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Leo Strauss and Edith Stein in the Grip of the Theopolitical

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Abstract: What connection with institutional religion ought modern political states promote? As they developed their political thinking in the early years of the Weimar Republic, Leo Strauss and Edith Stein came up with opposite answers to this question. While Strauss discerned in Carl Schmitt's maximalist concept of the theopolitical a possible remedy against the flaws of liberal democracy, Stein ascribed democracy's chance of survival to a renewed distinction between the political and religious spheres. Here, Strauss can be viewed as an heir to the ancient and medieval Jewish understanding of the ideal state, whereas Stein appears rooted in the critical legacy of the German Haskalah. At a fundamental level, the contrast between the two thinkers has to do with a difference in their respective philosophical epistemé. While Strauss, walking in the footsteps of Heidegger, thinks in terms of *Geschichlichkeit* ("historiality"), Stein applies a phenomenological method based on the intuition of essences and very much indebted to Adolph Reinach's philosophy of law. That Stein's essentialism succeeds where the 'historial' thinking of the young Strauss fails; that is, in diagnosing the nature of the political threat that would soon engulf European Jewry, is the main conclusion of the present paper.

Keywords: Leo Strauss; Edith Stein; Weimar Republic; Hans Kelsen; Carl Schmitt; Holocaust

"The German Federation is a republic. Supreme power emanates from the people (*Die Staatsgewalt geht vom Volke aus*)." One should probably go back to the first article of the Weimar Constitution (1919) to grasp the central object of Carl Schmitt's short albeit famous 1922 book, *Political Theology, Four Chapters of the Concept of Sovereignty*. What does it mean that the "supreme power" emanates from the people"? Contemporary minds would wrongly assume this declaration designates a democratic rule of law and a parliamentary political system. After all, a Weimar citizen coming across the first articles of the first Constitution of Bolshevik Russia (1917) would read equivalent statements: "The Union of Soviet Socialist Republics is a

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socialist state of the whole people ... All power in the USSR belongs to the people ...". As for the 1919 Constitution, drafted mainly by Hugo Preuss, it was a mix of parliamentarism and presidentialism. Hence the question: Who, being the "emanation" of the people, was the ultimate holder of the Weimar state's "supreme power," the president or the whole formed of the Reichstag's deputies? This was certainly not a superfluous question in a country where parliamentarism was continuously accused of being a source of national instability and divisiveness. On the other hand, claiming that the president was the ultimate holder of the state's supreme power raised a series of questions. Indeed, if the president's election was the "emanation" of the people, the actual exercise of his political power could no longer be so, unlike that of a parliament supposed to represent the position and interests of its constituency. There was an unbridgeable gap between the president's decisions and the citizens to whom they applied. Moreover, the very idea of supreme power implied that its holder was not accountable to anyone as to its exercise. Now, if the ultimate principle that would legitimate the decisions made by the head of the state could no longer be directly assigned to the people's will, what could it be?

Schmitt's concept of the theopolitical purports to provide an answer to this question. The ultimate justification for a political decision taken by the head of the state should be sought neither in the institutional expression of the people's will nor within the legal system to which the state was bound, as the traditional positivist school used to claim (the "statutory law" of Paul Laband's *Rechtsstaat*). For Schmitt, these decisions have a Godlike character; they ultimately do not need to justify themselves. Naturally, they are taken in the interest of the nation; but whether a specific decision serves this interest better than a different one should not be subject to discussion. Drawing on *Dictatorship*, his 1921 book, Schmitt argued that the "state of exception" that sees the power of the parliament suspended revealed the actual holder of the supreme power in the person of the head of the state. The "state of exception" was a transitory return to the foundational situation of the modern democratic state, a stage when political decisions *preceded the constitution of the state* instead of taking place *within a constituted state*. "Commissary dictatorship," a temporary suspension of the parliamentary system that does not forsake the established Constitution (Weimar's controversial art. 48) points toward the "sovereign dictatorship" that is a modern resurgence of Rome's imperial power prevailing over the Senate. The birth of France's republic in 1793, under Robespierre's regime of terror, saw the "pouvoir constituant" (constituting power) of the people (the "Convention") entrusted to a small group of people out of which emerged the authority of one man, in order to form a new political state as a "pouvoir constitué" (constituted power). For better or worse, the revolutionary government of 1793 abolished the particular theocracy of the Ancien Régime, but, by the same token, it brought to light the necessary theological component of any political regime,

including democracy. Political authority implies the existence of an ultimately Godlike decisional instance (Robespierre at the head of the “comité de salut public”/ Committee of Public Safety), an instance capable of expressing the nation’s unity by unilaterally designating its enemy.¹

One year before the publication of Schmitt’s *Political Theology*, Hans Kelsen, the luminary of modern legal positivism, had drawn his readers’ attention to the “extraordinary relatedness” between the “logical structure of the concept of God and the concept of the state.” Contrary to Schmitt, though, Kelsen did not view this analogy favorably. Indeed, according to him, the theopolitical idea defined the very core of the metaphysical illusions that his “theory of pure law” aimed to dismiss once and for all. An adequate understanding of the nature of the state would ban the confusion between the very specific “Sollen” of laws – legal and not moral validity – on the one hand, and factual judgments of existence pertaining to the realm of natural sciences on the other. The notion that nature should play the role of a normative source in relation to legal enactments – a basic assumption of theoreticians of natural law, from Aquinas to Pufendorf, Locke, and Rousseau – implies the existence of a transcendent Creator of nature.² Besides its metaphysical character, this kind of thinking is incompatible with democracy, as it enshrines laws and decisions instead of making them pliable to the changing and evolving minds of a majority of citizens. The truth was that all laws and decisions had to be rigorously deductible, *more juridico* and through a series of intermediate institutional layers, from an “originary” or “basic” norm (the Constitution). Nothing more was required for their validity, and the state, according to its reality, needed to be identified with the ever-evolving sum of all these legal enactments.

Until Schmitt’s somewhat belated rallying to the Nazi party (1933), the discussion between Schmittians and Kelsenians revolved around the nature and source of the ultimate authority in a democracy.³ To the exception of Marxist intellectuals, this

1 The following lines from Schmitt’s *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (1923) are particularly illuminating: “The belief in parliamentarism, in government by discussion, belongs to the intellectual world of liberalism. It does not belong to democracy ... Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires, therefore, first homogeneity and second – if the need arises – *elimination or eradication of heterogeneity*”, translated as *The Crisis of Parliamentary Democracy* (Cambridge, Massachusetts, and London, England: The MIT Press, 1985), 8–9. Added emphasis.

2 Kelsen writes: “To say that God in nature as a manifestation of his will commands men to act in a certain way, is a metaphysical assumption, which cannot be accepted by science in general and by legal science in particular, because scientific cognition cannot have as its object a fact which is assumed to exist beyond all possible experience,” *The Pure Theory of Law* (Berkeley: University of California Press, 1967), 221.

3 The opening sentence of *Political Theology* is famous: “Sovereign is the one who decides on the state of exception” (1996, 13). Until the rise of Hitler to the position of *Reichkanzler*, Schmitt argued

debate dominated political reflection on the value and legitimacy of the current regime in pre-1933 Weimar Germany.⁴ Kelsen was associated with the very existence of the *Republik*,⁵ just like that of Schmitt to its critics, the most vocal among whom were undoubtedly Rudolph Smend and Hans Gerber.

Examining how Jewish philosophers engaged during these years with the issue of the theopolitical, defined as the ultimate and possibly transcendent source of sovereignty in a democracy, is of particular interest. Indeed, this issue was directly connected to the political condition of Jewish existence at the time. Was not the Weimar regime a *Judenrepublik* in the eyes of large sectors of the German population? Was a Jew – Hugo Preuss – not the one responsible for drafting its Constitution (and a Jewish convert to Catholicism – Kelsen – one of its main inspirators)? Were the

that the use of emergency powers was a means to keep the anti-republican political forces (Communists and National Socialists) at bay, see his 1932 *Legalität und Legitimität*. After his adhesion to the Nazi party, however, Schmitt became the “crown jurist” (Waldemar Gurian) of the regime, a position he held for several years until more zealous advocates of Nazi legitimacy laid their hands on this coveted position.

4 A renowned jurist like Karl Larenz could write in 1931: “The ultimate significance of law and the state, and thus also the ultimate justification of philosophy of law and state, cannot be determined by philosophy itself, but by metaphysics or religion. Idealism and Christianity are the most profound answers the *German Geist* has found for the ultimate questions,” *Rechts- und Staatsphilosophie der Gegenwart* (Berlin: Junker und Dünnhaupt), 107. Quoted in *The Weimar Moment: Liberalism, Political Theology, and Law*, Leonard V. Kaplan, and Rudy Koshar eds., (Lanham, MD: Lexington Books, 2012), 11.

5 I find the following lines from Chris Thornhill book on German political philosophy particularly enlightening: “Kelsen’s main constitutional intervention was the writing of the drafts for the Austrian constitution of 1920, which contained many features of a fully positivist document. Opposition to his work in Germany, however, was also bound up with controversies about the Weimar Constitution, and critical debate with Kelsen acted, throughout the 1920s, as a framework for criticizing the positivist or allegedly formalist aspects of the Weimar Constitution and for suggesting amendments to the legal order of the Weimar state. This was particularly the case in the periods of most intense political instability, notably 1919–23 and 1930–33.” Chris Thornhill, *German Political Philosophy: The Metaphysics of Law* (New York, NY: Routledge, 2006), 266–67. According to Thornhill, this identification of the Weimar Republic with Kelsen’s legal thought is far from being groundless: “The constitutional fathers of the Weimar Republic created a document for German democracy that was, in part, marked by the conventional ideas of positivism. For instance, the constitution established a central state with separated powers and a limited parliamentary chamber; it defined its laws as a system of mandatory restrictions on state authority; it incorporated a distinct catalogue of rights; and it construed the constitution in its entirety as a procedural-administrative order, dictating to the state how its functions should be fulfilled. It therefore viewed the state, in classical positivist manner, as an agent under law, whose competences must be exercised in conformity with the prescriptions of the law.” *Ibid.*, See also 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), 80–81.

Jewish electorate not widely viewed as the core constituency of the bourgeois/liberal advocacy for the new regime? Did this period not witness an unprecedented influx of Jews into German political life? There seemed to be little room for detached political philosophy. For Jewish philosophers, thinking Weimar was tantamount to accounting for their place as Jews in modern Germany, a place the regimes opponents hotly contested. The philosophical assessment of the new regime's legitimacy had profound implications regarding German Jewry's future – or the lack thereof.

Paradoxically, it is fair to say that the elite among Jewish thinkers *was not there*, or only faintly responded to the challenge. Steven Aschheim writes:

It would be an exaggeration – but not a great one – to say that the alternatives for sensitive, dissenting, antibourgeois, postliberal youthful Jewish intellectuals of the Weimar Republic consisted of the choice between Zionism and Marxism, and sometimes a combination of the two, even if its proponents later moved beyond or refined both these positions.⁶

In his 1918 *Spirit of Utopia*, Ernst Bloch developed an original messianic and aesthetic interpretation of Marxism. Walter Benjamin, a good instance of oscillation between Zionism and Marxism, declared his “rejection of every current political tendency” in 1921.⁷ Meanwhile, Franz Rosenzweig, in his *Star of Redemption* published the same year, argued that the Jewish nation, being “in itself already at the goal toward which the peoples of the world are just setting out,” could only “stand outside the world.”⁸ Gershom Scholem, immersed in the project of rediscovering the sources of Jewish mysticism, left Germany for Palestine in 1923. As for the ultra-precocious Hanna Arendt, she was scrutinizing the writings of St. Augustine in search of an ideal of “human togetherness” and “mutual love” that would “replace mutual dependence,” eventually completing a doctorate under the supervision of Karl Jaspers in 1929.⁹

As is well-known, when it comes to the issue of the theopolitical, there is one Jewish thinker who stands out amidst a golden generation of intellectuals that showed so little concern for the fate of the Weimar Republic.¹⁰ By his own famous

6 Steven Aschheim, *At the Edges of Liberalism: Junctions of European, German, and Jewish History* (New York: Palgrave Macmillan, 2012), 13.

7 Walter Benjamin, *Gesammelte Briefe*, eds., Christoph Gödde and Henri Lonitz (Frankfurt am Main: Suhrkamp Verlag, 1996), vol. 2, 46.

8 Franz Rosenzweig, *The Star of Redemption*, trans. Barbara Galli (Madison: University of Wisconsin Press, 2005), 351.

9 Hanna Arendt, *Love and Saint Augustine*, eds. Joanna V. Scott and Judith C. Stark (Chicago: University of Chicago Press, 1996), 102, 108.

10 There is, however, another major Jewish philosopher who did not remain foreign to the discussion regarding the theopolitical. It is Martin Buber, with his *Kingship of God* (1932). Buber's book does not purport to analyze the principles of modern, secular democracies since it exclusively deals with the notion of political power in the Bible. Still, Buber's work echoes the debate on the possibility

admission, Leo Strauss found himself “in the grip of the theopolitical” during the years that led to the publication of his first book on Spinoza in 1930.¹¹ Recalling the state of mind that led him to write the book, Strauss writes in his 1965 preface that he was among those searching for spiritual reasons, not material ones like his Marxist peers, for what appeared as Weimar regime’s chronic instability. Between 1920 and 1923, this instability was indeed staggering. It is sufficient to remember that the period begins with the march of the Freikopf units against the Berlin government – the so-called “Knapp Putsch” – and the contemporary general strike led by the communists. It ends with the failure of Hitler’s 1923 putsch, the growing hyperinflation, and the occupation of the Ruhr by the French. The year 1922 – that of Schmitt’s *Concept of the Political* – alone saw 400 political assassinations, including that of Walther Rathenau, the Jewish Foreign Minister.

Much less known – or at least never examined from this perspective – is the treatise on which Edith Stein, the former assistant of Edmund Husserl, worked during these years and was finally published in 1925. There is little doubt Stein’s *Inquiry on the Nature of the State* can be read as a Kelsenian response to Schmitt’s constantly developing political theory, especially his 1921 *Dictatorship*. Most probably, one of the reasons explaining this lack of attention is that Stein had already converted to Christianity, receiving baptism in the Catholic Church in 1922. The question is whether Stein should cease to be perceived as a thinker embedded in Jewish identity and culture, for that matter. The very same question can be addressed to Leo Strauss: to what extent did Strauss’ complex relation to Jewish identity and culture play a role in his engagement with the most sensitive issue of his time in terms of political philosophy? To what extent did it result in an exercise of philosophical responsibility?

By comparing two thinkers who took opposite stances in the debate between Schmitt and Kelsen, I aim to shed additional light on the Jewish reception of the theopolitical issue during the fateful years of the Weimar Republik. Did this discussion convey some adequate understanding of the true challenge of this political era, as later manifested by the advent of a new political regime based on the hatred of Jews? I am therefore asking two questions about Strauss and Stein: (1) Did their treatment of the theopolitical issue owe something to their connection to Jewish identity and culture? (2) Did this connection lead them to a correct understanding of the dramatic implications of this issue? The two questions are intimately related to each other. Their

of an ultimate religious justification of the political order. We will go back to Buber’s own theopolitical thinking in the conclusion of this paper.

¹¹ “This study on Spinoza’s *Theologico-political Treatise* was written during the years 1925–28 in Germany. The author was a young Jew born and raised in Germany who found himself in the grip of the theologico-political predicament”, Preface to *Spinoza’s Critique of Religion* (later SCR) (New-York: Schocken books, 1952), 1.

combination will enable us to assess the nature of the *philosophical* responsibility exercised by the two thinkers in the face of the mounting political tragedy.

1 An Analysis of Strauss' Early Position on the Theopolitical

In the introduction to his 1953 book entitled *Natural Right and History*, Strauss provides a long quotation in German from Kelsen's 1925 *Allgemeine Staatslehre*.¹² The passage is supposed to illustrate the "disastrous consequences" that arise from the dismissal of natural rights. There, Kelsen claims that despotism cannot be *legally* abolished if it conforms with the *Grundnorm* (the Constitution). True, Kelsen does away with the notion of natural law, which he views as an instance of metaphysical assumption. Since nature has no will of its own from a scientific point of view, natural law implies "the will of God present in nature (which is his creation)."¹³ Still, Kelsen never denied that a moral assessment of the content of laws, including the *Grundnorm*, was necessary.¹⁴ Simply, he repeatedly emphasizes the distinction between the legal *Sollen* and the moral one. Nothing prevents statements pertaining to a specific category of *a priori* validity from being submitted to the scrutiny of principles pertaining to a different category of *a priori* validity. A despotic *Grundnorm* is not only legally reprehensible, but also morally reprehensible.

In *Natural Right and History*, Strauss's advocacy of natural law, especially in its ancient Platonic-Aristotelian teleological formulation that Medieval theology (Aquinas) inherited, never translates into a concrete political proposal adjusted to modern democracy, despite the author's relentless criticism of the latter's flaws and dangers. Has Strauss always kept himself to this sibylline style, though?

Strauss' controversial companionship with Schmitt in the Weimar years tells another story. It is a sad paradox that Strauss seems to have yielded to the "despotic temptation" of which he accuses Kelsen later on. When Strauss characterizes his way of thinking at the time as "in the grip of the theopolitical," it might be a sophisticated manner of referring to such a temptation.

The fact is that a shared hostility towards the liberalism inherent in the Weimar Republic sealed the unholy alliance between Strauss and Schmitt. Even Strauss' "political Zionism" aimed at countering what he called a "cultural Zionism" embedded in the Jewish liberal *Weltanschauung*. If Strauss' *Notes on the Concept of*

¹² Leo Strauss, *Natural Right and History*, Chicago: University of Chicago Press (1965), 4.

¹³ Hans Kelsen, *Allgemeine Theorie der Normen* (Wien: Manzsche Verlags, 1979), translated as *General Theory of Norms*, 5. See *supra* footnote 2.

¹⁴ See Caldwell, *Popular Sovereignty*, 80–81.

the Political, published in 1932 with the help of Schmitt, conveys a mild criticism of Schmitt's views, this was all done to strengthen Schmitt's theories – at least by Strauss' admission. As is well-known, it was with the support of Schmitt that Strauss was able to emigrate in 1932, eventually pursuing his research on Hobbes' political philosophy in Cambridge.

With Schmitt, Strauss identifies the spiritual illness of Weimar with liberalism itself. Of course, Strauss is not the first to claim that liberalism is an illness, but why does he believe it is spiritual?

In his *Notes*, Strauss writes that liberalism panders to the lowest aspirations of human beings. It reduces culture, morality, law, and art to entertainment or deprives all things of their seriousness. According to Strauss, Schmitt nailed down the core of the issue at stake when he characterized the essence of the political as what cannot be reconciled with the logic of liberalism or, equivalently, liberalism as the “the age of neutralizations and de-politicalizing (*Entpolitisierung*).” The command to sacrifice one's life on behalf of the state is what brings seriousness to the world of human beings, and it requires that the power to determine the issue of who is the enemy be the exclusive privilege of the state.

If Strauss distances himself from Schmitt during these pre-Nazi years, this has more to do with the etiology of liberalism than the negative politico-spiritual nature of this phenomenon. The assessment of the *wirkungsgeschichtliche* impact of Spinoza and Hobbes on the genesis of liberalism is probably the nodal point of the divergence between the two thinkers. Schmitt repeatedly expresses his religious admiration for Hobbes' political theory in the *Concept of the Political*.¹⁵ Naturally, Schmitt identifies Hobbes' admission that no collective consensus will warrant social peace any longer with the advent of Modernity. Yet precisely for this reason, according to Schmitt, Hobbes is the one who understood the need to transfer the religious dimension from the sphere of social consensus to that of the personal ruler upon whose authority the social contract keeping the peace and stability of the kingdom is established. The rationally unmotivated decision to divide the city between friends and foes, a decision on which social peace hinges, remains undisputed as long as it partakes of the sacred – the Sovereign is God-inspired, *a Deo excitatus*.¹⁶ Though Hobbes is himself a product of the modern age, he is also,

¹⁵ *The Concept of the Political* (later CP), Chicago-London: Chicago Univ. Press (2007), 52, 61, 65, 67.

¹⁶ In *Dictatorship* (1921), Schmitt sees in Cromwell – to whom Hobbes owes part of his political theory – the first and accomplished instance of a supreme ruler who claims to represent the people and yet draws the legitimacy of his decisions from God: “Although [Cromwell] occasionally talked about the people's consent to his dominion, nevertheless, in a decisive moment such as the dissolution of the Long Parliament, there was never any doubt that he saw in God the source of his power and he did not relate his sovereignty to the people, as the radical democrats of his time understood it,” Carl Schmitt, *Dictatorship*, Cambridge, UK: Polity press (2014), 121. At the very moment when

according to Schmitt, the one who offers the antidote to one of Modernity's most ominous woes: parliamentarism.

Nothing could be further from Strauss' view of Hobbes even if the Jewish philosopher, in the *Notes*, makes all possible efforts to offer an *interpretatio benigna* of Schmitt's reading of the *Leviathan*.¹⁷ For Strauss, Hobbes is "the founder of liberalism,"¹⁸ he is "the anti-political thinker" ("political" is understood here in Schmitt's sense).¹⁹ While Schmitt understands Hobbes' natural state of war as active *within* the political state, Hobbes construes the natural state as foreign and directly opposed to the bourgeois security and ease – the "ideal of civilization" – founded upon the Leviathan. According to Strauss, the truth is that Hobbes is the one who carves an intellectual space to the subsequent dreamers who conceive the state of nature as anchored in the goodness of humankind and civilization as an endless continuation of the state of nature. This assessment does not imply that Hobbes' own political theory is compatible with the optimism inherent in liberalism. Strauss' analysis is "historial" in Heidegger's sense of *Geschichtlichkeit*, not historical in the ordinary sense of the history of ideas. For Strauss, the optimism of the liberal age could not have flourished without the oblivion of the state of war that the advent of the modern Leviathan theorized by Hobbes induced.²⁰

In his reconstruction of Modernity's intellectual fate, the young Strauss contrasts Spinoza's *Tractatus theologico-politicus*, a work about which Schmitt has paradoxically (given its title) little to say to Hobbes' *Leviathan*. Of course, in his 1930 *Spinoza's Critique of Religion*, Strauss emphasizes that Spinoza is a product of Modernity just as Hobbes was. Baruch is the one who dismisses the belief in the theopolitical state on the grounds of a "scientific" approach to Scriptures. However, he is also the one who justifies this belief as a *political* necessity. Indeed, commoners cannot be asked to attain the sublime truth of the vision of nature *sub specie aeternitatis* ("from the point of view of eternity"), as displayed *more geometrico* ("according to the laws of

Cromwell designates Catholic Spain as the "providential enemy", he implicitly incarnates or, better, *re-incarnates* the political totalitarianism of the medieval Church in the midst of Modernity.

17 "Schmitt returns, contrary to liberalism, to its author, Hobbes, in order to strike at the root of liberalism in Hobbes's express negation of the state of nature. Whereas Hobbes in an unliberal world accomplishes the founding of liberalism, Schmitt in a liberal world undertakes the critique of liberalism", *Notes*, CP 108, see also footnote 2, *ibid.* Schmitt will notwithstanding maintain and further develop his reading of Hobbes in his 1938 series of lectures on the Leviathan, see Carl Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes – Sinn und Fehlschlag eines poetischen Symbols* (Hamburg-Wandsbek: Hanseatische Verlagsanstalt AG), translated as *The Leviathan In The State Theory Of Thomas Hobbes*.

18 *Notes* in CP, 107.

19 *Notes* in CP, 108.

20 *Notes* in CP, 107–108.

geometry”) in Baruch’s *Ethics*. In this situation, the closest thing to true philosophy is a religion that translates the conclusions of rational inquiry into myths capable of regulating the emotional-imaginative life of commoners. Practiced in this manner, religion preserves society from the disastrous effects of superstition; that is, from the destructive fiction generated by the unregulated emotional life of the masses. For the young Strauss, a return to the theopolitical in the midst of the modern age rests on this “Machiavellian” reading of Spinoza’s treatise.²¹

Strauss’ re-evaluation of Spinoza’s theopolitical thinking, succeeding in his radical criticism of Hobbes as the founder of liberalism, opened the door to a reconsideration of the Jewish contribution to political thought.²² Strauss’ initial interest in Maimonides concerns the latter’s interpretation of the Torah in political terms. Through Al Farabi and Avicenna, Maimonides is heir to a theological concept of political law and a teleological concept of natural law that goes all the way back to Plato’s *Nomoi* (*Laws*).²³

Here surfaces, in my opinion, a significant, although unacknowledged by Strauss, difference between his and Schmitt’s understanding of the theopolitical. For Schmitt, theopolitical does not simply designate the religious understanding of social order associated with the medieval Catholic Church, no matter how regrettable its disappearance might be. It designates the creative adjustment of this medieval order to Modernity, a process that Schmitt discerns in such counter-revolutionary thinkers as De Maistre, Bonald, and Donoso Cortes. In contrast, Strauss persistently identifies the theopolitical with the heteronomous dependence of the political order on a teleological, divinely established, natural order – the very structure that characterized medieval times. In this sense, Strauss’ early advocacy for the theopolitical consists less in the “awakening” of a potentiality in the modern political order than in a *cancellation* of the latter – a neutralization of the “age of neutralization” – through a never clearly thematized “return” to a bygone traditional order.

21 Strauss came to reject the *necessity* of this Machiavellian reading of Spinoza, as we read in the 1965 preface to his 1930 book, see *Spinoza’s Critique of Religion* (later SCR), New York: Schocken Books (1965), 30–31. The all-powerful scientific approach that saw the light of day at the time of Spinoza increasingly appeared to Strauss as an overreaching claim. Modern science, so argued Strauss, did not have the means to establish the sheer mythological nature of sacred Scriptures.

22 By some strange, albeit by all accounts deliberate, effect of symmetry, Schmitt, defending Hobbes in his lectures on the *Leviathan* (1938), came to accuse Spinoza of being “the first liberal Jew”, the one who had instilled the poison of individual freedom in the veins of Western modern society, see Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes* London: Greenwood Press (1996), 57. Even “the Jewish scholar Leo Strauss” is, writes Schmitt, forced to concede that “Hobbes regarded Jews as the originators of the revolutionary state-destroying distinction of the original political unity”, *ibid.*, 10.

23 See Strauss, *Philosophy and Law* (1935).

Understanding the nature of this divergence between the two thinkers is decisive when it comes to answering the central question we are asking: To what extent did Strauss' position in the discussion on the theopolitical manifest a sense of philosophical responsibility in relation to the looming political catastrophe? The fact is that Strauss has manifestly relied on his heteronomous concept of the theopolitical to disavow the connection between, on the one hand, his constant criticism of Weimar liberalism, his Schmidtian advocacy for a "sacral" status of the supreme authority in the state, and, on the other, the rise of the "pouvoir constituant" in its Nazi form. In a letter to Karl Löwith dated May 19, 1933, Strauss, at the time exiled and living in Rome, made clear that an authentic aspiration to a strong, anti-liberal regime should not be identified with Hitler's political program:

... I see no acceptable possibility to live under the swastika, i.e., under a symbol that says nothing else to me except: "You and your kind, you are subhuman *fusei* and therefore true Pariahs." ... as to the substance of the matter: i.e., that Germany having turned to the right does not tolerate us, that proves absolutely nothing against right-wing principles. On the contrary: only on the basis of right-wing principles – on the basis of fascistic, authoritarian, imperial principles – is it possible with integrity, without the ridiculous and pitiful appeal to the *droits imprescriptibles de l'homme*, to protest against the money-grubbing bedlam (*das meskine Unwesen*). I am reading Caesar's Commentaries with deeper understanding, and I think about Virgil: "Tu regere imperio ... parcere subjectis et debellare superbos." There exists no reason to crawl to the cross (*zu Kreuze zu Kriechen*), to liberalism's cross as well, as long as somewhere in the world there yet glimmers a spark of the Roman thought (*des römische Gedanke*). And even then: better than any cross, the ghetto.²⁴

I believe that the allusion to the Canossa historical episode ("zu Kreuze zu Kriechen," "to grovel before the cross") has little to do with a criticism of the Catholic Church. The cross under which Strauss refuses to crawl is the Swastika, *die Hakenkreuz* (there is a pun here on the substantive and the verb *Haken*), but, as Strauss adds, it is also the cross of liberalism and its illusions. Strauss brazenly endorses the claim of Mussolini's fascist regime to be heir to the Rome of the Caesars and turns it into a worthy alternative to Hitler's anti-Jewish, "money-grubbing bedlam."²⁵ Understandably, the at the time unviolated ghetto of Rome did not seem like such a bad place to people exiled from Berlin. In sum, there is little doubt that, for Strauss, the source of fascism's superiority over Nazism lies in embracing a definite set of heteronomous, transcendent values that Strauss finds entirely missing in the Nazi

²⁴ Translation in William F. Altman, *The German Stranger: Leo Strauss and National Socialism* (Lanham, MD: Lexington Books, 2011), 227.

²⁵ In another 1933 letter to Löwith, sent from Paris this time, Strauss wrote that it is only possible to "protest against the shabby abomination" of Nazi Germany "from the principles of the right, that is from fascist, authoritarian, and imperial principles", *Gesammelte Schriften*, vol. 3, ed. Heinrich and Wiebke Meier (Stuttgart: J. B. Metzler, 1996–2001), 624–625.

regime. We might see an explicit confirmation of this idea in the following lines written some twenty-six years later:

The crucial issue concerns the status of those permanent characteristics of humanity, such as the distinction between the noble and the base ... It was the contempt for these permanencies which permitted the most radical historicist in 1933 to submit to, or rather to welcome, as a dispensation of fate, the verdict of the least wise and least moderate part of his nation... The biggest event of 1933 would rather seem to have proved, if such proof was necessary, that man cannot abandon the question of the good society ...²⁶

In a nutshell, Schmitt's indifference to a set of religious/transcendent values when it comes to taking the political decision, a position that Strauss characterizes as a liberal tolerance in reverse in his *Notes*,²⁷ is what carries philosophical responsibility for the rise of Hitler to power. By contrast, the healthy form of fascism advocated by Strauss in his 1933 letter to Löwith would have prevented a catastrophe that was already taking shape. Its absence in Germany paved the way for Nazism as a natural consequence of the disintegration of the Weimar regime and its amorphous, illusory system of immanent values.²⁸

Strauss' explanation conspicuously leaves aside the arbitrariness of the strong ruler's decision in favour of teleological values at the expense of "immanent" ones. For Schmitt, this arbitrariness is a synonym for authentic, theopolitical sovereignty. In other words, the theopolitical remains unspoiled, whichever decision it makes as long as it is a sovereign decision. However, if one claims, with Strauss, that the authentically theopolitical depends on the decision in favor of transcendent values, then nothing can guarantee the taking of such decision as long as full, unaccountable sovereignty is concentrated in one man. Mussolini may decide to leave the Jewish minority in peace (his policy until 1942) but he also may change his mind without warning, depending on the circumstances. The fate of the once-welcoming Roman ghetto after 1942 eloquently demonstrates this situation. Transcendent values are acceptable, but, as Sartre would argue, nothing can eliminate the inherent freedom

²⁶ Leo Strauss, *What is Political Philosophy and Other Studies* (Glencoe, IL: The Free Press, 1959), 26–27.

²⁷ "...whereas the liberal respects and tolerates all "honest" convictions so long as they merely acknowledge the legal order, peace, as sacrosanct, he who affirms the political as such respects and tolerates all "serious" convictions, that is, all decisions oriented to the real possibility of war.", *Notes* in CP, 120.

²⁸ In the preface to the English translation of *Spinoza's Critique of religion*, one reads: "Liberal democracy had originally defined itself in theologico-political treatise as the opposite ... of 'the kingdom of darkness,' i.e. of medieval society. According to liberal-democracy, the bond of society is universal human morality, whereas religion (positive religion) is a private affair ... The Weimar Republic was succeeded by the only German regime – the only regime ever anywhere – which had no other clear principle than murderous hatred of the Jews," SCR, 3.

of decision of the one who makes them, something that goes without checks and balances in the strong-man regime the young Strauss advocates. By contrast, the superiority of a type of regime that Strauss scorns as weak, such as that of the Weimar Republic, becomes manifest with all the slowness and equivocations of parliamentarism, the logic of checks and balance together with the confrontation between mutually exclusive sets of values constrain seeking a consensus based on an elementary inclusion of dissenting minorities.

Ultimately, Strauss never separated his Jewish identity, his membership in the Jewish nation, from his theopolitical thinking. Whether this awareness led him to articulate a philosophically responsible political doctrine is questionable.

2 State and Religion According to the Young Stein

Stein seldom quotes her sources directly in the *Inquiry*. It is clear, however, that she has read Kelsen, and that their intellectual affinity is no less strategic than Strauss' intellectual affinity with Schmitt. It might have supplied the *rationale* for Stein's treatise. To understand why, I suggest examining the limits of Kelsen's theory of the state.

One of the main objections against Kelsen's "pure theory of law" has always been its concept of the state. Kelsen deliberately reduces the whole effectivity of the state to that of its laws – as such, the state is nothing but a functional concept that owes its existence to laws.²⁹ From Kelsen's perspective, when Schmitt anchors the sovereignty of the state in the realm of theology, he is explicitly admitting to the fundamental weakness of non-positivist state theory: the arbitrary postulate of "metaphysical" principles in a sphere in which only intra-legal considerations should be retained as valid. The sovereignty generally ascribed to the state derives from the Constitution, and this *Grundnorm* cannot be defined empirically, lest one overlooks Kelsen's fundamental distinction between the legal "ought" and the factual "is."

At a time when the foundations of Weimar's model of the liberal state were the object of constant criticism on the part of Schmitt's followers, it is hardly surprising that many found Kelsen's concept of the state lacking. The refusal to engage with the issue of the state's ultimate, meta-legal justification in the name of a neo-Kantian epistemology left the Weimar state, with Kelsen as its leading legal thinker, exposed to the attacks of those who questioned its very legitimacy. I want to suggest here that Stein's treatise draws inspiration, at least partially, from the desire to offer a

²⁹ *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre, The Problem of Sovereignty and the Theory of International Law: Contribution to a Pure Theory of Law* (Tubingen: J. C. B. Mohr, 1920), 12.

philosophical corroboration to Kelsen's forcefully anti-Schmittian vision of the legal order.

The fact of the matter is that Stein found the elements that could supplement Kelsen's positivist understanding of sovereignty in the writings of Adolf Reinach (who was her true mentor in the realm of phenomenology, in contrast to Husserl, the revered but never-fully adhered to *Meister*). Indeed, there is some decisive correspondence between Reinach's legal theory and that of Kelsen. Reinach's distinction between pure law and positive law in "The *A Priori* Foundations of the Civil Law,"³⁰ which runs through Stein's entire treatise, is close to Kelsen's distinction between the *Sollen* of pure law and the sphere of empirical causality. Just as Kelsen, Reinach conceives pure law as a gnoseological domain of its own, fundamentally distinct from all other domains, be it that of nature and its physical laws or ethical norms. This last point is critical: just as law, ethics brings forth a "*Sollen*" – but it is essentially distinct from the legal one. This is not to say that ethical norms have no influence on legal judgments – but this is an "influence" of one domain of validity upon another domain of validity distinct from it. In this sense, "pure law" is by no means reducible to ethical norms via – or not – a theory of "natural rights."

Still, there is an essential difference between Kelsen's "pure law" and that of Reinach. For Kelsen, *pure law designates the theory of positive law*. As it merely describes the rules of production of legal content, it has no legal content of its own. By contrast, Reinach conceives pure law as the set of elementary relations to which a positive law must implicitly refer when it purports to belong to the realm of legality. That a specific type of promise creates obligations is neither an analytical proposition in the Kantian sense, a physical observation, nor a moral norm: it describes some essential, phenomenologically discoverable structure underlying our social universe. Nothing could be more opposed to the very principle of Kant's philosophy and his epigones than positing the existence of synthetic propositions *a priori*, as Reinach consistently does.³¹ Fundamentally, the line that, according to Reinach, divides this legal *a priori* sphere from empirical realities separates pure law from positive law, whereas Kelsen contrasts the whole legal sphere, including positive laws, to empirical realities. Reinach's theory, therefore, implies the non-overlapping of pure law's ideal necessity and positive law's practical enactment.³² The laws that are

30 Adolf Reinach, "Die apriorischen Grundlagen des bürgerlichen Rechts," *Jahrbuch für Philosophie und phänomenologische Forschung* (1913), translated as *The Apriori Foundations of the Civil Law*, 685–847.

31 Just as the number two or the violet color have specific essential properties that become manifest in their relation to other numbers or colors, so do the actions of surmising, obliging, etc. Any action that aims to create an obligation relies on the essential properties of an obligation.

32 See Edith Stein, *An Investigation concerning the state* (later IS) (Washington DC: ICS publications, 2006), 39.

enacted can be “grounded in the essence” of pure law, according to Reinach’s expression, but they do not need to be so. A decree enforced by a dictator can infringe the sphere of pure law, despite its claim to ideal legality, but this does not make it less legal on a practical level.³³

Admittedly, despite their differences, Reinach’s theory is not exclusive of Kelsen’s. The former can be understood as describing a “metaphysical” level of reality – in a positive sense – with which the latter refuses to engage. In this sense, building a theory of the “pure state” on the foundations of Reinach’s theory of pure law could supply what is lacking in the understanding of society associated with Kelsen’s approach to the legal sphere. Seen in this light, the argument and goal of Stein’s Reinachian theory of the state become much more transparent. By defining the theoretical foundations of the Kelsenian state, Stein provides a powerful argumentation against the Schmittian critique of the Weimar type of liberal state.

So, what makes a state a state? Just like Kelsen, Stein argues that it is, basically, a constitution. However, Stein wrestles with what Kelsen dismisses as an extralegal, metaphysical issue; namely, the question of the origin of the state and the actual foundation of its legality. For Stein, such an analysis does not involve any empirical consideration – it is the first requirement of a “pure theory” of the state. What is implied in the essence of the state is an action that initially brings about its legality:

The establishment of a state is an act whose sense requires that it be an act of the state. Admittedly, the establishment of a state can be carried out only in the mode where a person or a body consents (*sich dazu hergibt*) to be an agent of the state (*Organ des Staates*). In that act of self-positing, the civil authority simultaneously defines its sovereign sphere and constitutes the state.³⁴

The *effective constitution* of the state that is required to formulate a *constitution of the state* could not be further from the self-designation of a leader. An agent of the state serves the state; he/she does neither own it nor rule it at will – this is why becoming a member of the civil authority (*Staatsgewalt*) implies free consent or a decision to let an instance higher than one’s personal will govern one’s actions.³⁵ In addition, what makes this self-positing as agent(s) of the state possible is its counterpart on the side

³³ Stein observes: “As to the content of [the system of positive law], there’s nothing to certify in advance that it must concur with the pure law, since after all the content is prescribed for the legal system by other points of view”, IS, 152. As we will see, this aspect is crucial to appreciate Stein’s *Realtheorie* of the state.

³⁴ IS, 177.

³⁵ “The state can execute acts only in those persons who ‘stand in for’ the state execute them for it. Yet such acts have a sense only as acts of the state and not as acts of persons or of bodies that are not characterized as ‘agents of the state’”, IS, 48.

of those who recognize it; the unconstrained readiness of the future subjects of the state (the “sovereign domain,” *Herrschaftsbereich*) to obey the rules enacted and enforced by the civil authority.³⁶ Thus, the necessity of the state must be freely accepted by all its components, be it in their capacity as agents or simple citizens, and this acceptance is manifested in the act of the civil authority’s self-positing that constitutes the state.³⁷ As for the state’s *Grundnorm*, it consists of the form given to civil authority. The authority can reside in one single agent of the state, in many, or in all the citizens via a system of political representation.³⁸ In this framework, Kelsen’s concept of legal derivation from the *Grundnorm* is preserved: “The first law that must be made and recognized so that further laws can attain validity is the right to make law. Every person who makes law thereby accepts the claim of this primary law.”³⁹ The principle of recognition (*Anerkennung*) that underlies the *Grundnorm* extends to all the laws and acts of governance that derive from it.

Stein’s analysis of the pre-legal nature of the state renews with the transcendent, supra-legal but still juridical personality of the state classically found among the theoreticians of the *Rechtstaat* (Laband and Jellinek), a “metaphysical” construct that Kelsen was desperately trying to avoid: “... the state can choose, command, regulate, promise, commit itself, and so on.”⁴⁰ At the same time, the concept of sovereignty Stein brings forward is fundamentally different from Schmitt’s anti-Kelsenian understanding of the transcendent, pre-constitutional state. For Schmitt, sovereignty resides in the one who, acting in the name of the nation, is the effective *pouvoir constituant* of the state and, therefore, cannot be constrained by the *pouvoir constitué*. For Stein, by contrast, sovereignty cannot be *owned* by one single individual because it is itself the result of a pre-legal act of recognition, the subject of which is the whole nation. Sovereignty does not exist in a nation without a state, and the state, not only initially, but continuously draws its sovereignty from the recognition of those who freely implement it and submit to it:

36 “...obedience “is the complement of the civil authority, without which it is not able to exist”, IS, 143 (Stein quotes Jellinek’s *Allgemeine Staatslehre*). This mutual aspect of the recognition involved in the foundational act of the state is particularly emphasized by Francesca De Vecchi, “Edith Stein’s Social Ontology of the State, the Law and Social Acts: An Eidetic Approach”, *Studia Phaenomenologica* 15 (2015), 317–319.

37 The situation is like a member of a family that accepts to administer the capital that the members of the family possess in common because he/she enjoys their trust – precisely, this acceptance gives birth to a (family) trust.

38 See IS, 10. Even in a democracy, the expression of the unity of the state entails that of an ultimate instance of decisions on matters of government, IS, 70. This was supposed to be the role of the president according to the Weimar Constitution.

39 IS, 40.

40 IS, 65.

Only a formation that involves free persons can declare itself to be sovereign or can exhibit sovereignty in practice. The constitutive threshold for sovereignty is that the freedom of individuals is not destroyed by the will of this formation, or of the body representing it, but instead remains a condition of putting that will into effect... “Unlimited civil authority” essentially subsists to the precise extent that it is recognized, and it can be wiped out at any moment.⁴¹

The fact that those who submit to the state’s “unlimited authority” are the same who give it existence through their recognition of its agents, is the source of healthy pressure on this absolute power to continue to secure the recognition of those subject to it, lest it loses all legitimacy.⁴² True, there are situations – Schmitt’s “states of exception” – where the implicit recognition of the *Staatsgewalt* has become so problematic, hindering the normal functioning of the state, that, in order to preserve its purpose and mission, the state is constrained to temporarily suspend some of the laws and institutions defined by the Constitution or derived from it. Still, the fact that these dispositions are themselves defined and limited by a law duly enacted, like the art.48 of the Weimar Constitution proves that they do not infringe on the principle of sovereignty arising from the “communal realization of free acts (*gemeinschaftlichen Vollzug von freien Akten*).”⁴³

Thus, addressing an issue that “has become controversial in quite a number of ways,” Stein can show that “her arguments result in an answer to the question of who the carrier of sovereignty might be.”⁴⁴ The source of political sovereignty does not reside in persons as such, be it an individual or a collectivity, but in what arises from the single act of recognition that continuously demonstrates the unity of the state both as an agent and as a subject of the law: “Sovereignty always presupposes a claim of control and its satisfaction through the recognition of those involved.”⁴⁵

This understanding of sovereignty has an immediate impact on the notion of the theopolitical. Kelsen claimed that any transcendent, pre-legal approach to the state would either introduce empirical considerations or appeal to metaphysical/religious

41 IS, 66. The self-positing of the *Staatsgewalt* correlates with the claim that only the law of the state is valid within the *Herrschaftsbereich*: “Whether will be implemented, and a state will actually come into being, depends upon whether the state is recognized or [at least] not disputed by the individuals involved”, IS, 12.

42 “[The state is secure] when the individual or the body that constitute themselves as the civil authority appear to be the qualified leaders [in the eyes of] the persons who belong to their sovereign territory, and preferably, to be sure, in [so] self-evident a manner that the legitimacy of the leadership does not become a problem”, IS, 66.

43 IS, 47.

44 Ibid.

45 IS, 67.

principles, both of which are foreign to the sphere of law. However, Stein's phenomenological analysis of the *a priori* essence of the state is neither empirical – it relies on the pure relationship that correlates with a very specific mutual act of recognition – nor metaphysical in a moral or religious sense. In fact, Stein's analysis corroborates Kelsen's emphasis on the autonomy of the legal sphere in its relation to ethics. Considered according to its *a priori* principle of formation, the state has nothing to do with a definite moral *Sollen*: "... as a state, the reign of Satan can be just as perfect as the reign of God."⁴⁶ Contrary to Schmitt's notion of the theopolitical, sovereignty does not need to clothe itself in religion's aura of transcendent infallibility since its legitimacy is intrinsic and has nothing to do with morals as an extrinsic source of authority.

The way Stein conceives the connection between the legal *Sollen* and the ethical one is very much in line with Kelsen, although it is reinterpreted according to the Reinachian distinction between pure law and positive law. With Kelsen, Stein points to the existence of a moral sphere, the norms of which do not govern the legal sphere, but can find their way into the latter, provided there is a will on the side of the legislator. At the same time, building on Reinach's legal theory, Stein shows that it is the empirical character of the positive law that makes this integration possible.

One needs to understand that, according to Stein, the set of *a priori* relations (*reine Rechtsverhältnisse*) that define what the state *is* are not by themselves able to give an account of what the state *does*, something that pertains to the realm of positive law and concrete governance: "The state, as a social pattern that organizes itself on its own authority, calls for a creative power that lends content and direction to its organizing potential and confers an inner authenticity [upon it]."⁴⁷

Here is what Reinach calls the realm of "what obtains" or truly exists as states of affairs, in contrast to "legal objectivities" (conceptual essentialities pertaining to the legal sphere) that may or may not be given existence depending on the circumstances. The "power" to which Stein refers here emanates from a particular social community shaped by a long series of interactions between human initiatives and unforeseeable events. To the established agents of the state, this community provides the living matter (needs, ideas, aspirations, all sorts of potentialities, etc.) they will have to process both in terms of legislation and concrete governance.⁴⁸ Not unlike the relationship between form and matter in Kant's first *Kritik*, this social

46 IS, 100.

47 IS, 24.

48 The "system of positive law" oversees "the needs and powers of the community for certain agencies" and establishes a "fixed system for the execution of the collective decisions and transactions", IS, 152.

“matter” is unable to secure unity and stability for the people without a state while the state remains an empty and clueless structure without this “social matter.”⁴⁹ Moral norms, considered in themselves, could well be entirely *a priori*. Still, from the point of view of the agents of the state who are due to identify them and evaluate their legal relevance, they come as part of the external, empirical “matter” associated with the yet unregulated life of civil society. Considerations about justice, for instance, have a close affinity with pure law as they are also objectivities related to behavior (in contrast to the logic of individual interests), even if a state can forgo them without ceasing to be a state.⁵⁰ Actually, it behooves the agents of the state as *persons* to perceive moral values, as the *state as such* is incapable of feeling or perceiving, its quasi-personhood being limited to acts of governance.⁵¹

From this perspective, there is no reason to associate these norms with the 17th–18th century concept of natural rights. Stein would resolutely oppose Strauss’ attempts to link the law of nature in its Platonic-Medieval sense with the normative concept of natural rights developed by thinkers such as Locke and Rousseau. Here again, Stein stands firmly on Kelsen’s side: one does not need to posit a teleological state of nature to give an account of the origin of the state, as in traditional theories of the social contract, since the state *per se* does not require ethical norms to exist and function.⁵² Actually, Stein argues that the supposition of a state of nature is absolutely unnecessary since socially organized communities preexist political states and can endure without them, although political states cannot exist, as mentioned earlier, without being anchored in such social communities.⁵³

The Steinian analysis of the state as arising from the need of an already existing community to self-regulate by the formal virtue of a constitutional act goes much beyond Kelsen’s positivism. Through a phenomenology of the different types of associations, it opens Stein’s theory of the state to the legacy of the German historical

49 “... [T]he people, as a ‘personality’ with creative distinctiveness, begs for an organization that secures for it a life according to its own lawfulness”. IS, 24.

50 When pure law or “ethical norms that are clothed in the form of law” are enacted, they become positive law. But positive law can also be deprived of such ideal foundation: *stat pro ratione voluntas*, see IS, 40. On the notion of justice, see IS, 150 and 174.

51 IS, 65 and 72.

52 “There’s no such thing as a ‘natural right.’ Pure law subsists independently of all individuals and their organization.”, IS, 51. Stein distinguishes the single, albeit collective, act of agreement that gives birth to the state from the contract theory that implies a pre-social state of nature endowed with specific rights, see *ibid*.

53 Stein gives the example of the Polish nation surviving the disintegration of its political state (IS, 17), but one can also think of the Jewish nation in its condition of *Galut*. This does not mean, however, that the original community who is both actor and subject of the constitution of the state is a people ethnically unified, so that the state will be the state of this ethnic people to the exclusion of other ethnic groups, see *ibid*.

school (Hugo, Savigny) as well as that of the social/organicist school (Beseler, Gierke, Jhering, Heller) on matters of constitution and laws.⁵⁴ It is incumbent on the *sense of the state* that the multifarious associations and collective entities that are the engine of civil society's life might be fostered and protected. Besides, only a *Volksgemeinschaft* shaped by its history, even if it includes other ethnic entities besides the main one, can develop in a cultural cosmos, a spiritual force that provides the state with impetus and direction in the enactment of positive laws and policy decisions.⁵⁵ It is not difficult to discern here a correspondence with the "organicist" concept of the state that, together with Kelsen's positivism, is one of the main sources of the Weimar Constitution.⁵⁶

All the previous considerations help us to understand Stein's position on the relationship between state and religion, i.e. the issue of the theopolitical, which Stein takes up in the last chapter of her treatise.⁵⁷ At this point, it is clear that Stein follows Kelsen in dismissing an intrinsic connection between the foundation of the state in pure law and religious values: "The state has no soul."⁵⁸ In the last chapter of her

54 A people defined in terms of ethnicity is more than a mass of atomic individuals or an association (*Gesellschaft*) of individuals to whom a commonality of goals gives a reason to unite. One speaks of a *Volksgemeinschaft*, that is, a community resting on bonds of mutual solidarity. It is this *Gemeinschaft* who has the potential to become the collective personhood and actor of its own history that we call a nation, see IS, 26. Regarding Stein's phenomenology of the human community, see Antonio Calgano, "Thinking community and the state from within," *American Catholic Philosophical Quarterly* 82, 1 (2008), Lived Experience from the Inside Out: Social and Political Philosophy in Edith Stein (Pittsburgh, PA: Duquesne University Press, 2014), and "The Role of identification in experiencing community: Edith Stein, empathy, and Max Scheler" in Elisa Magri & Dermot Moran, eds., *Empathy, Sociality, and Personhood* (Berlin: Springer, 2017), 143–160.

55 IS, 22–23. At the same time, Stein is almost prophetically aware of the dangers conveyed by the political prevalence of such a cultural spirit in a situation when the state is weakened by the corruption of its agents: "Wherever policy departs from what the sense of state prescribes – that means, where policy is composed of acts that are not really acts of state – what is speaking there is merely the spirit that prevails in the representatives of the state. Inasmuch as that spirit gains influence over policy, an outsider can also make the state subservient to his purposes – and that outsider can be God or the Satan with equal ease." IS 103.

56 Indeed, the Weimar Constitution appears very much as a compromise between Kelsenians and classical (non-Schmittian) anti-Kelsenians. Referring to the influence on the final document of Max Weber, Hugo Preuss, Friedrich Nauman, and Hugo Sinnzheimer among others, Thornhill observes: "... certain aspects of the Weimar Constitution deviated from more standard positivist ideals, and they actually reflected a counter-constitution to Kelsen's pure-positivist documents for the First Austrian Republic", *German Political Philosophy*, 267. By drawing on Reinach's distinction between pure law and positive law, Stein can reconcile Kelsen's notion of legality and the organicist approach to the state that, oddly enough, coalesced intellectuals from the most conservative right to the ultra-left of the German political spectrum.

57 IS, 184–192.

58 IS, 192.

treatise, Stein shows that a theocracy, a state where all political decisions would, as a result of historical circumstances, directly following the declared will of God, would tend towards self-disintegration. The legal and political sphere that the state brings with it would have become entirely subservient to a logic that is intrinsically foreign; namely, religion. It does not mean that God cannot empirically use a political state to serve the higher purposes assigned to His providential activity – but this inclusion of the state in God’s supreme design preserves the “fabric of the state,” both from the point of view of pure law and that of concrete governance.⁵⁹

For Stein, who quotes Matthew 22:21 (“render to Caesar the things that are Caesar’s; and to God that which is God’s”⁶⁰), the distinct character of the state’s logic from that of religious institutions is fundamental. From the state’s perspective, religion is part of the fabric of civil society, just as any other collective element defining the inner life of the *Herrschaftsbereich*. This position coincides with the concrete stance of the Weimar Constitution on religious matters (art.147). The notion of a state Church is omitted, and the *Republik* makes clear its intention not to meddle in the internal affairs of religious associations once they are recognized. Stein duly notes that there are areas where the interests of the state and those of religious institutions overlap, so the research of compromises between the two types of logic becomes necessary.⁶¹

Still, it can happen that the state infringes upon the legitimate autonomy granted to religious entities within civil society. The sphere of what is “legitimate” or not from the point of view of the *Staatsgewalt* is circumscribed by pure law or what can be derived from the essence of the state. Since, as emphasized earlier, nothing in the mechanisms of enactment of positive law compels the latter to comply with pure law, there is always a risk that the agents of the state will, for some reason or another, lose sight of the higher goals that they are supposed to serve. In a situation where the consequences of the subversion of the “sense of the state” among its agents are damaging to religious institutions, it stands to reason that citizens will place the commandments of their faith higher than the current government’s policies. As much as the violence of the “state of exception” is acceptable because it is ultimately subordinated to the legitimate interests of the state, the violence perpetrated by corrupted or unhinged agents of the state is not because it has ceased to be “grounded in the essence” of the state.⁶²

59 IS, 185–188.

60 Verse as quoted in the English translation of Stein’s work.

61 IS, 85–86.

62 “...heads of state themselves are behaving as enemies of the state if, through the content of their regulations, they alienate the powers that they were supposed to ally with – the impulses in the souls of individuals”, 189.

Stein's 1925 treatise sheds light on the theoretical premises of 1933 letter to the Pope, in which she beseeches him to publicly condemn Nazi persecutions against the Jews. Consistently, Stein argues that governmental institutions, having fallen in the hands of people filled with hatred against Jews ("*sie jetzt die Regierungsgewalt in ihre Hände gebracht*"), the anti-Semitic policies that are currently enforced infringe upon the sacrosanct principles of the Christian faith: "Is not this idolization of race and governmental power which is being pounded into the public consciousness by the radio open heresy? Is not the effort to destroy Jewish blood an abuse of the holiest humanity of our Savior, of the most blessed Virgin and the apostles?" Stein understands that public condemnation of the regime by the Pope would be tantamount to a call for civil disobedience, but her 1933 position is perfectly in line with her 1925 theory of the state. Rebellion against the state is allowed when the agents of the state betray the purpose and mission of the state. We see here how the profoundly anti-Schmittian concept of state sovereignty that Stein develops in her treatise deprives – by anticipation – the type of political decisions taken by the Nazi regime of any legitimacy.

3 Strauss vs. Stein: The Theopolitical and Philosophical Responsibility

In certain historical circumstances, it took more courage to opt for the rational, for moderation, for compromise, for plurality, for freedom, and for legal procedures than in others. The interesting question is: What made some intellectuals cling to liberal convictions in turbulent times when liberal democracy was not fashionable, when it was, in fact, regarded as an outmoded nineteenth-century model? A partial explanation is that a certain feeling of Jewishness, of *Bildungsbürgertum*, and of secular modernization enabled some thinkers to adhere to ideals that others threw overboard.⁶³

In my estimation, Jens Hacke's unconventional appreciation of Weimar Jewish intellectuals' political "engagement" fittingly applies to the comparison between Strauss' and Stein's respective positions on the theopolitical. Earlier, we started by asking two questions: (1) Did Strauss' and Stein's treatment of the theopolitical issue owe something to their connection to Jewish identity and culture? (2) Did this connection lead them to a correct understanding of the dramatic implications of this issue?

63 "Jewish Liberalism in the Weimar Republic? Reconsidering a Key Element of Political Culture in the Interwar Era", in *The German-Jewish Experience Revisited*, Steven E. Aschheim and Vivian Liska, eds. (Berlin: De Gruyter, 2015), 156.

Like many of his peers, Strauss was among those who considered liberal democracy as an “outmoded nineteenth-century model” if, by the latter, one refers to the model of social integration associated with the German protagonists of the Haskalah. This does not mean that Strauss’ Jewish identity did not play a role in his early political philosophy. His unique quest for the “theo-teleological” element in the political thought of Spinoza and Maimonides is a witness to the contrary. Strauss refused to follow Schmitt’s amoral or meta-moral concept of the theopolitical. On a concrete level, though, Strauss found himself allied with all the critical – Protestant in general – voices denouncing in the Weimar Republik a “state without God.” Everything tends to show that Strauss was perfectly aware that his fascination for the theopolitical, no matter how “morally upgraded” it needed to be, would contribute to replacing the Weimar regime with an authoritarian one. Klaus Tanner writes:

It was not the suppression of religious and metaphysical questions that led to the demise of the Weimar Republic. In fact, the opposite is true, the models of legitimization based on religion and metaphysics had a *de facto* delegitimizing effect for the parliamentary democracy of Weimar.⁶⁴

As we saw, the problem with Strauss’ “moral” or “teleological” concept of positive authoritarianism lies in the fact that it offers no legal or administrative safeguard that would prevent the supreme leader from discarding the “good values” and replace them with much more doubtful ones at will. This theoretical difficulty is a necessary consequence of the Schmittian-Straussian apology for supremely personal authority at the exclusion of parliamentarism under any form. In sum, the idea that Strauss’s Maimonidean-Spinozian accommodation of political theology could have prevented the tragedy that followed the demise of the Weimar regime, was an act of theoretical self-delusion, supposed it was ever entertained as such by Strauss at the time (and not brought forward by way of retrospective justification at a later point).

The contrast with Stein’s position on the theopolitical could not be sharper. Stein’s philosophical justification of Kelsen’s views unfolds into a much broader theory of the state which, without being the exact portrait of the Weimar regime, falls in line with its main aspects: parliamentarism, presidentialism, admissibility of a state of exception, non-ethnic concept of citizenship, advocacy of national values, social integration of communities and associations, separation of state and established religion, etc. Judging by its rarity and considering by contrast the ideological or “apolitical” (Peter Eli Gordon) speculations of most contemporary Jewish thinkers, Stein’s philosophical plea for the existing political order certainly deserves Hackes’ qualification of “courageous.” In it, one can easily recognize the option “for the rational, for moderation, compromise, plurality, freedom, and legal procedures.” Still, the question reads: To what extent is this plea connected to the Jewish

⁶⁴ *The Weimar moment*, op.cit., 12.

background of its author? Does it truly reflect a “certain feeling of Jewishness, of *Bildungsbürgertum*?”

The same year Stein published her *Investigation*, 1925, Mauritz Julius Bonn, an economist and political scientist, wrote a forcefully anti-Schmittian essay *The Crisis of Democracy*, where he pleaded for the parliamentary rule against totalitarian temptations of all sorts. As a Jew, Bonn spoke of the advantage of belonging “to a small, not highly thought-of religious community.” Due to his or her condition, the one who is less integrated into standard civil society is also the one who has less to lose when questioning the direction that the “crowds” are inclined to follow.⁶⁵ It is likely that Stein, just like Bonn, was not ready to let the Weimar regime go without putting up a theoretical fight – it was simply too close to the materialization of the political emancipation educated German Jews had dreamt about and struggled to obtain since the time of Moses Mendelssohn.

True, many Catholics from the *Zentrum Partei* and a great number of Jews from the *Deutsche Demokratische Partei*, the party of which Stein was still an active member in 1925, had political interests in common, like the defense of the freedom of private associations and the abolition of the privileged position of the Protestant Church vis-à-vis the state. Both parties had been instrumental in the proclamation of the *Republik* as well as in ensuring its early survival. However, when it comes to the issue of the theopolitical, Stein certainly shows to be more indebted to the Jewish liberal tradition than to social Catholicism. While the Catholic Church was at the time slowly distancing itself from the proclamation of the intrinsic bond between state and religion (*Mirari Vos*, 1832; *Quanta Cura*, 1864), its new embrace of the different types of regimes as long as the norms of divine justice were paid due respect (*Immortale Dei*, 1885; *Rerum Novarum*, 1891), did not go to the point of approving liberalism, this “sullied product of a revolutionary age of man’s unbounded urge for innovation” (*Libertas Humana*, 1888).⁶⁶ Stein’s emphasis on the legitimate distance between the sphere of the state and that of religion was certainly in line with standard Catholic teaching on modern democracies, but her complete severing of the state’s *essence* from the divine norms associated with a specific religion was still at the time totally foreign to Catholic political thinking.

Interestingly, Stein’s attitude towards the theopolitical issue as defined by the debate between Kelsen and Schmitt comes very close to Martin Buber’s *Kingship of God* (1932). Buber does not offer a theoretical treatise of political philosophy in this work. As Buber develops an exegesis of a series of passages from the Old Testament,

⁶⁵ Quoted in Jen Hackes, “Weimar liberalism”, 159.

⁶⁶ The *Zentrum Partei* kept being torn apart between its left-wing, more than willing to cooperate with the democratic agenda of the Weimar regime, and its right-wing, fundamentally suspicious of liberalism.

his goal is to lay out the principles of an authentically Jewish understanding of the relationship between God and the state. From this point of view, Buber finds a fundamental opposition between, on the one hand, the authentic theo-politics of Israel, which consists of the free, living, and ever-adapting obedience of the nation to the One God who rules over them as a King, and, on the other, what he calls “political theology;” namely, the repeated attempts to transfer the attributes of the divinity to an earthly ruler or an institution, thus leading the nation astray from the memory of God and directly into the pitfalls of paganism and political servitude. Buber’s “authentically Jewish theo-politics” does away with Schmitt’s understanding of theo-politics the same way Stein’s treatise does – by denouncing the idea that the earthly authority should be relying on divine decrees as dangerously deceptive.

In sum, Stein’s liberal-Jewish understanding of the state provides a clear ground to denounce the decision of a government to identify a specific religious group with the “enemy.” It allows for civil disobedience in this case. This is not a matter of teleological norms of morality, as Strauss unconvincingly argued, but of defining the boundaries of the state’s legitimacy with *essential precision*.

This touches on the fundamentally distinct ways in which Stein and Strauss conceive the very activity of philosophical thinking. That Strauss carefully avoids using the Aristotelian terminology of essence and accidents goes to the heart of the matter. Being an unrepentant admirer of Heidegger, his former professor, Strauss thinks in terms of ontological destiny, *Geschicklichkeit*, not in terms of an-historical essences. Accordingly, Strauss’ negative valuation of modern political thinking and his pessimism regarding the emancipation of the political order from religion leave no room for a distinction between Modernity’s positive aspects and its flaws. For the young Strauss, the liberal state is an unconscious and ever-worsening fall from grace that gradually leads human beings to submission to their most gregarious instincts. In this framework, the only salvific option seems to eliminate the liberal state as a whole.

By contrast, the phenomenological approach that Stein developed under the influence of Reinach, an approach that renews the Aristotelian distinction between essence and accident (formulated now in terms of “pure” and “positive” states of affairs) enables Stein to draw the line between the “normal weakness” of the parliamentary state (its fragility due to the slowness of its processes of decision and implementation) and the “pathological weakness” caused by the subversion of these same processes by the very agents supposed to implement them. Had the citizens of the Weimar Republik learnt to cherish and take care of the inherent fragility of democracy instead of demonizing it in the name of God, there are good reasons to believe that the tragedy brought about by the demise of the regime could have been avoided.

Drawing a word of wisdom from this lengthy argument, I would say that if democracy in the form that we know today has some chance of survival and renewal, we must hope that the young Strauss was wrong, dead and lethally wrong, while the young Stein was brilliantly, although desperately, right.