberg, *The Weimar Century*, 41.

²¹⁸ Ibid., 37, 41-42; Hans J. Lietzmann, “Integration und Verfassung: Oder: Gibt es eine Heidelberger Schule der Politikwissenschaft?” in *Schulen der deutschen Politikwissenschaft*, ed. Wilhelm Bleek and Hans J. Lietzmann (Opladen, Germany: Leske & Budrich, 1999), 246.

²¹⁹ Greenberg, *The Weimar Century*, 69.

²²⁰ Carl J. Friedrich, “The Political Thought of Neo-Liberalism,” *American Political Science Review* 49, no. 2 (June 1955): 509-25.

²²¹ Ibid., 509 fn. 2.

others, but Friedrich pointed out that while Hayek's movement "undertakes a specific defense of capitalism," in contrast "the *Ordo* liberals, especially [...] Rüstow, are distinctly critical of capitalism."²²² As Gerhard Schnyder and Mathias Siems note: "Drawing on the concept of *ordo*, the Latin word for 'order', ordoliberalism refers to an ideal economic system that would be more orderly than the laissez-faire economy advocated by classical liberals [...]."²²³

Friedrich discussed Rüstow's work in his article, emphasizing Rüstow's variegated use of the term *Herrschaft* in his various titles, which Friedrich observed was difficult to translate.²²⁴ Among the definitions Friedrich considered, he wrote: "[A]t times what *Herrschaft* refers to are 'dominance' and 'control.' The former of these clearly is equivalent to the Latin *dominus*, which in turn gave rise to the term *dominium*. 'Dominance' has the further advantage of suggesting the contrast to freedom which Rüstow's titles clearly call for."²²⁵ Friedrich noted that although Rüstow compared freedom with *Herrschaft*, which was unsurprising for a liberal thinker, there

²²² Emphasis in original, *ibid.*, 509 fn. 2.

²²³ Emphasis in original, Gerhard Schnyder and Mathias Siems, "The 'Ordoliberal' Variety of Neo-Liberalism," in *Banking Systems in Crisis: The Faces of Liberal Capitalism*, ed. Suzanne J. Konzelmann and Marc Fovargue-Davies (London: Routledge, 2013), 250-51. Though American neo-liberalism and European ordoliberalism were not always analogous, early American neo-liberals were one of the sources that shaped ordoliberalism. *Ibid.*, 255-56; Ralf Ptak, "Neoliberalism in Germany: Revisiting the Ordoliberal Foundations of the Social Market Economy," in *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective*, ed. Philip Mirowski and Dieter Plehwe (Cambridge, MA: Harvard University Press, 2009), 98-100.

²²⁴ Friedrich, "The Political Thought of Neo-Liberalism," 514-15. Friedrich discussed Rüstow's *Ortsbestimmung der Gegenwart (Orientation of the Present)*. *Ibid.*, 514 fn. 21; Alexander Rüstow, *Ortsbestimmung der Gegenwart: Eine universalgeschichtliche Kulturkritik: Ursprung der Herrschaft*, vol. 1 (Erlenbach-Zürich: Eugen Rentsch, 1950); Alexander Rüstow, *Ortsbestimmung der Gegenwart: Eine universalgeschichtliche Kulturkritik: Weg der Freiheit*, vol. 2 (Erlenbach-Zürich: Eugen Rentsch, 1952); Alexander Rüstow, *Ortsbestimmung der Gegenwart: Eine universalgeschichtliche Kulturkritik: Herrschaft oder Freiheit?* vol. 3 (Erlenbach-Zürich: Eugen Rentsch, 1957). A substantially condensed version of this work was later published in English. Alexander Rüstow, *Freedom and Domination: A Historical Critique of Civilization*, ed. Dankwart A. Rustow, trans. Salvator Attanasio (Princeton: Princeton University Press, 1980). Friedrich described the different uses of the word *Herrschaft* by Rüstow: "[T]he first [chapter] is called *Ursprung der Herrschaft* ('Origin of Government or Rule'), the second *Weg der Freiheit* ('March of Freedom'), and the third *Herrschaft oder Freiheit* ('Rule or Freedom'). The titles suggest a serious difficulty for the English reader on account of their use of *Herrschaft*." Emphasis in original, 515. Friedrich continued: "This term has been employed in German writings to designate those more informal aspects of government – whether political or associational – which are suggested by the word 'rule,' but it is also employed to refer to the governing function and the government as such." *Ibid.*, 515.

²²⁵ Emphasis in original, *ibid.*, 515.

was a more important juxtaposition in Rüstow's theory: "On the other hand, in his historical analysis, Rüstow rather stresses the contrast between *Herrschaft* and *Genossenschaft*, a dichotomy familiar to students of political and legal theory and history from Otto von Gierke's monumental work, *Das Deutsche Genossenschaftsrecht* (published in 1868-1913, in four volumes), which is built entirely on this antithesis."²²⁶

While Rüstow's comparison of *Herrschaft* and *Genossenschaft* was constructed on Gierke's work, it also superseded the limitations of Gierke's time, as Friedrich explained: "Gierke, in good romantic fashion, surmised that *Herrschaft* was the heritage of Rome and Roman law, while *Genossenschaft* was the principle of the Germanic folk community. Rüstow, on the other hand, asserts that these principles are of universal significance and application, and that they recur in the history of many peoples – obviously the sounder view."²²⁷ Friedrich thought Rüstow correctly identified *Herrschaft* and *Genossenschaft* as comprehensive categories that could be used to understand most societies. But Friedrich was surprised Rüstow did not cite to Gierke: "[T]he complete lack of reference to Von Gierke's thought is rather startling, since he developed the concepts and gave them their significant content."²²⁸ In analyzing Rüstow's work, Friedrich sought to place greater emphasis on *Genossenschaft* rather than *Herrschaft*.

Friedrich said Rüstow believed that "in the broader sphere of human endeavor, *Herrschaft* is seen as a vital factor in the evolution of civilization."²²⁹ Rüstow's analysis began with "the beginnings of human civilization," as Friedrich explained: "Rüstow asks how it could happen that about 10,000 years ago there set in a process of rapid and radical change leading to

²²⁶ Emphasis in original, *ibid.*, 515.

²²⁷ Emphasis in original, *ibid.*, 515.

²²⁸ *Ibid.*, 515 fn. 24. Intriguingly, Friedrich also argued that Max Weber was deeply influenced by Gierke: "The indebtedness of Max Weber to Von Gierke has never been properly appreciated – part of a general failure to recognize Weber's juristic background, so strikingly seen in his insistence upon abstract definitions." *Ibid.*, 515 fn. 24. Friedrich also noted that Gierke's theory was based on the work of Johannes Althusius. *Ibid.*, 515 fn. 25.

²²⁹ Emphasis in original, *ibid.*, 516.

the production of the great cultures of man, when for long ages preceding no such phenomena can be observed. He answers that this development is the result of the *Ueberlagerung*, the ‘super-imposition’ of one culture over another, resulting from conquest.”²³⁰ Rüstow thought *Überlagerung*, or the overlaying of a conqueror’s culture over that of the conquered, was constant throughout history: “Rüstow sees this process as repeating itself again and again, with the conquerors achieving their supremacy not as a result of higher culture but by means of their superiority in military technique. There then sets in a slow process of amalgamation of the two layers.”²³¹ This created a hierarchy, as the conquerors overwhelmed the conquered over time.²³²

Despite Friedrich’s emphasis on the need for force in fighting antidemocratic movements during the Cold War, he balked at Rüstow’s praise of coercion, noting that Rüstow “expresses approval of [Karl] Mannheim’s attempt to transcend the Marxist overemphasis on economic factors and quotes his statement that ‘in the last analysis the *ultima ratio* [final argument], both in our external political relations and in our final decisions in internal politics, is force.”²³³

During the Weimar Republic, Mannheim also followed Alfred Weber at Heidelberg.²³⁴

Mannheim’s 1929 *Ideology and Utopia* (*Ideologie und Utopie*) was an important work in sociology that Herbert Marcuse and Hannah Arendt assessed at the time.²³⁵ Friedrich objected to Rüstow’s support for Mannheim’s theory: “This unhappy notion is at variance with Rüstow’s own idea of the *Genossenschaftsstaat* [association-state], which obviously does not rest on

²³⁰ Emphasis in original, *ibid.*, 516.

²³¹ *Ibid.*, 516.

²³² *Ibid.*, 516-17.

²³³ Emphasis in original, *ibid.*, 517; Rüstow, *Ortsbestimmung*, vol. 1, 91; Karl Mannheim, *Rational and Irrational Elements in Contemporary Society: Delivered on 7 March 1934 at Bedford College for Women, University of London* (London: H. Milford, 1934).

²³⁴ Colin Loader, “Free Floating: The Intelligentsia in the Work of Alfred Weber and Karl Mannheim,” *German Studies Review* 20, no. 2 (May 1997): 217, 224; David Kettler, Volker Meja, and Nico Stehr, “Rationalizing the Irrational: Karl Mannheim and the Besetting Sin of German Intellectuals,” *American Journal of Sociology* 95, no. 6 (May 1990): 1445.

²³⁵ *Ibid.*, 1445; Karl Mannheim, *Ideology and Utopia: Collected Works*, vol. 1 (London: Routledge, 1997).

force.”²³⁶ Indeed, Friedrich preferred this notion of the state based on association, because he noted “surely power is generated by consent as well as by constraint.”²³⁷

While Rüstow related *Herrschaft* to domination, Friedrich asserted Rüstow nevertheless thought it was necessary for the rise of civilization: “If one asks just why a higher culture results from *Ueberlagerung*, that is, from conquest and dominance relations and the resultant rule, Rüstow answers that this *Herrschaft* makes possible the effective organization of large numbers of human beings over large areas.”²³⁸ This organizing process had implications for governance, which Friedrich elucidated: “For political theory, what is decisive is the stress Rüstow lays upon conquest as the origin of ‘the state’ [...]”²³⁹ Friedrich observed Rüstow believed there were two types of states: “Such a state may be based either upon community or upon dominance; it may be either *Genossenschaftsstaat* or *Klassenstaat* [class-state] (composed of equal and cooperating members, or of classes, one ruling and the other ruled). In other words, the ‘state’ may be either of one layer or of two [...]”²⁴⁰ Based on Friedrich’s reading of Rüstow, the *Klassenstaat* emerged after one culture conquered another, dividing the rulers and the ruled into hierarchical classes, until the conquerors had absorbed the conquered and created a *Genossenschaftsstaat*, in which there could finally be equality because the two classes had been amalgamated.

For Rüstow, this meant democracy was merely a reflection of hierarchy: “Rüstow regards democracy, when defined as majority rule, as merely the inversion of the state based upon dominance – an *Ueberlagerung der Ueberlagerten* [overlaying of the overlaid].”²⁴¹ Rüstow thought majoritarian democracy reflected efforts by the ruled to struggle against their rulers.

²³⁶ Emphasis in original, Friedrich, “The Political Thought of Neo-Liberalism,” 517.

²³⁷ Ibid., 517. Friedrich cited to his own work when discussing this point. Ibid., 517 fn. 30; Friedrich, *Constitutional Government and Democracy* [1950], 22.

²³⁸ Emphasis in original, Friedrich, “The Political Thought of Neo-Liberalism,” 517.

²³⁹ Ibid., 517.

²⁴⁰ Emphasis in original, *ibid.*, 517-18.

²⁴¹ Emphasis in original, *ibid.*, 518.

Friedrich found this troubling, noting that “[t]here is a good deal of elitist thinking among these neo-liberals, with little appreciation of the role of the common man.”²⁴² Accordingly, he thought this elitism reflected an anti-democratic sentiment among the ordoliberals: “Although their idea of the constitution as the creative act of instituting the free market economy requires an elaboration of their image of man along democratic lines, showing that he is capable of much ‘common sense,’ they do not see democracy in this perspective.”²⁴³ While ordoliberals conceded that the common man’s thinking was rational in economics, which was necessary to explain the free market, they did not extend this rationality to the common man’s political decision-making.

Because of this inconsistency, Friedrich argued that “[t]he importance of constitutionalism is not given adequate attention by Rüstow or any of the other members of the group, although Hayek has emphasized the importance of the rule of law, the *Rechtsstaat* [*sic*].”²⁴⁴ As Friedrich continued: “But this rule of law surely implies certain notions associated with constitutionalism – that the constitutional order owes its being to the action of a constituent power which is the people’s, that the people at large continue as the constitutional legislator in amending the constitution, that the constitution has to provide for a separation of powers and has to protect each citizen’s private sphere by due process, and so on.”²⁴⁵ Though Friedrich included the procedural requirements of his constitutionalism, such as the separation of powers and due process, he also emphasized the role of the people in creating and changing the constitution. Friedrich wanted to ensure that the postwar discussion of *Genossenschaft* remained indebted to

²⁴² Ibid., 518.

²⁴³ Ibid., 518. As Friedrich noted: “There is a general tendency to confuse constitutional democracy with anarchic majoritarian democracy that the Jacobins read into Rousseau, and to see totalitarian dictatorship as its inescapable fruit.” Ibid., 518.

²⁴⁴ Emphasis in original, ibid., 518.

²⁴⁵ Ibid., 518.

Gierke's belief in the necessity of the active role of the people in lawmaking, not just in economics. However, this exposed a discrepancy in Friedrich's own thinking – his discussion the necessity of force under military governments and constitutional dictatorships in the early 1950s was reminiscent of Rüstow's praise for *Herrschaft* and *Überlagerung* and was at odds with Friedrich's desire for politics based on consent, democracy, and trust in the common man.

XI. Conclusion

Friedrich's influence expanded throughout the 1950s. In 1956, Friedrich was granted a professorship at the University of Heidelberg in Germany, and he taught alternately at Heidelberg and Harvard into the 1960s.²⁴⁶ He also published *Totalitarian Dictatorship and Autocracy* in 1956, which he co-wrote with Zbigniew Brzezinski, a Polish-born immigrant to the U.S. and scholar of the Soviet Union at Harvard.²⁴⁷ Brzezinski later served as National Security Advisor for U.S. President Jimmy Carter.²⁴⁸ Although the book met with some criticism, Friedrich and Brzezinski's theory became the leading framework for analyzing totalitarianism.²⁴⁹

For all his success, Friedrich failed to recognize the limitations of his own political philosophy. As historian Jochen Hellbeck observes, early Soviet culture sought to create “the habitat of a perfect human being, the ‘new man,’ whom revolutionary actors described as a human machine, an untiring worker, or an unfettered, integrated ‘personality.’”²⁵⁰ The fictional new man served as an ideal around which the Soviets could build their Communist society even

²⁴⁶ Greenberg, *The Weimar Century*, 70.

²⁴⁷ Carl J. Friedrich and Zbigniew Brzezinski, *Totalitarian Dictatorship and Autocracy* (Cambridge, MA: Harvard University Press, 1956); Justin Vaïsse, *Zbigniew Brzezinski: America's Grand Strategist*, trans. Catherine Porter (Cambridge, MA: Harvard University Press, 2018), 1, 5; Abbott Gleason, *Totalitarianism: The Inner History of the Cold War* (New York: Oxford University Press, 1995), 125.

²⁴⁸ Greenberg, *The Weimar Century*, 64.

²⁴⁹ William David Jones, *The Lost Debate: German Socialist Intellectuals and Totalitarianism* (Urbana, IL: University of Illinois Press, 1999), 4-6; Gleason, 125.

²⁵⁰ Jochen Hellbeck, *Revolution on My Mind: Writing a Diary Under Stalin* (Cambridge, MA: Harvard University Press, 2006), 5.

if this vision did not reflect the social order at the time.²⁵¹ Friedrich and Brzezinski were critical of such thinking: “[T]he totalitarian dictatorship seeks to divide and rule in the most radical and extreme way: each human being should, for best effects, have to face the monolith that is the totalitarian rule as an isolated ‘atom.’”²⁵² According to them, this violated the natural state of mankind: “By being thus atomized, the people with its many natural subdivisions becomes the ‘mass’ and the citizen is transformed into the mass man. This mass man, this isolated and anxiety-ridden shadow, is the complete antithesis to the ‘common man’ of the working free society.”²⁵³ For them, the totalitarian mass man reflected an attempt to usurp the common man’s instinctive desire to associate with others in various groupings and institutions.

Yet Friedrich’s praise for the common man, which he espoused after abandoning his early 1930s flirtation with authoritarianism, was rooted in an imagined ideal much like the Soviet new man. Friedrich’s common man recognized the importance of the *Genossenschaft*, such as religious groups or political parties, but would not join associations Friedrich deemed “totalitarian.” The common man valued democracy but did not want unfettered democratic decision-making to call into question constitutional principles. The common man understood that totalitarian political parties could be excluded for advocating violence, but the common man justified the use of force when he believed it was necessary to reestablish constitutional order. Herein lay the problem for Friedrich’s theory: if the common man’s support for constitutionalism was simply a description of mankind’s social relations, Friedrich had difficulty explaining why many people across the globe subscribed to fascism and Communism rather than to his own constitutionalism. If, in contrast, the common man’s desire for constitutionalism was not

²⁵¹ Ibid., 5-6.

²⁵² Friedrich and Brzezinski, 281.

²⁵³ Ibid., 281.

descriptive but was indeed an idealized theory that Friedrich believed societies should aim toward, then he had to admit the common man was perhaps not so common. This explains why he believed a constitutional dictatorship was necessary in times of crisis, even if it ran counter to the desires of the common man. But how different was the constitutional dictatorship from the dictatorship of the proletariat?²⁵⁴ Despite Friedrich's professional achievements as a Cold War warrior in the 1950s, his theory was often woefully inconsistent, constantly vacillating between *Herrschaft* and *Genossenschaft*, between dictatorship and democracy.

²⁵⁴ Lietzmann, *Politikwissenschaft*, 283-84.

CHAPTER 5

Liberalism in the Lonely Crowd: **David Riesman's Search for Utopia in the American Dream**

David Riesman opened his 1951 article "The Nylon War" with the salvo: "Today – August 1, 1951 – the Nylon War enters upon the third month since the United States began all-out bombing of the Soviet Union with consumers' goods, and it seems time to take a retrospective look."¹ Riesman described the military strategy: "Behind the initial raid of June 1 were years of secret and complex preparations, and an idea of disarming simplicity: that if allowed to sample the riches of America, the Russian people would not long tolerate masters who gave them tanks and spies instead of vacuum cleaners and beauty parlors."²

The Americans were the first to strike: "Over 600 C-54s streamed high over Rostov, and another 200 over Vladivostok, dropped their cargoes, and headed back to their bases in the Middle East and Japan. By today's standard these initial forays were small-scale – 200,000 pairs of nylon hose, 4,000,000 packs of cigarettes, 35,000 Toni-wave kits, 20,000 yo-yos, 10,000 wrist watches and a number of odds and ends from P-X overstock. Yet this was more than enough to provoke frenzied rioting as inhabitants scrambled for a share."³ Ultimately, the Soviets had no choice but to respond: "Seattle was the first American city to learn the meaning of the Soviet warning as on July 15 a hundred Russian heavy bombers (presumably from bases in the Kuriles) left behind them 15,000 tins of caviar, 500 fur coats, and 80,000 copies of Stalin's speeches on the minorities question."⁴ It was an abysmal effort: "[I]n quantity and quality the counter-offensive has been unimpressive. Searing vodka, badly styled mink coats (the only really selling

¹ David Riesman, "The Nylon War," *Common Cause* 4, no. 7 (Feb. 1951): 379.

² *Ibid.*, 379.

³ *Ibid.*, 380.

⁴ *Ibid.*, 381.

item), undependable cigarette lighters – these betray a sad lack of know-how in production and merchandising.”⁵ Riesman asked: “What do the coming months hold? It is significant that this depends almost entirely on the outcome of the American domestic struggle: the Nylon War has altered the whole power-complex which, as the Korean War dragged on, still heavily favored Russia.”⁶ The Nylon War had turned the tide of the entire Cold War: “It is now Russia, not America, whose resources are overcommitted, whose alliances are overstrained. In fact, Mao’s visit to Moscow at the end of July seems to have been attended with apprehension lest he ask America to cut Red China in on Operation Abundance – at a price, of course.”⁷

Writing retrospectively in his 1954 compendium *Individualism Reconsidered*, Riesman noted: “‘The Nylon War’ is a serious attempt, couched as satire, to suggest how the Soviet Union might be brought down short of war.”⁸ Because Riesman wrote the story in earnest indicates it was a parable. Riesman wrote that “I conceived the idea originally as something of a heuristic device to sharpen discussion among a group of social scientists meeting in 1947 under the auspices of the Harris Foundation for International Affairs to discuss the ‘world community.’”⁹ This meeting, organized by Quincy Wright for the University of Chicago, was held in March 1947 at the grand Hotel Moraine in Highland Park, Illinois.¹⁰ An array of scholars and officials attended, including Adlai Stevenson, Hans Morgenthau, Talcott Parsons, Harold Lasswell, Karl Polanyi, Margaret Mead, Ruth Benedict, and Louis Wirth.¹¹

⁵ Ibid., 381.

⁶ Ibid., 384.

⁷ Ibid., 384.

⁸ David Riesman, *Individualism Reconsidered and Other Essays* (Glencoe, IL: Free Press, 1954), 411.

⁹ Ibid., 411.

¹⁰ Robert C. Angell, “Quincy Wright: A Personal Memoir,” *Journal of Conflict Resolution* 14, no. 4 (Dec. 1970): 457.

¹¹ Ibid., 457.

Riesman chafed under the ideas discussed by two main groups of attendees: “There were the self-proclaimed ‘realists,’ men like my colleague Hans Morgenthau, some of them geopolitically oriented, who thought in terms of the bipolar ‘big powers’ and exchanged strategic details about Iranian oil or Skoda’s output or de Gasperi’s majority. Opposed to them was a small group, of whom the late Ruth Benedict was one of the more eloquent, who occasionally also sought the prestige of ‘realism’ but did so in terms of psychology and culture rather than of steel plants or armored divisions.”¹² Riesman observed: “Although less patently nationalistic, this second group was no less devoted to the cause of the Western powers in the cold war, but it conceived of cross-cultural communication as a realistic possibility, once American ethnocentrism could be overcome.”¹³ In the end, he believed the first group failed to appreciate the appealing nature of the West while the second group misunderstood the oppressive nature of the Soviet state.¹⁴ According to Riesman, these failings were caused by the narrow-mindedness of both groups: “My fellow conferees tended to gravitate towards immediate policy questions – and to bind themselves to the alternatives the State Department might be willing or able to accept at the moment.”¹⁵ He found this self-imposed policy obsession perplexing: “Since we were a bunch of professors, and not the State Department, since we lacked its channels of information and misinformation, but also had less of an emergency mandate, I felt we should liberate ourselves from the conventions of thought which pass as realism.”¹⁶

In the late 1940s and early 1950s, Riesman found America at a crossroads. “The Nylon War” celebrated the economy of abundance offered by consumer goods in the postwar United

¹² Riesman, *Individualism Reconsidered*, 411.

¹³ *Ibid.*, 411.

¹⁴ *Ibid.*, 411.

¹⁵ *Ibid.*, 412.

¹⁶ *Ibid.*, 412.

States. Yet amid this material cornucopia was an intellectual paucity – at the 1947 conference, surrounded by many of the leading thinkers of the time, Riesman surprisingly found a stifling parochialism.¹⁷ The political ideas Riesman developed in the late 1940s and early 1950s led him to criticize the liberal consensus that emerged in the United States by the mid-1950s.¹⁸

Throughout the 1950s, Riesman was a rising star among American public intellectuals – his book *The Lonely Crowd* found widespread demand when it was issued in paperback in 1953, and in 1954 he appeared on *Time* magazine’s cover, which asked: “What is the American character?”¹⁹ This chapter reconstructs Riesman’s intellectual *Weltanschauung* to explain why Riesman was critical of early Cold War consensus liberal thinking.²⁰ Key to Riesman’s critique of consensus liberalism was his fascination with the idea of utopia.²¹ This was a concept he

¹⁷ In contrast, for a largely celebratory, but not wholly uncritical history of Cold War liberalism, see James T. Patterson, *Grand Expectations: The United States, 1945-1974* (New York: Oxford University Press, 1996).

¹⁸ For a historical overview of the remarkable flexibility of American liberalism in the twentieth century, see Gary Gerstle, “The Protean Character of American Liberalism,” *American Historical Review* 99, no. 4 (Oct. 1994): 1043-73. Godfrey Hodgson argues that the notion of consensus liberalism emerged in 1954, following the dissolution of McCarthyism and the conclusion Korean War. Godfrey Hodgson, *America in Our Time* (Garden City, NY: Doubleday, 1976), 71. As to the elements that defined consensus liberalism, this chapter draws upon the framework set forth by historian Lily Geismer: “By the late 1950s, it appeared that members of both the Democratic and Republican parties agreed on this set of principles, which observers such as [Arthur] Schlesinger came to call the ‘liberal consensus.’ This agenda rested on three central and interrelated notions. First, the American free enterprise system promoted both prosperity and social harmony and ended the need for redistribution since American society was becoming increasingly middle class. Second, federal programs could and should solve any existing social problems such as the persistence of Jim Crow segregation in the South. Finally, communism represented a basic threat to this system and thus the United States must both struggle against communism and spread the free enterprise system throughout the world.” Lily Geismer, “Kennedy and the Liberal Consensus,” in *A Companion to John F. Kennedy*, ed. Marc J. Selverstone (Chichester, U.K.: Wiley Blackwell, 2014), 501. While Riesman would likely have agreed with many of these policies, this chapter will explore the ways in which he sought to transcend them.

¹⁹ David Riesman, *The Lonely Crowd: A Study of the Changing American Character* (New Haven, CT: Yale University Press, 1950); Daniel Geary, “Children of *The Lonely Crowd*: David Riesman, the Young Radicals, and the Splitting of Liberalism in the 1960s,” *Modern Intellectual History* 10, no. 3 (2013): 608; “Social Scientist David Riesman: What is the American character?” *Time*, September 27, 1954, <http://content.time.com/time/covers/0,16641,19540927,00.html>.

²⁰ For a personal meditation on Riesman’s liberalism, see Irving Louis Horowitz, “Reflections on Riesman,” *The American Sociologist* 33, no. 2 (Summer 2002): 118-22.

²¹ Neil McLaughlin also observes the utopianism present in Riesman’s thinking, noting that “he was a utopian thinker who seriously engaged in the speculations and theoretical insights of great European thinkers such as Freud and Weber” – though McLaughlin emphasizes Riesman’s sociological theory, while this chapter focuses on his political theory. Neil McLaughlin, *Erich Fromm and Global Public Sociology* (Bristol, United Kingdom: Bristol University Press, 2021), 95. Writing retrospectively, Riesman noted that he intended *The Lonely Crowd* in particular to spur on political discussion: “We saw ourselves as contributing primarily to sociology but also to

engaged with as early as 1947 when he first conceived of “The Nylon War” and in an article in the *Yale Law Journal*, entitled “Some Observations on Community Plans and Utopia.”²²

In the years following the end of World War II, Riesman increasingly abandoned his early 1940s fears that latent fascist social forces in the U.S. threatened American liberalism – an apprehension some of his émigré colleagues, including Franz Neumann and Carl Friedrich, often expressed.²³ Instead, Riesman thought the greater threat was the possibility that American liberals had suppressed their desires to discover new and uncharted paths of freedom. Riesman shifted away from trying to control fascist tendencies and toward positive visions of a liberal utopia, which he believed would help wake people up to the potentials of their freedoms.

Riesman developed his notion of utopian liberalism as an alternative to consensus liberalism. For him, the concept of utopia allowed people to free themselves from their conventional considerations of policy, law, and values, and gave them a jumping-off point for

political science and to the newly developing field of American Studies.” David Riesman, “Innocence of *The Lonely Crowd*,” *Society* 35, no. 2 (Jan./Feb. 1998): 342.

²² David Riesman, “Some Observations on Community Plans and Utopia,” *Yale Law Journal* 57, no. 2 (Dec. 1947): 173-200. Riesman’s utopian suggestion for using consumer goods to fight the Cold War was quite prescient. For a discussion of the role consumer goods played in undermining the regimes in Communist East Germany and Yugoslavia, see Mark Landsman, *Dictatorship and Demand: The Politics of Consumerism in East Germany* (Cambridge, MA: Harvard University Press, 2005); Jonathan R. Zatin, *The Currency of Socialism: Money and Political Culture in East Germany* (Cambridge: Cambridge University Press, 2007); Patrick Hyder Patterson, *Bought & Sold: Living and Losing the Good Life in Socialist Yugoslavia* (Ithaca: Cornell University Press, 2011). See also Victoria de Grazia, *Irresistible Empire: America’s Advance Through Twentieth-Century Europe* (Cambridge, MA: Belknap Press, 2005).

²³ Riesman’s fear of fascism is exemplified in his 1942 article “Civil Liberties in a Period of Transition,” discussed in Chapter 1. David Riesman, “Civil Liberties in a Period of Transition,” in *Public Policy: A Yearbook of the Graduate School of Public Administration, Harvard University*, ed. C. J. Friedrich, Edward S. Mason, and Pendleton Herring (Cambridge, MA: Graduate School of Public Administration, 1942). In an essay published in 1998, Riesman described the suspicion held by many Americans and émigrés in the immediate aftermath of World War II that fascism could still rear its head in the U.S.: “There was a widespread expectation that, as had happened after the First World War, a new depression would occur with the end of the Second World War. There were also widespread fears of the consequences of the sudden return of twelve million uprooted veterans, most of whom were quickly demobilized. Many people believed that eight or nine million of them would not find jobs. It was not only European émigrés who anticipated that fascism (European style) might be the outcome of demagogic appeal to their bitterness. The GI Bill of Rights was one response to these anxieties.” Riesman, “Innocence,” 339. While Riesman never fully abandoned concerns about illiberalism and demagoguery, his work focused less on threats to liberalism in the U.S. and more on the nature of American liberalism itself.

reimagining the status quo.²⁴ Riesman's utopianism was liberal because he believed politics should be rooted in the decisions of autonomous individuals who were psychologically well-attuned to their own subjective desires and who could think and act independently of societal pressures. These individuals stood in contrast to a large swath of Americans, who Riesman believed were apathetic toward politics – a hypothesis he confirmed in his sociological studies. To reinvigorate American politics and to prevent the rise of illiberal demagogues, he argued that autonomous individuals needed to work together to find common ground, despite their different desires, to develop a robust understanding of utopian aims for American society. Yet Riesman struggled to explain how utopian liberalism could fit into a pluralist American culture, especially when some people advanced utopian visions that differed from his own ideals, or when others rejected utopias altogether. Moreover, his utopian liberalism was dependent on the consensus liberalism he tried to challenge, because his utopian ideas relied on substantial societal agreement on fundamental values. Ultimately, his utopian liberalism appeared increasingly unattainable as the 1950s gave way to the 1960s and American society became more splintered.

This chapter traces the development of Riesman's theory of utopian liberalism from the late 1940s to the early 1960s.²⁵ Although he did not systematically set forth a liberal theory, the outlines of a cohesive understanding can be traced from his writings. Through the late 1940s and

²⁴ For an insightful discussion of the history of utopia and its role (or lack thereof) in modern thought, see Russell Jacoby, *Picture Imperfect: Utopian Thought in an Anti-Utopian Age* (New York: Columbia University Press, 2005).

²⁵ For an illuminating analysis of Riesman's understanding of authoritarian tendencies in America with a particular emphasis on *The Lonely Crowd*, see Robert Genter, *Late Modernism: Art, Culture, and Politics in Cold War America* (Philadelphia: University of Pennsylvania Press, 2010), 54-89. Historian Daniel Geary offers an outstanding analysis of Riesman's liberalism in *The Lonely Crowd*. Geary, "Children of *The Lonely Crowd*," 607-611. However, this chapter seeks to explain the theoretical framework of Riesman's liberalism more fully and to elucidate how this affected his dialogue with leading American thinkers on Cold War politics. Sociologist Joseph Galbo provides an excellent overview of Riesman's book *The Lonely Crowd* but portrays Riesman as an overly credulous liberal: "Riesman and his colleagues [...] presented an inevitable movement of history very much in keeping with the prevailing liberal discourse of the time." Joseph Galbo, "From *The Lonely Crowd* to *The Cultural Contradictions of Capitalism* and Beyond: The Shifting Ground of Liberal Narratives," *Journal of the History of Behavioral Sciences* 40, no. 1 (Winter 2004): 61. This chapter argues instead that Riesman consciously challenged many assumptions made by American liberals, whom he found complacent.

early 1950s, Riesman developed his ideas regarding utopian thought and individualism, the work of Sigmund Freud, and the teachings of his mentor Erich Fromm. After Riesman published *The Lonely Crowd* in 1950, which was a commercial hit, selling over half a million copies from 1953 to 1960, he played an outsized role in American culture as a public intellectual.²⁶ During this time, he used his theory of utopian liberalism to debate the nature of American liberalism with Cold War thinkers who would go on to serve key roles in American politics, including Walt Rostow and Henry Kissinger. While Riesman's utopian vision was unable to solve the political challenges the United States faced by the 1960s, it serves as an important resource for understanding the political idealism of mid-twentieth century American liberalism.

I. Imagining the Future: Riesman's Theory of Utopia

The 1940s were a period of profound intellectual change for David Riesman. From 1941 to 1942 he moved temporarily from Buffalo to New York City for a fellowship at Columbia Law School.²⁷ Riesman recalled he was pleased because "New York [...] had the advantage of allowing more frequent analytic work and intellectual companionship with Erich Fromm."²⁸ He became close with Lionel and Diana Trilling and met Ruth Benedict and Margaret Meade, as well as influential legal thinkers Karl Llewellyn and Herbert Wechsler at Columbia Law.²⁹ Although Riesman's old mentor Carl Friedrich thought he should obtain a doctorate in government, Riesman recalled: "[A]s I got more deeply immersed in sociological questions and

²⁶ Daniel Geary found from 1953 to 1960 543,111 copies of *The Lonely Crowd* were sold, while from 1961 to 1970 411,000 were sold. Geary, "Children of *The Lonely Crowd*," 611, fn. 32. According to sociologist Herbert Gans, by 1971 over a million copies of *The Lonely Crowd* were sold. Herbert J. Gans, "Best-Sellers By Sociologists: An Exploratory Study," *Contemporary Sociology* 26, no. 2 (Mar. 1997): 133. In Gans's 1997 study, *The Lonely Crowd* appeared to be the best-selling sociology book in history. Ibid., 134.

²⁷ Daniel Horowitz, "David Riesman: From Law to Social Criticism," *Buffalo Law Review* 58, no. 4 (July 2010): 1009; David Riesman, "Becoming an Academic Man," in *Authors of Their Own Lives: Intellectual Autobiographies by Twenty American Sociologists*, ed. Bennett M. Berger (Berkeley: University of California Press, 1990), 49.

²⁸ Ibid., 49.

²⁹ Ibid., 49.

preferred to start with empirical data, the concerns with political theory of Friedrich and his disciples began to seem a bit abstract to me. In other words, I was in search of a mode of work more empirical – ethnographic, even – than government as it was then being taught could provide.”³⁰ Riesman intended to return to teaching at the University of Buffalo Law School but the needs of the Second World War caused it to shutter its doors.³¹ He stayed in New York City, where a friend from Harvard Law helped him get a job in Manhattan as a deputy assistant district attorney for the Appeals Bureau.³² Friedrich offered Riesman a position at Harvard’s Civil Affairs School “to train administrators for a future occupation of Germany” but Riesman noted “[m]y knowledge of Germany was slim, and I questioned my competence to be of help in such a school.”³³ Instead, he worked on contract terminations at the Sperry Gyroscope Company.³⁴

When the war concluded, Riesman decided not to teach law, despite rumblings he might be offered a position at Yale Law School.³⁵ He later wrote: “[B]y this time I was thoroughly converted away from an engagement with the law that was never wholehearted.”³⁶ A new opportunity presented itself when the College of the University of Chicago offered him an assistant professorship starting in 1946.³⁷ According to Riesman, one of his articles had impressed Chicago professor Edward Shils: “When he discovered that the author was still alive, unlike those of the social-science classics read in the course, he went to the administration of the

³⁰ Ibid., 50.

³¹ Ibid., 50; Horowitz, “David Riesman,” 1009.

³² Riesman, “Becoming an Academic Man,” 50.

³³ Ibid., 51.

³⁴ At Sperry, Riesman worked for James Webb, who would go on to lead the National Aeronautics and Space Administration (NASA) and oversaw the Apollo mission planning in the 1960s. Ibid., 51-52; W. Henry Lambright, “James E. Webb: A Dominant Force in 20th Century Public Administration,” *Public Administration Review* 54, no. 2 (Mar.-Apr. 1993): 95-99.

³⁵ Riesman, “Becoming an Academic Man,” 53-54.

³⁶ Ibid., 54.

³⁷ Ibid., 54.

College and proposed that I be recruited to the staff.”³⁸ If Erich Fromm’s influence sparked Riesman’s intellectual shift from lawyer to social theorist, at the University of Chicago he gained the necessary professional training in the latter field.³⁹ Riesman recalled the learning curve at Chicago was steep: “Although I had spent the previous summer immersed in my own crash course in sociology, beginning, as I recall with Comte and then some Durkheim, I had inadequate preparation for the course in which I would be teaching.”⁴⁰ He met regularly with Edward Shils, Milton Singer, who Riesman said was interested in psychoanalysis and “had a Ph.D. in philosophy and was beginning to reeducate himself as an anthropologist,” émigré Gerhard Meyer who was “steeped in Weber and German philosophical thought,” economist Abram Harris, and economic historian Sylvia Thrupp.⁴¹

By the late 1940s Riesman exhibited more expansive thinking in his research – for instance, at Chicago he presented “four successive lectures on Freud in his cultural context.”⁴² Before he took a break from publishing in 1944, Riesman’s pre-World War II writings focused on legal and political questions.⁴³ One of his first articles when he resumed publishing in 1947 was “Some Observations on Community Plans and Utopia” in the *Yale Law Journal*.⁴⁴ The article was non-legal in its focus, with a significant portion devoted to theories of architecture and city planning.⁴⁵ It is possible that Riesman became interested in city planning through Carl

³⁸ Ibid., 54. The article in question was “Civil Liberties in a Period of Transition,” discussed in Chapter 1. Ibid., 54.

³⁹ Neil McLaughlin, “Critical Theory Meets America: Riesman, Fromm, and ‘The Lonely Crowd,’” *The American Sociologist* 32, no. 1 (Spring 2001): 8-9.

⁴⁰ Riesman, “Becoming an Academic Man,” 54.

⁴¹ Ibid., 54-55.

⁴² Ibid., 55. After Riesman taught his 1946 autumn quarter course, he revised the second-year social science course, which he said “gave me a splendid opportunity for learning as a teacher some of the things I would have learned had I been a graduate student in sociology at the University of Chicago at a time when the line between sociology and anthropology (united at the graduate level until the 1940s) was not sharply drawn.” Ibid., 57.

⁴³ Riesman, *Individualism Reconsidered*, 510.

⁴⁴ Riesman, “Some Observations,” 173-200.

⁴⁵ Ibid., 180-200.

Friedrich, who helped develop a “*Plan for Greater Boston*,” which placed first in a 1945 urban planning competition organized by Boston University, Harvard, the Massachusetts Institute of Technology (M.I.T.), the Boston Society of Architects, the Boston Chamber of Commerce, Maurice Tobin, mayor of Boston, and Leverett Saltonstall, the governor of Massachusetts.⁴⁶

Riesman’s article explained how utopian ideals could be filtered into a society’s culture. As Riesman interpreted the word “utopia”: “A ‘utopia’ I define as a rational belief which is in the long-run interest of the holder; it is a belief, not in existing reality, but in a potential reality; it must not violate what we know of nature, including human nature, though it may extrapolate our present technology and must transcend our present social organization.”⁴⁷ For Riesman, utopian beliefs were not naïve daydreams, but needed to be “rational” – rooted in already existing aspects of reality. Riesman’s utopia was built on preexisting natural and social scientific knowledge and the utopian thinker was an idealist whose vision was tempered by this knowledge of reality.

Utopian thinking was also rooted in individualism, which is why Riesman said that utopia was “in the long-run interest of the holder.”⁴⁸ He contrasted utopia with “ideology”: “An ‘ideology’ I define as an irrational system of belief, not in the interest of the holder. It is sold to him by a group which has an interest in swindling him; he accepts it because of his own irrational needs, including his desire to submit to the power of the vendor group.”⁴⁹ Riesman’s utopia was based on what he would later call *autonomous* individuals, because the utopian thinker had to overcome the pressure of social groups who wanted to distort his or her individual

⁴⁶ Emphasis in original, Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America*, rev. ed. (Boston: Ginn and Company, 1950), vi; Jeffrey M. Diefendorf, “The Boston Contest: Introduction,” in *The Boston Contest of 1944: Prize Winning Programs* (Abingdon, U.K.: Routledge, 2015), vii, xiii.

⁴⁷ Riesman, “Some Observations,” 175.

⁴⁸ *Ibid.*, 175.

⁴⁹ *Ibid.*, 175.

vision of the world to fit their preconceived notions.⁵⁰ Yet for Riesman, the difference between utopia and ideology was not always clear:

An ideology may contain elements of truth; these serve to lend plausibility, rather than to open the eyes and increase the awareness of the recipient. Contrariwise, a utopia may contain elements of error, initially less significant than its truth, which assist its later conversion into an ideology: in this way, the utopias of one age tend to harden into a distorted form into the ideologies of the next, taken on faith rather than rationally rediscovered.⁵¹

Here, Riesman argued the utopia of today may become the ideology of tomorrow. This required individuals and societies to continually reassess the ideals toward which they were striving. He believed the nineteenth century was the high-water mark for utopian thinking: “The America of the last century, I suggest, made room for a limited amount of utopian thought and experiment because, among many other factors, the capitalism of that period was singularly unconcerned about propagandizing itself as an ideological system.”⁵² As Riesman made clear to Erich Fromm

⁵⁰ Riesman, *The Lonely Crowd*, 285-86, 290-91. In *The Lonely Crowd*, Riesman compared the *autonomous* with the *anomic*, a term he adopted from sociologist Émile Durkheim: “In each society those who do not conform to the characterological pattern of the adjusted may be either anomic or autonomous. Anomic is English coinage from Durkheim’s *anémique* (adjective of *anomie*) meaning ruleless, ungoverned. My use of anomic, however, covers a wider range than Durkheim’s metaphor: it is virtually synonymous with ‘maladjusted,’ a term I refrain from using because of its negative connotations; for there are some cultures where I would place a higher value on the maladjusted or anomic than on the adjusted. The ‘autonomous’ are those who on the whole are *capable* of conforming to the behavioral norms of their society – a capacity the anomics usually lack – but who are free to choose whether to conform or not.” Emphasis in original, *ibid.*, 287; Emile Durkheim, *The Division of Labor in Society*, trans. W. D. Halls (New York: Free Press, 1997), xxxi-xxxv; Emile Durkheim, *Suicide: A Study in Sociology*, ed. George Simpson, trans. John A. Spaulding and George Simpson (New York: Free Press, 1966), 241-48.

⁵¹ Riesman, “Some Observations,” 175.

⁵² *Ibid.*, 175. Riesman was particularly interested in using the writing of the nineteenth century utopian thinker Edward Bellamy as a model for utopian thinking: “In other words, ‘utopia’ is a place – in contemporary terms, a plan – that is nowhere, save maybe for pilot models, but that may someday be somewhere, so far as science can say; thus heaven is not a utopia in my sense, while the Boston of [Edward Bellamy’s] *Looking Backward* is one.” *Ibid.*, 175 fn.7; Edward Bellamy, *Looking Backward: 2000-1887* (Boston: Houghton, Mifflin, 1889). In 1888, Bellamy’s work was printed in America. Kevin Manton, “The British Nationalization of Labour Society and the Place of Edward Bellamy’s *Looking Backward* in Late Nineteenth-Century Socialism and Radicalism,” *History of Political Thought* 25, no. 2 (Summer 2004): 325. Describing Bellamy’s book, Lawrence Berkove writes: “*Looking Backward* differed from classical utopias that depicted an ideal ‘never-never’ land insofar as it popularized a conception of utopia that many readers believed feasible. It energized futuristic thinking.” Lawrence I. Berkove, “Edward Bellamy’s *Looking Backward*: The Contemporary Context,” *CEA Critic* 52, no. 1/2 (Fall 1989-Winter 1990): 81. Bellamy’s book was a massive commercial success in the United States and Europe, with 60,000 copies sold in its first year of print and more than 100,000 copies sold in its second year. John L. Thomas, *Alternative America: Henry George, Edward Bellamy, Henry Demarest Lloyd and the Adversary Tradition* (Cambridge, MA: Belknap

in their first psychoanalysis session, he did not want to be converted to Marxism.⁵³ But Riesman believed mid-twentieth century capitalism had entered into a new phase compared to nineteenth century capitalism, a phase with which he was not enamored. Whereas he saw the capitalism of the nineteenth century as open and flexible, Riesman thought mid-twentieth century capitalism had become too unyielding – an ideology that limited American visions of the future.

He thought this inflexibility arose with the explosion of consumer culture: “Business enterprise in America has, however, always tended to disguise its ideological pressures under a coating of apparently utopian aims, such as the promise of a chicken in every pot or a car in every garage. These promises, when made in [the] U. S. A., can scarcely be called utopian.”⁵⁴ For Riesman, the assurance of consumer plenty offered by mid-twentieth century business offered the illusion but not the reality of utopia for two reasons: “First, given our resources, it is not difficult to fulfill them; they are, in very fact, just around the corner. Second, attainment of these goals would not make the great mass of well-fed Americans noticeably happier.”⁵⁵

Riesman did not want to replace capitalist consumerism with socialism, but he was worried that consumerism could hinder the future of liberalism in the U.S.: “The fulfillment of utopian aims, on the other hand, is a revolutionary affair; it makes substantial demands on the community, and promises substantial gains in human happiness. While in the Age of Liberalism, capitalism was associated with just such great human aims, it has become distanced from them in its later phases of complacency, ideology, or reaction.”⁵⁶ Thus, the revolutionary eighteenth and

Press, 1983), 262. Many nineteenth century Americans found Bellamy’s ideas deeply engaging – some created collectives based on his ideals and by 1889 over 150 groups formed to discuss his suggestions. Berkove, 81.

⁵³ Riesman, “Becoming an Academic Man,” 46.

⁵⁴ Riesman, “Some Observations,” 176.

⁵⁵ Ibid., 176. Riesman’s second point here was an empirical question about whether consumer goods would make Americans happier. He sought to answer such questions throughout his sociological interviews of Americans in the 1940s and 1950s, discussed in further detail below.

⁵⁶ Ibid., 176.

nineteenth century alliances of classical liberalism – which overthrew artifacts of medieval feudalism by emphasizing human freedom in the political and economic spheres of society – faced a crisis in the mid-twentieth century.⁵⁷ Riesman continued: “[T]he utopian coating referred to has tended to satisfy masses of people with spurious social goals, while many thoughtful folk rebelled by doubting the whole Enlightenment concept of gradual process towards a liberal utopia.”⁵⁸ He thought the age of consumer abundance threatened the future of liberalism because it allowed people to become complacent and created a small, vocal minority that wanted to abandon liberalism altogether.

II. Embracing the “Nerve of Failure” in *The Lonely Crowd*

How could individuals living in America avoid complacency or cynicism and instead embrace utopianism? Riesman grappled with this question in a 1948 article in the magazine *Commentary*, entitled, “A Philosophy for ‘Minority’ Living: The Jewish Situation and the ‘Nerve of Failure.’”⁵⁹ According to historian Steven Zipperstein, *Commentary* was started in the 1940s in an effort to create “Jewish cultural integration in America” with a distinctly “secular identity” for “new and, to an extent, untested ways in which Jewishness might be made essential as well as American.”⁶⁰ This often aligned with the leftist anti-Communist tendencies of its first editor, Elliot E. Cohen.⁶¹ Riesman’s writings fit squarely into these efforts – Riesman often noted his

⁵⁷ Gerstle, “The Protean Character,” 1046.

⁵⁸ Riesman, “Some Observations,” 176.

⁵⁹ David Riesman, “A Philosophy for ‘Minority’ Living: The Jewish Situation and the ‘Nerve of Failure,’” *Commentary* 6 (Jan. 1948): 413-422. Riesman discussed the “nerve of failure” earlier in 1947 in his article “The Ethics of We Happy Few.” David Riesman, “The Ethics of We Happy Few,” in David Riesman, *Individualism Reconsidered: And Other Essays* (Glencoe, IL: Free Press, 1954), 47; Riesman, *Individualism Reconsidered*, 508.

⁶⁰ Steven J. Zipperstein, “*Commentary* and American Jewish Culture in the 1940s and 1950s,” *Jewish Social Studies* 3, no. 2 (Winter 1997): 18, 19.

⁶¹ *Ibid.*, 18.

parents were Jewish but agnostic and that “[s]uch religious upbringings as I had came primarily through seven years of Friends Meetings at the Friends school I attended.”⁶²

As Riesman defined the concept: “The ‘nerve of failure’ is the courage to face aloneness and the possibility of defeat in one’s personal life or one’s work without being morally destroyed. It is, in a larger sense, simply the nerve to be oneself when that self is not approved of by the dominant ethic of a society.”⁶³ He emphasized the individualist nature of the nerve of failure: “[W]hile many can find courage in defeat only when others are defeated too, those endowed with the ‘nerve of failure’ have the capacity to go it alone.”⁶⁴ Riesman rooted the nerve of failure in the individual’s decision to take action in life according to personal ethics even in the face of social rejection. He contrasted the nerve of failure with what he saw as the dominant ethic of American society in the 1940s:

In America, ‘success’ is central; we are provided with a catalogue of what is success and what is failure, and nothing matters except achieving the first and avoiding the second. Whoever accepts the prevailing social standards of our times is not alone, not morally isolated; even if he is a ‘failure’ he remains related, if only in fantasy, to the dominant theme. Such a person has no more need of the ‘nerve of failure’ than a gambler who has had a bad day at roulette: for him life is centered on the wheel, and he remains related, though anxious and miserable, so long as he can go on watching the others who are still in the game. The ‘nerve of failure’ is needed only for really heretical conduct: when one renounces even the company of misery and takes the greater risk of isolation – that is the risk of never rejoining the company.⁶⁵

⁶² David Riesman, “A Personal Memoir: My Political Journey,” in *Conflict and Consensus: A Festschrift in Honor of Lewis A. Coser*, ed. Walter W. Powell and Richard Robbins (New York: Free Press, 1984), 357; Riesman, “Becoming an Academic Man,” 25-26.

⁶³ Riesman, “A Philosophy for ‘Minority’ Living,” 413. Riesman touched on this in his 1947 *Yale Law Journal* article, describing the mindset utopian architects needed to hold when making plans: “The moment he begins to manipulate (let alone use physical coercion) – even if the manipulation only consists in the use of reasoning which does not convince *him* but which he feels may ‘sell’ his audience – he leaves the realm of utopia for that of ideology. Thereby he demonstrates, in many cases, his lack of the ‘nerve of failure.’” Emphasis in original, Riesman, “Some Observations,” 199. This was loyalty to one’s own vision, not to the ideals foisted by social pressures.

⁶⁴ Riesman, “A Philosophy for ‘Minority’ Living,” 413. Jean-Jacques Rousseau, Charles Fourier, Auguste Comte, William Blake, Robert Owen, Karl Marx, and Charles Darwin had the nerve of failure Riesman said. *Ibid.*, 413-14.

⁶⁵ *Ibid.*, 413.

Riesman thought Americans sought to prevent failure at all costs. He believed this was further compounded by the social pressure American society placed on its members to follow this ethic of success. Instead of viewing America as a fundamentally individualist society, he believed the postwar United States was conformist. Even if an ethic of success were unfulfilling, Americans would not abandon these beliefs because doing so would make them social pariahs.

In 1950, Riesman published what would become his most influential work, *The Lonely Crowd*, which he prepared with the help of Reuel Denney at the University of Chicago and Nathan Glazer at Yale.⁶⁶ It was no accident that the final chapter of Riesman's this book was entitled "Autonomy and Utopia," linking the two ideas.⁶⁷ Riesman believed America was at an inflection point as to whether autonomy – the individual's decision to abandon societal pressure and to embrace the nerve of failure – and utopia could be realized. He noted it was easy to be pessimistic about this: "Of course it does not follow that the utopian goals of the would-be autonomous are attainable. It is much more likely that, out of impatience with uncertainty and with the 'sluggish masses,' parties and authoritarian movements will force people toward goals which are neither commonsensical nor utopian but merely regressive."⁶⁸ In addition to the burden to conform placed on individuals by mass movements like parties, Riesman said autonomous individuals were often apolitical: "Many people who are clearly autonomous in character are sometimes political indifferents."⁶⁹ Despite these challenges, he argued: "Under noncrisis conditions people may find new motivations for political interest and participation, motives neither moralistic nor group conforming. They may turn to politics because it is interesting, because it is one important way of helping them to understand their environment,

⁶⁶ Riesman, *The Lonely Crowd*, ix-x.

⁶⁷ *Ibid.*, 368.

⁶⁸ *Ibid.*, 370.

⁶⁹ *Ibid.*, 370.

because of a desire to have less misery in the world. Out of such materials the autonomous may invent a new political style.”⁷⁰ Riesman remained sanguine about the possibility of a societal rebirth in which the autonomous became increasingly involved in politics toward utopian ends.

He believed the autonomous could bring about a new approach to politics because of the consumer plenty that could be found in American society: “As against the brilliant morbidity with which community surveys have exposed the evils of industry and the banalities of our leisure, I have concentrated on some of the economic richness of our middle-class life.”⁷¹ He continued: “In the same vein, we might ask, is it conceivable that these economically privileged Americans will some day wake up to the fact that they overconform?”⁷² Although Riesman said the answer to this question was ambiguous, he clearly thought it was possible that American consumer capitalism had laid the foundations for the autonomous to bring about their utopian aims.⁷³ Yet he still needed to explain why autonomous individuals had become positioned to make political changes and why so many Americans remained unwilling to do so.

III. Riesman, Freud, and the Interpretation of American Dreams

As the 1940s gave way to the 1950s, the postwar American economy boomed, and consumer capitalism greatly accelerated. In retail, from 1946 to 1955, Sears, Roebuck significantly enlarged its footprint, opening over a hundred new stores on top of redoing and expanding its existing empire.⁷⁴ While television existed in the 1930s in America, the push to

⁷⁰ Ibid., 371.

⁷¹ Ibid., 371.

⁷² Ibid., 371.

⁷³ Ibid., 371-72. As Riesman stated: “I believe that only certain ideas will be generated and catch on, under any given socioeconomic conditions.” Ibid., 368.

⁷⁴ According to historian Richard Longstreth: “Between 1946 and 1955, 154 stores were enlarged and otherwise remodeled, 125 were relocated in larger quarters, 11 new ones were added in cities where the company already had at least one unit, and 114 others were built where Sears had never been previously.” Richard Longstreth, “Sears, Roebuck and the Remaking of the Department Store, 1924-42,” *Journal of the Society of Architectural Historians* 65, no. 2 (June 2006): 266.

extend its presence came in earnest in the late 1940s and early 1950s – approximately one in four American households had a television by 1951 and that same year there were 108 television stations in the U.S. compared with only 37 in 1948.⁷⁵ Manufacturing moved back to producing the consumer goods Americans were deprived of during World War II. By 1942, American car manufacturing halted to shift largely to military production.⁷⁶ But the industry continued advertising during this time and by the 1950s sales took off – in 1953, the U.S. automotive industry sold 6.1 million automobiles, reaching its height in 1955 with 7.9 million sold.⁷⁷

In 1950, the same year *The Lonely Crowd* was issued, Riesman grappled with this new economic abundance in a series of articles published in the journal *Psychiatry*.⁷⁸ He used Freudian theory to try to explain how Americans could explore their utopian desires and to understand why so many Americans failed to do so. Rather than embracing the nerve of failure, many Americans abandoned efforts to create a liberal utopia. These articles drew on lectures Riesman had given at the University of Chicago on Freud.⁷⁹ Freud was unable to attain a professorship in Austria-Hungary for many years because of his Jewish background and the radical nature of his ideas, but as historian Carl Schorske observes, this only escalated Freud's

⁷⁵ Edward D. Berkowitz, *Mass Appeal: The Formative Age of the Movies, Radio, and TV* (Cambridge: Cambridge University Press, 2010), 110-11, 112.

⁷⁶ Sarah Frohardt-Lane, "Promoting a Culture of Driving: Rationing, Car Sharing, and Propaganda in World War II," *Journal of American Studies* 42, no. 2 (May 2012): 344.

⁷⁷ *Ibid.*, 341-42; Avner Offer, *The Challenge of Affluence: Self-Control and Well-Being in the United States and Britain since 1950* (Oxford: Oxford University Press, 2006), 193. In 1958 this sales figure cratered to only 4.2 million cars – as economic historian Avner Offer writes: "The 1950s car emerged as the great promise of affluence, and ended up as its first disappointment." *Ibid.*, 193.

⁷⁸ Riesman, *The Lonely Crowd*, iii; David Riesman, "Themes of Work and Play in the Structure of Freud's Thought," *Psychiatry* 13, no. 1 (Feb. 1950): 1-16; David Riesman, "Authority and Liberty in the Structure of Freud's Thought," *Psychiatry* 13, no. 2 (May 1950): 167-87; David Riesman, "Themes of Heroism and Weakness in the Structure of Freud's Thought," *Psychiatry* 13, no. 3 (Aug. 1950): 301-15.

⁷⁹ David Riesman, "On Discovering and Teaching Sociology: A Memoir," *Annual Review of Sociology* 14 (1988): 10.

commitment to his theories: “Freud’s intellectual originality and professional isolation fed upon each other.”⁸⁰ It is possible Freud embodied the nerve of failure in Riesman’s mind.

In “Themes of Work and Play in the Structure of Freud’s Thought,” published in February 1950, Riesman discussed how Freud fit within a nineteenth century cultural milieu.⁸¹ Riesman focused on Freud’s understanding of work: “In the nineteenth century, dominated by scarcity economics and Malthusian fears, work could nevertheless be given the rational meaning of the avoidance of hunger. And hunger and gain (ambition) could be viewed as the self-evident motives of a market economy, the former operating on the poor, the latter on the well-to-do.”⁸² Riesman said these scarcity economics explained Freud’s pessimistic understanding of labor: “Freud viewed work as an inescapable and tragic necessity. Although he was no student of population problems, he implicitly agreed with Malthus’ gloomy conclusion that men would be forever caught between the drives of hunger and sex – lucky to be one jump ahead of starvation. And sex, too, was for Freud, a realm of necessity.”⁸³ According to Riesman, Freud believed humans only took up work because their survival was constantly threatened by penury.

Riesman observed that Freud’s scarcity economics contrasted with the contemporary situation in the U.S.: “In the mid-twentieth century, in the countries of the Industrial Revolution and especially in America, it is likely that with very little human toil a full abundance can be assured to all inhabitants as the result of the machine technology.”⁸⁴ Yet despite the strides taken in the U.S. to reduce the burden of labor, Riesman asserted that the psychological desires

⁸⁰ Carl E. Schorske, *Fin-de-Siècle Vienna: Politics and Culture* (New York: Vintage, 1981), 184-85, 186.

⁸¹ Riesman, “Themes of Work and Play,” 1.

⁸² Ibid., 3. Freud had a complicated relationship with Malthusianism. While he sometimes argued against it, he also embraced some of its tenets, for instance arguing in favor of population control in his later work. Robert J. Mayhew, *Malthus: The Life and Legacies of an Untimely Prophet* (Cambridge, MA: Belknap Press, 2014), 153. This chapter focuses specifically on Riesman’s reading of Freud.

⁸³ Riesman, “Themes of Work and Play,” 2.

⁸⁴ Ibid., 3.

of men and women in America remained mysterious: “Neither the basic physiological drive of hunger, nor the basic equipment of production – man’s brain and eyes and hands – instruct him in what meaning, what pattern, he shall give to work, any more than the basic drive of sex, and its genital equipment, tell him what meaning, what pattern he shall give to love.”⁸⁵

Freud had tried to explain the psychology of human desires in his book *The Interpretation of Dreams*, originally published in 1899.⁸⁶ Here, he argued that dreams are the key to understanding psychic cravings: “*The dream is the (disguised) fulfilment of a (suppressed, repressed) wish.*”⁸⁷ But Riesman believed Freud did not see dreaming as a psychic release: “[T]here lies again the assumption of man’s laziness. If we had our way, Freud is saying, we would not even dream; we would lie in the blissful fetal state. But our wishes, and external stimuli also, prevent this; these create tensions in our otherwise flaccid state of rest; the *purpose* of the dream-work is to release this tension and thus, by permitting us to go on sleeping, to restore us to the workless state.”⁸⁸ In Riesman’s view, Freud thought of dreams as another form of work – humans used dreams to discharge the desires built up in waking life to prepare them for the jobs they performed when conscious. Riesman said this explained why Freud put so much effort into analyzing dreams. Freud was, Riesman wrote, “suspicious of dreams which, by their baroque imagery, their eloquent speeches, or other luxuriance, seemed to have required much ‘work’; since work is unnatural to man, this effort must hide something, must cover up a most forbidden thought.”⁸⁹ Thus, Freud thought the maladjusted worked hard even in their

⁸⁵ Ibid., 3.

⁸⁶ Ritchie Robertson, “Introduction,” in Sigmund Freud, *The Interpretation of Dreams*, trans. Joyce Crick (Oxford: Oxford University Press, 1999), vii. For an enlightening discussion of *The Interpretation of Dreams* in the context of Freud’s life in the Austro-Hungarian Empire, see Schorske, 181-207.

⁸⁷ Emphasis in original, Sigmund Freud, *The Interpretation of Dreams*, trans. Joyce Crick (Oxford: Oxford University Press, 1999), 124.

⁸⁸ Emphasis in original, Riesman, “Themes of Work and Play,” 10.

⁸⁹ Ibid., 10.

dreams – the more labor one put into the dream world, the more this indicated the repression of degenerate desires.

Riesman said Freud applied scarcity economics to his theories of dreams: “It seems clear that Freud, when he looked at love or work, understood man’s physical and psychic behavior in the light of the physics of entropy and the economics of scarcity. For him, life was not self-renewing, or self-producing; he viewed the process of life as drawing on the given natal store, as on a bank account. Hence for him, effort, expenditure, was problematical: it needed to be explained; something must lie behind it.”⁹⁰ Although Freud thought life revolved around toil to escape poverty both in waking life and in dreams, mankind was not supposed to enjoy this labor, which explains why he believed those who embraced work in their sleep through lavish dreams were suspect of neuroses.

While Riesman agreed with Freud that dreams expressed a wish, he argued that the abundance economics of the twentieth century United States had fundamentally altered how dreams should be interpreted compared to Freud’s scarcity economics: “If one thinks that growth is characteristic of life, that life can unfold unsuspected potentialities and resources, one feels that it is not *effort* that needs to be explained – that is life itself – but the *absence* of effort. Then it is the absence which appears pathological.”⁹¹ In America, where life revolved around plenty, not privation, Riesman surmised that having a profusion of complex dreams should be viewed positively. Flipping Freud on his head, Riesman believed that those with a dearth of dreams were the neurotics. Because of this, Riesman argued repression did not necessarily take place in the dreams of people living in abundance:

[I]f one comes upon a dream which is rich in invention and the use of symbolic expression, or which exhibits indignation, or judgment, or wit, or other human faculties

⁹⁰ Ibid., 11.

⁹¹ Emphasis in original, *ibid.*, 11.

which one appreciates in waking life, one will not feel that this is strange and that the dream must *necessarily* be about something altogether different. Any dream ordinarily requires interpretation, but its prima-facie opacity need not be due to censorship over malign or outrageous wishes; the necessity for interpretation may result from the fact that symbolic expression is simply a different language, often a more abundant one than the dreamer allows himself in waking life.⁹²

For Riesman, the dreams of people living in abundance could be as opulent as the society that surrounded them. Analyzing desires in these complicated dreams did not require interrogating whether people were suppressing their wishes but instead treated these dreams as symbols of positive aspirations rather than base desires.

In this discussion of dreams, Riesman cited Erich Fromm's 1949 article "The Nature of Dreams," noting: "I have leaned heavily on Erich Fromm's lectures on dream interpretation."⁹³ Fromm belonged to a group of analysts called the neo-Freudians, along with Karen Horney and Harry Stack Sullivan.⁹⁴ Sociologist Neil McLaughlin notes that mainline Freudian psychoanalysts emphasized "instinct theory," but the neo-Freudians "all downplayed the importance of instincts, arguing that the individual search for identity, self-esteem and secure relations with others in work, family, and the broader society should be the central focus of psychoanalytic theory."⁹⁵ In many ways, Fromm's psychoanalysis was a form of social theory rooted in individualism, analogous to Riesman's sociological work.⁹⁶

In "The Nature of Dreams," Fromm argued that Freud overstated the negative nature of dreams: "There can be no doubt that many dreams express the fulfillment of irrational, asocial and immoral wishes which we repress successfully during the waking state. When we are asleep

⁹² Emphasis in original, *ibid.*, 11.

⁹³ *Ibid.*, 11, fn. 60.

⁹⁴ Neil G. McLaughlin, "Why Do Schools of Thought Fail? Neo-Freudianism as a Case Study in the Sociology of Knowledge," *Journal of the History of the Behavioral Sciences* 34, no. 2 (Spring 1998): 115-16.

⁹⁵ *Ibid.*, 116.

⁹⁶ McLaughlin argues: "The consequence of this perspective [of Fromm, Horney, and Sullivan] was a stress on sociological, not biological, factors, a major break with both classical Freudian theory and the increasingly medically oriented American psychoanalytic establishment." *Ibid.*, 116.

and incapable of action it becomes safe to indulge in hallucinatory satisfaction of our lowest impulses. But the influence of culture is by no means as one-sidedly beneficial as Freud assumed. We are often more intelligent, wiser and more moral in our sleep than in waking life.”⁹⁷ Fromm proposed that social and cultural stimuli in waking life often made it difficult for human beings to understand themselves and their desires: “The reason for this is the ambiguous character of our social reality. In mastering this reality we develop our faculties of observation, intelligence and reason; but we are also stultified by incessant propaganda, threats, ideologies and cultural ‘noise’ that paralyze some of our most precious intellectual and moral functions. In fact, so much of what we think and feel is in response to these hypnotic influences that one may well wonder to what extent our waking experience is ‘ours.’”⁹⁸ In contrast to waking life, Fromm asserted: “In sleep, no longer exposed to the noise of culture, we become awake to what we really feel and think. The genuine self can talk; it is often more intelligent and more decent than the pseudo self which seems to be ‘we’ when we are awake.”⁹⁹ Fromm believed sleep allowed people to shed themselves of extraneous cultural influences, ensuring that an individual’s dreams were attuned to his or her true desires rather than to socially conditioned aspirations. Riesman appeared to share this thinking and, in doing so, Riesman’s theory of dreams dovetailed with his fascination with utopias – examining dreams could allow people to better understand their individual yearnings, while utopian thinking helped them apply these individual desires to societal goals.¹⁰⁰

⁹⁷ Erich Fromm, “The Nature of Dreams,” *Scientific American* 180, no. 5 (May 1949): 46.

⁹⁸ *Ibid.*, 46.

⁹⁹ *Ibid.*, 46.

¹⁰⁰ *Ibid.*, 47. Fromm’s dream interpretation was based on his belief that dreams used a universal symbolic language: “When we dream we speak a language which is also employed in some of the most significant documents of culture: in myths, in fairy tales and art, recently in novels like Franz Kafka’s. This language is the only universal language common to all races and all times. It is the same language in the oldest myths as in the dreams every one of us has today. Moreover, it is a language which often expresses inner experiences, wishes, fears, judgments and insights with much greater precision and fullness than our ordinary language is capable of.” *Ibid.*, 47. This would allow

IV. Et in America Ego: Riesman, Freud, and the Limits of Utopia

While Riesman tried to explain how individuals' desires could be better understood through dreams, he also grappled with elucidating why so many Americans failed to pursue their desires. He analyzed this problem in his May 1950 article, "Authority and Liberty in the Structure of Freud's Thought," drawing on the Freudian concepts of the id, ego, and superego.¹⁰¹

According to historian Peter Gay, Freud believed the id is "the wholly unconscious domain of the mind, consisting of the drives and of material later repressed [...]."¹⁰² As Freud defined the id: "It is filled with energy reaching from the instincts, but it has no organization, produces no collective will, but only a striving to bring about the satisfaction of the instinctual needs subject to the observance of the pleasure principle."¹⁰³ The irrational id was underpinned by what Freud called the "pleasure principle" – Freud believed "[i]t seems as though our total mental activity is directed towards achieving pleasure and avoiding unpleasure – that it is automatically regulated by the *pleasure principle*."¹⁰⁴ The roots of the pleasure principle were found in sex, according to Freud: "[T]he most intense pleasure which is accessible to human beings, [is] the pleasure of accomplishing the sexual act [...]."¹⁰⁵ Over time the pleasure

people to situate their individual desires within a more universal understanding of meaning. Perhaps for Riesman, this explained how individual wishes could be placed within a unifying utopian framework. Fromm associated this idea with his Jewish roots, writing: "Dreams which are not understood are like letters which are not opened," says the Talmud, and this statement is undeniably true." Ibid., 47. For a discussion of Fromm's interest in Hasidic Judaism and his desire to become a Talmudic scholar early in his life, see Lawrence Friedman, *The Lives of Erich Fromm: Love's Prophet* (New York: Columbia University Press, 2013), 8-18.

¹⁰¹ David Riesman, "Authority and Liberty," 167. Freud developed these concepts throughout his career, especially in lectures he gave in 1915 and published in 1917 as *Introductory Lectures on Psycho-Analysis*; he more fully elaborated them in his 1933 work *New Introductory Lectures on Psychoanalysis*. Peter Gay, "Sigmund Freud: A Brief Life," in Sigmund Freud, *Introductory Lectures on Psycho-Analysis*, ed. James Strachey, trans. James Strachey (New York: Liveright, 1989), xix; James Strachey, "Editor's Note," in *New Introductory Lectures on Psychoanalysis*, ed. James Strachey, trans. James Strachey (New York: W. W. Norton, 1965), 3.

¹⁰² Gay, "Sigmund Freud," xx.

¹⁰³ Sigmund Freud, *New Introductory Lectures on Psychoanalysis*, ed. James Strachey, trans. James Strachey (New York: W. W. Norton, 1965), 73.

¹⁰⁴ Emphasis in original, Sigmund Freud, *Introductory Lectures on Psycho-Analysis*, ed. James Strachey, trans. James Strachey (New York: Liveright, 1989), 443.

¹⁰⁵ Ibid., 443.

principle of the id was challenged by what Freud called the “ego-instincts” in his writings.¹⁰⁶

Discussing these ego-instincts, Freud argued “under the influence of the instructress Necessity, they [the ego-instincts] soon learn to replace the pleasure principle with a modification of it.”¹⁰⁷

According to Freud, when this change occurred, “[f]or them the task of avoiding unpleasure turns out to be almost as important as that of obtaining pleasure.”¹⁰⁸ The ego-instincts created a principle that directly opposed the pleasure principle, which Freud described:

The ego discovers that it is inevitable for it to renounce immediate satisfaction, to postpone the obtaining of pleasure, to put up with a little unpleasure and to abandon certain sources of pleasure altogether. An ego thus educated has become ‘reasonable’; it no longer lets itself be governed by the pleasure principle, but obeys the *reality principle*, which also at bottom seeks to obtain pleasure, but pleasure which is assured through taking account of reality, even though it is pleasure postponed and diminished.¹⁰⁹

The ego tempered the instant gratification of the id’s pleasure principle by replacing it with the reality principle. This reality principle substituted immediate satisfaction with delayed gratification, although Freud believed this offered less satisfaction than the pleasure principle.

In his May 1950 article, Riesman addressed these Freudian ideas. Discussing the ego, Riesman stated: “The ego has the task of curing the child’s addiction to the pleasure-principle and of encouraging his operation according to the reality-principle.”¹¹⁰ Riesman related the reality principle to economics: “What is the nature of ‘reality’ to which the ego relates itself? It appears to be the given state of economic development in Freud’s milieu, as interpreted by capitalist scarcity economics.”¹¹¹ In his February 1950 article, “The Themes of Work and Play in the Structure of Freud’s Thought,” Riesman argued that Freud believed fear of starvation was

¹⁰⁶ Ibid., 443-44. Peter Gay defines the ego in Freud’s writings as that “which is partly conscious and contains the defense mechanisms and the capacities to calculate, reason, and plan [...]” Gay, “Sigmund Freud,” xx.

¹⁰⁷ Freud, *Introductory Lectures*, 444.

¹⁰⁸ Ibid., 444.

¹⁰⁹ Emphasis in original, *ibid.*, 444.

¹¹⁰ Riesman, “Authority and Liberty,” 173.

¹¹¹ Ibid., 174.

the key motivator in forcing people to work.¹¹² Thus, according to Riesman, Freud thought humans would always be threatened by poverty unless the ego's reality principle forced them to work, thereby controlling the id's desire for instant gratification through the pleasure principle.¹¹³

However, the ego was not the only entity keeping the id in check, which Riesman noted in "Authority and Liberty in the Structure of Freud's Thought": "The ego, as the agent of economic or technical 'reality,' divides authority with the superego, which is the agent of parental and public opinion."¹¹⁴ Riesman asserted that for Freud, the ego and superego were two distinct entities.¹¹⁵ Accordingly, Riesman argued the roots of the superego grew out of different soil than those of the ego: "[E]nforcement here does not spring from the ego's role of adaptation to life itself but rather from emotional, indeed irrational, pressures in the child's upbringing."¹¹⁶ While the ego related the individual to his economic conditions, the superego "depends on the given state of social ideals and patterns for identification" established for the individual by parents and teachers in childhood.¹¹⁷ Riesman stated that the superego's socio-cultural ideals were the second source of control over the id: "As an unceasing source of guilt feelings, it cooperates with external authority in subduing the rebelliousness of the id. By holding the individual up to his internalized ideals – ideals he can never attain – the superego sees to it that he does not violate the cultural taboos appropriate to his social station."¹¹⁸

¹¹² Riesman, "Themes of Work and Play," 3.

¹¹³ This is corroborated by Peter Gay, who wrote that for Freud "hunger stood for the 'ego drives' which serve the survival of the self [...]." Peter Gay, *Freud: A Life for Our Time* (New York: W. W. Norton, 2006), 46.

¹¹⁴ Riesman, "Authority and Liberty," 174. According to Peter Gay, the superego is "only partly conscious, which harbors the conscience and, beyond that, unconscious feelings of guilt." Gay, "Sigmund Freud," xx.

¹¹⁵ As Riesman asserted: "Freud views the superego – as a Marxist might – as a sort of ideal superstructure. He does not credit it with the full power he attributes to the material base." Riesman, "Authority and Liberty," 174.

¹¹⁶ *Ibid.*, 174.

¹¹⁷ *Ibid.*, 174.

¹¹⁸ *Ibid.*, 174.

In his discussion of the superego, Riesman drew directly upon Fromm's understanding of Freud in a 1944 article "Individual and Social Origins of Neurosis" in the *American Sociological Review*.¹¹⁹ As Riesman interpreted Fromm: "If one assumes with Erich Fromm that the function of parents and teachers in any historical culture is to see to it that the individual will *want* to do what, under the given social and economic conditions, he *has* to do, further light is shed on the relation between ego and superego in Freud's thought."¹²⁰ While Freud argued that the reality principle mitigated the pleasure principle, Riesman said this was not enough: "By the reality-principle alone, mankind could not be governed. What is required is an actual reversal within the personality of its native attitudes towards work and play, as Freud regarded them: it must learn to enjoy what is inherently painful – its workaday tasks; and to fear what is inherently pleasurable – satisfaction of the desires of the id."¹²¹ According to Riesman "[t]his transformation of the affects of pleasure and pain is carried out under the aegis of the superego [...]"¹²² Riesman believed the superego was more oppressive than the ego because it did not merely inhibit the pleasure principle but forced people to actively embrace suffering in place of pleasure.

Moreover, the control exerted by the superego was far more inflexible than that of the ego. Riesman argued that the superego emerged out of historical forces beyond the individual's control: "[J]ust as the child carries his ancestral germ-cell as both legacy and mortgage, so he continues in his superego a morality which springs not from his own direct experience, or even from that of his parents, but one which goes back into the phylogenetic past."¹²³ This was particularly problematic for an individual because it meant the superego's limitations on his

¹¹⁹ Ibid., 174 fn. 26; Erich Fromm, "Individual and Social Origins of Neurosis," *American Sociological Review* 9, no. 4 (Aug. 1944): 380-84.

¹²⁰ Emphasis in original, Riesman, "Authority and Liberty," 174.

¹²¹ Freud, *Introductory Lectures*, 444; Riesman, "Authority and Liberty," 174.

¹²² Ibid., 174.

¹²³ Ibid., 175.

freedom were always anachronistic: “This inheritance, Freud wrote, is only slowly altered in response to economic factors, thus perceiving that the superego drives a person, in actual fact, not to the tasks required in his generation, but to those required in the past.”¹²⁴

Ultimately, Riesman argued this could create a divergence between the ego and the superego: “If there is rapid change in the economic environment, therefore, the superego and the ego would point in different directions; this, of course, is what actually happens when society moves from a technological economy of scarcity to a technological economy of abundance.”¹²⁵ Riesman believed the United States of the 1950s had effectively eliminated economic scarcity, as exhibited by its profusion of consumer goods. Unlike the ego of the past, which had been driven by the threat of poverty and starvation, the ego of the individual American in the 1950s no longer threatened the id in this manner. Yet because the superego’s controls were archaic – based on the societal demands of a previous generation – this created a divide in the United States in which “the superego and the ego would point in different directions [...]”¹²⁶

What effect would this have on Americans? Riesman did not give an explicit answer, but his beliefs can be gleaned from his own writing as well as Fromm’s. Riesman continued his article by stating: “Ordinarily, and apart from neurotic outcomes, the ego and the superego divide between themselves the bureaucratic job of id-supervision, the role of authority shifting from one to the other depending on the balance of internal and external forces.”¹²⁷ Riesman’s observation that the ego and superego normally worked together “apart from neurotic outcomes” implied the

¹²⁴ Ibid., 175.

¹²⁵ Ibid., 175.

¹²⁶ Ibid., 175.

¹²⁷ Ibid., 175. Riesman said under normal circumstances, the ego and superego worked together to control the id: “Under conditions of civilization, this dual monarchy appears to grow very strong, while the original wishes of the id become more and more repressed or, with the transformation of affect, turned into their opposite.” Ibid., 175.

American consumer paradise may have created nationwide neuroses, because the ego and superego were now at odds.

Indeed, it appears likely that Riesman held this belief when his article is placed in the context of Fromm's 1944 work, "Individual and Social Origins of Neurosis," which Riesman had cited.¹²⁸ Fromm believed there was a dichotomy between individual freedom and society's need for order.¹²⁹ He thought parent-child relationships defined the nature of individual freedom in the social structure: "What, then, happens to the child in relationship to his parents? It meets through them the kind of authority which is prevailing in the particular society in which it lives, and this kind of authority tends to break his will, his spontaneity, his independence."¹³⁰ He argued children rebelled against their parents because humans value freedom from domination: "But man is not born to be broken, so the child fights against the authority represented by his parents; he fights for his freedom not only *from* pressure but also for his freedom to be himself, a full-fledged human being, not an automaton."¹³¹ Taking an existentialist perspective, he argued that the highest good in life was freedom for individuals to choose their identities. But this struggle for self-definition often met with failure: "Some children are more successful than

¹²⁸ Ibid., 174 fn. 26.

¹²⁹ Fromm wrote: "As long as mankind has not attained a state of organization in which the interest of the individual and that of society are identical, the aims of society have to be attained at a greater or lesser expense of the freedom and spontaneity of the individual." Fromm, "Individual and Social Origins of Neurosis," 381.

¹³⁰ Ibid., 381-82.

¹³¹ Emphasis in original, *ibid.*, 382. This is reminiscent of Fromm's dual concept of freedom, which he described as *freedom to* and *freedom from* in his 1941 book *Escape from Freedom*: "[H]ere I only wish to point to the general principle, the dialectical process which results from growing individuation and from growing freedom of the individual. The child becomes more free *to* develop and express its own individual self unhampered by those ties which were limiting it. But the child also becomes more free *from* a world which gave it security and reassurance. The process of individuation is one of growing strength and integration of its individual personality, but at the same time a process in which the original identity with others is lost and in which the child becomes more separate from them." Emphasis in original, Erich Fromm, *Escape from Freedom* (New York: Holt, Reinhart, and Winston, 1964), 30-31. Fromm thought individuation could either atomize and alienate the child from the rest of society or it could help the child empathize and find solidarity with other people while at the same time maintaining individuality: "This growing separation may result in an isolation that has the quality of desolation and creates intense anxiety and insecurity; it may result in a new kind of closeness and a solidarity with others if the child has been able to develop the inner strength and productivity which are the premise of this new kind of relatedness to the world." *Ibid.*, 31.

others; most of them are defeated to some extent in their fight for freedom. The ways in which this defeat is brought about are manifold, but whatever they are, the scars left from this defeat in the child's fight against irrational authority are to be found at the bottom of every neurosis."¹³²

Neurosis could be found among those who failed to live according to their own choices.

Yet Fromm noted this did not trouble most people: "[D]efeat in the fight for freedom does not always lead to neurosis. As a matter of fact, if this were the case, we would have to consider the vast majority of people neurotics."¹³³ This created a conundrum: "[I]nstead of enumerating other conditions which make for neurosis, I prefer to reverse the question and ask what the conditions are which are responsible for the fact that so many people do *not* become neurotic in spite of the failure in their personal fight for freedom."¹³⁴ As Fromm explained:

It seems to be useful at this point to differentiate between two concepts: That of defect and that of neurosis. If a person fails to attain freedom, spontaneity, a genuine experience of self, he may be considered to have a severe defect, provided we assume that freedom and spontaneity are objective goals to be attained by every human being. If such a goal is not attained by the majority of members of any given society, we deal with the phenomenon of *socially patterned defect*.¹³⁵

On the individual level, the inability to realize one's own autonomy could manifest itself in neurosis. If most individuals in a society failed to attain self-definition, Fromm called this a socially patterned defect. However, such a defect was not always obvious, as he elucidated:

The individual shares it [the socially patterned defect] with many others; he is not aware of it as a defect, and his security is not threatened by the experience of being different, of being an outcast, as it were. What he may have lost in richness and in a genuine feeling of happiness is made up by the security of fitting in with the rest of mankind – *as he knows them*. As a matter of fact, his very defect may have been raised to a virtue by his culture and thus gives him an enhanced feeling of achievement.¹³⁶

¹³² Fromm, "Individual and Social Origins of Neurosis," 382.

¹³³ *Ibid.*, 382.

¹³⁴ Emphasis in original, *ibid.*, 382.

¹³⁵ Emphasis in original, *ibid.*, 383.

¹³⁶ Emphasis in original, *ibid.*, 383.

According to Fromm, people embraced the socially patterned defect of deference to authority rather than self-defining because it insulated them from alienation from others. Although accepting the defect gave someone superficial comfort, Fromm believed it took a burdensome psychic toll: “Today we come across a person and find that he acts and feels like an automaton; that he never experiences anything which is really his; that he experiences himself entirely as the person he thinks he is supposed to be; that smiles have replaced laughter, meaningless chatter replaced communicative speech; dulled despair has taken the place of genuine pain.”¹³⁷

In Riesman’s eyes, this was precisely the problem he saw in the late 1940s and early 1950s in the United States. Constructing a social theory based on an eclectic mélange of utopian politics, and the writings of Freud and Fromm, Riesman argued that the ego, which formerly controlled people through a fear of scarcity had been pacified by the abundance economy. Americans should have had the opportunity to finally embrace the id they saw in their dreams – to define their own individuality and have the nerve of failure to freely imagine the utopian ends they hoped to achieve, even if they might be unsuccessful. Yet, according to Riesman, too often the superego of past generations continued to limit their visions. The superego exerted its control through a socially patterned defect, in which people rejected freedom and substituted it with conformity. Riesman thought Americans feared that their neighbors would judge them harshly for failing to fall in line, which left many of his countrymen unwilling to embrace their individual dreams and desires and thus fundamentally unsatisfied.

V. Cold War Failures: Utopian Politics and the Paucity of Imagination

In 1952, Riesman followed up the success of *The Lonely Crowd* with *Faces in the Crowd: Individual Studies in Character and Politics*, a lengthy tome filled with what Riesman

¹³⁷ Ibid., 383.

described as “some twenty portraits or ‘faces’ of individuals, based on interview materials.”¹³⁸

In the book’s preface, Riesman declared that his social theory primarily dealt with the primacy of politics: “As in the earlier book, my preoccupation is with character structure, with politics, and with the relation between them, and the interviews lead me to ask: what sort of person is this, in terms of his character; how is his conformity secured; what is his political style – that is, how does he handle the political world as part of his total life-orientation?”¹³⁹

After conducting his extensive interviews, Riesman found that Americans were not political animals, but instead were quite apathetic: “When asked what they would like to see changed in our society, most could not think of anything.”¹⁴⁰ Perhaps this was the socially patterned defect Fromm had described – as Riesman noted with a tinge of Freudian psychoanalysis: “[T]he very fact that they could not envisage a future different from the past and present – and that they had repressed all claims to the point of utter modesty – is revealing to their lack of any utopian perspective on their own lives and on the society at large.”¹⁴¹ Riesman blamed the Cold War order for foisting political parochialism on Americans: “A more general symptom of the whole development is that Americans no longer look to other countries for the model of their own political utopias.”¹⁴² He argued that more dynamic political visions – rooted in utopian ideals – could be found abroad: “Until recently, they [Americans] could hope that some European answer – Soviet Communism, Fabianism, Sweden’s ‘middle way,’ or whatnot – could be found applicable here, if only it could get a following. Today, however, while many idealistic west European youth spend summers ‘building socialism’ in Tito’s Yugoslavia,

¹³⁸ David Riesman, *Faces in the Crowd: Individual Studies in Character and Politics* (New Haven, CT: Yale University Press, 1952), v.

¹³⁹ *Ibid.*, vi.

¹⁴⁰ *Ibid.*, 41.

¹⁴¹ *Ibid.*, 41.

¹⁴² *Ibid.*, 42.

Americans can only regard the country as a problem or opportunity in cold-war strategy.”¹⁴³

Rather than synthesizing European utopian thought with American politics and institutions, Riesman believed the Cold War led many Americans to wholly reject European programs.

Echoing his sentiments in “The Nylon War,” Riesman was frustrated with the American experience because he saw the U.S. as better positioned than the Soviet Union to espouse a utopian social vision: “The ‘lesson’ of Marxism is not that we should have no dreams but that we should cultivate intelligent rather than fanatical, rich rather than impoverished ones – dreams premised on life’s inexhaustible abundances rather than on its all too evident scarcities.”¹⁴⁴

Riesman believed the utopia championed by Soviet Marxism was based on the fear of scarcity, an idea he found outdated; instead the economic largesse of the U.S. could be used to free Americans and allow them to create a utopia based not on anxiety but on hope for the future.¹⁴⁵

According to Riesman, the danger Americans faced in abandoning utopian visions was that they would end up rudderless: “The fervently repeated American cold-war formula that the end does not justify the means tends to become more than a wholly proper critique of Soviet ruthlessness: it encourages us to forget that we *do* need ends, precisely to justify, and criticize, our means. The contradiction between means and ends, the inescapable tension, is what Marxism and like ideologies pretend to evaporate.”¹⁴⁶ For Riesman, the Soviets were fixated on their ideals but ignored the damage they caused to people in their efforts to achieve a Communist

¹⁴³ Ibid., 42.

¹⁴⁴ Ibid., 48.

¹⁴⁵ Historian Charles Maier argues that from the 1950s to the 1970s, economic growth in Eastern European Communist countries was on par with the rates seen in Western nations. Charles S. Maier, “The Collapse of Communism: Approaches for a Future History,” *History Workshop* 31 (Spring 1991): 35. However, Eastern bloc nations focused on heavy industry, particularly steel and coal. Ibid., 45, 47. Consumer goods created difficulties for the Communist regimes – at the beginning of the 1950s, the Soviet government sought to reduce prices and increase supply of consumer goods but struggled to meet demand. Kristy Ironside, “Stalin’s Doctrine of Price Reductions during the Second World War and Postwar Reconstruction,” *Slavic Review* 75, no. 3 (Fall 2016): 673-75.

¹⁴⁶ Emphasis in original, Riesman, *Faces in the Crowd*, 48.

utopia. Riesman hoped that, despite the deficiencies of Soviet utopianism, Americans would not wholly abandon efforts to discover the political ends necessary for human flourishing.

VI. Utopia and the Public Sphere: David Riesman as a Public Intellectual

In 1957, Riesman left Chicago for Harvard after being offered a professorship by Dean of the Faculty of Arts and Sciences McGeorge Bundy.¹⁴⁷ Riesman became increasingly involved in debates with leading American intellectuals on totalitarianism, the nature of the Cold War, and American liberalism.¹⁴⁸ One of these conferences was organized by Walt Whitman Rostow through the Center for International Studies at M.I.T. and the Carnegie Corporation; in the words of Max Millikan, the conference was created “in the hope that such a gathering might suggest new approaches to the analysis of contemporary America.”¹⁴⁹ In 1951, Millikan helped set up the Center and recruited Rostow, then a professor of economic history at M.I.T.¹⁵⁰ The Center received funding from the Rockefeller and Ford Foundations, as well as the Central Intelligence Agency, which was largely unknown until the 1960s.¹⁵¹

Rostow, Bundy, and Arthur Schlesinger, Jr., among others, prepared the conference, with the conference themes guided by Rostow.¹⁵² The conference was held from May 23 to 27, 1957, in Endicott House, a mansion in Dedham, Massachusetts.¹⁵³ In addition to Rostow, Bundy, Schlesinger, and Millikan, the participants included a diverse group of intellectuals, such as

¹⁴⁷ Riesman, “Becoming an Academic Man,” 64.

¹⁴⁸ Riesman attended a conference on totalitarianism in March 1953 organized by his old friend Carl Friedrich. Carl J. Friedrich, ed., *Totalitarianism: Proceedings of a Conference Held at the American Academy of Arts and Sciences March 1953* (Cambridge, MA: Harvard University Press, 1954), v.

¹⁴⁹ Max F. Millikan, “Preface,” in *The American Style: Essays in Value and Performance: A Report on the Dedham Conference of May 23-27, 1957*, ed. Elting E. Morison (New York: Harper & Brothers, 1958), vii-viii.

¹⁵⁰ David Milne, *America’s Rasputin: Walt Rostow and the Vietnam War* (New York: Hill and Wang, 2008), 44; Kevin V. Mulcahy, “Walt Rostow as National Security Adviser, 1966-69,” *Presidential Studies Quarterly* 25, no. 2 (Spring 1995): 225.

¹⁵¹ Milne, 44-45.

¹⁵² Millikan, “Preface,” viii.

¹⁵³ *Ibid.*, viii.

economist Richard M. Bissell, Jr., historian Richard Hofstadter, economist Carl Kaysen, political thinker George Kennan, scientist J. Robert Oppenheimer, economist Paul Samuelson, M.I.T. President James Killian, Jr., and Riesman.¹⁵⁴ The core of the conference was an essay written by Rostow, entitled “The National Style,” while Riesman had the task of responding to Rostow’s essay.¹⁵⁵ The two intellectuals disagreed profoundly about the status of American liberalism in the Cold War world. Rostow expounded on its dynamism while Riesman portrayed it as a spent force compared with utopian and anti-authoritarian political movements behind the Iron Curtain.

In his youth, Rostow had been quite precocious – he began his undergraduate studies in 1932 at Yale at age fifteen.¹⁵⁶ From 1933 to 1934, along with Millikan he attended an informal “black market” course led by Richard Bissell, who had studied under Harold Laski and Friedrich Hayek at the London School of Economics.¹⁵⁷ Bissell educated them in the new economic theory of John Maynard Keynes, transforming Rostow into a Keynesian.¹⁵⁸ The course also shaped Rostow’s strong aversion to Karl Marx’s thinking.¹⁵⁹ Rostow then obtained a Rhodes Scholarship in 1936 and completed his doctorate in history and economics at Yale in 1940 before

¹⁵⁴ Elting E. Morison, ed., *The American Style: Essays in Value and Performance: A Report on the Dedham Conference of May 23-27, 1957* (New York: Harper & Brothers, 1958), 317.

¹⁵⁵ W. W. Rostow, “The National Style,” in *The American Style: Essays in Value and Performance, A Report on the Dedham Conference of May 23-27, 1957*, ed. Elting E. Morison (New York: Harper & Brothers, 1958), 246-313; David Riesman, “Commentary: The National Style,” in *The American Style: Essays in Value and Performance, A Report on the Dedham Conference of May 23-27, 1957*, ed. Elting E. Morison (New York: Harper & Brothers, 1958), 358-68.

¹⁵⁶ Milne, 22-23. Rostow’s father was a Jewish Ukrainian who had emigrated to New York City. Ibid., 16-17. Walt Whitman Rostow was born in 1916 in Brooklyn, the middle child between Eugene Victor Rostow and Ralph Waldo Rostow. Ibid., 18-19. Eugene worked in President Lyndon B. Johnson’s administration and became Yale Law School Dean, while Ralph ran a retail store. Ibid., 18-19.

¹⁵⁷ Ibid., 24; W. W. Rostow, *Essays on a Half-Century: Ideas, Policies, and Action* (Boulder, CO: Westview Press, 1988), 2. As Rostow noted: “My academic work runs in a straight line from a kind of black market seminar at Yale in 1933-1934 to the present.” Ibid., 2; Milne, 24. Bissell later worked for the CIA. Ibid., 23.

¹⁵⁸ Ibid., 24-25.

¹⁵⁹ Ibid., 25.

joining the OSS during World War II.¹⁶⁰ From 1966 to 1969 he served as President Lyndon B. Johnson's National Security Adviser, succeeding McGeorge Bundy in the position.¹⁶¹

In "The National Style," Rostow indicated, unlike Riesman, that he believed the postwar United States had not abandoned idealism: "It would be quite incorrect to conclude that under the strain of Cold War the American community had abandoned the old link between nationhood and ideal values."¹⁶² Instead, Rostow asserted:

Virtually without exception, Americans feel impelled, in the end, to justify their positions by an identification of the national interest with some version of these old values, be it a McCarthyite crusade against materialistic Communism; a Humphreyite effort to protect the United States as an effectively functioning capitalist island; or a Trumanite effort to build and sustain a viable coalition not merely capable of holding the military balance of power but also reflecting in some meaningful sense the notion of a Free World.¹⁶³

Whether these movements could be called idealism was questionable. Rostow framed McCarthyism as anti-Communism but did not explain why this was idealism. Likewise, he saw Truman's efforts as politicking rather than developing political ideals. The "Humphreyite" movement likely referred to George Humphrey, President Dwight Eisenhower's Treasury Secretary who also advised on national security.¹⁶⁴ Historian Robert McMahon describes Humphrey as one of the "staunch fiscal conservatives" on Eisenhower's national security team, and Rostow noted Humphrey opposed American economic assistance to foreign countries.¹⁶⁵ Humphrey was a strange example for Rostow to give – while Humphrey's fiscal conservatism on the international level was perhaps an ideal, it was at odds with Rostow's desire for a more

¹⁶⁰ Ibid., 26, 30-31.

¹⁶¹ Mulcahy, 223.

¹⁶² Rostow, "The National Style," 295.

¹⁶³ Ibid., 295-96.

¹⁶⁴ Robert J. McMahon, "US National Security Policy from Eisenhower to Kennedy," in *The Cambridge History of the Cold War: Origins, 1945-1962*, vol. 1, ed. Melvyn P. Leffler and Odd Arne Westad (Cambridge: Cambridge University Press, 2010), 290.

¹⁶⁵ Ibid., 290; W. W. Rostow, *The Diffusion of Power: An Essay in Recent History* (New York: Macmillan, 1972), 88.

interventionist Cold War policy.¹⁶⁶ Thus, whether there was a coherent American idealism that continued to exist during the Cold War was an open question.

In Riesman's response, he analyzed the dream of America that Rostow sought to turn into reality: "When I got through his paper, I asked myself what kind of an America would he fashion were he suddenly made dictator with power to alter men, events, and institutions? From what he says, he would do many necessary things, civilized things and intelligent things. Many negative perils would be removed or ameliorated: rivalry in the armed services, segregation in the South, the blight of our cities, the stifling of individual initiative in large organizations and so on. There would be more vigor in America and less decay."¹⁶⁷ Riesman tried to understand whether Rostow's vision of America, rooted in Keynesian economics and anti-Communist politics, was utopian. Riesman then asserted: "Yet, I had no sense that the America he wants is radically, unmanageably, explosively different from present-day America; and I cannot believe that without a larger dream of America people would willingly make the sacrifices necessary to achieve even the minimum-decency-America that Mr. Rostow sees as viable."¹⁶⁸ He believed "The National Style" was not a bold vision for America's future, but instead offered anemic policy prescriptions promising more of the same. For Riesman, this was myopia not utopia.

Riesman contrasted "The National Style" with the "Polish and Hungarian uprisings in 1956," where "there was a more passionate feeling for freedom in the Satellite countries (and, I gathered, among the youth of Leningrad and elsewhere in the Soviet Union itself) than one found at the time in this country."¹⁶⁹ He was impressed with the ardor of those leading the uprisings

¹⁶⁶ Rostow preferred the possibility of American intervention abroad: "In general the character of the Cold War, as decreed by Communist strategy and method, has denied us the opportunity to react to national threat in the style with which we were most comfortable; that is, a clean and total switch from peace to war which could be fought with the widespread conviction that both our interests and ideals were at stake." Rostow, "The National Style," 298.

¹⁶⁷ Riesman, "Commentary: The National Style," 358.

¹⁶⁸ Ibid., 358.

¹⁶⁹ Ibid., 363.

compared with the state of politics in the U.S.: “When I read the articles by young Polish writers in the emancipated Polish press, or the appeals of the short-lived Petofi Club which sparked the Hungarian Revolution, I wondered how many American youth and how many American writers were as clear about freedom as these people who had been radically deprived of it.”¹⁷⁰

The spark that ignited these uprisings was a February 1956 “secret speech” delivered by Nikita Khrushchev to the Soviet Communist Party leadership attacking policies carried out by Joseph Stalin, who died in 1953.¹⁷¹ This process of “de-Stalinization” had ripples across the Eastern bloc, including in the U.S.S.R., instilling unease in the Soviet leadership.¹⁷² In Poland, heavy industrial workers led a forceful protest on June 28, 1956, in Poznan, where up to 100,000 people denounced the regime and many broke into government buildings.¹⁷³ The Polish state relied on military intervention to quell the protests – up to 73 people died after the Polish Minister of Defense and Politburo sent in 10,000 troops, supported by several hundred tanks.¹⁷⁴

The situation was just as dramatic in Hungary. In 1953, Matyas Rakosi, a Hungarian Stalinist, was told by the Soviets to step down as Hungarian prime minister in favor of the less repressive Imre Nagy, but by 1955 Rakosi reasserted his power.¹⁷⁵ However, de-Stalinization allowed for greater public voicing of disapprobation in Hungary – including among members of the Petofi Circle, an arm of the youth section of the Communist Party originally established by

¹⁷⁰ Ibid., 363.

¹⁷¹ Brian McCauley, “Hungary and Suez, 1956: The Limits of Soviet and American Power,” *Journal of Contemporary History* 16, no. 4 (Oct. 1981): 778; Johanna Granville, “Reactions to the Events of 1956: New Findings from the Budapest and Warsaw Archives,” *Journal of Contemporary History* 38, no. 2 (Apr. 2003): 263; Tony Kemp-Welch, “Dethroning Stalin: Poland 1956 and Its Legacy,” *Europe-Asia Studies* 58, no. 8 (Dec. 2006): 1264-65; Mark Kramer, “The Soviet Union and the 1956 Crises in Hungary and Poland: Reassessments and New Findings,” *Journal of Contemporary History* 33, no. 2 (Apr. 1998): 163, 165-67.

¹⁷² Ibid., 194-96.

¹⁷³ Kemp-Welch, 1267-68.

¹⁷⁴ Ibid., 1268. There is debate over the true number of deaths – often estimates given by the regime were lower. Granville, 264-65.

¹⁷⁵ Kramer, 175.

Rakosi.¹⁷⁶ On June 27, 1956, the Petofi Circle forcefully denounced the authoritarian regime, leading Rakosi and his allies to prohibit further Petofi Circle actions on June 30th.¹⁷⁷ The Petofi Circle gathering on June 27th and the Polish protests in Poznan on June 28th led many Hungarians to believe the regime was weakened.¹⁷⁸ In July 1956, the Soviets pressured Rakosi into leaving, but his replacement, Erno Gero, was seen as being equally zealous.¹⁷⁹

Several months later, in Budapest on October 23, 1956, approximately 10,000 university students protested against the government and paraded through the city, even razing a Joseph Stalin statue – and protests continued to spread throughout Hungary.¹⁸⁰ Gero asked for Soviet military intervention to put an end to the demonstrations and Soviet forces arrived in Hungary as early as October 24th, swelling to 31,500 soldiers, and also including tanks, planes, and aerial bombers.¹⁸¹ This enflamed tensions and violence broke out – Hungarian protesters attacked Soviet vehicles with explosives, leading to approximately 25 demonstrator deaths by October 24th.¹⁸² Nagy replaced Gero over the course of October 23rd to the 24th and sought to implement regime changes, but on October 31st Khrushchev decided to use powerful Soviet military might to put down the Hungarian protests.¹⁸³

In his response to Rostow, Riesman celebrated these protests, emphasizing their idealistic aims: “The Hungarian and Polish rebels fought, as people always do, for mixed motives, including reactionary ones; their published programs had a nineteenth century and Enlightenment flavor which at the present time, in the want of superior Utopias, remains

¹⁷⁶ Ibid., 176.

¹⁷⁷ Ibid., 177.

¹⁷⁸ Ibid., 177.

¹⁷⁹ Ibid., 179-80; Granville, 269.

¹⁸⁰ Ibid., 270; Kramer, 182.

¹⁸¹ Granville, 270-71; Kramer, 183, 184-85.

¹⁸² Ibid., 185.

¹⁸³ Granville, 271; Kramer, 190.

revolutionary.”¹⁸⁴ Riesman lauded the diversity of thought he saw in the demonstrators’ writings. In contrast to the dynamic thinking in the Eastern European protests, Riesman described the situation in the U.S.: “[W]hen old oppressions have been removed, it takes a while to ‘discover’ the new and subtle ones our better fortune presents. We have not done that in America; we have coasted on old although still pressing and dangerous problems.”¹⁸⁵

Though Rostow thought America was full of energetic idealism, Riesman remained unconvinced. He said that Rostow was a hard-nosed pragmatist: “Mr. Rostow’s account of the American style almost completely disregards all the transcendental and idealistic sides of American life. He has been too much swayed by the demise of Wilson’s ideals and by the general shabby way in which many ideals have turned out in this period.”¹⁸⁶ Indeed, from 1914 to 1917 many of President Woodrow Wilson’s beliefs on internationalism emerged out of his engagement with idealistic American progressives and socialists, including John Reed, Max Eastman, Jane Addams, and Upton Sinclair.¹⁸⁷ In addition to pragmatism, Riesman believed Rostow was fixated on conformity, failing to discuss radical elements of American politics: “There is a mention of the progressive movement and a dismissal of the socialists in this country, such as Debs, as a kind of no-count movement whose trendex rating was never high.”¹⁸⁸ In reality, Eugene V. Debs played an important role in the 1912 presidential election as the Socialist Party candidate because Wilson’s Democratic Party and Theodore Roosevelt’s Bull Moose Party

¹⁸⁴ Riesman, “Commentary: The National Style,” 363.

¹⁸⁵ Ibid., 363.

¹⁸⁶ Ibid., 364.

¹⁸⁷ Thomas J. Knock, *To End All Wars: Woodrow Wilson and the Quest for a New World Order* (Princeton: Princeton University Press, 2019), xx-xxi.

¹⁸⁸ Riesman, “Commentary: The National Style,” 364.

adopted many aspects of the Socialist platform to mollify workers.¹⁸⁹ For another indication of Debs' popularity Rostow could look closer to home – his eldest brother was named after Debs.¹⁹⁰

Rostow's work embodied many of the faults Riesman saw in 1950s American society:

Mr. Rostow is as liberal as I am, but I am questioning whether liberalism in its traditional American form can survive if there is no radicalism against which to be moderate. Whereas a few years ago America was more endangered by idealism than by realism, today the situation is reversed and, while we are confronted with a kind of muddy and shoddy idealism in many public pronouncements, we suffer much more from cynicism, from a lack of profound ideals which can motivate a new, or even keep going under present conditions an older, society.¹⁹¹

Riesman feared that Rostow's thinking was acutely indicative of the national style. Indeed, Riesman was concerned that too many Americans eschewed the idealistic elements of American liberalism and that the Cold War had narrowly bound the political ideals with which they could engage. Ultimately, he believed Rostow's essay was a symptom of this, and Riesman worried that such thinking would lead to political stagnation in the U.S., perhaps even threatening the stability of the liberalism that people like Rostow wanted to protect.

VII. Apathy and the Dangers of a World Without Utopias

Riesman was not alone in asserting that new political theories and goals were needed to wrestle with postwar social and economic changes – his discussions with Henry Kissinger and the pollster Louis Harris indicated the dangers of politics without utopian goals. Riesman thought that without utopian aims which could truly stir the inner desires of Americans, dissatisfied people might not care enough to nurture liberalism in the United States. His studies led him to conclude that American liberalism in the 1950s was not as robust as thinkers like

¹⁸⁹ Ernest Freeberg, *Democracy's Prisoner: Eugene V. Debs, the Great War, and the Right to Dissent* (Cambridge, MA: Harvard University Press, 2008), 19-20.

¹⁹⁰ Milne, 18. In 1947, Eugene V. Rostow was among those on the Committee on National Policy at Yale that had asked Riesman to conduct a research project at Yale, which culminated in Riesman's works *The Lonely Crowd* and *Faces in the Crowd* with Nathan Glazer. Riesman, "Becoming an Academic Man," 58-59.

¹⁹¹ Riesman, "Commentary: The National Style," 365.

Rostow believed but was instead infected with political indifference. Riesman thought this indifference made many Americans susceptible to political decision-making based on emotions rather than reason, which could ultimately lead them to support illiberal firebrands.

In a letter dated September 5, 1957, Kissinger voiced concerns to Riesman about the labor movement, hoping he might write an article for Kissinger's journal *Confluence*.¹⁹² Around this time Kissinger returned to Harvard after working for the Rockefeller Brothers Fund in New York from 1955 to 1957.¹⁹³ Kissinger later served as President Richard Nixon's National Security Adviser starting in 1969 and as Presidents Nixon and Gerald Ford's Secretary of State starting in 1973.¹⁹⁴ In his September 1957 letter, Kissinger wrote to Riesman: "It seems to me that labor movements all over the world may soon face a major crisis because of their very successes. In the more industrialized countries there now exists, or will soon exist, a social climate in which labor will achieve automatically many of the things which seemed utopian a century ago."¹⁹⁵ Alluding to utopianism, Kissinger thought the achievements of the labor movement of the 1950s had transcended the wildest dreams of previous eras. He continued: "What then becomes the labor movements or socialist parties? What goals can they set themselves to challenge young people to devote a life-time to their service?"¹⁹⁶ For Kissinger, if socialists and unions failed to grapple with these questions, it could create a crisis threatening the *raison d'être* of the labor movement.

¹⁹² Correspondence from Henry A. Kissinger to David Riesman, September 5, 1957, Box 51, Folder 7, "Riesman, David," Henry A. Kissinger Papers, Part II, Manuscripts and Archives, Yale University Library, Yale University, New Haven, CT (hereafter the Kissinger Papers).

¹⁹³ Robert Dallek, *Nixon and Kissinger: Partners in Power* (New York: HarperCollins, 2007), 49-51.

¹⁹⁴ "Biographies of the Secretaries of State: Henry A. (Heinz Alfred) Kissinger (1923-)," Office of the Historian, Foreign Service Institute, U.S. Department of State, accessed July 28, 2021, <https://history.state.gov/department-history/people/kissinger-henry-a>.

¹⁹⁵ Correspondence from Henry A. Kissinger to David Riesman, September 5, 1957, Box 51, Folder 7, "Riesman, David," Kissinger Papers.

¹⁹⁶ Ibid.

Analogous to the challenges Kissinger foresaw within organized labor, Riesman was worried that Americans might fail to develop new utopian aims beyond Rostow's Keynesian economics and anti-Communism, which could threaten the foundations of liberalism in the U.S. He relayed a story about this theme repeatedly, including in his critique of Rostow's essay and in a lecture entitled "Private People and Public Policy" that he delivered in September 1958 before the American Friends Service Committee near Saratoga Springs, New York, which Riesman later sent to Kissinger on October 28, 1958.¹⁹⁷

In his lecture, Riesman discussed an anecdote from his time in Chicago: "In the spring of 1956, Louis Harris, one of the most intelligent and enterprising of public opinion pollers, brought Stewart Alsop to Chicago on one leg of a journey through the Midwest to introduce him both to polling techniques and to what the 'man in the street' was thinking about the forthcoming election."¹⁹⁸ Harris was an important political analyst – John F. Kennedy's presidential campaign hired him in 1960 for polling in the primaries.¹⁹⁹ Alsop served in the OSS starting in 1944, working with the French Resistance in Nazi-occupied Europe.²⁰⁰ During World War II, his older brother Joseph Alsop assisted Chiang Kai-shek's Nationalists fight the Japanese in China – as a result, Joseph became highly critical of Communism.²⁰¹ After the war, the brothers became *New York Herald Tribune* commentators, known for their strong anti-Soviet attitude.²⁰²

¹⁹⁷ Riesman, "Commentary: The National Style," 359-60; David Riesman, "Private People and Public Policy," Box 51, Folder 7, "Riesman, David," Kissinger Papers Part II; Correspondence from Secretary to David Riesman to Dr. H. A. Kissinger, October 28, 1958, Box 51, Folder 7, "Riesman, David," Kissinger Papers. Riesman turned a version of this into an article. David Riesman, "Private People and Public Policy," *Bulletin of the Atomic Scientists* 15, no. 5 (1959): 203-08.

¹⁹⁸ David Riesman, "Private People and Public Policy," Box 51, Folder 7, "Riesman, David," Kissinger Papers.

¹⁹⁹ Lawrence R. Jacobs and Robert Y. Shapiro, "The Rise of Presidential Polling: The Nixon White House in Historical Perspective," *Public Opinion Quarterly* 59, no. 2 (Summer 1995): 167.

²⁰⁰ Gregg Herken, *The Georgetown Set: Friends and Rivals in Cold War Washington* (New York: Vintage, 2014), 14.

²⁰¹ *Ibid.*, 13-14.

²⁰² *Ibid.*, 14. As Riesman described: "All that year, as you will remember, the Alsop brothers had been hammering in their column that the Eisenhower Administration was lagging behind the country in its lack of concern with the danger of Soviet advances and in its budget-mindedness. They had ferociously assailed what they considered the

Riesman also accompanied Harris on one of these excursions “into a new middle-class suburb south of Chicago.”²⁰³ Harris wanted to learn about the voting patterns of the 1952 election.²⁰⁴ As Riesman noted, many of these people were apolitical, even if they had voted: “Virtually all had voted for Ike [Dwight Eisenhower] and some had trouble in remembering who it was who had run against Ike.”²⁰⁵ Riesman described how those interviewed thought about politics: “Sometimes Harris would say, ‘Well, you’ve heard about criticisms of the President for playing too much golf and for being a part-time President: what do you think about that?’ The very idea irritated many people: they would say, ‘If I had that job I’d play golf too.’ It was clear that, as more formal surveys done at The Survey Research Center had revealed earlier, people tended to see the Presidency in terms of personalities, not in terms of issues or responsibilities.”²⁰⁶ Harris found many people cared merely about the surface level of politics, such as presidential persona. He also discovered that simple slogans, not policy platforms, formed the core of politics for many of those interviewed.²⁰⁷

complacency of Washington.” David Riesman, “Private People and Public Policy,” Box 51, Folder 7, “Riesman, David,” Kissinger Papers.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Riesman wrote: “This came out even more clearly when Mr. Harris asked respondents whether the Republicans or Democrats had done anything lately that they had especially liked or disliked. They would scratch their heads and think for a moment, and at times they would say they had liked the ending of the war in Korea, or that they disliked high taxes; but often they had to reach for a slogan in order to respond, and there was little animus in what they said.” Ibid. Gabriel Lenz, a contemporary political scientist, has made somewhat similar findings: “Voters do pass the relatively easy test of judging politicians on performance. When people think a politician has performed well – perhaps by boosting economic growth or winning a war – they become or remain supportive of that politician. Likewise, when people perceive a politician as having desirable character traits relative to performance, such as honesty, they become or remain likely to vote for that politician.” Gabriel S. Lenz, *Follow the Leader? How Voters Respond to Politicians’ Policies and Performance* (Chicago: The University of Chicago Press, 2012), 2-3. However, beyond assessment of performance and personality, Lenz finds that people generally do not care about policy positions: “But voters fail the policy tests. In particular, I find surprisingly little evidence that voters judge politicians on their policy stances. They rarely shift their votes to politicians who agree with them – even when a policy issue has just become highly prominent, even when politicians take clear and distinct stances on the issue, and even when voters know these stances. Instead, I usually find the reverse: voters first decide they like a politician for other reasons, then adopt his or her policy views.” Ibid., 3.

Riesman observed that many of the people Harris interviewed cared most about the spectacle politics could create: “Occasionally, Harris would ask if people liked McCarthy, and if they said yes he might also ask if they liked Kefauver. What struck me particularly was that if they liked one they often liked other and for the same reason: these men were dramatic, entertaining, not ‘politicians,’ but on the contrary against the politicians.”²⁰⁸ Joseph McCarthy and Estes Kefauver were at opposite ends of the political spectrum. McCarthy was elected to the Senate from Wisconsin in 1946 as a Republican critic of the New Deal.²⁰⁹ He became well-known for his anti-Communist crusade that began when he declared in a February 1950 speech that he had a list of 205 Communists in the State Department.²¹⁰ Kefauver was a left-wing Democrat who famously wore a hat made of racoon fur in his 1948 Senate campaign as a symbol of American frontier culture to fight accusations that he was sympathetic to Communism and to signify his autonomy from Tennessee’s political machine.²¹¹ His stature grew and in 1956 he was nominated for vice president on the Democratic Party ticket.²¹² Riesman believed the best explanation for why people approved of both McCarthy and Kefauver, whose political ideologies were completely at odds, was that many people preferred seeing politics as entertainment.

For political commentators like Stewart Alsop this was a troubling find.²¹³ Riesman said the findings of Harris and others were reflective of the political insouciance he also saw in 1950s America, writing a footnote to his lecture: “Although conclusive evidence is lacking, it would

²⁰⁸ David Riesman, “Private People and Public Policy,” Box 51, Folder 7, “Riesman, David,” Kissinger Papers.

²⁰⁹ David M. Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy* (New York: Free Press, 1983), 51-52, 53-54.

²¹⁰ *Ibid.*, 103, 108-09.

²¹¹ Joseph Bruce Gorman, *Kefauver: A Political Biography* (New York: Oxford University Press, 1971), 36-37, 52-53.

²¹² *Ibid.*, 261-64.

²¹³ As Riesman stated: “You may remember that Stewart Alsop wrote in his columns that he was shaken by these visits, that Washington, far from being behind the country, was far ahead, living in a climate of concern and activism and attention that knew no match in the complacency and optimism he had seen on his trip.” David Riesman, “Private People and Public Policy,” Box 51, Folder 7, “Riesman, David,” Kissinger Papers.

appear that get-out-the-vote campaigns swelled the Eisenhower majorities in 1952 and 1956 with voters who, basically apathetic, responded only to personalities and not to issues; many would consider themselves as Democrats, though without interest or great conviction.”²¹⁴ Riesman contended this apathy was dangerous because people might seek to escape their indifference by treating politics as emotional contests based on charisma rather than as reasoned, policy-focused debate: “Bringing sleepwalkers to the polls simply to increase turnout is no service to democracy. Such apathetic voters are easily swayed by a small hard core of convinced party workers, when the latter have in turn the support of traditional ideology and moral climate, whether this is the Republican isolationism of Midwestern small towns or the Democratic racist demagogery [sic] of the South.”²¹⁵ This was troubling for Riesman because it meant many Americans might be willing to abandon the rational, cosmopolitan liberalism passed down from the Enlightenment that he had routinely celebrated in his writings. Without the promise of a liberal utopia, destructive tendencies and illiberal political ideologies might arise in its place.²¹⁶

VIII. A Utopia Deferred? Riesman and the Nuclear Question

Riesman connected political apathy with a substantive policy debate he had long cared about – nuclear nonproliferation.²¹⁷ Yet even as he sought to develop his own utopian goals, he

²¹⁴ Ibid. Riesman cited Louis Harris’s *Is There a Republican Majority?* And Angus Campbell, Gerald Gurin, and Warren Miller’s *The Voter Decides*. Ibid. Though Riesman cited to the 1952 version, see Louis Harris, *Is There a Republican Majority? Political Trends, 1952-1956* (New York: Harper & Brothers, 1954). See also Angus Campbell, Gerald Gurin, and Warren E. Miller, *The Voter Decides* (Evanston, IL: Row, Peterson, 1954).

²¹⁵ David Riesman, “Private People and Public Policy,” Box 51, Folder 7, “Riesman, David,” Kissinger Papers.

²¹⁶ Riesman made a similar point in his article “Private People and Public Policy,” a revised version of this lecture. Riesman, “Private People and Public Policy,” 208.

²¹⁷ In a memoir, Riesman noted: “From Hiroshima to the present the theme that unifies my political attitudes has remained that of the danger of nuclear war and the destruction of entire populations, perhaps of half the planet.” Riesman, “A Personal Memoir,” 339; Geary, “Children of *The Lonely Crowd*,” 612-13. He specifically stated: “There were others, like myself who espoused the strategy of minimum deterrent, preferably a few missile-armed submarines, which could not be wiped out in a first strike, as a kind of insurance – a stable and secure and sufficient deterrent on the basis of which one would take small, unilateral steps toward disarmament; if the Soviet Union reciprocated, further steps could be taken.” Riesman, “A Personal Memoir,” 344.

struggled to explain how utopian ideals could be turned into concrete policy in a pluralist world – what steps could Riesman take if people fundamentally disagreed with and rejected his utopia?

In his 1958 article “Abundance for What?” in the *Bulletin of the Atomic Scientists*, Riesman dealt the familiar themes of abundance and indifference.²¹⁸ Riesman discussed a series of interviews conducted by *Time* with students graduating in the “Class of 1955” that he had been permitted to study.²¹⁹ Riesman was concerned that the abundance economy served as much to threaten Americans as to free them: “There is liberation in plenty itself, up to a point. And yet I think we fear the future’s opacity, and try not to pierce it with concrete plans. The terrifying prospect of atomic and biological annihilation has been one factor in this foreshortening, but for most Americans it is not a very important (not nearly important enough) cloud on anticipation.”²²⁰ He believed many Americans were unperturbed even by the threat of nuclear destruction: “What we fear to face is more than total destruction: it is total meaninglessness; and it is my contention that we may bring about the former, in some part because the latter inhibits our alternatives to what I have depicted as our sub-rosa military Keynesianism; and, perhaps more important, our future as a country is not inviting or challenging enough to mobilize our attention and our energies.”²²¹ Like in his articles on Freud, Riesman thought America in the late 1950s failed to help people find fundamental meaning in their lives – an understanding of the self beyond mere economic consumption.

²¹⁸ David Riesman, “Abundance for What?” *Bulletin of the Atomic Scientists* 14, no. 4 (1958): 135-39.

²¹⁹ Ibid., 139 fn. 10; David Riesman, “The Found Generation,” *The American Scholar* 25, no. 4 (Autumn 1956): 422-23. He observed complacency among those with whom he spoke: “[I]n the whole lot of interviews, there was very little stirring of the discontent which could presage new needs, new wants, let alone an image of a social pattern organized to supply them. Such young men might be prepared to speed up the rate of obsolescence of consumer goods by, let us say, one third, in order to exhaust inventories faster, if the patriotism of advertising urged them on.” Riesman, “Abundance for What?” 139.

²²⁰ Ibid., 139.

²²¹ Ibid., 139.

Riesman appears to have sent an earlier version of “Abundance for What?” to Kissinger, which Kissinger commented on in a letter dated December 2, 1957.²²² Although Kissinger was complimentary overall, he was critical of Riesman’s arguments regarding nuclear war: “As for the conclusion of your paper, I am of course in substantial disagreement. I am as worried as you are about the proliferation of armaments, and for the same reasons. I should think that history will judge us severely for permitting this situation to arise in so crass a form. I also agree with you that our present approach is sterile. I cannot persuade myself, however, that we should escape our dilemma by unilateral disarmament.”²²³ Kissinger developed his own ideas on these themes in *Nuclear Weapons and Foreign Policy*, published in 1957, which met with commercial success.²²⁴ Kissinger’s beliefs diverged substantially from Riesman’s condemnation of nuclear weapons. As historian Robert Dallek observes, in this book Kissinger argued that in certain circumstances “defense planners needed to focus on limited wars in which the United States considered the possible use of tactical or battlefield nuclear weapons.”²²⁵

According to Kissinger, the crux of their debate hinged on their disparate understandings of the Soviet Union: “Gandhi’s defense was shrewd precisely because he could count on the preconceptions of his opponent, who really shared his pacifism and whose will to victory was not really pronounced.”²²⁶ On a deeper level, Kissinger explained that he and Riesman differed in their conception of the anthropology of man: “This relationship does not obtain with the Soviets,

²²² Correspondence from Henry A. Kissinger to David Riesman, December 2, 1957, Box 51, Folder 7, “Riesman, David,” Papers Part II. Kissinger identified the piece as “the paper on Abundance [...]” Ibid. This paper likely became “Abundance for What?” because the themes Kissinger discusses are present in the published article and the date of Kissinger’s letter and the date of publication of “Abundance for What?” in 1958 are closely aligned.

²²³ Ibid.

²²⁴ Henry A. Kissinger, *Nuclear Weapons and Foreign Policy* (New York: Harper & Brothers, 1957); Dallek, 48.

²²⁵ Ibid., 49. Niall Ferguson finds Kissinger’s arguments in favor of limited nuclear warfare in this book unconvincing, but says the book found popularity because its ideas offered a possible substitute for all-out nuclear war. Niall Ferguson, *Kissinger: 1932-1968: The Idealist* (New York: Penguin, 2015), 368-73.

²²⁶ Correspondence from Henry A. Kissinger to David Riesman, December 2, 1957, Box 51, Folder 7, “Riesman, David,” Kissinger Papers.

I am afraid that I take a somewhat cynical view of the consensus of humanity and of the high moral principles of the uncommitted; and I do not think we could count on their exerting pressure if we stood naked before a Soviet onslaught.”²²⁷ For Kissinger, a belief in the fundamental goodness and trustworthiness of the enemy needed to be met with skepticism to prevent the United States from being taken advantage of, or worse, destroyed. Riesman responded to Kissinger on February 8, 1958, noting their divergence: “I agree with you that the Gandhi strategy is impractical. Still I think limited war is impractical too for Americans who are, I am afraid, a very bellicose people. Tocqueville was right about this as about so much else.”²²⁸ Interestingly, Riesman did not seek to convince Kissinger of his position. The discussion between Kissinger and Riesman on nuclear weapons illustrated a problem with Riesman’s liberal utopian thinking – if two people held incommensurate political goals, if one person’s utopia was another’s dystopia, how could their differences be resolved?

Riesman’s September 1958 lecture “Private People and Public Policy,” which he passed along to Kissinger, encapsulates this tension.²²⁹ The audience for Riesman’s lecture was the American Friends Service Committee, created by the Quakers in 1917 during World War I to assist Americans through nonviolent means.²³⁰ Riesman had received a Quaker education in Philadelphia and partook in meetings held by the Friends during that time.²³¹ In April 1955, the

²²⁷ Ibid.

²²⁸ Correspondence from David Riesman to Henry A. Kissinger, February 8, 1958, Box 51, Folder 7, “Riesman, David,” Kissinger Papers.

²²⁹ Correspondence from Secretary to David Riesman to Dr. H. A. Kissinger, October 28, 1958, Box 51, Folder 7, Kissinger Papers.

²³⁰ H. Larry Ingle, “The American Friends Service Committee, 1947-49,” *Peace & Change* 23, no. 1 (Jan. 1998): 28; Elizabeth Walker Mechling and Jay Mechling, “Hot Pacifism and Cold War: The American Friends Service Committee’s Witness for Peace in 1950s America,” *Quarterly Journal of Speech* 78, no. 2 (1992): 176.

²³¹ Riesman, “Becoming an Academic Man,” 26; Riesman, “A Personal Memoir,” 357.

Committee issued *Speak Truth to Power*, a tract championing pacifism that sought to elide the Quakers' religious justifications for peace in favor of secular, scientific reasoning.²³²

In this context, Riesman's lecture discussed nuclear disarmament. He analyzed a talk he gave to a group of university students, noting: "I explained, for instance, why I had been a signatory of the Committee on a Sane Nuclear Policy."²³³ Emerging from an April 1957 meeting in Philadelphia organized by pacifists, including the American Friends Service Committee, the group that became known as the National Committee for a Sane Nuclear Policy (SANE) focused on limiting nuclear testing.²³⁴ Erich Fromm likely gave SANE its name.²³⁵ The organization became well-known when, in November 1957, it obtained a page declaring "We Are Facing A Danger Unlike Any Danger That Has Ever Existed" in the *New York Times*.²³⁶

In "Private People and Public Policy," Riesman said he faced vociferous objections from some students for joining SANE: "When time came for discussion I was attacked by a number of students who said, 'Would I rather live on my knees than die on my feet?' This slogan came up like a blow again and again."²³⁷ Riesman disagreed with them strongly: "These students thought themselves non-conformist and independent because they were willing to die in the battle against what we could all agree was Communist terror and oppression. But they were quite unaware of

²³² Mechling and Mechling, 178, 179-80; *Speak Truth to Power: A Quaker Search for an Alternative to Violence* (Philadelphia: American Friends Service Committee, 1959).

²³³ David Riesman, "Private People and Public Policy," Box 51, Folder 7, "Riesman, David," Kissinger Papers.

²³⁴ Milton S. Katz, *Ban the Bomb: A History of SANE, the Committee for a Sane Nuclear Policy, 1957-1985* (New York: Greenwood Press, 1986), 21-22; Paul Boyer, "From Activism to Apathy: The American People and Nuclear Weapons, 1963-1980," *Journal of American History* 70, no. 4 (Mar. 1984): 823.

²³⁵ Katz, 24.

²³⁶ Ibid., 26-27; Boyer, 823. Among those signatories were James Shotwell, Paul Tillich, and Eleanor Roosevelt. Katz, 28.

²³⁷ David Riesman, "Private People and Public Policy," Box 51, Folder 7, "Riesman, David," Kissinger Papers. Riesman believed they were a conservative group: "It turned out that a number of these students were readers of The National Review." Emphasis in original, *ibid.* That publication, started in 1955 by William F. Buckley, Jr., became an influential voice in 1950s conservatism. K. Healan Gaston, "The Cold War Romance of Religious Authenticity: Will Herberg, William F. Buckley Jr., and the Rise of the New Right," *Journal of American History* 99, no. 4 (Mar. 2013): 1151-52.

the extent of their own oppression which had led them to accept a current ethno-centric slogan without critical examination.”²³⁸ In light of his desire for limiting nuclear testing, Riesman’s criticism is unsurprising. Although he did not think these students were non-conformist, in way they embodied Riesman’s nerve of failure, which was “simply the nerve to be oneself when that self is not approved of by the dominant ethic of a society.”²³⁹ Perhaps some were unduly influenced by the media commentary they had read, but others may have independently arrived at the position they were arguing. The problem for Riesman was that their goals, which they perceived as challenging societal convention, directly contradicted his own utopian aims.

He was more sympathetic toward a different group of students: “There were other students there (also to be met with at other institutions) who were critical of the Committee on a Sane Nuclear Policy because they felt its efforts did not go far enough, [...] dealing only with the symptoms of testing and not with the diseases of foreign policy and nationalism itself. These latter students were a small minority.”²⁴⁰ This group was utopian-minded – they did not merely seek to ban nuclear testing but wanted to resolve deeper issues that led to what they saw as Cold War jingoism. Riesman described the effect he believed the debate had on these students:

I got the impression, however, that they had not previously been aware that any considerable number of fellow-students, not to speak of a visiting social scientist, shared and could carry forward their own private concerns. They had suffered, I suspect, from what sociologists term ‘pluralistic ignorance’ -- believing that ‘everyone’ shared the viewpoint of the articulate minority, and they were even more isolated, confused, and self-deprecatory than was actually warranted. Correspondingly, other students, part of the previously great unconcerned majority, were in some cases required to stop, look, and listen on discovering that people they respected found questions of survival worth discussing seriously.²⁴¹

²³⁸ David Riesman, “Private People and Public Policy,” Box 51, Folder 7, “Riesman, David,” Kissinger Papers.

²³⁹ Riesman, “A Philosophy for ‘Minority’ Living,” 413.

²⁴⁰ David Riesman, “Private People and Public Policy,” Box 51, Folder 7, “Riesman, David,” Kissinger Papers.

²⁴¹ Ibid.

But perhaps Riesman's liberal utopianism was preaching to the converted in the context of nuclear weapons. Riesman may have changed the tenor of the debate, but had the discussion changed any minds? Moreover, was it possible that some of the utopians had become more sympathetic to the anti-SANE arguments? Riesman did not appear to address this possibility. One of the great difficulties for Riesman's utopian liberalism was explaining what steps he could take if people rejected his utopian aims, such as nuclear nonproliferation. When the debate had finished, was there a mechanism through which people could resolve their disputes if both sides found their principles to be irreconcilable? This state of affairs could be anticipated in a pluralistic society in which people were expected to disagree, even on fundamental values. Yet this was a problem Riesman never fully solved.

IX. Conclusion

As the 1950s gave way to the 1960s, Riesman reached the zenith of his political influence. When President Kennedy took office in 1961, he selected McGeorge Bundy to lead the National Security Council (NSC).²⁴² Riesman asked Bundy, his colleague from Harvard, to hire Marcus Raskin to be the NSC's "conscience" – Riesman was galvanized by a piece Raskin wrote entitled "The Theory and Practice of Deterrence."²⁴³ In 1962, Raskin was sent to Geneva with Jerome Wiesner, a special assistant for Kennedy in the Office of Science and Technology, where they discussed the possibility of a nuclear test ban treaty with the Soviets.²⁴⁴ This was a small element in the movement toward the Limited Test Ban Treaty with the Soviets, which

²⁴² Kai Bird, *The Color of Truth: McGeorge Bundy and William Bundy, Brothers in Arms: A Biography* (New York: Simon & Schuster, 1998), 185.

²⁴³ *Ibid.*, 187.

²⁴⁴ *Ibid.*, 219; Norman Birnbaum, "Marcus Raskin: Farewell to a Prodigiously Beating Heart," *The Nation*, December 29, 2017, <https://www.thenation.com/article/archive/marcus-raskin-farewell-to-a-prodigiously-beating-heart/>; Desmond Ball, *Politics and Force Levels: The Strategic Missile Program of the Kennedy Administration* (Berkeley: University of California Press, 1980), 85.

President Kennedy formally adopted on October 7, 1963, after Senate approval.²⁴⁵ However, there were storm clouds brewing on the horizon.²⁴⁶ Raskin was slowly pushed out of the NSC by Bundy, likely because he had contributed an essay to the 1962 book *The Liberal Papers*, as did Riesman.²⁴⁷ The book received withering criticism from several Republican Senators.²⁴⁸

Moreover, by the mid-1960s, Riesman found himself increasingly at odds with some of the students he taught, especially those on the left.²⁴⁹ In the 1960s, American liberalism was destabilized when it was forced to grapple with institutional racism in the United States; it was also criticized vociferously by radical youth groups.²⁵⁰ These youth groups made up the New Left, a diffuse political movement often associated with the Students for a Democratic Society (SDS) and the Student Nonviolent Coordinating Committee (SNCC), both founded in 1960.²⁵¹ SNCC, which had primarily African-American leadership, was instrumental in coordinating the Freedom Rides of the early 1960s and pushed strongly for desegregation and voting rights in American South.²⁵² Influenced by SNCC's work, the SDS issued its famous Port Huron

²⁴⁵ Andreas Wenger and Marcel Gerber, "John F. Kennedy and the Limited Test Ban Treaty: A Case Study of Presidential Leadership," *Presidential Studies Quarterly* 29, no. 2 (June 1999): 460, 479.

²⁴⁶ Riesman later became critical of the test ban treaty – in a 1984 memoir he wrote: "Today I am not so sure that those of us who lobbied for passage of the treaty were wise. In the early Sixties I would ask students, as I visited colleges, whether they had had nightmares about nuclear destruction of the planet, and most of the students had had such nightmares." Riesman, "A Personal Memoir," 350. However, by 1984 he noted: "But those baby-boomer students who were born, let us say, in 1960 and are now asked the same question do not report such nightmares." *Ibid.*, 350.

²⁴⁷ Bird, 218-20; James Roosevelt, ed., *The Liberal Papers* (Chicago: Quadrangle Books, 1962).

²⁴⁸ Bird, 218.

²⁴⁹ Geary, "Children of *The Lonely Crowd*," 618.

²⁵⁰ Gerstle, "The Protean Character," 1073. For a discussion of the inconsistent opposition of consensus liberals to racism and discrimination against other groups, see Gary Gerstle, "Race and the Myth of the Liberal Consensus," *Journal of American History* 82, no. 2 (Sept. 1995): 579-86; Galbo, 64-65. However, Galbo mistakenly argues that Riesman's work "lacks the sensitivity to [...] gender issues that more contemporary thinkers have addressed [...]." *Ibid.*, 72. Riesman was intent on discussing gender discrimination at various points in his analysis. For example, in David Riesman, "The Saving Remnant: An Examination of Character Structure," in David Riesman, *Individualism Reconsidered and Other Essays* (Glencoe, IL: Free Press, 1954), 114-16.

²⁵¹ Howard Brick and Christopher Phelps, *Radicals in America: The U.S. Left Since the Second World War* (New York: Cambridge University Press, 2015), 93-94, 96.

²⁵² *Ibid.*, 96, 98-100.

Statement in 1962.²⁵³ According to historians Howard Brick and Christopher Phelps, in the Port Huron Statement the SDS “drew on French existentialist philosophy, particularly [Albert] Camus, to insist that individuals must take a stand; failure to make such choices was a sign of ‘apathy,’ a condition linked to powerlessness.”²⁵⁴ To fight apathy, Brick and Phelps argue that the Port Huron Statement proposed the importance of “participatory democracy” and the centrality of “moral acts of ‘choice’” to bring about individual liberation.²⁵⁵

Such a movement may seem to be consonant with Riesman’s own beliefs. However, although his writings on nuclear nonproliferation helped contribute to the rise of the New Left and he supported its efforts in the early 1960s, over time Riesman became disillusioned with the movement.²⁵⁶ During a visit to the University of California, Berkeley, on October 2, 1964, Riesman observed the actions of the Free Speech Movement, which he believed merely embodied “a good deal of enjoyment in tormenting the adult generation, including parents, about their hypocrisy – watching the liberals squirm.”²⁵⁷ In a memoir, Riesman wrote: “In the Vietnam Summer, as it was called, of 1967, I was at odds with these students and with some of their faculty mentors who would later be termed the New Left.”²⁵⁸ He described his opposition to a program proposed by New Left students:

To illustrate, leaders among the students who gathered in Cambridge in that summer planned a referendum to show that the public of the city was opposed to war. I argued as strongly as I could against the idea, saying that Cambridge was primarily a working-class city, not a university town like Ann Arbor or Madison, and that such a referendum was bound to lose; since many people thought of Cambridge as a university town, this would

²⁵³ Ibid., 96, 100.

²⁵⁴ Ibid., 101.

²⁵⁵ Ibid., 101.

²⁵⁶ Daniel Geary, “The New Left and Liberalism Reconsidered: The Committee of Correspondence and the Port Huron Statement,” in *The Port Huron Statement: Sources and Legacies of the New Left’s Founding Manifesto*, ed. Richard Flacks and Nelson Lichtenstein (Philadelphia: University of Pennsylvania Press, 2015), 83-94; Geary, “Children of *The Lonely Crowd*,” 613-14.

²⁵⁷ Ibid., 618.

²⁵⁸ Riesman, “A Personal Memoir,” 353.

serve as evidence to the still prowar or indifferent population in the country that the antiwar movement was an affair of a small ‘un-American’ minority.”²⁵⁹

Though Riesman opposed the Vietnam War like the students, he considered their arguments and strategies to be out of touch with Americans living outside the university environment.²⁶⁰

Riesman thought the students were in an echo-chamber, largely unwilling to engage with arguments running counter to their preconceived beliefs: “It was hard for students living within their own moral enclaves to imagine that people could possibly remain sympathetic to the war, once the students brought the light to them. It was even harder for them to accept the arguments I made repeatedly, that there were people opposed to the war who were even more opposed to the protestors and did not want to be identified with them.”²⁶¹

In his 1958 lecture “Private People and Public Policy,” Riesman described a passionate discussion between two opposing groups on the use of nuclear arms, which he believed led both sides to a more productive mutual understanding.²⁶² In contrast, he thought many New Left students were unwilling to rely on reasoned debate to better understand the arguments made against their position. He entreated the students to try a different approach: “I pled with students to ask questions of working-class voters and to learn what their outlooks were; undoubtedly the students were resented for the privileges that allowed them to spend their summer in political activity rather than at work, or already in military service.”²⁶³ Yet Riesman found that student dissenters themselves were fractured, despite their shared opposition to the Vietnam War: “Not only was the referendum held – and lost – but there were actually two versions of it, one

²⁵⁹ Ibid., 353-54.

²⁶⁰ Ibid., 353-54.

²⁶¹ Ibid., 354.

²⁶² David Riesman, “Private People and Public Policy,” Box 51, Folder 7, “Riesman, David,” Kissinger Papers.

²⁶³ Riesman, “A Personal Memoir,” 354.

sponsored by a then Far Left SDS splinter, which framed the ballot in terms of the language of imperialism and the working class.”²⁶⁴

While Riesman was not so jejune as to believe that all Americans held the same substantive values, his discussion in “Private People and Public Policy” about his talk with university students indicated that he did believe Americans shared a common belief in the necessity of reasoned discourse.²⁶⁵ In Riesman’s eyes, the New Left not only thought their values were incommensurate with their opponents, but many of them also rejected attempts to follow a process through which their beliefs could be put in dialogue with their opponents’ ideals. Although Riesman was critical of the provincialism he found among the consensus liberals of the 1950s, his utopian liberalism was highly dependent on the consensus that existed. For utopian ideals to be adopted by American liberals, Riesman recognized that utopians had to enter into conversation with their opponents, even if such discussions ultimately led to naught. The turbulence of the 1960s called into question whether such a process was still feasible.

In a certain sense, Riesman’s vision of utopian liberalism fell short in its assumption that even if Americans disagreed about their substantive values, they still held a shared understanding of the process through which they could debate the good life. Yet in another sense his ideas were a breakthrough. Riesman wanted liberals in the mid-twentieth century to think more expansively and to have bolder dreams about what their society could become. Through utopian liberalism, he wanted nothing less than to reclaim the dynamism he saw in the politics of the Age of Enlightenment and to revive that spirit in the America of his own time.

²⁶⁴ Ibid., 354. As historian Daniel Geary argues, although the New Left’s “Port Huron Statement imagined a coalition of liberals and socialists” in the early 1960s, by the middle of the decade, the SDS began to reject the notion that liberals held common cause with them. Geary, “The New Left,” 92.

²⁶⁵ Riesman described the disagreement in the U.S. over substantive values: “The concept forcefully put forward by Walt Rostow of clear national interest evoked a critical commentary from me. I contended that it took us back to the days of Teddy Roosevelt to assume that this vast and diverse country could be unified in agreement on some simple definition of *the* national interest.” Emphasis in original, Riesman, “A Personal Memoir,” 345.

CONCLUSION

When historian Arthur Schlesinger, Jr., attempted to analyze the liberal consensus he saw in the United States in his 1956 essay “Liberalism in America: A Note for Europeans,” he struggled to define the limitations of this liberalism, even though its boundaries had become increasingly important during World War II and the early years of the Cold War.¹ By the mid-twentieth century, the ideologies of Nazi fascism and Soviet Communism lay beyond the borders of political discourse deemed acceptable by many liberals, especially in the United States.² Extricating these ideologies from American society became an important project for protecting liberalism at home in the U.S. and for building support for liberalism abroad.

One liberal response to Nazism and Communism was to fête individualism as the most important virtue of liberalism. This notion was developed by Austrian émigré economist Friedrich Hayek, who asserted that the Nazi and Communist states had abandoned individual freedom through government planning and state coordination of private actors – which he argued were usually harbors for fascist and Communist tendencies.³ In 1955, Carl J. Friedrich called

¹ Arthur M. Schlesinger, Jr., *The Politics of Hope* (Boston: Houghton Mifflin, 1962), 65.

² Historian Abbott Gleason, tracing the history of the word “totalitarianism,” argues that the 1939 Nazi-Soviet Pact between Nazi Germany and the Communist Soviet Union solidified the belief among Americans that these two regimes were of the same nature. Abbott Gleason, *Totalitarianism: The Inner History of the Cold War* (New York: Oxford University Press, 1995), 49-50. On the Nazi-Soviet Pact signed in August 1939 to ensure non-aggression between the two nations, see Richard J. Evans, *The Third Reich in Power* (New York: Penguin, 2005), 692-93. According to historians Michael Geyer and Sheila Fitzpatrick, the term “totalitarianism” became associated with Germany in the late 1940s and then with the Soviet Union with the emergence of the Cold War. Michael Geyer and Sheila Fitzpatrick, “Introduction,” in *After Totalitarianism: Stalinism and Nazism Compared*, ed. Michael Geyer and Sheila Fitzpatrick (New York: Cambridge University Press, 2009), 3-4. These totalitarian societies served as a contrast to liberal democracies. *Ibid.*, 4.

³ In the economic sphere, Hayek argued that individual actors naturally came together to create a market, as described by economist Bruce Caldwell: “In Hayek’s view, the classical economists’ greatest accomplishment was to recognize that a mechanism exists that coordinates economic activity. The mechanism did not have to be invented, and it was not the result of deliberate planning. Rather, it arose spontaneously as the unintended consequence of the actions of many individuals. The mechanism is what Adam Smith referred to with the famous metaphor *the invisible hand*.” Emphasis in original, Bruce Caldwell, *Hayek’s Challenge: An Intellectual Biography of F. A. Hayek* (Chicago: The University of Chicago Press, 2004), 197. Starting in the 1930s, Hayek combined his economic and political arguments by asserting that planning was in many instances illiberal and often led to fascist and Communist “totalitarianism.” *Ibid.*, 238-39. Caldwell observes that Hayek recognized planning was necessary in some instances even in liberal nations – yet the type of planning Hayek favored was often unclear. *Ibid.*, 238. In

this the *neo-liberal* movement, spearheaded by Hayek's Mount Pèlerin Society in Chicago.⁴ By the 1970s, Hayek's ideas played an important role in the United States, especially as they were further developed by the economist Milton Friedman at the University of Chicago under his theory of monetarism.⁵

Historian Daniel T. Rodgers argues that neo-liberalism in the 1970s reflected a trend in the U.S. toward lionizing the notion of individualism.⁶ He contends that in the mid-twentieth century American intellectuals tried to displace the nineteenth-century belief in free individuals and instead turned toward a theory of humanity that situated people within a web of social relationships and cultural connections – a “structuralist” framework of thinking.⁷ By the 1970s, Rodgers asserts, these structuralist theories were supplanted by a return to individualism that sought to deconstruct and atomize rather than to unify.⁸ Similarly, historian Paul Sabin finds that by the early 1970s, even figures associated with left-wing politics in the U.S., such as Ralph Nader, forcefully argued that government regulations did not effectively protect Americans and asserted instead that public interest activists had to guard against inept civil servants – a notion

The Road to Serfdom, Hayek often resisted explaining what planning ought to look like in a liberal society: “It is of the utmost importance to the argument of this book for the reader to keep in mind that the planning against which all our criticism is directed is solely the planning against competition – the planning which is to be substituted for competition. This is the more important, as we cannot, within the scope of this book, enter into a discussion of the very necessary planning which is required to make competition as effective and beneficial as possible.” Friedrich A. Hayek, *The Road to Serfdom* (Chicago: The University of Chicago Press, 1972), 36. Hayek was willing to allow for greater oversight when ensuring competition was particularly difficult, declaring that the liberal argument “does not deny, but even emphasizes, that, in order that competition should work beneficially, a carefully thought-out legal framework is required and that neither the existing nor the past legal rules are free from grave defects. Nor does it deny that, where it is impossible to create the conditions necessary to make competition effective, we must resort to other methods of guiding economic activity.” Ibid., 36. Of course, if the market emerged spontaneously, as Hayek argued elsewhere, it was curious that he believed competition would sometimes need to be guaranteed.

⁴ Carl J. Friedrich, “The Political Thought of Neo-Liberalism,” *American Political Science Review* 49, no. 2 (June 1955): 509-10 fn. 2.

⁵ Daniel T. Rodgers, *Age of Fracture* (Cambridge, MA: Belknap Press, 2011), 44, 50-51; Tony Judt, *Postwar: A History of Europe Since 1945* (New York: Penguin, 2005), 537.

⁶ Rodgers, 4-5.

⁷ Ibid., 4-5.

⁸ Ibid., 5-6.

that would likely have been unthinkable to a Democrat like Arthur Schlesinger in the 1950s.⁹

According to Rodgers and Sabin, by the 1970s liberalism had become synonymous with the free and unfettered beliefs and actions of the individual in the minds of many Americans.¹⁰

Against this notion of liberalism as individualism – crafted by neo-liberals like Hayek – other émigrés, including Franz Neumann and Carl Friedrich, as well as American intellectuals like David Riesman argued that American liberalism rested on a dialectical relationship between the need for social cohesion – especially through government coordination – and the need to protect individual liberty when government intruded too extensively into the private lives of its citizens. The attempt to find an equipoise between the need for social cooperation and the individual desire for personal autonomy could be termed *solidaristic liberalism*.

In developing this notion of solidaristic liberalism, Neumann, Friedrich, and Riesman agreed to some extent with their neo-liberal counterparts – the Nazis and the Soviets provided examples of societies where uncritical obsequiousness toward government authority had resulted in vicious and repressive regimes. Yet, at the same time, the solidaristic liberals called attention to the problems of neo-liberalism, particularly its inability to avoid atomization and the

⁹ Paul Sabin, *Public Citizens: The Attack on Big Government and the Remaking of American Liberalism* (New York: W. W. Norton, 2021), xv.

¹⁰ Such thinking was a transnational affair. This is perhaps best encapsulated in the writings of the German constitutional theorist and former judge of the German Federal Constitutional Court (*Bundesverfassungsgericht*) Ernst-Wolfgang Böckenförde, who argues: “[T]he liberal, secularised state is nourished by presuppositions it cannot itself guarantee. That is the great gamble that it has made for liberty’s sake.” Emphasis in original, Ernst-Wolfgang Böckenförde, *State, Society and Liberty: Studies in Political Theory and Constitutional Law*, trans. J. A. Underwood (New York: Berg, 1991), 45; Mirjam Künkler and Tine Stein, “State, Law, and Constitution: Ernst-Wolfgang Böckenförde’s Political and Legal Thought in Context,” in Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings*, vol. 1, ed. Mirjam Künkler and Tine Stein, trans. Thomas Dunlap (Oxford: Oxford University Press, 2016), 1. As Böckenförde states: “On the one hand, it can only survive as a liberal state if the liberty it allows its citizens regulates itself from within on the basis of the moral substance of the individual and the homogeneity of society. On the other hand, it cannot attempt to guarantee those inner regulatory forces by its own efforts – that is to say, without the instruments of legal coercion and authoritative command – without abandoning its liberalness and, at a secularised level, lapsing into that pretension to totality out of which it led the way into the denominational civil wars [of religion].” Böckenförde, 45. Böckenförde asserts that liberal politics rest on forces liberals themselves cannot control – the beliefs of free individuals. He believes this creates a paradox because the state cannot force people to be free nor can they be coerced into valuing liberty – they have to arrive at this belief of their own accord.

difficulties it had in creating feelings of empathy and loyalty between citizens – a particularly important matter in a pluralistic state.

Neo-liberal criticisms of government planning were especially problematic in the United States, because the American people had shed monarchical rule through the Revolution and were therefore regarded as holding ultimate sovereignty over the government.¹¹ This explains why at the time of the American founding many Federalists argued against including a bill of rights in the U.S. Constitution, as historian Gordon Wood explains: “Over and over again they said that the old-fashioned idea of an English bill of rights had lost its meaning in America. A bill of rights, they said, had been relevant in England where the ruler had rights and powers distinct from those of the people [...].”¹² In contrast to England, Wood asserts: “[I]n the United States rulers had no pre-existing independent governmental powers; all rights and powers belonged to the sovereign people who parceled out bits and pieces sparingly and temporarily to their various delegates and agents. Since the federal Constitution implied that every power not expressly delegated to the general government was reserved in the people’s hands, a declaration reserving specific rights belonging to the people, said James Wilson, was ‘superfluous and absurd.’”¹³ If the government was controlled by the people themselves, then a bill of rights was unnecessary because government action simply reflected the will of the people as delegated to the state.¹⁴ In

¹¹ Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (Oxford: Oxford University Press, 2009), 66.

¹² *Ibid.*, 66.

¹³ *Ibid.*, 66; quoting John Bach McMaster and Frederick D. Stone, eds., *Pennsylvania and the Federal Constitution, 1787-1788* (Philadelphia: The Historical Society of Pennsylvania, 1888), 143-44.

¹⁴ There was, of course, also an American tradition of distrust toward the government and skepticism that it would protect the rights of the individual. As historian Gordon Wood notes, describing the arguments made by the Anti-Federalists in favor of a bill of rights to the U.S. Constitution in the late eighteenth century: “The Anti-Federalists [...] continued to presume in traditional terms that governmental powers naturally adhered in rulers with whom the people had to bargain in order to get explicit recognition of their rights.” Wood, 67. Thus, it appears that, at least in practice, the early American government rested on *both* the assumption that individual liberty needed to be protected against some forms of government intrusion *and* on the belief that the government’s actions were the result of societal coordination which substantially limited the need to protect individuals against the state.

twentieth century debates over the permissibility of government planning, this raised the question: what was the problem with government planning if the state's actions were ultimately answerable to the sovereign authority of the people themselves? Neo-liberals like Hayek struggled to answer this query convincingly.¹⁵

The solidaristic liberalism of the émigrés Neumann and Friedrich was indebted to the *Genossenschaft* theory developed extensively by Otto von Gierke – particularly his emphasis on group association. Gierke's arguments differed subtly from the arguments made by neo-liberals, but the distinction is very important.

Neo-liberals like Hayek argued that the impromptu interaction of *individuals* naturally created collective activities, such as economic exchange in a free market.¹⁶ According to political theorist David Runciman, Gierke agreed that sometimes collective activity was rooted in the actions of individuals: “[G]roups are seen to have what Gierke would call a ‘unity-in-plurality’: that is, a unity which is consequent upon some arrangement between a group’s individual members, such that the parts come before the whole.”¹⁷ But for Gierke, this was only half the story – as Runciman explains, Gierke argued that at other times the collective activities

¹⁵ Friedrich critiqued Hayek's arguments along similar lines. In his review of *The Road to Serfdom*, Friedrich quoted Hayek, writing: “Yet ‘the delegation of particular technical tasks to separate bodies, ... is yet only the first step in the process whereby a democracy which embarks on planning progressively relinquishes its powers.’” Carl J. Friedrich, review of *The Road to Serfdom* by Friedrich A. Hayek, *American Political Science Review* 39, no. 3 (June 1945): 577; Hayek, 66-67. Friedrich responded to this by stating: “We had thought that when democracy or anything else acquires power, it does not relinquish them.” Friedrich, review of *The Road*, 577. Friedrich was not convinced by Hayek's assertion that a democratic government's delegation of its authority for a limited time or purpose would inevitably lead to the decline of democracy. Instead, Friedrich argued that in practice, the bodies to which a democratic government delegated a small portion of its power recognized that they were ultimately answerable to that democratic body, and indeed celebrated that accountability: “But, according to Hayek, both can be done at the same time; for ‘the belief is becoming more and more widespread that, if things are to get done, the responsible authorities must be freed from the fetters of democratic procedure.’ How come? To quote from our Plan for Greater Boston: ‘We believe that only genuine democratic sharing of responsibility for metropolitan government can give us the necessary long range support.’ And again: ‘We believe citizen participation to be absolutely essential to any effective progress in the metropolitan community.’” Ibid., 577; Hayek, 67. Thus, Friedrich believed planning was an inherent part of the democratic process, not its antithesis.

¹⁶ As discussed above, Bruce Caldwell notes that Hayek believed economic exchange “arose spontaneously as the unintended consequence of the actions of many individuals.” Caldwell, 197.

¹⁷ David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997), 37.

of *groups* shaped the lives of the individuals within them: “By the other, groups have a ‘plurality-in-unity’: that is, a unity which is prior to, and in some senses determinate of, the individuality of a group’s members; the whole comes before the parts.”¹⁸ Gierke drew this conclusion starting in the 1860s in his historical work; he argued that in German history groups were freely created by individuals – the groups were not forced on these individuals.¹⁹ He asserted, moreover, that the members of these voluntary associations thought of their group as something more than their individual identities, as Anthony Black explains: “Groups really have a personality, a mind and will, and the state and the law ought to recognize this. Gierke meant that individuals really feel themselves to be parts of a group, identify themselves with it, becoming ‘inwardly’ and ‘outwardly’ – subjectively and objectively – part of it; so that there actually is a group consciousness that is not a mere sum of individuals’ consciousnesses.”²⁰ Thus, the group’s collective personality, identity, or consciousness was as important as that of the individuals who made up the group. Gierke’s student, the left liberal jurist Hugo Preuß, later argued that the autocratic power of the state during the German Empire was the result of placing too much weight on individual freedom against the government, and not placing enough emphasis on the role community could play in realizing liberty through collective activities.²¹

¹⁸ Ibid., 37.

¹⁹ As Anthony Black explains: “We can see how Gierke wished to demonstrate the very considerable extent to which, in his opinion, the real group personality of voluntarily formed associations was implicit in the social forms, legal documents and political evolution actually found throughout German history, for example in the medieval towns and gilds, the Hansa and rural communities. Such bodies, he repeatedly argues, behaved *as if* their members believed they could decide and act as collective unities. With this he contrasted the imposed, artificial unity of groups formed despite or against their members’ will, as under feudal lordship and benevolent despotism (*Anstalt, Obrigkeit*).” Emphasis in original, Anthony Black, “Editor’s Introduction,” in Otto von Gierke, *Community in Historical Perspective: A Translation of Selections from Das deutsche Genossenschaftsrecht* (The German Law of Fellowship), ed. Anthony Black, trans. Mary Fischer (Cambridge: Cambridge University Press, 1990), xv.

²⁰ Ibid., xvi.

²¹ Christoph Schoenberger, “Hugo Preuss,” in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper (Berkeley: University of California Press, 2002), 111-113.

Neumann's mentor in his legal studies, Hugo Sinzheimer, was deeply influenced by Gierke's arguments.²² Furthermore, while at the London School of Economics Neumann worked with Harold Laski, whose ideas were shaped by Gierke's work as it was adapted through the theories of the British pluralist tradition, particularly the writings of John Neville Figgis.²³ Likewise, Friedrich's early work responded directly to Gierke's theory of *Genossenschaft*. In addition to Gierke's *Genossenschaft* theory, Friedrich's political theory of association was likely also derived from the criticisms of individualism developed by his teacher Alfred Weber.²⁴

However, Neumann did not uncritically accept Gierke's arguments. Neumann's theory of solidaristic liberalism exhibited a complex, and often ambivalent relationship with Gierke's thinking. Although Neumann wrestled with the same questions Gierke had dealt with – especially the exploration of the role group interests played in society – Neumann was not persuaded that Gierke's theories had convincingly solved these issues.

In his 1942 work *Behemoth*, Neumann described what he called the “pluralist doctrine,” writing: “The theory originated in Otto von Gierke's interpretation of German legal history, fused in a curious combination with reformist syndicalism ([Pierre-Joseph] Proudhon) and the social teaching of neo-Thomism.”²⁵ Neumann argued that the pluralist theory developed by Gierke and other thinkers sought to counterbalance the power of the state: “The pluralist doctrine

²² David Kettler and Thomas Wheatland, *Learning from Franz L. Neumann: Law, Theory and the Brute Facts of Political Life* (London: Anthem Press, 2019), 34.

²³ Herbert Marcuse, “Preface,” in Franz Neumann, *The Democratic and Authoritarian State: Essays in Political and Legal Theory*, ed. Herbert Marcuse (Glencoe, IL: The Free Press, 1957), vii; David Nicholls, *The Pluralist State: The Political Ideas of J. N. Figgis and his Contemporaries*, 2nd ed. (New York: St. Martin's Press, 1994), 47. David Nicholls says the British pluralists thought the “pluralist state” is one “where the role of government is to maintain in existence a structure of rules and practices within which associations will, as far as may be, pursue their own goods; it is not the proper function of governments to impose some supposed substantive common good on the country.” *Ibid.*, xix.

²⁴ For a discussion of Weber's critique of individualism in modern societies and the alternatives he proposed, see Colin Loader, *Alfred Weber and the Crisis of Culture, 1890-1933* (New York: Palgrave MacMillan, 2012), 141.

²⁵ Franz Neumann, *Behemoth: The Structure and Practice of National Socialism 1933-1944*, 2nd ed. (New York: Oxford University Press, 1944), 10.

was a protest against the theory and practice of state sovereignty.”²⁶ Accordingly, Neumann explained: “Pluralism conceives of the state not as a sovereign unit set apart from and above society, but as one social agency among many, with no more authority than the churches, trade unions, political parties, or occupational economic groups.”²⁷ Neumann believed that Gierke’s theory, and pluralism more generally, sought to challenge the sovereign authority of the state by asserting that other bodies held as much claim to political power as the government.

According to Neumann, “[u]nderlying the pluralist principle was the uneasiness of the impotent individual in the face of a too-powerful state machine.”²⁸ To counteract the individual’s feeling of powerlessness, Neumann said many people sought to aggregate themselves together into large groups and associations: “As life becomes more and more complicated and the tasks assumed by the state grow in number, the isolated individual increases his protests against being delivered up to forces he can neither understand nor control. He joins independent organizations. By entrusting decisive administrative tasks to these private bodies, the pluralists hoped to accomplish two things: to bridge the gap between the state and the individual, and give reality to the democratic identity between the ruler and the ruled.”²⁹ Here, Neumann argued that pluralism tried to reconcile the relationship between the individual and the

²⁶ Ibid., 10.

²⁷ Ibid., 10.

²⁸ Ibid., 10.

²⁹ Ibid., 10. Neumann’s observation had antecedents in American history, especially the nineteenth century Grange movement, as described by historian William Cronon: “For farmers, ‘cooperation’ became an almost mystical symbol of modern civilized life, allowing people in large cities and corporate institutions to join forces in the service of their collective interests.” William Cronon, *Nature’s Metropolis: Chicago and the Great West* (New York: W. W. Norton, 1991), 362. Many American farmers concluded that to effectively counter the financial power found in large cities, especially among corporations, they needed to abandon individualism and to organize themselves into equally large and powerful groups, as Cronon explains: “If only farmers, the last economic individualists in an increasingly collective world, could form associations and work to support their common interests as every other sector of society seemed to be doing, they too would participate in the progressive changes that had heretofore been concentrated in cities.” Ibid., 362. This led many farmers to create associations known as the Grange. Ibid., 362.

state by reinvigorating the influence of democracy in government, albeit through the input of large cooperative groups rather than through purely individual participation.³⁰

However, Neumann believed the pluralists were too optimistic about the possibility of challenging state power through cooperative associations: “Once the state is reduced to just another social agency and deprived of its supreme coercive power, only a compact among the dominant independent social bodies within the community will be able to offer concrete satisfaction to the common interests. For such agreements to be made and honored, there must be some fundamental basis of understanding among the social groups involved, in short, the society must be basically harmonious. However, since the fact is that society is antagonistic, the pluralist doctrine will break down sooner or later.”³¹ Neumann averred that in practice pluralism was often unrealistic – only when the different groups that made up society fully agreed on their common aims could state sovereignty be eliminated, because there would no longer be any wayward groups that the state needed to compel to follow society’s foundational principles. But if these groups were divided, then any attempt to form an agreement between them would fail, as Neumann wrote: “Either one social group will arrogate the sovereign power to itself, or, if the various groups paralyze and neutralize one another, the state bureaucracy will become all-powerful – more so than ever before because it will require far stronger coercive devices against strong social groups than it previously needed to control isolated, unorganized individuals.”³² Although the pluralists tried to undermine the power of the state, ironically they might enable the state to gain greater authority, justified by the government’s need to exert more force against larger and more powerful groups that refused to follow the law.

³⁰ As Neumann wrote: “Pluralism is thus the reply of individual liberalism to state absolutism.” Neumann, *Behemoth*, 10.

³¹ *Ibid.*, 10-11.

³² *Ibid.*, 11.

While Neumann disagreed with aspects of Gierke's thought – especially the elimination of sovereignty – Neumann recognized that it was probably untenable to abandon all aspects of Gierke's pluralism. Group cooperation was often a fact of life.³³ But Neumann did not believe all groups were inherently good, and the most important question for him was how to keep destructive groups under control.³⁴ According to Neumann, until society could be organized through an amicable agreement made between all of its competing groups, the state always needed to remain in the background, prepared to enforce the law when a group stepped too far out of line with liberalism. For Neumann, the clearest example of an illiberal attempt by some actors to dominate other groups and individuals was the creation of oligopolies and monopolies in industry, because these massive corporate institutions could drastically undercut the power of small consumers and producers in the market.³⁵ Neumann's solidaristic liberalism argued that a

³³ As Neumann wrote in his 1937 article "The Change in the Function of Law in Modern Society," liberal "general laws also regulate human institutions." Franz Neumann, "The Change in the Function of Law in Modern Society," in Franz Neumann, *The Democratic and Authoritarian State: Essays in Political and Legal Theory*, ed. Herbert Marcuse (Glencoe, IL: Free Press, 1957), 31. Neumann first published this article in 1937 in German as "Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft" in the *Zeitschrift für Sozialforschung*. Ibid., 22. Neumann said these institutions were fundamentally based on groups or associations: "By institutions we mean an enduring, dominational or co-operative association for the continuance of social life. (These relationships can be formed either between different properties or between different people or between persons and properties." Ibid., 31. However, Neumann also noted that his notion of institutions differed that of the pluralists: "This definition is purely descriptive and has nothing to do with pluralistic theories of the state, with Thomism or with the National Socialist philosophies of the law, both of which have attached central significance to 'institution.'" Ibid., 31.

³⁴ This explains why Neumann argued the Nazi regime depended upon four malformed mass groups – monopolized industry, the Nazi Party, the army, and the government bureaucracy. Neumann, *Behemoth*, 470, 475-76.

³⁵ In his article "The Change in the Function of Law in Modern Society," Neumann drew on the work of one of the most prominent liberals of the eighteenth-century: Adam Smith. Neumann, "The Change," 41. In this essay, Neumann described a deep divide between Adam Smith's theory of the market and the historical development of liberal legal theory: "According to the legal theory of liberalism (and there it is in opposition to Adam Smith), freedom of contract implies the right of the entrepreneur to form organizations, cartels, corporations, syndicates, employers' associations, and finally the monopolistic trust which dominates the market." Ibid., 41. Neumann asserted that the idea of freedom of contract had often been used to undermine individualism by allowing contracts to create massive cartels, oligopolies, and monopolies, which could control economic exchange at the expense of small actors, especially producers and consumers.

He argued that this theory of freedom of contract could only have been developed by ignoring the moral arguments Smith made: "Since the legal theory of liberalism discarded the social postulates of Adam Smith's classical liberal theory – namely, his objection to *unrestricted* competition, his demand that the competitors be equal, his fight against monopolies, his declaration for the unification of the capital-providing and the managerial functions in the same individual – i.e., in the property-owner – and, accordingly his fight against the joint stock company – it arrived unanimously at the conclusion that freedom of contract meant nothing but the freedom to

liberal state needed to guarantee at least a minimum level of solidarity among its members – such as safeguarding equality in size among market competitors – by creating and enforcing laws that ensured certain groups did not gain too much political or economic power, which they might use to oppress others.

In contrast to Neumann, Carl Friedrich was often a critic of liberalism, arguing in favor of greater democratic participation instead. But Friedrich's theory of democracy was analogous to solidaristic liberalism, as seen in his attempts to emphasize forms of group association that could avoid the totalitarian tendencies of Nazi and Soviet societal coordination.

In his 1950 book *The New Image of the Common Man*, Friedrich defended democracy against its detractors, especially those who associated it with totalitarianism: "The critics of democracy throughout the last century and a half have always dwelt upon the incompetence of the masses. In a famous book, Ortega y Gasset dwelt on the revolt of the masses, and while he himself was a high-minded intellectual, his thought fed anti-democratic mills."³⁶ Here, Friedrich referenced José Ortega y Gasset's *The Revolt of the Masses*, originally published in 1930 in

conclude freely of any kind of contract if there were no express legal prohibitions, even such contracts as would mean the end of free competition." Emphasis in original, *ibid.*, 41. When describing Smith's opposition to competition without limits, Neumann cited to Smith's work *The Theory of Moral Sentiments*, originally published in 1759. *Ibid.*, 66-67 fn. 11; Adam Smith, *The Theory of Moral Sentiments*, ed. Knud Haakonssen (Cambridge: Cambridge University Press, 2004), 3, 159, 97.

Contemporary philosopher Jack Russell Weinstein asserts that *The Theory of Moral Sentiments* set the foundations for Smith's analysis in *The Wealth of Nations*, first published in 1776. Jack Russell Weinstein, *Adam Smith's Pluralism: Rationality, Education, and the Moral Sentiments* (New Haven, CT: Yale University Press, 2013), 2; Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. Edwin Cannan (Chicago: The University of Chicago Press, 1976); Edwin Cannan, "Editor's Introduction," in Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. Edwin Cannan (Chicago: The University of Chicago Press, 1976), xix. Weinstein contends that "Smith's theory contains positions that, in the latter years of the twentieth century, would have been called communitarian." Weinstein, 266. According to Weinstein, *The Theory of Moral Sentiments* asserts "that humans are by nature social, morality is the product of social processes, moral reasoning and self-identification are impossible in isolation, general moral rules are after-the-fact constructs developed from social interaction enabled by education, the state should foster both secular and religious education, the sympathetic foundation of morality functions best in small communities, and political society is not derived from a social contract." *Ibid.*, 266. Daniel Rodgers also makes a similar argument. Rodgers, 44-45.

³⁶ Carl J. Friedrich, *The New Image of the Common Man* (Boston: Beacon Press, 1950), xviii.

Spanish.³⁷ Friedrich explored Ortega y Gasset's notion of the "mass-man": "Contrasting the 'noble life' and the 'common life' as effort and inertia, he deduced his image of a mass-man as the multitudinous or average man, creature of material ease, when the worker is 'assured' of his existence, when the average man finds no social barriers raised against him, and when, *horribile dictu* [horrible to say], 'the ordinary man learns that all men are equal before the law.'"³⁸

According to Friedrich's reading of Ortega y Gasset, mass-man emerged out of modern society because the vast majority of people no longer faced material strife, which in turn made them emotionally and intellectually indolent.³⁹ Friedrich said similar arguments could be found in Friedrich Nietzsche's *Thus Spoke Zarathustra*.⁴⁰

Although Friedrich disagreed with Ortega y Gasset's critical attitude toward democracy, he believed the theory of mass-man had been confirmed: "[T]he totalitarian societies of our generation give ample support to the negative aspect of this analysis."⁴¹ Moreover, Friedrich did not believe this totalitarian threat was limited to the Nazi and Soviet systems – he also saw it menacing the U.S.: "Totalitarian tendencies in existing democratic societies confirm it. When Ortega cries out against the mass-man's dislike for all discussion, for all consideration of other viewpoints, one is forcefully reminded of the witch-hunts which are sweeping contemporary

³⁷ José Ortega y Gasset, *The Revolt of the Masses* (New York: W. W. Norton, 1993), 4.

³⁸ Emphasis in original, Friedrich, *The New Image*, xix; Ortega y Gasset, 61-62, 56.

³⁹ Friedrich said Ortega y Gasset "concludes his 'psychological chart' of the mass man of today by two fundamental traits: 'the free expansion of his vital desires' and 'his radical ingratitude toward all that has made possible the ease of his existence.' In short, his is 'the psychology of the spoilt child.'" Friedrich, *The New Image*, xix; Ortega y Gasset, 58.

⁴⁰ Friedrich quoted from this work: "Alas! There comes the time of the most despicable man, who can no longer despise himself. A little poison now and then: it makes pleasant dreams. And much poison finally for a pleasant death. One still works, for work is a pastime. But one takes care lest the pastime fatigue. No shepherd and one flock! Each wants the same, each is the same: he who feels differently enters the insane asylum of his own accord." Emphasis in original, *ibid.*, xix. This quotation appears to be a slightly altered and abbreviated version of what Nietzsche said in *Thus Spoke Zarathustra*. Friedrich Nietzsche, *Thus Spoke Zarathustra: A Book for Everybody and Nobody*, trans. Graham Parkes (Oxford: Oxford University Press, 2005), 16.

⁴¹ Friedrich, *The New Image*, xx.

America.”⁴² Friedrich was most likely referring to the anti-Communist crusades that had become a central part of American politics by 1949.⁴³ Indeed, on February 9, 1950 – the same year Friedrich published *The New Image of the Common Man* – Republican Senator Joseph McCarthy assumed his unbridled anti-Communist mantle in a speech delivered in Wheeling, West Virginia.⁴⁴ Despite Friedrich’s clear opposition to Communism, he worried the anti-Communist movement could threaten political deliberation, a core principle of his democratic theory.⁴⁵

Friedrich described why he believed Ortega y Gasset and Nietzsche’s theories revealed key problems for democratic politics, even in the United States.⁴⁶ First, Friedrich elucidated how Nietzsche’s ideas had been interpreted: “Regardless of Nietzsche’s more subtle and qualified concept, the ‘superman’ has come to mean the man who can do what other men cannot. He is the type who by strength, whether of body or of mind, can accomplish ‘wonders,’ and who is consequently ‘beyond good and evil.’”⁴⁷ Friedrich then explained how someone who was popularly viewed as a superman gained significant power by gathering myrmidons in a population made up of mass-men: “Mass-man admires him, because the feats of superman are those which he himself would like to achieve. It thus happens that the societies in which the mass-man has become the supporter of totalitarian ‘managers’ are at the same time those in

⁴² Ibid., xx.

⁴³ Richard M. Fried, *Nightmare in Red: The McCarthy Era in Perspective* (Oxford: Oxford University Press, 1990), 87-88.

⁴⁴ Ibid., 120-21. As historian Richard Fried notes, McCarthy had used anti-Communist rhetoric in the years before his Wheeling speech, going back at least to 1946. Ibid., 121.

⁴⁵ Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America*, rev. ed. (Boston: Ginn and Company, 1950), 128-29. Here, Friedrich described the deliberation process he believed was necessary for the creation of a constitution: “Confusing *opposition* with *rebellion* prevents the mature deliberation of those who participate in the decision.” Emphasis in original, *ibid.*, 129.

⁴⁶ Friedrich asserted: “Mass-man and superman belong together as the joint products of despair over the imperfections of democratic society.” Friedrich, *The New Image*, xxi.

⁴⁷ Ibid., xxi. This appears to be a reference to Nietzsche’s work *Beyond Good and Evil*, see Friedrich Nietzsche, *Beyond Good and Evil: Prelude to a Philosophy of the Future*, ed. Marion Faber, trans. Marion Faber (Oxford: Oxford University Press, 1998).

which the idea of a self-appointed elite or superman (*Führer, duce*) has been widely accepted.”⁴⁸

Thus, Friedrich argued the psychologically enervated mass-man sought to escape his own apathy by embracing the charismatic vitality of a leader – such as the *Führer* in Nazi Germany.⁴⁹

Friedrich sought to fight against the emergence this type of regime in democratic societies by exploring how mass-man differed from democratic man, or what he called the “common man.”⁵⁰

According to Friedrich, democracies did not need to embrace individualism to prevent the advent of mass-man – instead these societies needed to recognize the communal nature of democratic participation: “The image of the common man [...] seeks to elicit a realization of what men have in common and what enables them to form communities.”⁵¹ This reflected the influence Gierke’s theory of *Genossenschaft* held over Friedrich’s thinking. Despite the importance of state coordination in totalitarian nations, Friedrich contended that these societies lacked true communities: “The communal side of man requires for its unfolding the setting of a free community. Fortunately, some human beings have such strong inclination toward the development of these traits that they will maintain small groups of resistance even under the most formidable terror. There are, even after a generation of totalitarianism, enclaves of genuine community left.”⁵² Friedrich believed some people had such a deep propensity toward group association that they would build and maintain voluntary communities even under the most oppressive regimes. In turn, he thought these communities would serve as the seeds from which democracy could bloom once totalitarian governments were overthrown, such as in the areas

⁴⁸ Friedrich, *The New Image*, xxi.

⁴⁹ This argument finds support in the work of historian Claudia Koonz, who observes that Hitler sought to craft an image of himself as embodying the twisted “morality” of Nazism – which indeed found popular appeal among many Germans. Claudia Koonz, *The Nazi Conscience* (Cambridge, MA: The Belknap Press, 2003), 17-18.

⁵⁰ Friedrich, *The New Image*, xxi. As Friedrich stated: “I am convinced that it is of decisive importance to rescue the citizen of the free world from being identified with this mass-man, by carefully analyzing the limitations within which he operates.” Ibid., xxi.

⁵¹ Ibid., xxi-xxii.

⁵² Ibid., xxii.

occupied by the liberal, democratic Allied nations after World War II: “The policy of democratization would have little chance of success under the quasi-dictatorship of military occupation if it could not count upon these surviving common men to grasp the torch and carry it.”⁵³ In contrast to neo-liberals, who argued that freedom was best protected through individualism, Friedrich asserted that liberty and human flourishing were best cultivated through community. Even if his philosophy was not strictly liberal, Friedrich’s democratic thinking – with its emphasis on communal association – was strongly aligned with solidaristic liberalism.

Among American intellectuals influenced by these German émigrés, solidaristic liberalism’s emphasis on finding an equilibrium between social organization and individual freedom was perhaps best described by David Riesman in his 1951 essay “Individualism Reconsidered,” in which he declared that “such terms as ‘society’ and ‘individual’ tend to pose a false as well as a shifting dichotomy [...]”⁵⁴ Riesman argued that although these two ideals were necessary, too great an emphasis on one or the other could be detrimental to human flourishing: “We live in a social climate in which, in many parts of the world and of the United States, the older brands of ruthless individualism are still a social danger, while in other parts of the world and of the United States, the newer varieties of what we may call ‘groupism’ become increasingly menacing.”⁵⁵ He recognized this was a delicate balance and that people could, at different times, tip too far toward one antipode or the other.

Riesman called attention to late nineteenth and early twentieth century debates in the natural sciences over whether human life, and biological life in general, was based on individualism or social organization. Riesman recalled his days as a “biochemical sciences”

⁵³ Ibid., xxii.

⁵⁴ David Riesman, “Individualism Reconsidered,” in David Riesman, *Individualism Reconsidered and Other Essays* (Glencoe, IL: Free Press, 1954), 26, 508.

⁵⁵ Ibid., 26.

major at Harvard College by discussing the dialectical relationship between individuality and social organization in the nineteenth century work of Charles Darwin: “In the perspective of hindsight, we can see how Darwin’s *Origin of Species* came to be so completely misinterpreted when it first appeared, as a brief for struggle to death *among individuals*. We can see, as the pendulum has swung towards groupism, that Darwin’s book might just as well be interpreted as demonstrating the need for social solidarity or symbiosis within and among given species in order to achieve survival; thus (as [Peter] Kropotkin pointed out) the book has much to say about cooperation as a technique of competition.”⁵⁶

In the mid-nineteenth century, Peter Kropotkin had worked for the Russian Ministry of Internal Affairs in Siberia, where he trekked from 1862 to 1867, and became a respected member of the Imperial Russian Geographic Society, publishing numerous articles on topography.⁵⁷ Despite his reputation as a naturalist, he was imprisoned in 1872, and absconded to the United Kingdom in 1876.⁵⁸ In 1893, Kropotkin joined the British Association for the Advancement of Science and in 1896 was tendered a position at Cambridge University in geology, though he turned it down.⁵⁹ Kropotkin was introduced to Darwin’s thought in 1863, and Kropotkin’s observations of the fauna of eastern Siberia led him to argue in his 1902 work *Mutual Aid: A Factor of Evolution* that there was a relationship between evolution and cooperation, particularly in places like Siberia where the environment was extremely harsh.⁶⁰ He applied this

⁵⁶ David Riesman, “Becoming an Academic Man,” in *Authors and of Their Own Lives: Intellectual Autobiographies by Twenty American Sociologists*, ed. Bennett M. Berger (Berkeley: University of California Press, 1990), 27; emphasis in original, Riesman, “Individualism Reconsidered,” 28; Charles Darwin, *On the Origin of Species*, ed. Gillian Beer (Oxford: Oxford University Press, 2008).

⁵⁷ Daniel P. Todes, *Darwin Without Malthus: The Struggle for Existence in Russian Evolutionary Thought* (New York: Oxford University Press, 1989), 124-25, 126.

⁵⁸ *Ibid.*, 125.

⁵⁹ *Ibid.*, 126.

⁶⁰ *Ibid.*, 127, 129; Paul Avrich, *The Russian Anarchists* (Princeton: Princeton University Press, 1967), 30. For a later edition of Kropotkin’s work, see P. Kropotkin, *Mutual Aid: A Factor of Evolution*, rev. ed. (New York: McClure Phillips, 1904). Kropotkin argued that Darwin’s interpreters relied too heavily on Thomas Malthus’

evolutionary theory of cooperation to human society, arguing that this social collaboration could also be seen in anarchist communities organized around group solidarity.⁶¹

Riesman did not wholeheartedly embrace the collectivism of Kropotkin. Instead, Riesman was critical of the “1900-1950 shift toward emphasis on the group” because he believed that group needs during this time were too ill-defined: “Americans have devoted less scientific attention to the measurement of group needs and potential wants through market research techniques (save in the most obvious commercial forms) than to what we might term ‘mood engineering’ in work, play, and politics. Mood engineering leads not so much to specific ‘altruistic’ behavior as to a general readiness to participate in the given group activities of the moment, even if their only purpose is to help pass the evening.”⁶² Riesman argued that when group desires were not fully understood, this prevented individuals from forming a real sense of solidarity and personal satisfaction from group participation and instead led people to view group association merely as a transitory distraction to avoid boredom.

Despite this failure, Riesman did not think the group cooperation he saw in his own time should be completely undone by abandoning collaboration and instead turning toward unencumbered individual action: “We must skeptically question the demands for greater social participation and belongingness among the group-minded while, on another front, opposing the claims of those who for outworn reasons cling to individualism as a (largely economic) shibboleth.”⁶³ For Riesman, uncritically glorifying individualism – especially the economic individualism celebrated by neo-liberals – was as misguided as Communist attempts to impose

theories which focused on the individual’s fight for survival, ultimately leading these interpreters to neglect the role that cooperation played in the evolution of different species. Todes, 137. In the 1960s, W. D. Hamilton developed an evolutionary explanation for altruism – though Kropotkin’s work probably did not directly influence his thinking. Lee Alan Dugatkin, “Inclusive Fitness Theory from Darwin to Hamilton,” *Genetics* 176, no. 3 (July 2007): 1377-78.

⁶¹Avrich, 30-31.

⁶² Riesman, “Individualism Reconsidered,” 31.

⁶³ Ibid., 32.

social harmony through forced collectivization. Indeed, later on in his essay he recognized the limitations that his own historical circumstances placed on his arguments against what he called groupism: “[I]t should be obvious to the reader that I speak in a social context in which anarchy and ‘unbridled’ individuality are much less likely prospects (except on the international scene) than the all-too-evident danger of the ‘garrison state.’”⁶⁴ Writing in 1951, Riesman could not have predicted the extent to which neo-liberalism’s emphasis on individualism had become an important part of mainstream American culture by the 1970s.⁶⁵

To illustrate how finding a balance between individual desires and social cooperation could be put into practice, Riesman applied his thinking to the concept of work. According to Riesman, work in his time had become too focused on group involvement, which adversely affected the attitude people had toward group participation in their private lives: “If men were not compelled to be sociable at work, they could enjoy sociability in their leisure much more than they often do now.”⁶⁶ As he continued: “In fact, while men in the nineteenth century may have underestimated their satisfactions from solitary occupations, hobbies and other pursuits, we tend today to reverse these extremes and to forget that men can enjoy, let us say, the physical rhythms of work or the private fantasies of leisure even when they are for long periods deprived of social comradeship at work and play.”⁶⁷ Riesman asserted that unlike in the nineteenth century – when he thought individualism was more predominant and the need for group belonging was more pressing – in the mid-twentieth century society, groups and organizations predominated, which called for a greater emphasis on the desires of individuals.

⁶⁴ Ibid., 37.

⁶⁵ Rodgers, 5.

⁶⁶ Riesman, “Individualism Reconsidered,” 35.

⁶⁷ Ibid., 35.

In doing so, he hoped to swing the pendulum back toward the middle: “What is necessary is some sort of balance which will find room for quite idiosyncratic individual desires to be, variously, alone and with others.”⁶⁸ When such an equilibrium was found, this would give people more variety in their work and in their leisure time to discover what pursuits – both as an individual and as a member of different groups – they found most fulfilling, granting them the opportunity to live their lives with more psychological edification than had been possible for previous generations.⁶⁹

Riesman argued that finding such a balance could be a messy process and might evade clear solutions – made more difficult by intellectuals who wanted to impose an overarching theory of human society onto the complexities of human desire: “[M]ost of our social critics cannot imagine a society being held together without putting organized work in the forefront of its goals and agendas.”⁷⁰ He said this rigid thinking was also applied to politics, which severely limited the prospects of creating a government that could be more responsive to citizens’ desires: “When we turn to formal politics, we see that the same fundamentally reactionary ideology leads to a demand for national unity and a distrust of the chaos of democratic politics and of the war among the so-called ‘special interests.’”⁷¹ Riesman wanted Americans to embrace the tumultuous nature of democracy, which he believed would engender a more creative approach to solving political problems. What solidaristic liberalism needed was a framework that allowed

⁶⁸ Ibid., 35.

⁶⁹ As Riesman stated: “The flexibility of modern industrial organization, no longer bound geographically to rail lines and power sites, the steady decrease of hours of compulsory work which our abundance allows, and our increasing sensitivity to the psychic as well as physical hazards of the different occupations – these developments permit us to move toward the reorganization of work so that it can offer a great variety of physical and social challenges and simulations.” Ibid., 35.

⁷⁰ Ibid., 35.

⁷¹ Ibid., 36.

people to come together – both as individuals and as members of various groups – to channel the boisterous hodgepodge of democratic debate into concrete political decisions.

For this reason, Riesman criticized attempts to craft a theory of politics that rested on an immutable catechism of foundational values: “The notion that there must be ‘agreement on fundamentals’ in order that democratic politics may go on is an illusion. Carl J. Friedrich, in *The New Image of the Common Man*, provides a discriminatory critique.”⁷² Riesman disapproved of finding an “agreement on fundamentals” because he thought this would force people to divorce themselves from their social identities: “What is meant is actually a surrender of special interest claims, whether these grow out of ethnic loyalties, church affiliation, regional, occupational, or other ties.”⁷³ In *The New Image of the Common Man*, Friedrich described the pluralistic nature of Switzerland, arguing that Switzerland’s internal divisions – between German, French, and Italian cultures, and between the differing religious beliefs of its populace – strengthened the democratic order there: “[T]he making of modern Switzerland reinforces the proposition that constitutional democracy makes it possible for people to co-operate in spite of such disunity. Constitutional democracy has flourished in Switzerland as nowhere else in Europe, suggesting that it is peculiarly adapted to countries which are divided upon fundamentals.”⁷⁴

Drawing on Friedrich’s work, Riesman contended that attempts to downplay or eliminate the diverse array of human connections would fail because such thinking could never fully capture how American politics operated in practice: “Yet the fact is that our democracy, like that of Switzerland, has survived without securing agreements. In our country, this has been attained

⁷² Ibid., 36.

⁷³ Ibid., 36.

⁷⁴ Friedrich, *The New Image*, 164. For a more contemporary iteration of Friedrich’s argument, see Cass R. Sunstein, “Incompletely Theorized Agreements,” *Harvard Law Review* 108, no. 7 (May 1995): 1733-72. Interestingly, Friedrich and Neumann both claimed that many liberal, democratic, or constitutional societies were divided – for the two of them this raised an important question as to how government could form some sort of unified nation out of society’s divisions.

by a party system that serves as broker among the special interest groups: the parties do not ask for agreement on fundamentals – certainly, not on ideological fundamentals – but for much more mundane and workable concessions.”⁷⁵ Riesman argued that *institutions*, especially political parties, channeled the disparate beliefs of various individuals and groups – such as religious sects, unions and business organizations, social clubs, and various other formal and informal associations – into concrete political decisions. These institutions did not require everyone to fully agree on a set of beliefs or a clear ideology; instead, the institutions operated as mediators for deliberation, which helped overcome the inertia that might exist if individuals and groups focused solely on intractable debates about fundamentals.

This institutional framework was consonant with solidaristic liberalism. It allowed for people in a pluralistic society to engage in politics both as individuals and as group members. It also asserted that liberalism could never fully rest on a set of foundational values – at certain times individual interests would need to predominate while at other times group interests might need to prevail.⁷⁶ Although it lacked theoretical perfection, it created a framework for governance that more accurately reflect the kaleidoscopic nature of human experience than unrestrained individualism or coercive group pressure.

⁷⁵ Riesman, “Individualism Reconsidered,” 36.

⁷⁶ In 1984, Riesman reiterated this institutionalist thinking when he explained his support for Jimmy Carter in the 1976 U.S. Presidential election: “I had been one of [Carter’s] early supporters for much the same reason that I had supported former Governor Terry Sanford of North Carolina for President in 1972. I was skeptical about Senators and Congressmen as candidates, seeing them as much like professors, capable of running a staff of ten, often vain and anarchic; I wanted a governor who had headed the administration of a diverse and populous state, or a big-city mayor, or a cosmopolitan corporate or university leader who combined managerial and political skill with civic courage.” David Riesman, “A Personal Memoir: My Political Journey,” in *Conflict and Consensus: A Festschrift in Honor of Lewis A. Coser*, ed. Walter W. Powell and Richard Robbins (New York: Free Press, 1984), 359. Like the political parties he described in “Individualism Reconsidered,” here Riesman said governors and mayors of large, metropolitan areas had a better understanding of how to guide the diverse forces of democratic politics – including individual voters, interest groups, and bureaucracies – into political action, compared to more individualistic legislators.

The themes of solidaristic liberalism recurred in the decades following the 1950s – particularly in discussions about political philosophy set off by the 1971 publication of John Rawls’ influential work *A Theory of Justice*.⁷⁷ Rawls emphasized that his theory focused on “social justice” and he crafted an analysis of the idea of justice that grappled with the disparities he believed were endemic to human existence: “It is these inequalities, presumably inevitable in the basic structure of any society, to which the principles of social justice must in first instance apply.”⁷⁸ Daniel Rodgers argues that Rawls’ theory was based on individualism and used many of the market-oriented arguments that were increasingly endemic by the 1970s.⁷⁹ Nevertheless, Rodgers contends that Rawls’ analysis was fundamentally founded upon the ideal of social solidarity: “However thin Rawls’s collective notion of the ‘we’ might have been, the social imagination on which it was premised was broader and more inclusive than those that were increasingly to replace it.”⁸⁰ In this way, Rawls’ philosophy may have reflected elements from the tradition of solidaristic liberalism.

According to Rodgers, Rawls’ thinking was increasingly untenable in the United States because of an unstoppable tide of societal fragmentation – but his account of the movement toward social splintering is debatable in the field of political philosophy.⁸¹ Individualistic arguments did indeed play a role in some reactions to *A Theory of Justice*. Robert Nozick responded to Rawls with his 1974 book *Anarchy, State, and Utopia*, developing a libertarian

⁷⁷ John Rawls, *A Theory of Justice: Original Edition* (Cambridge, MA: Belknap Press, 1971). For an insightful analysis of Rawls’ influence on mid-twentieth century philosophy, see Katrina Forrester, *In the Shadow of Justice: Postwar Liberalism and the Remaking of Political Philosophy* (Princeton: Princeton University Press, 2019).

⁷⁸ Rawls, 7. Rawls described the nature of the inequality he perceived: “The intuitive notion here is that this structure contains various social positions and that men born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances. In this way the institutions of society favor certain starting places over others. These are especially deep inequalities.” *Ibid.*, 7.

⁷⁹ Rodgers, 184-85.

⁸⁰ *Ibid.*, 185.

⁸¹ *Ibid.*, 185.

political theory that focused primarily on the importance of individual freedom – in parallel to contemporaneous neo-liberal thinking.⁸² But Nozick’s theory did not dominate the philosophical discourse of the time. As Rodgers himself notes, by the 1980s “communitarian” and “civic republican” political theory – which argued that liberalism needed to better account for the role groups played in society and politics – had become the most dynamic field in political philosophy, not libertarian theory.⁸³

While Rodgers asserts that communitarianism, like libertarianism, was responsible for the social disintegration in the late twentieth century, this was not necessarily the case.⁸⁴ Michael Walzer – whose 1983 book *Spheres of Justice* Rodgers identifies as the leading work of communitarian political philosophy in the 1980s – was seen as a liberal by his contemporaries in the 1990s.⁸⁵ However, Walzer wanted to bring about a different form of liberalism compared to Rawls – a type of liberalism that did not begin its political philosophy with the individual as the sole source of identity, but a liberalism that accepted the central role cultural groups and institutions played in how people conceived of human flourishing.⁸⁶ Viewing Walzer as part of a

⁸² Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); Rodgers, 187-88.

⁸³ *Ibid.*, 191-92.

⁸⁴ As Rodgers argues: “[I]f, by the end of the era, the notion of a social bargain across the great society of the nation that Rawls had taken for granted seems illusory and archaic, the communitarians – like the libertarians, to whom they were so profoundly opposed – had no small part in it.” *Ibid.*, 191.

⁸⁵ *Ibid.*, 192-93; Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983); Amy Gutmann, “Introduction,” in Charles Taylor, *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton: Princeton University Press, 1994), 10-11. Walzer contributed to this volume, so it is likely that he agreed with Amy Gutmann’s characterization of him as a liberal. For Walzer’s essay, see Michael Walzer, “Comment,” in Charles Taylor, *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton: Princeton University Press, 1994), 99-103.

⁸⁶ Amy Gutmann said there were two forms of liberalism discussed in the book *Multiculturalism* – as she explained the first notion of liberalism: “One perspective requires political neutrality among the diverse and often conflicting conceptions of the good life held by citizens of a pluralistic society.” Gutmann, 10. She then defined the other notion: “The second liberal democratic perspective, also universalistic, does not insist on neutrality for either the consequences or the justification of public policies, but rather permits public institutions to further particular cultural values on three conditions: (1) the basic rights of all citizens – including freedom of speech, thought, religion, and association – must be protected, (2) no one is manipulated (and of course not coerced) into accepting the cultural values that are represented by cultural institutions, and (3) the public officials and institutions that make cultural choices are democratically accountable, not only in principle but also in practice.” *Ibid.*, 10-11. As Walzer explained in his own essay, he would prefer the second form of liberalism as the overarching scaffolding for society,

twentieth century solidaristic liberal tradition more effectively explains continuities in liberalism – particularly among liberals concerned with balancing individual freedom and group cooperation – than the argument that communitarian thinking inherently led to deconstruction, atomism, and fracture.⁸⁷

Indeed, this solidaristic liberal conversation in the United States in the closing decades of the twentieth century was part of a global effort to find a middle way between the two extremes of neo-liberalism's uninhibited individualism and Communism's coerced government coordination – as seen prominently in the works of Eastern bloc dissidents, such as Václav Havel.⁸⁸ That the theories offered by solidaristic liberal thinkers were often imperfect does not

and then make use of the first form of liberalism from within that framework. Walzer, "Comment," 102-3. Jürgen Habermas said that philosopher Charles Taylor would also identify with the second notion of liberalism, discussed above, though Habermas noted that Taylor might push even further than Walzer because "Taylor's reading attacks the principles [of liberalism] themselves and calls into question the individualistic core of the modern conception of freedom." Jürgen Habermas, "Struggles for Recognition in the Democratic Constitutional State," in Charles Taylor, *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann, trans. Shierry Weber Nicholsen (Princeton: Princeton University Press, 1994), 109. For Taylor's essay, see Charles Taylor, "The Politics of Recognition," in Charles Taylor, *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton: Princeton University Press, 1994), 25-73. For Taylor's first major contribution to the communitarian debate, see Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: Harvard University Press, 1989).

⁸⁷ Of course, communitarianism was not a clearly delineated school of thought, but was made up of a diverse group of philosophers, some of whom were much more critical of liberalism in their works, especially Alasdair MacIntyre and Michael Sandel. MacIntyre's communitarianism was more than a critique of liberalism – he contended that liberalism's limitations are part of a broader set of problems present in what he calls "modernity," a mode of thinking which downplays the importance of virtues. Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed. (Notre Dame, IN: University of Notre Dame Press, 2007), 119. MacIntyre originally published this work in 1981. *Ibid.*, iv. In 1982, Michael Sandel published *Liberalism and the Limits of Justice*, arguing explicitly that the liberal project was untenable – as Sandel wrote in the second edition of this work: "For a society inspired by the liberal promise, the problem is not simply that justice remains always to be achieved, but that the vision is flawed, the aspiration incomplete." Michael J. Sandel, *Liberalism and the Limits of Justice*, 2nd ed. (Cambridge: Cambridge University Press, 1998), iv, 1. Interestingly, Rodgers does not focus on MacIntyre's vociferous critique of liberalism and only briefly discusses Sandel's work in a footnote. Rodgers, 316 fn. 22. A more comprehensive analysis of solidaristic liberalism in the 1980s could further delve into the cleavage in communitarian thinking between those who identified with liberalism and those who wholly rejected it.

⁸⁸ It should be noted that Havel's thought was probably not a form of solidaristic liberalism. In an excellent analysis of Havel's thinking, political theorist Delia Popescu describes Havel's emphasis on individualism rather than group identity. Delia Popescu, *Political Action in Václav Havel's Thought: The Responsibility of Resistance* (Lanham, MD: Lexington Books, 2012), 125. However, she also notes that Havel did not see his individualism as synonymous with Western bloc individualism, which he believed was improperly focused on consumerism. *Ibid.*, 140-41. Havel sought to develop a post-totalitarian concept of the person that avoided the oppression of the Eastern bloc as well as the excesses of the Western bloc. *Ibid.*, 142-44. For a discussion of the dual critique of Eastern bloc Communism and Western bloc liberalism and capitalism among Czech dissidents, see Jonathan Bolton, *Worlds of*

mean that their ideas are not worth interrogating. Instead, it indicates the depths they plunged, which go straight to the heart of what it means to be human – particularly the need to understand oneself as a singular being and at the same time the desire to find belonging among others. In 1942, in the midst of World War II, David Riesman identified his time as a “period of transition.”⁸⁹ Perhaps we, too, are in an age of transition. It is our formidable yet resplendent task to discover for ourselves and our communities the answers that eluded those previous generations.

Dissent: Charter 77, The Plastic People of the Universe, and Czech Culture under Communism (Cambridge, MA: Harvard University Press, 2012), 28-32.

⁸⁹ David Riesman, “Civil Liberties in a Period of Transition,” in *Public Policy: A Yearbook of the Graduate School of Public Administration, Harvard University*, ed. C. J. Friedrich, Edward S. Mason, and Pendleton Herring (Cambridge, MA: Graduate School of Public Administration, 1942), 96.

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