Weimar

A Jurisprudence of Crisis

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AND

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WITH

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UNIVERSITY OF CALIFORNIA PRESS
Berkeley Los Angeles London

University of California Press
Berkeley and Los Angeles, California

University of California Press, Ltd.
London, England

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Library of Congress Cataloging-in-Publication Data

Weimar : a jurisprudence of crisis / edited by Arthur J. Jacobson and Bernhard Schlink; translated by Belinda Cooper with Peter C. Caldwell . . . [et al.].
p. cm. — (Philosophy, social theory, and the rule of law ; 8)
Includes bibliographical references and index.
ISBN 0-520-22059-5 (cloth : alk. paper)
1. Constitutional history—Germany—Sources. 2. Constitutional law—Germany—Philosophy—History—Sources. 3. State, The—History—Sources. 4. Germany—Politics and government—1918–1933—Sources. I. Jacobson, Arthur J. II. Schlink, Bernhard. III. Series.
KK4710. W45 2000
342.43′029′09042—dc21 00-037772

Manufactured in the United States of America

09 08 07 06 05 04 03 02 01 00
10 9 8 7 6 5 4 3 2 1

The paper used in this publication meets the minimum requirements of ANSI/NISO Z39.48-1992 (R 1997) (*Permanence of Paper*). ♾

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INTRODUCTION

Christoph Schoenberger

The Weimar Constitution had no more passionate defender than the person who drafted it. No German law professor bound his name so unreservedly to the Weimar Republic as Hugo Preuss.

On 15 November 1918, six days after the fall of the monarchy, Friedrich Ebert, the Social Democratic chairman of the Council of People's Deputies and later president, appointed Preuss to a high post in the government: *Staatssekretär des Inneren.* His main responsibility was to draft a democratic constitution. Preuss, a bourgeois left-liberal, was at the time the most left-leaning scholar of the law of the state in Germany—Social Democratic professors of the law of the state had been unthinkable under the Kaiser. By appointing him, Ebert sought to bridge the divide between his Social Democrats and the middle class. He hoped to mollify bourgeois fears of a social-revolutionary dictatorship, the "authoritarian state in reverse" against which Preuss had warned in a famous newspaper article in the days after the November Revolution.[1] At the end of 1918, Preuss completed a draft that decisively influenced the Weimar Constitution, although it underwent significant changes in the National Assembly. This "paternity" strengthened his deep inner bond with the Weimar Republic; his death in 1925 at the age of sixty-four spared him the experience of its failure.

During the Empire, Preuss had been an outsider among fellow scholars of the law of the state—unlike, for example, Gerhard Anschütz, one of his generation's few other pro-republican scholars of state law. Preuss was never offered a professorship at a German university; political and scholarly

reservations as well as anti-Semitic prejudice kept him from the centers of scholarly life in the Empire. It was not an accident that he taught at the far less respected Berlin College of Commerce [*Handelshochschule*], a private school founded by the Berlin business community. The College of Commerce was an institution of the urban liberal bourgeoisie, the social class to which Preuss, a financially independent member of the Jewish upper class and an active left-liberal municipal politician, felt the closest ties. Here Preuss's career coincided with his scholarly and political interest: the self-organization of a free citizenry.

Preuss believed that citizens should organize themselves in locally self-governed communities, which would ultimately be supplemented by parliamentarization and democratization at the level of the Länder and the Reich. His personal involvement in local Berlin politics, as city councilor and honorary member of the municipal council [*Magistrat*], served this end at the local level. Historians of the Empire have sometimes viewed such liberal influence in local politics as indicative of the potential for liberalizing imperial Germany as a whole.[2] This is certainly what left-liberals like Preuss had in mind. But it should be noted that the strong position of liberals in the cities was largely due to the restricted franchise that applied to local elections. By contrast, the introduction of universal suffrage for Reichstag elections in 1871 seriously reduced liberal influence at the federal level and strengthened the Social Democrats and the Catholic Center Party. Preuss's political fate at the national level during the Empire mirrored the different conditions there. His efforts to win a Reichstag seat were unsuccessful both in the Empire's last Reichstag elections of 1912 and in the elections to the National Assembly and the first Reichstag of the Weimar Republic in 1919–20. Preuss, who joined the newly founded left-liberal German Democratic Party [*Deutsche Demokratische Partei,* DDP] after the end of the monarchy, ultimately proved to be too much the scholar and too little the politician.

His scholarly work centered on citizen self-organization as well. In 1889, he successfully defended his *Habilitationsschrift* under Otto von Gierke at the University of Berlin. That work, *Municipality, State, and Reich as Territorial Corporations* [*Gemeinde, Staat und Reich als Gebietskörperschaften*] and his later historical work on the development of German towns since the late Middle Ages were strongly influenced by Gierke's *Theory of Associations* [*Genossenschaftslehre*]. Gierke thought that the possibility of creating associations and cooperatives was the basis of human history in general. According to him, associations of all kinds, from the family to the state, were able to combine diversity and uniformity.[3] Gierke's theory owed much to the tradition of the failed German revolution of 1848 and the Paul's Church Constitution drafted by the National Assembly in Frankfurt.

Gierke and Preuss, influenced as they were by the liberal ideals of 1848, opposed the legal positivism of Paul Laband that dominated state law

scholarship during the early decades of imperial Germany. Laband viewed the law of the state as a creation of state power and attributed this power to the monarchy and its bureaucracy alone. His canonical *State Law of the German Reich* [*Das Staatsrecht des deutschen Reiches* (1876–82)] therefore dealt only grudgingly with the Reichstag's position in the Wilhelmine system. Laband considered parliamentary institutions to be mere formal limitations to an elementary state power that remained firmly in the hands of unelected bureaucrats.[4] Gierke, on the other hand, insisted on the crucial importance of the Reichstag, on the significance of basic rights and on the right of citizens to participate in public affairs in general. But Gierke was in favor of neither parliamentary government nor modern democracy. Preuss later radicalized Gierke's position, advocating gradual parliamentarization and democratization of the Wilhelmine system, which he termed an "authoritarian state" [*Obrigkeitsstaat*]. Long before Hans Kelsen, Preuss rejected the very concept of sovereignty, which was for him a relic of the monarchic-bureaucratic-absolutist tradition. A state built according to the principles of Gierke's *Theory of Associations* could no longer be fixated on sovereignty; instead, the state would be characterized by popular self-organization at all levels—from the municipalities to the Länder and the Reich.

During the First World War, Preuss became one of the most outspoken critics of Wilhelmine Germany's political system. His impassioned *German People and Politics* [*Das deutsche Volk und die Politik* (1915)] dealt harshly with the Empire from a practical political perspective. In this wartime book, Preuss bemoaned the weakness of the German liberal tradition, which he claimed gave Germany a fundamentally different nature than the western democracies. The German idea of freedom, he argued, was traditionally apolitical and aimed only at protecting a private sphere of freedom against the alien, authoritarian power of the state. Freedom was only freedom from the state, not freedom *in* the state. For Preuss, the German party system reflected this tradition. Since the Reichstag had no direct influence on the formation of a cabinet, the German parties had developed stubborn ideological convictions and a strong oppositional spirit. They lacked the ability to compromise, let alone to take practical responsibility:

> Despite the constitutional structure and local autonomy, the state appears again and again—above all in cases of conflict—to be embodied by the sole executive with its army and bureaucracy. Faced with this state, parliament and local government are an alien, heterogeneous element and can at best serve as external limitations. Not only does the attitude of the executive involuntarily follow this pattern; so does, involuntarily, the effort of the political currents called upon to practice eternal opposition in the German Länder. This effort always tended far more toward the negative side, the protection of individual and private freedom from encroachments by the state—the authoritarian

> bureaucracy—than toward the positive side, the conquest of state power and responsibility for one's own party.[5]

Preuss, in contrast, wanted freedom to be thought of as the freedom to cooperate in the community of citizens. With the end of the monarchy, he had the opportunity to translate his ideas into action.

Preuss drafted the Weimar Constitution, defended the draft before the National Assembly, and was closely involved in working out the final version of the document, which was promulgated on 14 August 1919. However, the Weimar Constitution did not reflect Preuss's wishes in every respect, particularly with regard to Germany's new federal structure. Preuss was convinced that the young republic could succeed only if its territorial boundaries, until then coupled with the dynasties of the individual Länder, were to change fundamentally. He proposed, on the one hand, unifying the underpopulated dwarf states of the Empire into larger territories, and, on the other, dividing Prussia into several separate Länder. In Preuss's view, the dissolution of Prussia, which had exercised a de facto hegemony during the Empire, was indispensable to the formation of a parliamentary democracy at the national level. He was convinced that the end of the dynasties signaled the coming of a unitary German nation-state—a state that could not bear the weight of an overgrown Prussia.[6] Preuss underestimated the tenacity of German federalism, however, and was unable to put his views into practice. A thorough restructuring of territorial divisions did not occur, nor did the breakup of Prussia. The continued existence of Prussia, which comprised three-fifths of the territory of Germany and its population, would be an obstacle to the development of the constitution, as Preuss had predicted. Ironically, democracy in Prussia, under the leadership of the Social Democratic minister-president Otto Braun, proved far less crisis-prone than its national counterpart.[7]

By contrast, the central institutions recommended by Preuss for the Weimar Constitution did succeed in gaining the support of the National Assembly, in particular his conception of the relationship between Reichstag, cabinet [*Reichsregierung*], and president [*Reichspräsident*]. In Preuss's model, the president would appoint a chancellor to head the cabinet, who would at the same time require the confidence of the Reichstag. The president, directly elected by the people, would have a status equal to that of the Reichstag. In case of conflict between president and Reichstag, the president would have the right to call new elections "to lodge an appeal against the people's representative with the people themselves."[8] This system was intended, on the one hand, to lead to an equilibrium based on separation of powers; on the other hand, it was to guarantee the democratic rights of the people against parliament.[9]

The new constitutional system weakened parliamentary institutions from the start. The Reichstag still had to grow out of the oppositional role to which

it had become accustomed during the Empire. The new system, however, favored the persistence of behavior held over from the monarchy, as it ensured the presence of an executive ready for action and supported by the civil service and the military. The existence of a popularly elected president relieved the parties in the Reichstag, which were deeply split by social and religious differences and unused to the necessity of compromise, of the responsibility to form a cabinet. With the president as an *Ersatzkaiser,* a reserve authority stood at the ready that could easily head the state administration should the Reichstag fail to act. This "reserve constitution" became reality at the end of the Weimar Republic, when a presidential cabinet replaced the Reichstag as the primary legislative body. Preuss, who had denounced the weaknesses of the imperial constitutional system so unsparingly during the First World War, proved in his Weimar draft constitution to be far more influenced by the legacy of the constitutional monarchy than he himself realized. His system was one-sidedly aimed at weakening the Reichstag but took no practical precautions against the danger of a dictatorship of the president.

Preuss's idealistic conception of cooperative democracy prevented him, like so many other Weimar democrats, from paying enough attention to the great significance of parties in a democratic state. Apart from exceptions such as Gustav Radbruch and Hans Kelsen, even democratically oriented state law scholars left the discussion of parties to conservative authors such as Heinrich Triepel, who bemoaned their influence over representative bodies and flirted with the idea of a parliament of estates. Even pro-republican scholars such as Preuss conceived of democracy more as an organic unity of the people than as a system for the orderly resolution of conflict. In their minds as well, the president easily developed into a guardian of the unified popular will facing a parliament splintered into opposing parties.[10]

Preuss continued his political, journalistic, and academic engagement on behalf of the young German democracy until his death in 1925. He was especially hurt by the accusation of right-wing nationalists circles, often accompanied by anti-Semitic attacks directed at him personally, that the Constitution was "un-German."[11] Improvised in a climate of wartime defeat, saddled with enormous problems of foreign policy and economics, the Weimar Republic was unable to fulfill the task formulated by Preuss during the First World War as the goal of German constitutional development: "to synthesize antitheses and interests in common work and common responsibility for the commonwealth, the *res publica.*"[12]

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THE SIGNIFICANCE OF THE DEMOCRATIC REPUBLIC FOR THE IDEA OF SOCIAL JUSTICE

Hugo Preuss

Originally appeared as *Die Bedeutung der demokratischen Republik für den sozialen Gedanken* (1925), in Hugo Preuss, *Staat, Recht und Freiheit: Aus 40 Jahren deutscher Politik und Geschichte* (Tübingen: Mohr, 1926), 481–96. It is the text of a speech that Preuss gave to the General Association of Free Employees [*Allgemeiner freier Angestellten Bund*], which was a trade union of white-collar workers.

Of the value and dignity of the republic and of democracy in general I do not believe that I need to speak. I know that the AfA-Bund [*Allgemeiner freier Angestellten Bund,* General Association of Free Employees] is supposed to be "apolitical" in a certain sense; yet it is not so apolitical as not to be pervaded by the value and dignity of democracy, without my having to preach it. One would have to be politically blind not to discern clearly in the great course of recent history the direction in which historical development is moving with an internal necessity. If we look back one and a half centuries—a short span of time in the historical context—this period, especially its final decades, is filled with the incomparable triumph of democratic principles around the world. It starts with the Declaration of Independence by the United States and ends with the world war. One and a half centuries ago, when the United States entered the community of nations, it was the first and only large, modern, democratic republic. And after one and a half centuries had past, the last three anti-democratic powers collapsed in the world war—we, unfortunately, along with them. It is of world historical significance that not only Germany and Austria fell before the superior power of the coalition, but first of all Russia, which had been on the side of the victors, on the side of the superior power. This certainly does not prove that the allied and associated democracies of the West had led a crusade for democracy, as they claimed in their wartime propaganda. Yet it proves much more. It proves that in the great conflicts and decisions of the modern world with its tremendous mass movements—in these battles in which not only the military, but whole peoples, determine victory or defeat in their social entirety by summoning all their social strength of soul and technical potential—that in these times the anti-democratic form of government is simply no longer capable of competing with the great democracies. In short, it is so clear and apparent that the development is strengthening and securing the spread of the democratic principle and asserting it everywhere, that one could hardly deny it even if one wished to.

Yet, some say, all that may be true, but the democratic state simply does not suit Germany. It contradicts the German character! Democratic institutions are "Western." Yes, gentlemen, as I said at the beginning, I do not believe I need to refute that in front of this audience. They would be a strange people, these Germans, if they alone were incapable of keeping step with the political development of all civilized humanity. This claim is suspiciously reminiscent of those who glorified Russian czarism and desired to protect "Holy Mother Russia" from infection by the "rotten West." It is generally those in power, favored by the historical destiny of a country and its people and by particular circumstances, who fear nothing so much as that their subjects could enter the great stream of general political and social development. The beneficiaries and followers of the power of princely dynasties, as well as the princely bureaucracies, also insisted that the German character and the true German national feeling stood in opposition to a unified national state. German nationalism, they said, could only feel at home in Prussia, or even more in Bavaria, and then, *secundum ordinem,* down to the Lippe and the Reuss. One is bitterly reminded of [Gotthold Ephraim] Lessing's despairing words, uttered at the height of princely sovereignty: "The true German national character is to have no national character." But praise God, these times are behind us. Democratic freedom and national unity belong together, and why they belong together will be discussed later. But is it not already proven by the fact that we survived the terrible collapse of the old powers and the six equally terrible years of peace on this foundation of democratic and national unity? We could not have done it on any other foundation. But I do not need to discuss this further here.

In this circle, however, dedicated to social policy, the question formulated in my topic does arise: the social significance of the democratic republic. This certainly does not mean that I expect you to be small-minded enough to gauge great principles of the state's communal life and its historical development according to the personal advantages they bring or some other facet of social or trade union policy. I know that your opponents accuse you of this, but it does not touch you. But on the other hand, the republic and the democratic idea would be nothing but sounding brass or a tinkling cymbal* if the democratic idea were not closely linked with the social idea; if the free people's state that we hope to realize in the democratic republic meant nothing for the freedom and for the moral and material improvement of the people—that is, in general, the working people—in their own state. However, two opposing parties claim that democracy and republic mean nothing for the social idea and social progress.

You all know the term "formal democracy" used as an attack. Formal democracy—and there are many who mean the Weimar Constitution in

*Preuss quotes from 1 Corinthians 13:1.—EDS.

particular when they say this—is said to be socially meaningless as long as the capitalist economic order has not been destroyed. In this view democratization of the state without socialization of the means of production is form without content, the equal rights of democratic freedom are as much of a lie as the private-law freedom of the so-called free-labor contract between the owners of the means of production and the proletarian who possesses only his labor power; just as the worker continues to be exploited through free-labor contracts, so also does he remain unfree under the freedom of democracy and the republican constitution. And this is where the opposing side chimes in: No, not only does he remain unfree, but he is even less free and more helpless in the democratic republic; for in the democratic republic, the property-owning classes rule without scruple or restraint. In the capitalist economic order, there is only one road to effective social reform, effective social progress, and that is a strong monarchy, they say, a strong monarchy that stands above the interests and aspirations of the ruling economic classes and is immune to class egoism, but which must also have the power to rein in the ruling economic classes and circles, to set restraints and to force them to take measures of social reform. And then, naturally, they go on to praise specifically the social kingship of the Hohenzollerns, and they quote the old Fritz, who is supposed already to have said that he would like to be a king for the beggars.* These are the two opposing parties, in whose cross-fire the democratic republican constitution stands with regard to its connection with the social idea.

"Formal democracy!" Yes indeed, in a sense every constitution, like every legal order, is formal. It creates formal barriers between individuals and groups. Is, for example, the Soviet constitution (if one can speak of a constitution) not formal? It determines above all purely organizational forms and the rights to participate in the full electoral process and to vote. It is even more formal in creating, purely formally, an endless chasm between the minority of those with rights and the great mass of those excluded from them. These are formal barriers. Because every constitution, like every legal order, is in itself a formal element, no constitution as such can create a new society. It would be exciting false hopes to claim that any constitution, however it may be formulated, could immediately and directly create a new social landscape. Nevertheless, the value of a constitution for the idea of social

*The supporters of the monarchy in Imperial Germany had argued that only the monarchy could guarantee social justice, because it stood above the various interest groups. They referred to a celebrated remark of Frederick the Great, who, as Prussian prince, is supposed to have said that as king he would be "a king for the beggars" ["Quand je serai roi, je serai un vrai roi des gueux."]. See Eckart Reidegeld, "Schöpfermythen des Wilhelminismus: Kaiser und Kansler an der 'Weige des deutschen Sozialstaates'," in Lothar Machten, ed., *Bismarcks Sozialstaat: Beiträge zur Geschichte der Sozialpolitik und zur sozialpolitischen Geschichtsschreibung* (Frankfurt and New York: Campus, 1994), 269.—EDS.

justice can vary enormously. I believe that the value of a constitution for the idea of social justice can be determined by looking at its structure, the "formal" structure in which the constitution shapes the organization of government. The constitution may benefit and promote positive social development and leave it the most leeway legally, or it may limit social justice through privileges on the one hand and deprivation of rights on the other, and set artificial barriers and obstacles to the natural development of positive social movement. A constitution, even in the democratic republic, cannot create the "social state of the future" (to use an older expression). That is beyond the powers of a mere legal order. However, its value from a social point of view will be judged according to how its legal norms—the legal limits and restraints it sets—perform in regard to the law of progressive socialization. Although, or perhaps because, I am not a socialist, I can refer to progressive socialization with a clear conscience. It is an undeniable truth. Of course, one must not expect of it the sudden fulfillment of any socialist schema. But with shrinking space on earth, due as well to the growth of mankind and the conquest of distance, the law of progressive socialization has a certain natural inevitability. One need only consider the development of common means of transportation, light sources, energy sources, water sources, etc., with all their consequences. The present situation, with the consequences of the world war, offers indirect evidence. At first, a socialist deluge was expected, hoped for, or feared as a consequence. In fact, we see the opposite: an ebbing of socialization despite a socialist electorate and the swelling of an anti-social super-capitalism; for the world war temporarily pulled mankind apart, not only intellectually but also economically. By making international exchange and traffic more difficult, it also increased physical distances to a certain extent. As long as this situation continues, it limits or interrupts the efficacy of the law of progressive socialization.

However, it makes a significant difference whether a legal order hinders the development of the law of progressive socialization, whether it, as we can also say, hinders the intensification of social life—through artificial restraints, legal inequality, privileges and deprivation of rights—or whether it smoothes the path through democratic equality. Smoothing does not immediately lead to an ideal goal; neither do restraints hold off the goal forever. The development simply takes a longer or shorter time; and above all, it progresses either through healthy, peaceful internal development or through internal struggles and convulsions. That is the whole difference. But it is important enough for those who have to live with it.

I would like to illustrate this with an example. The free-labor contract certainly brings only formal equality of rights. When the employer and the employee, formally equal, make a legally free contract, they are not economically and socially equal; the economic and social differences at first remain unchanged. Here we see a spectacle that is often repeated in similar

circumstances. There was a time and there were people who celebrated the free-labor contract as the ultimate in economic and social wisdom and who said: Children, what else do you want? The thousand-year Reich has been achieved! That was foolish; it was lack of political awareness. And it is partly for this reason that the opposing side now can claim, in contrast to this senseless overestimation, a swindle, a complete nothing, a lie; the free-labor contract is worthless! Gentlemen! For social policy it is neither the ultimate wisdom, nor is it socially worthless. It is even eminently valuable. Ask yourself: Is not the free-labor contract the starting point for the entire recent upward movement in social policy? Would this even be imaginable without the "formal" legal prerequisite of the free-labor contract? Would this entire development be imaginable under conditions of slavery, bondage, serfdom, indentured servitude, and guilds? No, these legal conditions had to outlive themselves, they had to make room for the new, "formal" right of the free-labor contract in order to create the opportunity and precondition for all the things that seem obvious to you today, since they have become so normal: the right to form unions, their movement and activity, collective bargaining agreements, etc. Just ask yourselves, in a quiet moment, what the necessary precondition to all these things is. The free-labor contract! Certainly, the free-labor contract did not in itself create the upward social movement, other movements and struggles did this. But the disgraceful "formal" right of the free-labor contract was the precondition to and root of all these modern weapons in the onward pressure of social policy. And now, to leave this example, constitutionally granted "formal" democracy offers in a similar, but much broader and larger sense, the basis, the starting point, the precondition for a rich and vigorous, though gradual, step-by-step unfolding of the social idea.

The democratic constitution contributes nothing to social progress? The supporters of the old say: Did not the social kingship do more? The democratic constitution does not speak of the "poor man" who must be "raised." The so-called social kingship spoke quite a lot of him. Yes, gentlemen! The older among you still recall the large employers, who were in a certain sense extremely active in regard to "social policy"; they created a wealth of well-meaning rules and beneficial social institutions—and they strongly emphasized what they did. But is it not remarkable that those who were to be favored by these measures saw them as a means of oppression! No fair person would deny that in a material sense the results were excellent. But why did those on the receiving end, if they were of firm character and clear head, experience at least, let us say, an uneasy feeling? Because they felt, and rightly so, that these social measures were not an end in itself; they were rather the means to an end, to a goal of power, stricter control and tighter shackles. Nonsocialists must never forget that, despite certain errors and mistakes, socialism always heavily and rightly emphasized, despite the importance of

material questions, that the human being, and therefore the worker, does not live by bread alone; that to him ideal claims, claims to freedom, are just as much a necessity. For those "social" welfare measures, one is justifiably convinced that many a grant of bread and other material things occurs at the cost of personal freedom, dignity, and autonomy. What for the individual large employer is a matter of business policy and personal advantage, is on a larger scale and in modernized form what the social policy of the eudaimonic police state and of the Kaiser used to be. I do not deny that liberals and Social Democrats made political errors in dealing with these things. But what is now extolled in so many beautiful speeches—that real social improvement was achieved from above, that a real social, I won't say reconciliation, but rapprochement between the various segments of this one people through the instrument of social policy was reached; that is beyond question. For just like the policy of the enlightened absolutist employers (if we may so characterize them), authoritarian social policy was also a means to an end. The obvious proof of this is the fact that legislation concerning social policy was framed within anti-Socialist legislation—emergency legislation. The aim of this legislation was not social improvement in itself; it did not indicate that the social idea had penetrated the state; it was a means to the goal of power. We need not express it as impolitely as did Marx and Engels, speaking of the deception of royal Prussian government socialism; but those who follow these things more closely know what Bismarck learned from Louis Bonaparte in regard to this social policy as an instrument of power. It is simply an embarrassment to ascribe merely to Social Democratic agitation the astonishing fact that Germany, the country with the most progressive legislation concerning social policy, is at the same time the country whose working class is most alienated from the state, the life of the state, and the nation. During the war, as a member of the Reich Committee for the Welfare of War Invalids, I once went to Brussels at the invitation of the former governor-general of Belgium, von Bissing. Some of you will remember that Herr von Bissing made great efforts to explain to the Belgians how far ahead of their fatherland Germany was in social policy. He thought that with this he would propagandize Germany to the Belgian workers in a particularly clever and cautious way. And one must admit that Belgium was as backward in social policy as Germany was progressive. Despite Germany's exemplary social policy, the Belgian workers wanted nothing to do with its control. For *politically* they were more closely linked with their state than the German workers unfortunately were or could have been with the German state until the war, despite social policy from above—a result of the authoritarian system that excluded broad sectors from the life of the state.

Is not there a strong nexus between the idea of the republic—the *res publica,* the *res populi,* the affair of the people, what is shared by the entire people—and the social idea, in and of itself? Seen in broad terms, two

structures of the state face one another here. The socialists call each other *comrade*. And the 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 ever wider associations, from bottom to top. It is the cooperative structuring of the state. It faces the authoritarian structuring of the state from top to bottom that claims an authority given *a priori*. Max Weber has defined state power as the "monopoly of the legitimate use of force." If this monopoly of the legitimate use of force is not in the hands of the entire population but of a dynasty, a class, a caste, a ruling body, they are forced like every creature, in line with the drive for self-preservation, to use their power and force, first of all to obtain the monopoly. They must follow policies that cannot arise from the cooperative spirit of the entire population. They assure their own preservation, the assertion of their own control, anchored in all sorts of formal legal regulations and a corresponding administrative practice.

To be sure, democratic equality cannot be equated with the fiction of complete personal equality. First of all, people are not equal but very unequal. It has been said that, just as on a tree not one leaf is like the other, so not one person is really like the other. And further, political organization, like every organization, is differentiation and division of labor, hence, inequality. 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. Those who would like to introduce an "organic" right to take part in the full electoral process, as they like to call it—that is, an unequal right—insist that the highest legal principle is not equal treatment for all, but equal for equals, unequal for unequals. But against what standard can one justly measure the allocation of political rights? Once, it could be done, when the rights of the estates still existed—before they were in ruins and could only be upheld in the flow of times through trickery and violence. At a time when they were still vital, the legal order had strict measures and could do justice to mass phenomena according to them. Individuals could still fall under the wheels of life, but these were individual cases. In general, the knight was a knight, the peasant a peasant, the trader a trader, the wage laborer a wage laborer in his entire nature and manner. It always happened that some were declassed upward or downward, but these were exceptions. But in this regard, modern social development (to summarize) involves differentiation of individuals and integration of classes. I know that it contradicts some of this audience's feelings, but I must openly express my scholarly conviction: Our development is not characterized by a deepening of class oppositions; rather, it integrates the classes.

The mental and intellectual differences, the typical features of classes are leveling out; they level out to the same extent that individuals differentiate and become intellectually more varied. Today, gentlemen, the worker is not simply part of the mass phenomenon of workers; everything depends on individuality. I know "workers" who are statesmen in their entire individuality and mentality. And there are members of classes formerly called upon by law to govern, who in their mentality are not the least statesmen. The fact that they are not workers is certainly not a result of their being too good for it intellectually and being destined for something else because of their mentality. I do not want to go into this more deeply. If you follow me and quietly extend it according to your own personal experience, you will find confirmation in many examples. And if you know family histories, you will see how great the changes have been within a few generations! Differentiation of individuals out of their classes, and integration and equalization of various classes and vocations. Economic conditions also help to blur these boundaries. And because this is the essence of modern development, the legal order can no longer link varied rights to a variety of fixed, large groups. Thus democracy in the sense of equality, unconditional equality, is not a doctrinaire quirk, not a dogma made up in someone's study, but the natural, just consequence of all recent economic, social, cultural, and intellectual development.

Law in a democracy has realized that to turn political valuations into legal distinctions would be purely arbitrary; for the fixed, large, cultural, intellectual, etc. mass phenomena to which they could be linked no longer exist. However, individual differences cannot be measured using "formal" law. Does democracy therefore mean atomization, dissolution into mere unconnected individuals? Oh no, not into unconnected individuals; they simply are no longer divided into artificial, falsely formed groups forced together through a law that has become unjust.

On the basis of modern development, there is a remedy for atomization in keeping with and based upon democratic equality, which is also necessary and indispensable for the new state: the people's free *self-organization* in *parties*. This avoids atomization and gives the people the means of acting politically in a democratic sense. Perhaps you will interject: Wait! Do the political parties in Germany really provide the people with the means of acting politically, or should one maintain the opposite? Democratic self-government is still in its infancy here. We have inherited our party system from the old days of the old authoritarian state, where playing political games was a more-or-less sensible way of passing the time without any true, serious responsibility for the fate of the people. They will have to change and reform themselves under the harsh necessity of the responsible task that popular self-government poses. Thus, our old party system is experiencing ferment and decomposition; something new is happening. Certain parties

would like to use social conflicts of interest to drive apart the political trends that belong together from internal necessity for the future of our people.

All liberal political trends must be rooted in the social idea, if they are not to betray themselves. One often hears of the contradiction in principles between liberalism and democracy, namely, social democracy. Gentlemen, this contradiction is not genuine, not true. Read the father of classical liberal economics, Adam Smith. If you really read him, you will have to say that the man is not the father of the Manchester guild; he is much more what today we would call social-liberal. He certainly is, and this also is what liberalism was originally. That is why liberalism had to grow into a socially oriented democracy. Only later does one find a different trend, a distortion of liberalism—when, as Alfred Weber described it, competitive capitalism changed into monopoly capitalism. That was an important change. The idea of free movement for all, the search for freedom of economic development in opposition to the state, were no longer the true leitmotifs; they declined to mere propaganda and advertisement. Instead, in reality, the real issue for this trend was and is until today control by private economic interests over the entire state, over the public interest. Monopoly capitalism is necessarily anti-democratic and anti-social—what competitive capitalism is not, so long as it is healthy and fresh. In contrast, the democratic and the social ideas are rooted together in the cooperative principle of the commonwealth, the democratic, the republican state. Gentlemen, it was under the aegis of imperial social policy that monopoly capitalism, with its anti-social and anti-democratic instincts, became far stronger. It became one of the driving forces behind that means of power, behind the whip of the emergency laws, when the carrot of social policy with its legislation was proven politically ineffective. It was one reason for the alienation of broad sectors of the population from the state and finally for the collapse that we experienced with horror.

Lulled by the dream of security in the good old days, no sector of the German people was prepared for that collapse. If one considers this, one must realize—as will future historical investigation—that those trends and movements of the people who were not attached to the old system come hell or high water, as well as those who in fact opposed it, did an incredible rescue job after the collapse. I have always emphasized that the attitude taken by the Majority Social Democrats in those terrible, critical days was a stroke of luck for Germany. It was statesmanlike, it was national in the true sense of the word, and it gave credit to its name, social and democratic. It is really not so much a question of how the two parts of the word are connected, whether democratic and social or social and democratic. It is just a difference in emphasis. What counts is not to allow the democratic and the social principles to be turned against one another, playing into the hands of those

who, as anti-nationalists and anti-democrats, serve the cause of reaction and monopoly capitalism. In that terrible emergency, after all the gods or idols had collapsed in the great twilight of the gods; after the world war, this horrible judgment of the world, had revealed the old system's loss of vitality, the only possibility of salvation proved to be the fact that the new state could be erected on the elemental community of democratic, social, and national ideas, all inseparable from one another.

A nation that no longer believes itself held together by subservience to hereditary dynasties—what is it but a cooperative community, the cooperative community of a people sharing common historical experiences, a common language, a common culture, a people that wishes to be itself, developing through its own individuality, its own character, its own intellectual gifts as a full-fledged member of the international community? For this national community to hold together strongly and firmly, it must—on a cultural and intellectual level that a people such as ours achieved long ago—live in a state based on the rule of law that facilitates and makes possible the betterment of all members of the people and gives it free rein by refraining from limiting and harming the natural development of this upward movement through outdated privileges, legal inequalities of a "formal" yet legally binding type. The necessity of democratic equality of which I spoke previously must become the reality of this state based on the rule of law.

Common work on the common democratic state, on the *res populi,* the affair of the people, at the same time creates common ground for the various economic and social interest groups and classes. This is not the sweet song of eternal social peace and harmony. We should not believe that economic and social struggles, or party struggles, will disappear even in the most attractive democratic order. That would be marasmus; everything would suffocate in such stagnation. But the struggles would lose much of their poison if they were framed by the common object of democratically equal comrades, by the political commonwealth. Common political activities—getting acquainted, standing shoulder-to-shoulder, collegial political relationships—create mutual respect and temper harshness, and the attack of monopoly capitalism will be countered by the great mass of voting citizens with their superior weight.

When we consider under what conditions of external and internal distress the democratic German republic was born and lived its early years, we must say, despite everything that, God knows, we do not approve of in this German republic, it did good work. It would not have been possible to hold the German Reich together without the democratic and social communal spirit. Without this communal spirit, without the commonalities of the national, democratic, and social principle, everything would have come apart at the seams. Pure power politics, pure authoritarian power could not have kept

the Germans on the Rhine and the Ruhr within the Fatherland. Not because they were ordered from above, but because they wanted from below, they remained loyal to the nation. It would be triply pernicious from this point of view if one did not attempt to lead the social struggle into calmer paths where possible—if one were to fan the flames of social bitterness and embitterment in Germany's democratic, national, and social republic.

Certainly weaknesses, grave weaknesses, did the state reveal during this period and continues to reveal today. When the so-called bourgeoisie feared that the red wave of socialism would close over their heads, in reality monopoly capitalism was celebrating its orgies. In those early days, when there was weeping and gnashing of teeth in many circles I knew, when people sat behind lowered blinds and only timidly passed a lantern, then I said, my God, I am not afraid of socialism but of social reaction. It will not be caused by what really happened, but by your fear. And unfortunately, that was often the case. The fact that great parts of our bourgeoisie were impoverished under the Weimar Constitution was not caused by the Weimar Constitution or by its social content, nor by socialism, which may have done many wrong things and unfortunately may not have done some right ones. But the responsibility lies with the orgy of monopoly capitalism. Lately, monopoly capitalism does not seem to be doing so well; and while until now it was closely linked with all the reactionary opponents of democracy and the republic, in accordance with its anti-democratic and anti-social nature, today one can observe something resembling an affectation of reconciliation. It almost seems as though the monopoly capitalists would begin to recognize the republic "formally." Maybe they recall how it was often scornfully said that it was only a formal democracy; and they have neither great respect for nor great fear of the simply formal. There is some indication that a great transaction could take place: recognition of the republic as a formal constitutional schema and, in return, a united "bourgeois" front against socialism. This is not without dangers. But I must say, such a price is too high for the recognition of the "formal" democracy and republic by its opponents. If the content withers, the shell will also shrivel away. Whoever does not want this to happen must, I believe, whatever narrow party basis he may stand upon, stand together with all who wish to truly preserve the Weimar Constitution, the republic, its close link to the forward movement of the social idea so that the republican form will not be robbed of its democratic and social content. All supporters of the democratic, national, and social republic, supporters of its true spirit belong together in opposition to attempts at domination made in manifold guises by anti-democratic, anti-social monopoly capitalism. The nuances may vary in what the supporters seek in terms of political freedom, national unity, and social advancement; but their goals are linked at the core. In any case, in our modern age and under its conditions, the one

cannot be achieved without the other. One must serve all three, must fight for them together—national unity within the international community, political freedom and democratic equality, and social advancement according to natural development. This, gentlemen, I consider—and I would be happy if you would consider it with me—to be the significance of the democratic republic for the social idea.

THREE

Gerhard Anschütz

INTRODUCTION

Walter Pauly

Gerhard Anschütz did not owe his standing in the state law theory of the Weimar period to conceptions of state and constitutional theory, as did Hermann Heller, Rudolf Smend, and Carl Schmitt, nor to a position on state law grounded in legal theory, as did Hans Kelsen; his prominence was due instead to doctrinal works on existing public law. He succeeded in writing the classic commentary on the Weimar Constitution, one of the few works that went to fourteen editions in the Weimar Republic, and with his temporary colleague on the Heidelberg faculty, Richard Thoma, edited the two-volume *Handbook of the German Law of the State* [*Handbuch des deutschen Staatsrechts*], a unique encyclopedia that collected pieces by numerous scholars. Citations from both works continue to this day to carry great weight.

Anschütz had already become a scholarly authority during the Empire; his appointments in Tübingen (1899), Heidelberg (1900), Berlin (1908), and, at his own wish, his return to Heidelberg (1916) document this, as do his assumption of Georg Meyer's successful textbook on German constitutional law and the inclusion of his article on German constitutional law in the *Encyclopedia of Jurisprudence*. He began publishing in 1891, at the age of 24, with a dissertation written under Edgar Loening in Halle: *Critical Studies on the Theory of Legal Propositions and Formal Law* [*Kritische Studien zur Lehre vom Rechtssatz und formellen Gesetz*]. It was—like his later lecture, "Theories of the Concept of Legislative Power," given following his

Habilitationsschrift—a contribution to the concept of the "statute," and thus to the scope of parliamentary cooperation in the process of creating law. According to Anschütz, for acts interfering with the freedom and property of individuals, the monarchic executive needed statutory authorization and to that extent the agreement of parliament—the "provision of legality" [*Vorbehalt des Gesetzes*].

While the dissertation was still clearly influenced by the conceptual legal method of Carl Friedrich von Gerber and Paul Laband—its construction was largely conceptual—the second study focused on the text and genesis of the relevant constitutional norms. Here Anschütz changed his position from a constructivist legal positivism [*Rechtspositivismus*] to a statutory positivism [*Gesetzespositivismus*] based on an historical and genetic understanding of norms. His commentary on the Prussian constitutional charter that appeared in 1912 also followed this method and thus became in many ways more traditionalist than had it followed a doctrinal approach guided by von Gerber's and Laband's conceptual legal method. Thus Richard Thoma[1] praised the fact that at least in part it took the rights of Prussian citizens seriously as individual rights but at the same time criticized Anschütz's argument that these rights did little more than mirror the provision of statutory legality.

Anschütz's strict statutory positivism placed him in conflict with other leading contemporary scholars of the law of the state. Unlike Paul Laband, he denied the existence of a legal resolution of a conflict where monarch and parliament could not agree on the budget, stating: "Here the law of the state ceases; the question of how to proceed when no budget exists is not a legal question."[2] He accused Rudolf Smend of confusing law and politics, of interpreting the constitution with his integrationist approach—if not counter to, then at least far beyond the text.[3] He criticized Erich Kaufmann as a natural-law thinker for seeking to bind the legislature to the principle of equality, although this was not stated explicitly in the constitution.[4] He also questioned the doctrinal conclusions Hans Kelsen had drawn from his legal theory as lacking historical understanding.[5] He criticized as unfounded in the text the substantive limits on constitutional amendment asserted by Carl Schmitt as a consequence of his concept of the constitution.[6] Anschütz's statutory positivism placed constitutional law within narrow bounds. The field of constitutional *policy,* to which he also devoted himself throughout his lifetime, began for him beyond these bounds.

Impressed by southern Germany's social structure and mentality that he had come to know and appreciate in Tübingen and Heidelberg, the Prussian Anschütz developed increasingly in the course of the Empire into an advocate of the democratic idea. In his writings on constitutional policy during the First World War, he demanded the elimination of the three-class

electoral system in Prussia and the introduction of the parliamentary system in the Reich, especially the responsibility of the chancellor [*Reichskanzler*] to the parliament [*Reichstag*]. This began to be realized only in 1918, when collapse and revolution were imminent. Thus it is not surprising that in 1919 Anschütz participated, as a drafter and adviser, in the creation of the democratic constitution. He identified passionately with the Weimar Constitution and the state it created; he was more than a mere "republican of convenience" [*Vernunftrepublikaner*].[7]

Thus it was no accident that Anschütz chose "The Three Guiding Principles of the Weimar Constitution" as the subject of his speech in the auditorium of Heidelberg University on the *dies academicus* in 1922. Anschütz expected agreement when he linked the democratic and national ideas, and was surprised to be interrupted precisely at this point by loud scraping of feet—the traditional expression of student dissatisfaction, unprecedented at an academic ceremony. Anschütz agreed with Thomas Mann, who, in a speech on German youth also held in 1922, had remarked: "Let them scrape. It doesn't matter, I will finish speaking and put my heart and mind into winning them over."[8] However, this was a difficult enterprise, doomed to failure. Major segments of the young rejected democracy, the victors' form of government, as alien and considered the national idea besmirched by Anschütz's linkage. Among his colleagues, Anschütz found agreement here and there, but mainly was subjected to pointed criticism: The speech was labeled political, hence unscholarly. The reactions to his speech indicate the extent to which the Weimar Republic was a democracy without democrats from the beginning. Until the Nazi seizure of power Anschütz sought to defend the Weimar state by publicly professing his allegiance to democracy.

On 31 March 1933, when democracy succumbed to National Socialism, Anschütz requested emeritus status, with the justification that he could not teach National Socialist state law because of his lack of "inward connection" to it. With this personal, ethical decision, Anschütz's colleagues felt under pressure to do likewise. In a letter to him of 22 October 1933, Richard Thoma, agreeing with Heinrich Triepel, justified his coming to terms with the new rulers as not signifying sympathy, and accused Anschütz of a "rash lack of consideration for younger colleagues (in some cases not even entitled to a pension)." Anschütz lived in seclusion in Heidelberg during the Nazi period and wrote his memoirs. He died in 1948 after a traffic accident.

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THREE GUIDING PRINCIPLES OF THE WEIMAR CONSTITUTION

Gerhard Anschütz

Originally appeared as *Drei Leitgedanken der Weimarer Reichsverfassung: Rede gehalten bei der Jahresfeier der Universität Heidelberg am 22. November 1922* [Speech to the Annual Gathering of the University of Heidelberg on 22 November 1922] (Tübingen: Mohr, 1923).

Fellow Citizens!

The tradition of our alma mater requires that the rector speak at today's celebration on a subject of his teachings and work. The teacher of the German law of the state thus finds himself—beginning with the search for a suitable theme—faced with a task that is neither easy nor pleasant.

Under pressure of the terrible fate that has befallen it in recent years, the German legal system, along with the state, has fallen into disorder and confusion. The revolution neither completely designed the public law that had prevailed in Germany, nor has it designed a new public law that is uniform. Alongside remnants and ruins of the old, we see a growing wealth of new creations, some of them incomplete shells that themselves resemble ruins. Feverish legislation, encouraged constantly by pressing emergencies and exigencies of the moment, creates an army of wavering formal statutes that, having barely a chance to take force, must be soon be revised. It is an unpleasant situation, not least for scholarship, since it is almost impossible in many areas of the law of the state and administrative law to follow the continual changes in the material, to retain a clear overview, to ensure the clarity and order of concepts. A chaos, about which, unfortunately, one cannot yet say when and how it will form into a cosmos.

And all this is still not the most unpleasant aspect of our public law. The entire situation is, naturally, only a symptom of the illness imposed upon our state by the loss of the war and its consequences. We view this deathly ill state with deep, often despairing concern. Is it even necessary to describe our situation? A dictated peace cloaked in the garb of a treaty that mocks the defeated, more vile than any that has ever been forced upon a great nation, has robbed us of land and people that are ours and loaded us with unbearable burdens. The union of our enemies, with the deadly arch-enemy in the West always at their head, has suborned our finances, our economy, our entire national life to control and tutelage to such an extent that one would have to be an expert in the legal art of differentiating between law and fact to be able to claim that the German Reich remains a sovereign state. Internally as well, the externally powerless state—how could it be otherwise?—

is no longer in command. Here I am thinking not of the special situation in the occupied territories but of a general phenomenon: The internal opponents of state power, who without directly combating it threaten to outgrow it—the social and economic powers, labor and business associations, created through a concentration of people and capital, that the state often can no longer control and that will be joined at the first opportunity by the forces of the streets—a rival to state power! All of this taken together provides a bleak picture of *a state in crisis,* the further development and consequences of which remain completely in the dark.

And yet we do not want here to succumb to unrelieved pessimism. Let us recall that in all our national misfortune a last possession is left to us, at the same time the greatest good that a people like the German—sure of itself, yet suffering from internal divisions and conflicts—can call its own. This greatest good is the state organization of our national unity, *our Reich.* Certainly even this last possession is not unthreatened. French politics is at work, sometimes secretly, sometimes hypocritically hiding its aim, sometimes with cynical openness—according to circumstances and by turns—to tear to pieces the Reich whose destruction it did not achieve at Versailles. And in Germany, too—a shame that cannot be denied—there exist corrupt sentiments that degrade the idea of the Reich, because they do not like its present *constitution,* that even attempt to uproot the idea of the Reich, because they are more concerned with particularistic special interests than in the weal and woe of the nation. We know this; but we also know that these Reich-corrupters are just a small crowd and that, as long as we others are unified against them, as long as the overwhelming majority of the German people wants the Reich and the national unity it embodies, the French will not achieve their goal, this old and constantly renewed goal—not even with the help of the eastern vassal states that have been built up behind us so that they can attack at the right moment in support of their great friend.

The Reich must remain ours, and it will remain ours so long as we are united.

I would like to speak today about the political type, the legal essence of our Reich, as represented by its current basic law, the Weimar Constitution of 11 August 1919; and I would like—with some doubts as to the correctness and completeness of the title—to describe my task with the words:

Three Guiding Principles of the Weimar Constitution.

Twice in a period of seventy years the German people, in contrast to its deeply rooted propensity for being led from above by historically legitimized power, has roused itself to take its fate into its own hands, to help itself out of the difficulties of the time, to reform its state from the bottom up, and to do all this *itself* through a freely elected constitutional assembly, a national assembly. The first time, what the national will had intended was unsuccessful;

it is well known that the meeting of the National Assembly in Paul's Church in Frankfurt created a Reich *constitution,* but not a Reich that could be served by this constitution. The Frankfurt Constitution of 1849 remained a document, an honorable legal monument; it did not become law. The second time, in 1919 in Weimar, the will became reality. This time, however, despite all the obstacles in its way, the task was not as difficult as it had been seventy years ago; it was not necessary first to create the national state, for it had already been formed in the great period of the fulfillment of our dream of unity, 1866–71, and the task of the Weimar Assembly was only to give the existing Reich a new constitution in place of the old one that had been destroyed by the revolution.

The crucial guiding principles of both times, of Frankfurt in 1849 and Weimar in 1919, correspond to a great extent despite all the differences between the two epochs. The work of Paul's Church in Frankfurt and the Weimar Constitution are much more closely related than either is to the third German constitution that separated them and that ruled us until the collapse of 1918: the Bismarck Constitution of 1871. Between the men in Paul's Church in Frankfurt and those in the Weimar Theater stands the founder of the Reich: Bismarck. Overall he is closer to those in Frankfurt than to those in Weimar but is so far removed from both camps that his work stands out sharply from what Frankfurt wanted, as well as what Weimar then achieved—a distance that must be grasped by anyone wishing to achieve clarity on the basic questions of the German law of the state.

The distance between the Weimar Constitution and its predecessor, the Bismarck Constitution, is apparent in the following, to mention only the most important points:

1. Far more clearly and strongly than its predecessors the Weimar Constitution emphasizes the *statehood of the Reich,* its character as an independent national state that is more than, and different from, the sum or union of its member states.

2. The relationship of the Reich to its member states, the Länder, previously structured in favor of the latter, looks different today. The standard is no longer federal but in conformity with the opposite principle, *unitary.*

3. A particularly deep chasm opens up when we look at the differences in the *form of the state* then and now. In place of the old monarchic Germany a new one has appeared, *democratically* structured in Reich and Länder, and *republican.*

Statehood of the Reich, unitary Reich, democratic Reich; before us are the three great principles of the Weimar Constitution. Thus we enter the area that we would like to examine more closely.

I

Statehood of the Reich. I have already tried to explain what this means. "The German Reich is a state" means it is more and other than merely an association of the particular powers that have taken over German soil in the course of the centuries as opponents of national unity. The Reich is not both the unity of these particular powers, *the Länder,* and the *unity of the German people;* it is the German people united across Länder borders under a supreme power. Thus, even if one wants to see the Länder, too, as entities possessing statehood, as states of lower degree and rank, and therefore to consider the Reich's entirety to be a common state [*Gesamtstaat*] made up of single states [*Einzelstaaten*]—even then, the Reich is also a state and essentially equal to other large nation-states such as England and North America, France, Italy, etc. The Reich does not offer the Germans a substitute for a state; *it is the German state.* This is not merely a political wish but legal reality, the unequivocal, stated will of our constitution. To estimate the progress this implies for our national unification correctly, we must look backwards and compare in hindsight the present with the earlier stages of the movement towards unity, especially the position taken by the Bismarck Constitution on the question of the statehood of the Reich. What was the meaning of the great popular movement that gripped Germany, like other divided nations, in the nineteenth century—what was the aim of our search for unity? The meaning and aim lay ever in the wish to escape from all these small and medium-sized states, from all these many states, and to replace or place *above* them one state, a national state: *the Reich.* That is how the generation that fought the wars of liberation already thought more than a hundred years ago. They did not forget that divided Germany had once been a single state, a mighty imperial Reich; they knew that this state had collapsed and wished to regain it. They could not fulfill this wish for unity but instead were diverted in a petty and deplorable fashion when the German princes, unable to sacrifice even the least rights of sovereignty to the national idea, united in 1815 in the Deutsche Bund, a protective union that was mainly intended mutually to secure allied dynastic interests, but which had *nothing* to do with the idea of national unity, the *idea of the Reich.* Our long-suffering people accepted this situation, first until 1848. Then it rebelled. Out of the revolutionary movement of the time came the Frankfurt National Assembly of which we have already spoken, in Paul's Church. The German Reich that it hoped to create and to which it hoped to dedicate the constitution it wrote had, in accordance with the will to national unity, all the characteristics of true statehood: It was to be not a contractual relationship between individual states, not a union of princes, but the state organization of the German people in the form of a democratic, constitutional, imperial Reich—a state about which one may argue whether it was or would have become a federal

state [*Bundesstaat*] or a centralized state [*Einheitsstaat*], *but in any case a state.* But, as mentioned, the founding of the Reich did not succeed, the Deutsche Bund came back into force. What then finally smashed it half a generation later was not a popular movement but the German policies of Prussia and its brilliant leader. What did Bismarck put in place of the Deutsche Bund? What was the Norddeutsche Bund of 1867 and its extension, the Deutsches Reich with its Constitution of 1871? Was it a state, or something else, a mere union of states [*Staatenbund*] that in certain respects achieved the same as a state?

The Constitution of 1871 provided no clear answers to these questions. Sometimes its text seemed to speak more for a union of states and was gladly interpreted as such by those who had an interest in this; for example, the introductory words, in which the Reich is described as an "*eternal union*" of German princes and free cities, or the provisions reserving powers from the central state, or the treaty with Bavaria appended to the constitution. Bismarck himself spoke only once about the basic plan of his work—whether a state or a mere union—and then with apparently intentional ambiguity. The guidelines he provided in the autumn of 1866 for drafting the Norddeutsche Bund's constitution stated at one point: "It will be necessary *in form* to adhere more to a *union of states,* but *in practice* to pursue a *federal state,* with elastic, unassuming but far-reaching wording." Now, this did not mean that the structure of German unity should be a union of states but instead that it should as far as possible simply *resemble* a union of states, because (we may add this in revealing the motive) the dynastic and other particularisms with which we must deal would otherwise become uneasy. Here, as always, Bismarck used his characteristic combination of courtesy and cleverness to make the work of unity palatable to the German princes. For them he veiled the statehood of the Reich in a union of states; in any case, he veiled it. And thus it is not surprising that a tendency became apparent in scholarship that preferred the veil to the picture behind it, a view that advocated the Reich as more or less a union of states. This tendency was led by the Munich professor Max von Seydel, the most radical advocate of the Reich as a union of states among German state law scholars in Bismarck's period; he was joined by certain others, some of them without specific political views, such as Eugen von Jagemann and Otto Mayer, and more recently by the Austrian Leo Wittmayer. However, the large majority of German theorists of the law of the state rejected this view. At the beginning of the 1870s, Albert Hänel had already spoken up with great energy for the statehood of the Reich, and another master of our discipline, Paul Laband, at the same time presented the theory of the Reich as a federal state that would soon prevail, in which the statehood remaining to the Länder did not cripple the statehood of the Reich; the Reich was a sovereign common state

consisting of nonsovereign single states—a *federal state.* Thus we scholars learned and taught—and I, for my part, never doubted—that Laband and Hänel were right, as opposed to Seydel and even Bismarck. But I must admit that as a result of the ambiguity of the constitution it was often difficult to refute opposing arguments. For those who were not willing to accept the Reich as a mere union of states, the old constitution presented many rough spots and contradictions that were more than so-called blemishes. In short: that the Reich of 1871, though also a union, was mainly a *state,* not merely a union, was not an entirely undisputed, agreed-upon fact.

Then came the Weimar Constitution, which brought with it the clarity that had been lacking until then, based upon the new political foundations created by the revolution. The old constitution disappeared, and with it also that which had been called, rightly or wrongly, its "contractual" elements, including the treaties and alliances made in November 1870 with the southern German states. And the new structure was executed not through agreements between the states, not on a treaty basis, but through an act of the national will to unification, through the decisions of the constitution-making National Assembly, possessing complete sovereignty in regard to the Länder. We encounter the distance between then and now in its full solemnity when we compare the introductory words, the preambles that precede the texts of both the old and the new constitutions. The old preamble declares that the king of Prussia, in the name of the Norddeutsche Bund, creates an "eternal union" with the monarchs of the southern German states, "for the protection of the federal territory and the laws in force within it, as well as for the promotion of the welfare of the German people." "This union will carry the name of the *Deutsche Reich* and will have the following constitution." The new preamble is very different: "The *German people,* united in its tribes and inspired with the will to renew and consolidate its Reich in freedom and justice . . . has given itself this constitution." There is no more talk of the single states, the German Länder that had in the meantime become republics. They no longer appear as Reich-founding or constitution-making factors, nor even as the building blocks from which the Reich is formed. The Reich is no longer a union of member states but a commonwealth of the entire German people, which rightly describes the Reich as "*its* Reich." The Reich is the German people, united by the authority that arises from itself. A people united under a higher authority: that is what is considered a state, *that is the image of the state. Today* no further argument is possible about the statehood of our Reich. Only now—may we confess this without negating Bismarck and his work—only now, after the overturn of the state and on the basis of the new constitution, have we *indisputably* reached the degree of unity to which we, as a great nation, have an undying claim: *state unity.* Only now is the notion of the statehood of the Reich free of all dross. Seydel once held

that a German Land that single-handedly separated from the Reich did not commit treason but at the most breach of contract; on the same conceptual basis, [Eugen] von Jagemann even declared the governments of the German Länder justified in dissolving the Reich and replacing it with another Reich and another constitution, since it was nothing but a contract signed by them. But today, such views are simply impossible, completely out of the question. We can thank the Weimar Constitution for this; it is one of the greatest national and political advances that constitution has given us.

It would have been surprising had this advance escaped the deadly enemies of our unity. Thus, it did not escape the French, and the conclusion they drew is too typical, too French, for me to keep it from you. Not long ago, a respected representative of French jurisprudence, Professor [Henri] Berthelémy in Paris—with the quick eye of hate, and commendably revealing the actual goals of the war—explained to his countrymen that France had *lost the war, politically speaking;* for what Bismarck had failed to achieve was achieved as a result of the revolution following the German defeat: the German people were fused into a *state.* And as I have been told, Herr B. is by no means alone in this opinion.

II

With the theoretical energy that characterizes us, we Germans love to argue with each other about the fundamental theoretical principles of our state. Just as the statehood of the *Reich* was once disputed, so we argue today about the statehood of its members, the *Länder.* The controversy surrounding the question whether the Länder are really still states or only provinces of the Reich, self-administering bodies of a special kind, is naturally not without significance; after all, the decision whether the Reich is a *compound state* or a unified state depends upon it. If one accepts the statehood of the Länder, it is a compound; if one rejects it, it is a unified state. Thus the question is not unimportant; yet at the same time I would prefer not to address it here and now, as such a discussion would, as Bismarck would say, lead us too far afield into the sand of professorial disputes. In my opinion, the position of power remaining to the Länder under the new constitution is sufficient to allow scholars to label them states even today; and since, in addition, during the annoying conflict between Bavaria and the Reich that we recently experienced, their undamaged quality as states was officially confirmed to the Länder by the Reich at the express wish of the Bavarian government, I see no reason to consider this an open question. Thus the German Reich appears, now as before, to be a common state divided into single states, a *compound state,* for which it would then be necessary to examine—a question that we will not touch upon here either—whether it corresponds to

the special concept of a *federal state.* However, it is certain—and here we come *to the second great guiding principle* of the Weimar Constitution—that the relationship of the Reich to the Länder is distinctly unitary, much more unitary than in the Reich of the Bismarck period.

The unitary state and its counter-concept, the federal state, are organizational forms of compound states, especially of the federal state. Should the relationship between the central power and the regional powers tend toward a centralized state, as a result of the predominance of the former and corresponding weakness of the latter, the whole in its statehood is considered centralized: "*unitary*"; if the situation is reversed, and it gravitates toward a union of states, it is described as unionlike: "*federalist.*" It is remarkable that unitary and federal statehood are not characteristics that exclude each other, that exist in a federal state completely or not at all, but can exist to a greater or lesser degree, so that it is quite possible that the constitution of a federal state can at the same time possess unitary and federal characteristics. Our constitution itself can serve as an example of this.

Unitary was the basic mood of the revolution; unitary in spirit were the overwhelming majority of members of the constitution-making National Assembly. It was only natural that the unitary principle would prevail in the work of Weimar. And that is what happened. The unitary characteristics of the Weimar Constitution leap to the eye. The number of matters for whose regulation the legislature of the Reich is responsible has increased conspicuously in comparison with the past. Important branches and objects of administration have been taken from the Länder and transferred to the Reich; for example, foreign policy, the military, railroads and waterways, mail and telegraph. The financial sovereignty of the Länder has been greatly reduced by the fact that all significant tax sources have been taken over by the Reich and are exploited in its own interest, under its statutes and by its own officials. The *organization* of the Reich as well is mainly unitary, for of the three main organs, two—the parliament [*Reichstag*] and the president [*Reichspräsident*]—are elected directly by the people of the Reich, without a right of cooperation by the single states; only the filling of the less-powerful third main organ [*Reichsrat*] is reserved to the Länder, that is, their governments. Also unitarily conceived is the fact that under Article 18 of the Constitution the territories and borders of the Länder are at the disposal of the Reich's sovereignty. The division of the Reich into Länder, the entire intra-German border network, is thus completely at the disposal of the Reich; this border network can be changed whenever the overwhelming interests of the Reich require it by a Reich amendment to the Constitution and, if the Länder involved agree, or if they do not agree but the population involved does, even through a simple Reich statute. No irrevocable right of the Länder to territorial and border integrity, not even a right to the

existence of the single Länder, is recognized as against the territorial sovereignty of the Reich. In no other point is the subordination of the regional to the national interests followed through so unrestrainedly as here.

The unitary principle is thus the prevailing one of our constitution, there can be no doubt of that. However, there is no lack of institutions which, whether one considers their *form* federalist or not, nevertheless, are federalist in substance, to the extent that they satisfy the interests of the Länder—on the one hand, in an autonomy that is not too narrowly drawn, and on the other in equally broad participation in creation of the Reich will that governs them. The foremost of these institutions is the Reichsrat, the successor to the old Bundesrat, with its numerous responsibilities in the areas of Reich legislation and administration—it would be going too far afield for me to list them—that, though much weaker than similar rights of the Bundesrat, are strong enough to allow the Länder forcefully to represent their special interests. Second, there is the provision in the Reich constitution according to which, now as before, execution of Reich statutes is the responsibility of the Länder; that is, it is ensured by Länder authorities and can be transferred to Reich authorities only in exceptional cases, under special Reich statutes (as has occurred, for example, in the area of taxation). Thus, the Länder governments have the opportunity to interpret and apply Reich statutes in ways that conform to the character of their Länder. A third concession to the federalist idea lies in the Reich constitution's provision that Reich bureaus in the single Länder generally be staffed with citizens of the Land, and that Länder characteristics be taken into account in the organization of the Reich armed forces.

These pro-Länder institutions in the Constitution do not go far enough for some people, who say they contain too little of the spirit of true federalism. In the region in which this view is most widespread, in Bavaria, one hears again and again in increasing measure the call for a general revision of the Constitution in a more federal direction. A discussion with those who demand this is made somewhat difficult by the fact that they lack a clearly defined program. However, it is possible to gauge more or less the direction in which they are moving. The issue is to reduce the Reich to something that, under the Weimar Constitution, it neither is nor is to be: *a union of single German states*—perhaps not a union of states as a matter of mere international law, perhaps only a loose constitutional federative relationship of the type imputed to Bismarck's Reich by Seydel and the like; a federative relationship entered into not for its own sake, not even so much for the sake of the German nation, but first for the sake of the federated, *the single states* to their advantage above all. It is hardly necessary to point out that if such views were to dominate the law of the state, it would mean a fundamental alteration in the work of Weimar. For the Reich of today, as we have al-

ready seen, did not emerge *from* a union, nor was it created *as* a union of single states; it is the commonwealth of the German people, created by the people itself, a state in which the unity of this people, not the multitude of single states, emerges as the bearer of supreme authority.

Precisely because the constitutional revision desired by the opponents is not an incidental question, but one involving issues of the highest principles, altering the existing foundations, I expect agreement with my view that *today is not the time* for such changes. The times demand of us that we seek rescue from our afflictions, which cry out to Heaven, but not that we alter articles of the Constitution or even its *foundations.* The need of the moment is not to *revise* the Constitution, but to settle our differences under it, to recognize it as the supreme ordering of German affairs, determined by and for all; while its opponents, if they wish, may continue to call it by the completely unsuitable epithet "emergency constitution." This of course does not mean that private discussions on basic constitutional principles are impossible, and this is such a private discussion.

What I have to set against the spirit of the federal state is first of all a confession.

I confess that I am one of those to whom, in case of conflict, the Reich is everything, the single state nothing. For me, the German state was always embodied first and foremost *in the Reich,* not in the Länder. The Reich is not a union of German Länder, on no account an emanation of particularism; it is the state representing national unity. The Reich is necessary to our survival, its existence is not open to discussion; whether it is to be divided into Länder, and if yes, into which ones, is a question of expediency and open to discussion.

That had to be stated at the outset. Besides, there is no reason—and thus I return to our original subject—to alter that of which we are speaking, the existing relationship between Reich and Länder. For this relationship is one under which both can live: not only the Reich but also the Länder. As evidence of this, I remind you of the pro-Länder institutions in the Weimar Constitution: the Reichsrat and the execution of Reich statutes by the Länder governments. In my opinion, the Länder have no reason to complain—of course, assuming they remain aware of their position. This position is not that of sovereign members of a union of states, but of *members serving a federal state!*

There is yet another reason for rejecting the revision of our constitution in a more federal direction. The Weimar Constitution is elastic and widemeshed enough to leave room for further development of the relationship between Reich and Länder conditioned by time and circumstance, without its being formally altered. In particular, there is nothing standing in the way of a further development that I—here again, I do not hesitate to confess my

convictions—would desire in the national interest: *further development of Germany into a centralized state.*

Do not misunderstand me. I am not thinking of a centralized state as a result of formal constitutional change to be taken in hand today or tomorrow. Anyone who would call now for such constitutional change would, through untimely arousal of political conflicts and passions, be open to the same charge that I previously raised against plans for a revision of the Constitution in a more federal direction. For we must admit that a large sector of the German people does not support a centralized state, at least not an openly declared centralized state. In this regard, there is an undeniable difference between Prussia, northern Germany in general, and the southern part of our Fatherland, especially Bavaria. Unitary views have always been more at home in the north; in southern Germany, federal views are more common. The contrast in public opinion became visible in December 1919, when the Prussian constitutional assembly made the tactically perhaps mistaken, though otherwise notable decision to openly declare support for the notion of the centralized state, and called upon the government to act towards its realization. I believe that the centralized state would by now be accepted not only in Prussia, but in the other northern and central German states. It is different here in the south, with Bavaria always at the forefront. Here, the centralized state—*the word even more than the thing itself*—is thoroughly unpopular. At the moment, it is difficult to do anything about this, especially without using means that resemble force or would be perceived as such, among which I would include thoughtless outvoting in the Reichstag and Reichsrat.

Those who cherish the great idea of the national centralized state must have patience. And they must be content if they do not live to see the realization of their idea. *We must be able to wait, and we are able.* For, and I trust in this, time is on our side. Things will develop, not only *around us,* but also *within us. Within us:* on this it will mainly depend. What will bring us the centralized state is not an order of the legislature but a change in convictions. It is to be hoped that the apparently indestructible spirit of particularism that inhabits our people will progressively learn that the reacquisition and reassertion of all that we have lost is only possible through strict inclusion and combination of all national forces, a combination that only the centralized state can bring about. And to the extent that this belief in unity progresses, the Länder will change not according to the letter of the Constitution, but (if I am permitted the expression) according to their own self-assessment. The independence of the Länder will gradually fade, even in the eyes of those to whom it is so important today.

I thus imagine this progress towards a centralized state, in summary, as what Georg Jellinek would call a *constitutional transformation:* a gradually advancing shift in people's convictions and, linked with this, in the political

dynamic—in contrast to a constitutional *amendment,* that is, the formal revision of the formal law of the state by legislative decision. This transformation will not lead to the disappearance of the Länder. That which has so often been said to the opponents of the centralized state, especially those who reject it for fear that it would destroy the colorful variety of German life and replace it with bleak monotony and uniformity, must be repeated again and again: *A centralized state does not exclude administrative decentralization.* One could decentralize the centralized state so much that all the unique characteristics of our peoples and regions would retain the scope they deserve. The bearers of this decentralization would be the Länder, within their present borders or within new ones given them under Article 18 of the Reich Constitution. They could continue to exist under the centralized state, with rights and freedoms that need be no fewer than those they possess today; with autonomy over wide areas left to them by the Reich, with the right to influence legislation and administration by means of the Reichsrat, and with the right to execute Reich statutes under Reich supervision. They would continue to exist with the status of large, strong, free *self-governing administrative bodies* that, by sacrificing their independence (today only formal anyway) are, and want nothing else than to be, members that willingly serve their whole, the whole Reich.

This goal is not new. Its result is nothing other than what one of the greatest sons of this university, Heinrich von Treitschke, once pronounced: "*the centralized national state with a strong self-government of autonomous provinces.*" Like him, I speak of ideas as if of things to come; like him, with the assurance of those who have faith.

III

We became a state late, and still later a people's state. The triumphal march of the democratic idea, which elsewhere in the world overturned thrones and expelled dynasties, turned monarchies into republics or monarchs into largely decorative heads of state receiving their power and dignity more from below than from above; this triumphal march was long forced to halt before the gates of the German state. The year 1848 shook the foundations of the monarchy, just as Paul's Church in Frankfurt hoped to create its German Reich as an *imperial Reich* in form, though in reality a people's Reich, a democracy. But the monarchy held firm against this onslaught; and it was then so strongly stabilized by Bismarck, and so firmly secured in the Reich and Länder by the union of princes on which the Reich Constitution was based, that for the foreseeable future it seemed immune to the democratic spirit, even if only in the modest form of monarchic parliamentarism. Today we know that the era so characterized, imperial Germany, was not an epoch, but merely an episode. With the collapse of our old state's political

and military forces in the world war its central institution, the monarchy, also collapsed. We do not want to discuss how this happened or who is to be blamed. The correct view is most likely that the monarchy was brought down neither by foreign nor by domestic forces, neither at the dictate of the enemy alliance nor by a conscious, popular revolutionary decision; that it was not overthrown on purpose at all, but *collapsed* from and in its own weakness, failing at the decisive moment, overwhelmed by the huge tasks of the world war. The fact is that the German people, abandoned by Kaiser and princes in those dark November days that recently had their fourth anniversary, was thrown back upon itself. We had to help ourselves without our hereditary princes, and help ourselves we did. That is the significance of the events we call the revolution; that, above all, is the meaning of the work of Weimar.

The Weimar Constitution is a *democratic* constitution, both in origin and content.

Unlike its predecessor of 1871, its *origin* was not an agreement among the German states, but—like the Frankfurt Constitution of 1849—an act of the German *people.* Thus its introduction states: "The German people has given itself this constitution"; this of course should not be understood literally, as if the entire people itself accepted the Constitution through plebiscite, but rather to mean that the people acted through a parliament that it elected and empowered: the National Assembly of Weimar. We should recall that the elections to this constitutional assembly took place on the basis of an extremely free right to take part in the full electoral process and with the participation of all political parties—*all,* including those that rejected the new state that was being created. Even these opponents consented to democracy in one main point; in their opinion, too, the new Germany could not be created otherwise than through the self-organization of the people, through the will of constitutive popular representation. If in addition one considers the fact that the Constitution was accepted in the National Assembly by a majority of more than three quarters of those voting, it is clear how foolish the contention is; I would not even mention it had it not recently been made by a politician who otherwise wishes to be taken seriously (Dr. Heim)—that the Weimar Constitution was adopted against the will of the majority of the people, that is, undemocratically.

Like its origin, the *content* of the Constitution reflects the democratic idea in all its purity. The very first article states the guiding principle: "State power emanates from the people." The state power spoken of here, *Reich* power, is located and has its source not outside of and above the people, but in it; it is synonymous with the common will of the entire people. Two of the major organs that are to create, explain, and execute this common will, the Reichstag and the president, are filled by popular election, so that not only the *legislature,* but also the highest bearer of the *executive* are direct agents of the national will. Only the third main organ, the Reichsrat—not powerless, just less

important than the first two—consists not of representatives elected by the people but as we have seen, of members appointed by the governments of the Länder; this, however should not be seen as an anti-democratic concession but as a federal counterweight to the strictly unitary formative principle of the first two organs. However, above all these organs, as the highest extraordinary organ of the Reich, stands the entirety of those entitled to vote for the Reichstag: the electorate, the people in that sense, which can be called upon by the president, by a certain portion of the electorate, or by the Reichsrat to make the most important and final decision, the "plebiscite" in certain cases; for example, when a statute passed by the Reichstag is to be changed against its will, or a statute not wanted by the Reichstag is to be passed, or the president is to be removed before his term has expired. If one adds to all this the fact that the Constitution also prescribes to the Länder a democratic, republican form and thus forbids them not only a return to monarchy but also the introduction of undemocratic forms of government, such as, in particular, the dictatorship of the working class or proletariat—it becomes apparent with what energy and consequence a democratic view of the state is expressed and implemented in the Weimar Constitution.

We put the people's state into practice; everybody must admit that much. Less unanimous is the judgment whether democracy is right for Germany. Here the political standpoint matters, and opinions part.

Do not expect me to go fully into the problems related to the essence and value of democracy. But I will say several things about it here.

The question whether democracy should be retained or eliminated is usually identified with another either/or; namely, the alternatives *republic or monarchy*. But this equation is not accurate; for there are very undemocratic republics, and monarchies that are quite democratic. The law of the Bolshevik state, as the tyranny of one class over another, as an oligarchic dictatorship, has nothing in common with democracy; on the other hand, only one who allows himself to be fooled about the basic plan of the edifice of the state by looking at its facade could claim that modern parliamentary monarchies like England and Italy are more than merely formal monarchies, while in reality they are nothing less than democracies. However, we do not want to be sidetracked by these inconsistencies. Fortunately, Bolshevism is out of the question for Germany; and restoration of a monarchical form of state—assuming that it were desirable—faces insurmountable obstacles at the moment, *even if* it were to be a parliamentary-democratic monarchy, and thus something very different from what we had until the overthrow. Those who believe that our former enemies and their accomplices all around us would permit us to restore the imperial system, even as a democratic imperial system, belong in the class of political dreamers. But even from a purely internal point of view, the remonarchization of Germany—if one imagines it occurring legally, and not through a victorious

civil war by monarchist against republican Germany—is completely impossible for the foreseeable future. And precisely because it would involve the incitement of internal struggles that would destroy everything—truly everything—we possess in terms of national unity and harmony, any *attempt* to introduce a monarchist revision of our constitution must be met with the same or even stronger objections than those made previously against suggestions for a constitutional revision in a more *federal* direction. Again, it makes no difference what variety of monarchy is being sought. In Germany, at the moment, there is not even room for an imperial system that is intrinsically democratic; the supporters of such an imperial system should tell themselves that this is not the time for constitutional debates beyond simple disputes over technical details. The work of Weimar came about through compromise—reached arduously but in the end with an impressive, even awe-inspiring majority—between great formative forces, between the bourgeoisie and the workers; it is important to honor this compromise in the overriding interest of national unity, which must be preserved internally and proven externally. A right-wing politician recently spoke once again of the form of the state "that we need." The form of the state that we need, and the only one we can use today, is that which is supported by the greatest possible majority of the people. And that, today, is democracy in the form of the republic. In the present need and distress of our country, we cannot afford a battle, or even a mere campaign, on the question "republic or monarchy," for the question to be decided—as those who are involved must realize—is in reality not "republic or *monarchy,*" but "republic or *anarchy*." It is not too much to ask of the opponents of the existing form of the state that they understand this and cease for the time being to treat what exists, and rightly exists, as an open question.

We are, in general, not asking much of them. Politically, it would be a great step forward if the opposition about and to which I am speaking could bring itself to admit not only that we *must* accept the principle of democracy, but that we *can*.

The *principle,* I say. That is all that matters. Not the specific shape of the principle in the Weimar Constitution. The details are open to discussion, if not now then in a quieter period. But accord could and should already prevail today *on the spirit that pervades the whole, the democratic idea of the state.*

Certainly we are a long way from such accord. Large groups, particularly in the class to which we academics belong, the educated bourgeoisie, reject democracy even today. But are not they led more by surges of emotion, more by agitation, than by insight? Are they fighting against democracy or rather against a bogy that has been made of it? Ordinary anti-democratic politics are not always free of the resentments of a social class that feels pushed back by other classes—a resentment, however, that should not be aimed against democracy, but should instead focus upon regaining ground on the basis of democracy. With reference to the bogy that has been set up, the popular dis-

tortions of the democratic principle about which I am thinking provide an unflattering view of the political insights of those who take them as true.

One hears, for example, that democracy is the equivalent of weak, and monarchy of strong, state power. As if—good heavens!—in the world war, which was very much a contest between the democratic and authoritarian-monarchic forms of state, the democratic Western powers were not stronger in every respect! And as if the present weakness of state power in Germany could be traced to its democratic organization and not rather to the lost war, lost not by the new state, but by the old. Then it is said that democracy, "where everyone has his say," prevents uniform, firm leadership and the rise of outstanding statesmen. That the opposite is the case is shown by a glance at the impressive power and steadiness which directed the foreign policy of the great democracies of the West not only during the world war, but long before; while the achievements of our monarchy during the same period in terms of the uniformity, steadiness, and firmness of the high command as well as of the selection of the leadership are a chapter too painful for me to present here.

Finally, there is the attempt to place the democratic principle in the wrong; better put, to discredit it by calling it un-national or anti-national. That attempt is doomed to fail from the start through the inferiority of its means. These opponents are very often under the influence of a political vice that is unfortunately widespread in Germany and that makes certain parties claim patriotism and national spirit for themselves alone and deny them to others—a bad habit that I simply record, without condescending to discuss it. Aside from this, the attempt to discredit of which we are speaking unveils a strange ignorance of the intrinsic connections between nationalism and democracy, connections that become apparent when one recalls the gradual advance of democratic ideas since the days of the American Declaration of Independence and the first French Revolution. The consolidation and deepening of the view of the state based on the nationality principle, *nationalism,* goes hand in hand with this slowly yet inexorably advancing democratization of the world to such an extent that it is sometimes difficult to say which is the cause and which the effect—whether democratization had nationalist effects, or the growing national consciousness of peoples made their states democratic. The latter appears more correct to me, and I would like to indicate briefly why. Not every people is a nation, but only those conscious of their unity and individuality. This self-consciousness normally does not remain mere *knowledge,* but increases sooner or later, depending on the people's political talents, to a desire: to the will to create an independent state for itself and shape this state as the people wishes and wills.

This is the spirit of democracy. Monarchic institutions are not incompatible with this—since in general (and I emphasize this again) the democratic state need not necessarily be a republic—but only so long as the bearer

of the crown bows to the genius of the nation, so long as he aspires to be nothing more than the servant of this genius, the executor of the national will. Thus we recognize that the national and the democratic notions are *not contradictions, but sisters, children of one spirit;* this spirit is *the right of self-determination of peoples, demanded by their self-consciousness.* Once awakened, this self-consciousness will grow and act; in the short or long run, it will lead forcefully to a state in which bearers of power who claim to be outside of and above the people will have no place, and only those authorities will govern *that emanate from the people themselves.*

Thus, after casting off certain errors, we arrive at the heart of the democratic principle, the democratic state view; this is the notion of the *unity of state and people.* The state is not an institution outside of us; we ourselves, the association of the entire people, are the state; *we are the state.* The monarchy need not stand in the way of this unity of state and people, but experience shows that it often did, especially, unfortunately, here as well. Our monarchy was afflicted to the end with the remnants of an absolutism and patrimonialism that had otherwise been overcome, of a doctrine of divine right that no longer contained any truth; this gave our state the character of an institution that transcended the people and that, embodied in princes ruling in their own right, enforced its mission, which was said to come from outside and above, upon the people. This was a constitution and a view of the state that necessarily led to the disastrous situation in which the mass of the people no longer considered the state their own, but something *alien*—an alien force that lost respect and moral justification to the same degree that the people matured and desired a state for themselves.

This turning point has now arrived, the situation has changed. *We are the state.* We the people are no longer the object of a state force that derives its force from some "above"; we have ourselves become the subject of state power. The power of the state is the will of the people; the "authorities," that is, the entirety of those fellow citizens called upon to implement state power, are only servants, organs of popular will, organs whose power is and can only be rooted in popular will. The state is a power not transcending us, but *immanent in us,* to which we are all subordinate, but in which we are also participants, which involves all of us and for which we should all feel responsible as dutiful citizens.

Collection of all popular energies in the state, dutiful cooperation by all towards the state, responsibility of all for the state—that is the essence and value, the ethos of democracy. Democracy had to come at last, and it is good that it came. For if we want to preserve the idea of the state at all, if we still consider the state as a sovereign power overriding all single interests in the interest of the general public, such power can be borne by none other than the entirety of the people itself, by its affirmation of the state, by the national solidarity of all forces living in it. *Our state will be democratic, a people's state, or it will not be.*

We see again and again—the thought is important enough to me that I will end with it—the close kinship between the democratic and the national idea. Both ideas are basically *one;* both herald the great, proud notion of a people that rules itself. Nationalism aims to produce and consolidate this unity in the consciousness of the people; democracy seeks to put it in practice through the will of the people. We are reminded of the spirit of [the Swiss founding fathers taking] the Rütli oath: "*We want to be one single people of brothers*"—of brothers who, we may add in a democratic sense, regulate and administer their common affairs through common decisions, not subordinate to a paternal power.

My esteemed listeners, especially you students, my dear young friends, I have tried to impress upon you the great ideals of our Reich Constitution, ideals that I, so help me God, did not read into the Constitution, but only read out of it.

It is far from my intention to imply that the work of Weimar contains ultimate wisdom. Many of its details may be open to attack, others wrong. But the guiding principles are good—good in the relative sense that is characteristic of political value judgments. They are good because they accord with our internal relations of power, and because they genuinely reflect the political views of the majority of our people. And that for now, for the time being, is the most important thing. Admitting all this, we should not see in the Weimar Constitution a talisman that will bring us good and protect us from evil. We must be careful not to overestimate the significance of this, or of *any* other constitution. A good constitution is only one of the prerequisites if a state is to live and blossom. What we need are not only good constitutional institutions, but also the right people to embody and give life to them. Here, too, the important thing is: not rules, but men. A good constitution can guarantee that the choice of such men, the *selection of leaders,* is carried out correctly, that is, that the contest of political forces brings those relatively most competent to the positions most suitable for them. And it is a lot if it guarantees this. But every choice requires material, people among whom to choose, broad classes from which *more* statesmen than actually needed are constantly emerging—in the end, it requires an entire people that thinks and feels politically. These are conditions that no constitution can create, that on the other hand are *prerequisites* for every constitution, especially that of a democratic state.

It is *up to us* to make these prerequisites a reality—up to us, and especially *to you young Germans* who are the future of our people, who have the difficult duty to be more, to achieve better than the generation that preceded you and that—it must be said—failed politically in so many things.

You shall not only train the man within yourself, but even more the *citizen,*

the *citizen of the state.* Three virtues you should have: joy in sacrifice, a citizen's sense of responsibility, love of fatherland; love of fatherland, however, is the greatest among them. Love your German fatherland more than all of these and more than yourselves, and more than your narrow homelands, for it is not the narrow homeland that is first and most important, but the nation; and there is no Bavarian or Prussian, but only one German nation. As [the Prussian reformer of the Napoleonic era] Freiherr vom Stein once said: "I know only one fatherland, and it is called Germany; therefore I can devote my whole soul only to all of Germany, and not to a part of it."

Love of fatherland is something that can tolerate no conditions. Therefore do not be like those whose love of fatherland depends on the degree to which they like the constitution and the men who govern; such people are bad patriots, for they love their party dogmas more than their fatherland. You should be proud of your German fatherland, for Germany does not become worse because others speak badly of it, nor because it is sick and unhappy. You should have a sensitive and passionate national pride that is to the citizen what honor is to the man; here too one can say, better too thin-skinned than too thick-skinned. And just as no love can exist without hatred of the deadly enemies of that which one loves, so too the love of fatherland. Just as it is holy, so too is the hate it demands. But do not turn your hatred against your fellow citizens, turn it where it belongs. The enemy is not to the left and right, *but on the Rhine;* there he is, the only one with whom there can be neither peace nor reconciliation, I do not need to name him.

Our Heidelberg has often been accused of tending to internationalism in the negative sense of the word. I find the accusation unjust; it is based on externals. In any case, it was not always justified. I previously mentioned Freiherr vom Stein; let me conjure up the great shade once again. With regard to the works of our romantic poets that were created here, especially with regard to those of Achim von Arnim and Clemens Brentano, works that contributed more than a little to the awakening of German spirit and German national feeling in the period before the wars of liberation, Stein once said that in Heidelberg a good deal of the fire had been kindled that would later consume the French. The day will come when this fire will flare up again. May it then again be rightly said of our city, and especially of our university, that it protected and fed the holy flame with a loyal hand.

FOUR

Richard Thoma

INTRODUCTION

Peter C. Caldwell

Of the leading representatives of the statutory positivist approach to public law in the Weimar Republic, Richard Thoma produced the most coherent political theory of the Weimar constitutional system. He developed this theory in numerous essays and expositions of legal problems, in journals, in Festschriften, and in his many contributions to the *Handbook of the German Law of the State* [*Handbuch des deutschen Staatsrechts*], edited by him and Gerhard Anschütz in 1930 and 1932. Thoma provided a political and legal account of parliamentary democracy expounded from a left-liberal political and a neo-Kantian philosophical position. Both positions owed much to the Heidelberg milieu and the circle of scholars around Max and Marianne Weber in which Thoma was trained. The product was a theory of the way the Weimar Republic was supposed to function, had the left-liberal, social-democratic, and Christian-democratic political assumptions at its basis been realized in German political culture.

Thoma was born in 1874, the son of a factory owner in Todtnau, a town in the Black Forest region of the southwestern German state of Baden.[1] In the years after 1848, southwestern Germany and Baden in particular had become the training-ground for the theory and practice of left-liberal democracy in Germany. It was in Baden, for example, that the Social Democratic faction first entered into voting agreements with liberals during the Empire. A major theme of Thoma's mature works was the development of social reforms in tandem with Social Democracy.

Thoma wrote his dissertation in 1900 on issues of property law in the new

civil code, which went into effect in the same year. Six years later, at the University of Freiburg, he wrote his *Habilitationsschift,* titled *The Police Command in the Law of Baden* [*Der Polizeibefehl im Badischen Recht*]. From this time on, Thoma quickly gained a reputation among legal scholars across Germany.[2] In 1908, he received a professorship at the Kolonialinstitut in Hamburg; in 1909, he returned to the southwest to accept a professorship in Tübingen; and in 1911 he was called to Heidelberg. He remained there until 1928, when he accepted a position at Bonn, where he stayed until his death in 1957.

Thoma's work spanned half a century and four state forms in Germany. His works prior to 1918 already show some of the basic issues that would preoccupy him until his final days. These issues are apparent in his 1910 essay "The Idea of the State Based on the Rule of Law and Administrative Law Scholarship" [*Rechtsstaatsidee und Verwaltungsrechtswissenschaft*].[3] The dry title of the essay conceals a burning political topic: how to combine the rule of law with administrative activity in the early years of a modern welfare state. Thoma argued that conceptions of the state based on the rule of law from the mid-nineteenth century had posited a substantive idea of what *Recht* was, based on individualistic notions of personal and property rights. But these substantive notions had to be replaced with a more formal notion of *Recht* at the end of the nineteenth century, when "the creative forces of national and the socialist ideas" overcame "individualist" conceptions.[4] Like other left-liberals and like later reformist socialists, Thoma linked the words "national" and "socialist" to develop the idea of an interventionist ("social") republic based on legal principles—a republic that would provide for the "emancipation of the fourth estate" and initiate social reform legislation.[5] This combination of ideas prefigured the underlying logic of the Weimar Republic, which combined republicanism and an openness to substantive reforms in its constitutional structure.

At the same time, Thoma insisted that openness to social law would not undermine the formal structure of law. Indeed, he called for a more rigidly formalist approach to administrative law to preserve the rule of law. First, all administrative acts were necessarily subordinate to a statute approved by the legislature (in the case of the Empire, the monarch and the Reichstag). The statute was "omnipotent," the highest expression of the state's authority; it set the framework within which the administration could operate.[6] Second, basic rights would create an additional set of limits to the actions of the administration.[7] Finally, Thoma stressed the necessary presence of a strong parliamentary system equipped with the institution of ministerial responsibility. The responsibility of ministers to the assembly was not, however, fully developed in the Empire. In spite of being a member of the right-liberal National Liberals, Thoma cast doubt on the *Rechtsstaatlichkeit* of the Bismarck Constitution of 1871 while still basically affirming the existing Reich.[8]

At first somewhat hesitant in his support of the new Weimar Republic in 1919, Thoma soon became one of the republic's leading supporters. He gave speeches to the left-liberal German Democratic Party, worked with an organization of university educators who were "faithful to the constitution," and published numerous works in defense of the Weimar democracy.[9] As one of his colleagues wrote in an obituary: "He did not, like so many others of his generation, merely accept the first democratic constitution of the Reich; he loved it."[10]

By "democracy" Thoma meant the kind of liberal-democratic system adopted by the Weimar Constitution. Like his fellow left-liberals Anschütz and Hugo Preuss, Thoma repeatedly rejected rule by "the plebeian." As he wrote in the essay below, the election of the National Assembly on 19 January 1919 was a decision for "responsible government" based on competing parties whose representatives were elected by rules of general suffrage—not rule by an autocratic minority. In other words, parliamentary democracy was still based on an aristocratic principle of indirect representation and not direct (plebiscitary) democracy, while at the same time the "aristocratic" electors were responsible to periodic popular votes.

The democracy Thoma had in mind, then, was anything but the "series of identifications" of people and state invoked by Carl Schmitt.[11] To Schmitt, Thoma would respond: To proclaim a magically unified, republican whole was to ignore the reality of fragmented interests of the German people. Democracy had to involve representation of concrete interests. Therefore, Thoma argued, it required different, contending political parties. From here it was only a short step to assuming (with Hans Kelsen) that only proportional voting rights could adequately represent the many interests of the German people, without allowing a majority to trample the interests of a minority.[12] At the same time, Thoma had great faith that the combination of proportional representation with the parliamentary system would create a truly democratic decision-making process. For this reason, he argued that the right of the Reichstag to amend the Constitution through a two-thirds vote was in theory unlimited. This idea of free, democratic self-determination, he argued, was "daring, perhaps, but sublime in its logical consistency."[13] The key to his argument, however, lies in the distinction between theory and practice: theoretically, i.e., from the point of view of existing legal forms and procedures, Article 76 was unlimited. But in actual practice, Thoma pointed out, a whole range of limits to "parliamentary absolutism" existed—from minority parties' right of inquiry to public opinion to the plebiscitarian right of popular initiative.

Thoma made a similar distinction between theory and practice in his essay on the limits of judicial interpretation of constitutional law in a democracy. He laid out this argument in a brilliant speech to the first meeting

of the Association of German Teachers of the Law of the State [*Vereinigung der deutschen Staatsrechtslehrer*] in 1922. The essay, on the judiciary's right to review legislation, is a perfect example of the way a sharp-minded legal scholar in the neo-Kantian tradition of Max Weber would proceed with analysis. First, he confronted efforts either to affirm or to deny the right of judicial review on the basis of a reading of existing law. The relevant statutes, he argued, did not provide an explicit answer to this question. There was, then, no legal answer to the problem; this was "an authentic problem," to be solved "with the will, not with logic."[14] A problem of the "will" meant, in this case, a problem to be solved through an analysis of values and desires, not of an existing legal system. Thoma phrased the problem in a way that stressed the values of the Weimar Constitution: "Can German jurisprudence continue to adhere to the basic principle of the nonreviewability of statutes, which has been quite satisfactory in legal politics, or is it compelled to give it up to rush to the aid of the threatened new constitutions?"[15]

Thoma rejected the judiciary's right to review statutes on political grounds: There were sufficient other defenses of the Constitution such that granting judges this right—and deviating from existing doctrine—seemed unnecessary. During these same years the higher levels of the judiciary did begin to develop systems of judicial review, often making questionable judgments in the process. Thoma viewed these new practices as autonomous claims, almost usurpation, of power by the courts: a "gerontocracy of the judiciary."[16]

The strength of the positivist tradition lay in its ability to outline the way a given system of law should function. Thoma and Anschütz's *Handbuch des deutschen Staatsrechts* was, in this respect, one of the best practical works of German political science before 1945. The dark side of the positivist tradition lay, however, in its utter dependence on the workability of the political system. By 1932, when the second volume of the *Handbuch* was published, the Weimar constitutional system had become paralyzed. During the final months of its existence, the positivist tradition was unable to offer any politically acceptable way out of the crisis.[17]

Thoma continued teaching under National Socialism, but restricted himself to the less immediately political area of administrative law. He published only one major work during the Nazi period, an essay from 1937 that dealt with the financial policies of the new *Volksgemeinwirtschaft,* or the "common economy of the Volk."[18] The book contains praise for the "insight" and "saving deeds" of "our Führer, Adolf Hitler." In this respect, Thoma offered no critical perspectives.[19] The argument can be made, however, that his work indicated the limits to expansive financial policies. In this way it seems to have supported Hjalmar Schacht's calls for limiting deficit spending on rearmament. It is unclear whether Thoma intended this work

as a strategy to counter Hitler's rearmament policies or as a reflection on the existing system.

After the Nazis were defeated in 1945, Thoma regained a prominent position in public life. He published an important defense of parliamentary democracy in 1948—no longer filled with the enthusiasm of the 1920s, but still supporting the institutions of liberal democracy.[20] He served as an adviser to the Parliamentary Council during its discussions on basic rights in the Basic Law of 1949. In his last essays, he developed an important, critical commentary on the rights and the place of the Federal Constitutional Court [*Bundesverfassungsgericht*], completed as blindness was slowly setting in.[21] In this and other works, he repeated virtually verbatim the arguments he had made against an extensive application of the equality clause in the Weimar Republic, which had been part of his general critique of judicial review.[22] In 1949, Thoma served as honorary chair of the newly reorganized Association of German Teachers of the Law of the State in its first meeting since 1932. He died on 26 June 1957, in Bonn.

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THE REICH AS A DEMOCRACY

Richard Thoma

Originally appeared as *Das Reich als Demokratie,* in *Handbuch des deutschen Staatsrechts,* edited by Richard Thoma and Gerhard Anschütz, 2 vols. (Tübingen: Mohr, 1930–32), 1:186–200. Translated by Peter C. Caldwell.

I

[T]he Weimar Constitution begins with the words:

> The German Reich is a Republic. State power emanates from the people.

These words fulfill two concepts that express a symbolically solemn content and at the same time provide a legally binding provision with a quite precise meaning. *Republic* means the negation of all power of domination by a single person, be it a hereditary monarch or a monarch irremovable for life, conveyed by vote or by co-optation. But republic also means affirmation and construction! The positive and original sense of the word conceives of the state as a *res publica,* as a *commonwealth,* in which all citizens participate, in which all domination is bound to serve the parts, and each part is bound to serve the whole. Republic in this sense makes the subject a citizen; it obliges and entitles him to the sentiments and the engaged readiness that Friedrich Naumann couched in the words: "We are the state." These words express a pride in freedom and the humility of responsibility with the same force.

The *people,* from which all state power is supposed to emanate, means similarly not just any concept of people, not any arbitrarily bounded active citizenry, ranked, perhaps, according to differing political rights. What it means is the totality of all adult Germans, conceived as a united association enjoying equal rights, including both those without property, of the lowest social strata, and those with wealth and education, of the highest social strata. Thus it signifies *an active citizenry enjoying a universal and equal right to vote and to take part in the full electoral process.*[23] "The people" in Article 1, paragraph 2 refers to the nation, i.e., to the Germans as such, not differentiated in one way or another.

Thus the first article of the Constitution proclaims what the following articles in fact organize: *democracy,* and with it, if one wants to express it thus, *popular sovereignty.*[24]

A *vast* democracy! The number of its active male and female citizens at present exceeds forty million.

A *poor* democracy! Of the heads of families and individuals assessed for

the federal income tax in 1928, only around 370,000 showed a taxable income in the calendar year 1927 of more than 8,000 marks. Of these, only those assessed with more than 50,000 marks of taxable income a year could be considered well-to-do or even rich. That was, however, fewer than 17,000! Before the war, 15,547 people with more than one million marks were assessed property taxes. Their number has declined to 2,335.[25] In addition the buying power of the currency has sunk around 30 percent, and the tax burden has multiplied. It is no wonder that the economically independent "gentleman-politician"—characterized by his social condition, not his political tendency; he was and presumably still is to be found among the Social Democrats and to a considerable extent in the English Labour Party—has become rare in German democracy.

An *oppressed* democracy: The men and women productively active in the economy have to maintain the hundreds of thousands left injured from the war and on-the-job accidents, the surviving dependents that need support, as well as around a million unemployed and in addition countless other [victims of] poverty. And what is left over from the year's social product is drawn out of the country by the suction-pump of reparations payments. The misery of daily economic struggle, compensated by the sensations of movies and sporting events in recreational hours, permits only the fewest to train themselves seriously in politics through press and assembly.

A *threatened* democracy: In order to maintain itself, it had to crush the social-revolutionary rebellion of the years 1920 and 1921 in bloody civil wars. Today it sees itself confronted by a fascist rebellion that is growing in public and arming itself in secret.

II

The word "democracy" can be found neither in the constitution of the Reich nor in those of the Länder. There is no definition of the democratic established in positive law. And for ages, the concept has been iridescent with different meanings and colorations in the theory of the state and in practical usage. It can signify more form or content, more a "least" or more a "best" or "worst." No politician or theorist can be prevented from making use of a concept of democracy that would permit him to assert that the German Reich, in its constitutional construction or in its political reality, is not at all what one has to understand by democracy, or at least not what is to be true or authentic democracy—meant as criticism, or as praise.[26]

Thus it is superfluous—at least for investigation and description, the aims of scholarship about positive German state law—to argue over whether the German Republic under its present-day constitutional law "really" presents itself as a democracy. It is enough to indicate that a *concept of democracy* has been in vogue for decades in the entire world of western culture, which

refers solely to whether all holders of the power of domination in a state arise, directly or indirectly, from popular elections and whether these elections take place according to a truly universal and equal suffrage.[27] What matters for this usage is thus, on the one hand, the full political emancipation and equality of rights of the lower stratum of society, and, on the other hand, the abolition of all stable, irremovable governmental authority, and instead *governmental authority, with a time limit or subject to recall, on the basis of democratic rights to take part in the full electoral process.*

Democratization is the name for the venture of western civilization, epoch-making in world history, to draw the working classes into the state on the basis of equal rights, in spite of—or because of—their increasing numbers, outgrowing all other classes and groups. It is the attempt to take the regulating power of domination from a lord and master over a society split by interests and give it to a creature and servant of a nation, conceptualized as somehow fundamentally solidary in its interests.[28] It is a resultant of the most varied components and developments, among which the unfolding of the idea of freedom, equality, and fraternal solidarity weighs, if not the heaviest, then also not the lightest. Born of the ethics and metaphysics of Christianity, transformed into an inner-worldly enthusiasm for the dignity and happiness of the human, democracy dares to seek the solution to national, social, and cultural problems by way of the free self-determination of individuals, classes, and nations.

One can define a state as a *democracy* in this sense *to the extent that its state law summons all strata of the people to equal rights to take part in the full electoral process and, should the occasion arise, to an equal right to vote directly in a plebiscite, and builds all power of domination either directly or indirectly on this foundation, which necessarily includes freedom of the press, of assembly, and of associations.*

The majority of the Council of People's Delegates decided for the democratic way in *this* sense of the word in the months of revolution, in opposition to the dictatorial minority of the Workers' and Soldiers' Councils. In *this* sense, the Weimar National Assembly decided for the construction of a democracy[29] in opposition to reactivating a governmental authority based on hereditary monarchy, to limiting or relativizing rights to take part in the full electoral process, to paralyzing the democratic representative assemblies through first chambers based on occupation or even birth, and so on.

Democracy or the people's state signifies an exclusive opposition to what Hugo Preuss called the "authoritarian state," by which is meant a state with stable and irremovable authority: "autocratic government" [English in the original] as opposed to "responsible government" [English in the original].

Now a constitution, according to which all holders of the highest legislative and governmental power emerge from the votes of the people or from the votes or other powers of designation of popularly elected state organs, cannot be called to life or kept alive unless some groups form freely within

society and present their leaders as candidates for the different elective offices (member of parliament, president, minister, etc.). Therefore every state based on "responsible government" [English in the original] is necessarily and according to plan a *party-state* (in a general sense, free of any value judgment). And it is necessary and self-evident that the decision of the *majority* always has to be binding for the minority, whether in the election of representatives or heads of state, in a vote in the representative assembly, or in a referendum of the citizens themselves. The distinction between the stable authoritarian state and the party-state with legitimately removable governments is not based on "authority or majority," as Friedrich Julius Stahl maintained in former days. It is based on whether authority should lie in the hands of an irremovable minority group or in the hands of a government borne by the *trust of a majority*. Only an "elite" can govern. The question is, who or what does the electing.

A party-state can be constructed in a highly undemocratic way. It is a democratic party-state only when it broadens its base to the ultimate possible point, i.e., to a truly universal and thoroughly equal suffrage. In other words, it must renounce elevating an individual or a small group to rights of domination that cannot be withdrawn, a privilege characteristic of the authoritarian state; and in addition it must renounce all other constitutionally based privileges, such as prerogatives based on birth, census-based rights to take part in the full electoral process, gradation of those rights according to income classes, and so on. Then the state is no longer a state constitutionally based on privileges but a democracy, no longer a "class state" but truly a *com-mon*wealth, and has at least the chance to get rid of all plutocratic or ochlocratic degenerations for ever.

If the German Republic thus exhibits the constitutional *form* of a democracy, then the next question is whether it is not also determined in *substance,* directed toward goals, oriented toward ethical-political ideas. In fact, in the National Assembly and its Constitutional Committee not only were highly different and contradictory ideas asserted about how a just German people's state should be organized and operate. Rather, *one* group of such ideas and considerations predominantly succeeded and made only a few concessions to the opposing group. Until more precise analyses have been carried out and more appropriate expressions found, one can characterize the two complexes of ideas as democracy of a more radical and egalitarian stamp and democracy of a liberal stamp. I have characterized the two tendencies as follows:[30]

> The basic tendency of *radical* democracy is *egalitarian.* Carried to an extreme, its realization in the constitution would lead to a dwarf democracy with completely unrestrained popular resolutions and offices filled in succession or by lottery; in the economy, to communism. In the practice of modern constitutional politics, radical democracy prefers the plebiscite over legislation

through representative assemblies; in representative assemblies it prefers the imperative over the free mandate; in filling offices and courts it prefers the popular vote and *recall* [English in original] over legally determined appointments, and so on. All this characterizes *one* kind of democracy.

The basic tendency of *liberal* democracy is *anti-egalitarian.* It demands the equality of rights as the basis of political and social life, in which the natural inequality of humans with respect to character and ability will finally be able to work itself out completely, undisturbed by privileges of birth or of wealth. One may characterize Kant, and [Immanuel Hermann] Fichte even more, as its philosophers. The word "liberal" should not hereby signify an opposition to "socialist."

On the contrary, perhaps no one has defined the principle of democracy of the liberal stamp more sharply than the Swedish socialist [Gustav Fredrik] Steffen, at home in the intellectual world of John Stuart Mill and the Fabian Society, when he says: "A deeply rooted aristocracy is the salt of a vital democracy."[31]

What it excludes is, of course, only an aristocracy based on heredity, estate, or property; it includes, however, and emphasizes personally gained higher qualification for offices based on education (the *Bildungszensus* of Max Weber). The selection should be democratic, but not necessarily direct: It includes the possibility of selection by electors. The hope, moreover, often raised to the level of utopia, is that direct and indirect democratic selection will raise the most able and most worthy, and that through the principle of representation and other selections the principle of democracy will not be dissolved, but "ennobled" (J. C. Bluntschli). The fervor of liberal democracy, however, lies at least as much in the demand for guarantees of individual freedom.

In the sense of these concepts, *German democracy* proves to be one of an *overwhelmingly liberal stamp,* with some concessions to popular referenda in tune with radical democracy. Moreover, the plebiscitary elements of the constitutional structure do not so much arise from an ideology or the superstition that the masses—themselves in part indifferent, in part seducible by demagogues—possess a higher wisdom as from the need for a corrective against deformations of parliamentarism and rigidification of the parties. And in part they arise from the hope that occasional plebiscites on major and generally comprehensible questions will have the effect of drawing the people to take a responsible interest in politics. Common to all German democracy—socialist as well as "bourgeois"—is the conviction that politics and legislation forced on the majority by a minority are not worthy of a free and cultured nation, that such domination by force is unable to solve the great problems of social reform, economic reconstruction, the unity of the Reich, and the unfolding of culture in the sense of a national community, and that it cannot truly become master over the enmity of classes, branches of economic production, confessions, and particularisms.

As Friedrich Meinecke shows, . . . it is not so much doctrines that have determined the spirit and details of the German constitution and make it

conceivable, as practical reflection on how the task of mastering a particular and almost desperate historical and political situation can be solved.[32]

These analyses and intimations only lead through the outer courts to a deepened scholarly insight into the German democracy's spirit and mode of operation, its social and political preconditions, the dangers of its degeneration, and the chances of its accomplishment. And it is the task not only of scientific politics, of sociology, and of the philosophy of the state, but also to a significant extent of legal scholarship to penetrate these problems. But that is not the task of this *Handbook,* which is dedicated to the depiction of positive German state law. The most important and indispensable preliminary question for grasping the law of a democratic party state, namely that of the type and significance of the political parties that realize it, is investigated and depicted separately [in another chapter of the *Handbook*]. Here is the place to discuss the foundation and blueprint of the *legal* structure of the German Republic.

III

A democratic constitution claims to be based on the "people's will." A constitution and those who hold power on its basis count as democratically legitimate only if they rest on a resolution of the will made in full freedom by the entire citizenry. Naturally, this resolution can in practice only be the agreement of a decisive majority of all adult citizens of the state. *The Weimar Constitution rests on the foundation of such a plebiscite.* It took place on 19 January 1919, when the Germans answered the summons of their revolutionary governments in the Reich and the single states, elected a National Assembly, and empowered it with a full and unlimited mandate for the proclamation of a new political organization of the nation. This was the beginning of the new, democratic legitimacy of German political life.

Only from a *legal* point of view can one consider what the majority of this National Assembly decided to be the decision of the German people. For the so-called representation of an absent multitude through some council or individual "representing" it always remains merely an idea or a fiction. In reality it was the 262 delegates who agreed to the constitution, drafted by the Constitutional Committee of the National Assembly in cooperation with the government of the Reich and in contact with the governments of the Länder, with some considerable regard for their wishes; they wanted the constitution and established it. But three considerations show that in this case the fiction was uncommonly close to reality, and that the assertion of the Preamble and of Article 181—that the German people had decided on this constitution "through its National Assembly" and "given" it to "itself"—accords with the truth. First, each voter who gave his vote to one of the

three great parties of the so-called Weimar Coalition knew full well that these parties were resolved to establish a thoroughly democratic constitution. Next, the proportional voting law made sure that the strengths of the parties in the National Assembly represented, certainly not a mirror image, but an essentially true picture of their strengths among the active citizenry. Finally, with the rule that amendment of the Constitution would require a two-thirds majority, the National Assembly put a sensitive fetter on all future Reichstags for the purpose of consolidating the new order. Alongside this normal method of constitutional amendment, however, it also opened the gates to a second, extraordinary *pouvoir constituant,* that begins with the popular initiative and, if the Reichstag resists, is decided by plebiscite (according to Articles 76 and 73). Certainly this type of constitutional amendment requires the consent of more than half of all those entitled to vote. Practically, then, it is even more difficult to obtain than the ordinary method; for a statute that has so many opponents that it cannot obtain a two-thirds majority in the Reichstag, it will be difficult to get more than twenty million "yes" votes from the mass of those entitled to vote, who are in part quite indolent. In principle, however, the National Assembly subjected its constitution to plebiscites, that is, to plebiscites of a *simple,* though to be sure positive and active, majority.

Thus the Weimar Constitution is not only historically based on authorization by the majority of the nation, but also at present always based on its freely revocable sufferance. The opinion that the doubled *pouvoir constituant* regulated by Article 76 cannot be without limits, that one cannot have "really decided in Weimar for a system of apparently legalized coup d'état," fails to appreciate the idea—daring, perhaps, but sublime in its consistency—of free, democratic self-determination.[33] Certainly this freedom can be demagogically misused. But how would it be freedom otherwise? However, from the standpoint of democracy and liberalism, from which interpretation must begin, it would be impossible to evaluate what the resolute and undoubted majority of the people wills and decides in a legal way as a coup d'état or rebellion, even if it subverts the basic pillars of the present Constitution!

The doubling of the *pouvoir constituant* and in general of the legislative process, which ordinarily culminates in a resolution of the Reichstag but in extraordinary cases can culminate in a popular referendum, presents legal theory with difficulties that up to now have been relatively little discussed, even though they are as characteristic of the constitutional law of the Länder as of that of the Reich and in both cases of the same practical relevance. It is left to the theory of the functions of the state . . . to determine whether, to what degree, and with what duration a statute sanctioned by referendum is of higher rank than one voted by parliament. The latter, looked at closely, is not sanctioned at all, but becomes ripe for promulgation by the mere

passage of time (during which popular referenda can be demanded or ordered, and objections of the Reichsrat or of the Prussian State Council* lodged).[34]

For the present, the pillars of the Weimar constitutional edifice—its "*plan of government*" [English in the original], to say it less loftily with an expression that is difficult to translate—stand unshaken. And whoever has comprehended the beneficial force of steady development and grasped the questionable nature of *all* conceivable constitutional systems, whether they have grown over time or been created, will wish it durability and show it respect, even if he is unable to share my personal conviction as to its relative excellence.

IV

This "plan of government," that is, the organization of the power of domination and the order of cooperation amongst state organs, is constructed in such a way that it places the representative assembly, the Reichstag, in the commanding center. Therefore, the German Republic is a democracy ruled predominantly indirectly, i.e., through representation—by parliament. At the same time, however, it is a democracy that separates powers in a genuine way and balances the national parliament with a whole system of counterweights. Some arise from the decentralization of the federal state. Others from the powers of the directly elected president. Still others from permitting popular initiatives and referenda. Added to that are important rights of the minority within parliament and the indirect counterweights of the bureaucratic organization and the institutions implementing the "rule of law." The German Republic is a democracy that one surely calls "mixed," because of the interplay, established in Reich and Länder, of representative-parliamentary (indirectly democratic) with plebiscitary (directly democratic) elements. Only the term "mixed parliamentary-plebiscitary-federal-bureaucratic-rule-of-law" would indicate its full complexity.

This is the place to provide a concise *general picture of the structure of the German people's state,* prior to the detailed exposition in the chapters that follow.[35]

1. The representative assemblies of the German people in the Reich, the Länder, and the municipalities are based on *proportional representation*. This above all gives German democracy its peculiar character, distinguishing it from the other democracies in large states. In England, France, and (in somewhat different conditions) in the United States of

*Article 40, paragraph 4 of the 1920 Prussian Constitution reserved to the state council in Prussia the right to examine all statutes, including those of the Reich, before their promulgation, although it had no legal right to alter any statute.—TRANS.

America, with their majority voting, the possibility—and often enough the reality—exists that minority parties (because of their relative majority) come to power and force upon the nation possibly years of political action and legislation, of which the overwhelming majority of the active citizenry disapproves. If democracy is supposed to signify guidance of the state through "leader personalities" and representative majorities that by and large have the trust and assent of the majority of the nation behind them, then once the political will of the people has crystallized into a multitude of parties and interest groups (and not merely a duality, as at present in America, which is now only gradually getting serious about the economic, cultural, and foreign-policy problems of the present-day state), democracy cannot be realized except through proportional representation. Proportional representation has its dark side, and at present in Germany has been implemented in an exaggerated manner in need of reform. . . . *But its abolition would destroy democracy!* Artificially implementing a two-party system would deepen class divisions and lead a socialist Reichstag majority that might arise into the temptation of a proletarian, and a "bourgeois" Reichstag majority into the temptation of a fascist dictatorship. Furthermore, it would almost inevitably have to go hand in hand with the abolition of direct popular legislation. For against a real (not merely so-called) minority government and legislature, popular initiatives would pile up intolerably. Already at present, the relatively greatest role in practice in the mid-sized and small German Länder is played by initiatives and referenda for dissolution, which aim at new elections for a Landtag that ostensibly no longer accords with real majority conditions.

2. The *Reichstag* is the normal legislator (Article 68) and even the legislator of the constitution, if it has a qualifying majority (Article 76). The combination of party groupings making up the majority at a given time is, moreover, what essentially determines the general direction of politics and to a great extent as well the leading figures of the Reich government. Article 54 of the Constitution has expressly established the so-called *parliamentary system of government.* According to this system, a parliamentary majority can in the Reich recall the entire ministry and each individual minister, and thus indirectly force the head of state of the Reich to name a government acceptable to the *majority* and, in the Länder, which lack a head of state, elect such a government directly. The meaning of the system is multiple. First, it effects a monistic union of powers, guaranteeing the unity of the legislature and the executive, in opposition to a division of powers, which is in a specific sense "constitutional," as was characteristic of the monarchic constitutionalism of Germany and is characteristic of the American presidential republic.

Also, it guarantees the democratic principle of majority rule. Finally, one hopes it will enlist, school, and sift political talent that can rise to responsible statesmanship through service to a party, the proof of parliamentary mandates or other functions.

Out of clear insight into the possibilities for degeneration in a parliamentary party state, however, the National Assembly hedged in majority rule with a whole system of safeguards, limits, and counterweights. These can be arranged into the six groups of institutions sketched next.

3. *Counterweights of a direct democratic variety*—popular initiatives and referenda—have been built into the constitutional law of Reich and Länder with the intent that they might become effective as a corrective against one-sided parliamentary and party rule. Until now they have been almost exclusively misused demagogically and have remained, as is fitting, without effect. But this should not seduce one into thinking that the institutions at issue here are imprudent and scarcely worth maintaining. Different circumstances are conceivable, under which they could prove to be a desirable solution to political difficulties and valuable guarantees of political freedom.

4. A *president,* elected by the entire people for seven years, faces the Reichstag. To him are reserved an abundance of the most important governmental powers, all of which he can exercise, however, only with the countersignature of a minister (Article 50), so that he is and ought to be bound to a majority government dependent on the Reichstag. In this way, he remains more or less "capped" by parliament, as historically first befell the English king. He is elected by the people, like the American president, who actually governs, and positively thrust aside from governing independently, like the French president, who is elected by parliament. This combination of a parliamentary system of government with a head of state appointed by popular election, devised by Hugo Preuss, was a genuine and thus daring gamble. Only the experience of decades can judge whether it has succeeded. The president is strong in the negative, insofar as he refuses, for example, the chancellor's suggestion of an official appointment, a dictatorial measure, dissolution of the Reichstag, a directive for a popular referendum, ratification of an international treaty, or pardoning a condemned person. He could raise himself up to an independent political act were he to combine the dismissal of a majority government with the simultaneous dissolution of the Reichstag (Article 25) and the naming of a chancellor of his choice to countersign the entire action. It would depend on the result of the new election whether or not the new chancellor stays in power.

It is significant, furthermore, that the president functions as the independent guarantor of the constitutionality of statutes (Article 70).* Most significant, finally, is his quiet influence, not graspable in legal terms, which he is able to exercise as a prominent personality and as the chosen one of millions.

5. With some strength, the democratic will of the governments of the Länder is able to balance the majority of the Reichstag, and thus become a *federal counterweight*. . . .

6. Through the richly developed catalogue of "*Fundamental Rights and Duties of Germans,*" the Constitution seeks in part to secure the most important rights and freedoms of citizens, municipalities, and churches, and in part to put the Reich and Länder at the service of certain conserving or progressive goals. This catalogue signifies above all a comprehensive *substantive determination and legitimation* of the newly ordered state.[36] However, inasmuch as not a few of these norms have the binding force of constitutional law, and thus can be neither modified nor infringed by a simple majority in the Reichstag, they form at the same time a most important element of the hedges surrounding the parliamentary powers. To that extent they form part of the institutions protecting minorities as well as the institutions of the German state based on the rule of law [*Rechtsstaat*]. The "genius" of the work of Weimar in the realm of "substantive integration" (Rudolf Smend) is most clearly expressed in the social-liberal intentions of Articles 151 and 162.** These two articles recognize the economic freedom of the individual, but only within the limits of an order that corresponds to "justice aiming at an existence worthy of a human being for all." They stress interwovenness in the world economy and in international law (Article 4), but also oblige German foreign policy to commit itself to an international labor law that "strives for a universal minimum of social rights for the entire working class of mankind."

7. Combining the democratic majority principle with a *protection of minorities* that is, of course, only relative is certainly not characteristic of democracy in general (as Kelsen assumes), but of democracy with a liberal stamp. The combination is realized above all in proportional representation, evaluated above. The protection of minorities receives its most important augmentation through the wall of a two-thirds majority erected by Article 76, which secures not only the Constitution's

*According to Article 70, the president promulgates all laws "that have been adopted in accordance with the constitution."—TRANS.

**Article 151 regulated "economic life"; Article 162 called for a uniform code of labor law. —TRANS.

provisions dealing with the state's organization, but also, as the preceding section mentioned, a wealth of substantive provisions. Another most important minority right is the right to committees of investigation (Article 34), which under certain circumstances could throw light on illegalities or unfair practices of the majority government. Finally, the minority right to suspend the proclamation of a statute (Articles 72 and 73) is a component of the legislative procedure.*

8. The *principle of the rule of law* requires that the powers of the public authority and the rights and freedoms of citizens and their corporate bodies be as clearly and precisely delineated as possible, and above all that the legality of the life of the state be guaranteed by the right to invoke independent courts in legal disputes of all kinds. This principle remains incomplete in the German state law and administrative law, to be sure, but it has been implemented in such breadth and in so many forms that here one cannot even begin to hint at the ways it has been realized. . . . Fundamental to the legal structure of German democracy and of significance for the systematic limitation of parliamentary majority rule, however, are the fortifications and guarantees of the rule of law, in particular with reference to the following two groups.
   a. To decide the many conflicts in state law, an independent *court for disputes over the law of the state* [*Staatsgerichtshof*] has been organized (see, in particular, Articles 15, 19, and 108). Furthermore, *the courts* have claimed for themselves the authority to *review* statutes approved by simple majority in Reich and Länder for their substantive conformity with the Constitution, and, should the occasion arise, not to apply them.
   b. Democracy has not just allowed to persist—and further extended—in Reich and Länder the numerous "self-administering" municipalities and other corporate bodies, as well as a richly developed bureaucratic organization, and not just by and large taken over from the authoritarian state the civil service and its law, but it has also placed the duly acquired financial rights and the most important of the other *rights of civil servants,* in enhanced measure those of judges, under the protection of carefully sharpened articles of the Constitution (especially Article 129). Here lies a significant, sometimes politically very palpable limitation to the free discretion of parliaments and parliamentary governments. . . . The German Republic has been democratized from root to branch in the constitution of the munic-

*Article 72 allowed for deferral of the promulgation of a law for two months if two-thirds of the Reichstag so demanded. Article 73 allowed for referendum in such a case, if 5 percent of the voting population so demanded.—TRANS.

> ipalities and the Länder. In wise self-restraint, it is democratized only to a precisely limited extent in relation to its "administrative staff."[37]

All these types of minority rights, basic rights, and institutions for the protection of rights, which not infrequently benefit the opponents of democracy, involve checks to majority rule, which a democracy of a liberal stamp imposes upon itself freely, out of idealistic motives: to protect civil and political freedom and to serve the ideal of the rule of law. Making it harder to effect constitutional amendments—which is hard to justify in doctrine, but evident in practice—serves at the same time the continuity of the life of the state.

This, then, is the system of "checks and balances" [English in the original] with which the Constitution prohibits rule by parliamentary majority beyond certain extreme limits. If one surveys this richly developed system of counterweights and limitations in toto, it follows that nothing is more perverse than to complain about a supposed parliamentary absolutism of the German Reichstag. "The Reichstag"—that is, an assembly of close to 500 representatives of the most highly opposed political tendencies, split into six large and constant party groupings and a number of smaller and fluctuating groups—this Reichstag, whenever in its normal activity a political task is at all *important* and controversial, produces at best a simple majority, and then usually only at the cost of painful coalition and compromise. The simple majority, however—the Reichstag in its normal activity—is fenced in or diked from several sides here; it finds limits in the Constitution, so rich in content, and in adversaries well-armed by law: the Reichsrat, the popular referendum, the president, the courts, and its own minorities. Only if the majority coalition, brought together to form a government, is able to convince a large enough part of the opposition of the necessity of legislation or some other step may a two-thirds majority come together. Then, to be sure, the dikes will be inundated, the Constitution can be suspended or amended, the Reichsrat overcome, the president impeached or put to a referendum of recall. But in this form, too, the Reichstag is not absolute; set above it still are dissolution and popular referendum, to which the president, the Reichsrat and popular initiative can appeal, so that the "residue of sovereignty," as the authors of the seventeenth century said, remains in all cases in the direct popular referendum. As a rule, however, this referendum is not at all necessary. For, as a result of proportional representation and in light of the dependence of each party grouping on the opinions and voices of its adherents as they emerge from the press, assemblies, and resolutions of associations, it is virtually impossible that a resolution by two-thirds of the Reichstag would come about whose expediency or at least inevitability a majority of the active citizenry would not recognize.

Naturally, one cannot simply maintain the same of the resolutions of a

simple Reichstag majority. It is, however, precisely the proper sense of parliamentarism in German liberal democracy that in the normal course of state affairs deciding on the general direction of politics, filling the ministries, issuing laws, and drawing up the budget should be entrusted to a relatively small number of chosen individuals, namely, the representatives, not to the broad masses of an untrained and demagogically susceptible active citizenry.

Naturally, whether a decision is made by the Reichstag or by popular referendum—and in both cases whether the decision is constitutionally normal or extraordinary, amending or suspending the Constitution by a qualifying majority—there always remains, despite all minority rights, an outvoted and thus in some sense "violated" minority. Thus, one of the most popular accusations either against parliamentarism or against democracy is that they are a despotism of the majority and violate the minorities.

Frequently this critique derives from mere thoughtlessness and can be dispatched, since it belongs to the essence of the state to consider and to decide, since every measure offends some interest and quashes some contrary opinions, and since in a democracy it is, after all, only the majority that rules the minority, which can one day become the majority. In privilege-based and authoritarian states, on the other hand, a minority rules definitively over the majority, and therefore this nondemocracy can scarcely escape the socialist accusation of being a class state.

The critique can also be understood in a deeper sense; then it originates in either the disappointment that democracy has caused the social revolutionaries, or in the deeply rooted fears harbored by the upper strata of property and higher education against the economic and cultural consequences of the state of the common man, which is how, in any event, democracy presents itself. The fear is that a minority, conceived as a cultural elite, will gradually be violated, that the Patrician will be overrun by the Plebeian.

To recognize these dangers clearly, and, in the spirit and deed of national solidarity and of bond of fate, to eradicate them, this is the great task of national-democratic social and cultural policy.

FIVE

Heinrich Triepel

INTRODUCTION

Ralf Poscher

Heinrich Triepel's significance for the law of the state of the Weimar Republic was the result not only of his scholarly undertakings but also of his practical efforts.

Born on 12 February 1868 in Leipzig, Triepel completed his studies in Freiburg and Leipzig and, with the support of his teacher, Karl Binding, progressed rapidly through the early stages of his academic career. In the winter semester of 1900–01, he succeeded Gerhard Anschütz in Tübingen as professor of the general and German law of the state, international law, and the theory of the state. After appointment at Kiel in 1908, he became a member of the law faculty in Berlin in 1913.

Immediately after the war, Triepel devoted great effort to strengthening the discipline of public law institutionally. In 1920, together with Otto Koellreuther, he became publisher of the Archive for Public Law [*Archiv für öffentliches Recht*], thus ensuring continuity for the forum founded by Paul Laband. In 1921, thanks to Triepel's initiative, state law theory formed a topic at the German Jurists' Congress [*Deutsche Juristentag*] for the first time. Triepel himself gave the inaugural speech, on the distinction between statute and regulation.[1]

Even more important than the inauguration of law of the state as a discrete field at the Jurists' Congress was the founding of the Association of German Teachers of the Law of the State [*Vereinigung der deutschen Staatsrechtslehrer*]. With this, Triepel was responding to the wishes of other colleagues as well.

The association was intended neither to be a trade association nor to have a political agenda, but to "provide the basis for a working group that was urgently desired under the exigencies of the present and was possible despite antagonisms of scholarly method and political viewpoint."[2] From its first meeting in 1922, the association did full justice to the role Triepel intended for it.[3] Its meetings were important stimulus for the Weimar law of the state. Thus presentations by Kaufmann, Smend, and Heller at the 1926 and 1927 meetings took the struggle over methods and aims to new heights. It is due not least to debates mandated by the association's charter on set topics—in which Triepel was consistently one of the most active participants[4]—that the minutes of these meetings are today among the most lively documents of Weimar state law theory.

I

Triepel first gained lasting international recognition in the field of international law through his 1899 work *International Law and National Law* [*Völkerrecht und Landesrecht*]. Developing the consequences of the concept of sovereignty, Triepel depicted the relationship between international law and national law as a relationship between independent legal systems. He thus founded the so-called dualist theory, which he defended in 1923 against monism, which Hans Kelsen especially advocated.[5]

Although Triepel went on to be active in the field of international law after 1908 as publisher of the respected *Recueil Martens,* his interests gradually returned to the law of the state, with which he had already dealt in his dissertation on the Interregnum. With his focus of interest, his methods also shifted. While his work on international law was still written entirely in the style of the conceptual legal tradition of Carl Friedrich Wilhelm von Gerber and Laband, Triepel developed increasingly into an opponent of positivism. This was already apparent in the subtitle of his 1907 monograph on unitary and federal elements in the Reich, *A Constitutional and Political Study* [*Eine staatsrechtliche und politische Studie*]. Besides an examination of the Constitution, Triepel offered a detailed portrayal of the historical development of constitutional reality, including an analysis of the positions of political parties. Triepel had not yet brought the law of the state and politics into an alliance. Still, this work showed Triepel's lively historical and political interests, by no means limited to Germany, as his numerous references to Swiss and American constitutional law attest.

Triepel found his lifetime subject in the federal state. He returned to these issues again and again. Even in his last year of life, he took up the subject and wrote on the federal reorganization of Germany.[6] His most extensive work on state law in the Reich, *Reich Supervision* [*Die Reichsaufsicht*] of 1917, was devoted to that subject. Here, too, Triepel preceded his legal examination

with a historical, comparative law investigation. He turned explicitly against the conceptual approach with which the supervisory powers of the Reich had previously been constructed. "The conceptual construct serves only . . . to derive a desired construct through inference from an arbitrarily created concept."[7] He emphasized the necessity of asking, in contrast, about the intent of the Constitution and its historical development.[8]

His speech inaugurating his rectorship in 1926 can be seen as a methodological reflection on the departure from state law positivism already completed by the First World War. In the teleological method he had come to know as an instrument of the jurisprudence of interests [*Interessenjurisprudenz*] during his period in Tübingen,[9] Triepel found a tool that mediated the legal and political aspects of the law of the state and also provided legal legitimacy to his historical and political interests. In this way, Triepel showed himself more an improver of the old than the originator of a new methodology.[10] Like conceptual jurisprudence, the teleological method in the law of the state was inspired by private law. His approach broke with positivist methods without having to break with the content of positivism. Teleological argumentation was also found among Weimar positivists such as Richard Thoma.[11] Therefore, the speech was seen not only as a settling of accounts with positivism but also as a rejection of the idealist method [*geisteswissenschaftliche Methode*][12] that Günther Holstein had promulgated with a strong critical, anti-positivist impetus only a year earlier.[13] It was not even mentioned by Triepel, either in this speech or later.

II

"I am . . . neither an absolutist nor a democrat, but if someday I would have to decide unconditionally and without further ado for absolutism or democracy, I would, without thinking twice, prefer monarchic absolutism as the lesser evil . . . in the certainty that it is ultimately better to live under the enlightened or unenlightened despotism of a single person than under the despotism of the never enlightened rabble."[14] This and other political confessions[15] in the Empire already suggest that Triepel, who considered himself a strong supporter of the rule of law,[16] was less than enthusiastic about the prospects for the Weimar Republic. As a democratic form of state, only a presidential democracy on the American model seemed to him to have any chance of success. His attitude towards the semi-parliamentary system of the Weimar Constitution was skeptical, though always constructive.[17] In Weimar, he was conservative in the sense that he wished to retain "eternal justice"[18] in the new age. Thus Triepel was the first to develop the equality principle of the Weimar Constitution into a principle of justice binding on the legislature. To him, freeing the legislator from all legal restrictions seemed unacceptable even under monarchic constitutionalism, but "in a democratic republic . . .

downright impossible."[19] His plea for a constitutional court with abundant powers accords with this view.[20]

Triepel considered the party-state a defect of Weimar, and the history of the Republic did little to make him doubt his assessment. Nevertheless, to his credit, he was one of the first to make the role of parties in the constitutional state the subject of a legal treatise. In his 1927 address inaugurating his rectorship, *The State Constitution and Political Parties* [*Die Staatsverfassung und die politischen Parteien*], he diagnosed party rule as a sickness of the commonwealth and contrasted modern mass democracy with an idea, not lacking in nostalgia, of liberal constitutionalism with a parliament of notables.[21]

His addresses reflect the ambivalence with which Triepel initially approached National Socialism. To him, bolshevism and fascism, in which a single party rules the state,[22] epitomized a society perverted into a party-state. Thus after the "enabling law" [*Ermächtigungsgesetz*], which gave Hitler's government almost unlimited legislative power, Triepel did not mourn the passing of the Weimar multiparty state. He still cherished the hope that "time will succeed in stripping from the now victorious party the dress of a party, and in transforming it into a community encompassing the entire nation, in which everyone feels able to incorporate himself in *freedom.*"[23] Triepel yearned for a self-administering, cooperatively organized commonwealth.[24] But there is an air of desperation in Triepel's willingness to take Hitler at his word with his talk of legality and law and demands for a "national revolution" to end un-German radicalization and respect for the freedoms in the Weimar Constitution.[25]

During the national socialist regime, Triepel withdrew into works focusing largely on history[26] and the history of constitutional doctrine.[27] He did not take part in the legal idealization of the regime. His distance from the German situation in 1938 is evident in the chapter titled "The Essence of the Leader and of Leadership" [*Wesen des Führers und der Führung*] in his major study on hegemony.[28] The Jewish background of his wife, Marie Ebers, also stood in the way of any closer relationship with the Nazi movement.

It was commensurate not only with his advanced age but also with the distance between Triepel and his time that at the end of his life he wrote, from an aesthetic perspective, *On the Style of Law* [*Vom Stil des Rechts*]. Only with the eye of a scholar sweeping the centuries could he make himself believe as early as 1946 that, next to the beauty of German law, "the ugly blots that emerged in the recent past will somewhat fade."[29]

Heinrich Triepel died on 23 June 1946 in Grainau, Upper Bavaria.

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LAW OF THE STATE AND POLITICS

Heinrich Triepel

Originally appeared as *Staatsrecht und Politik: Rede beim Antritte des Rektorats der Friedrich Wilhelms-Universität zu Berlin am 15. Oktober 1926* [Speech Inaugurating the Rectorship of the Friedrich Wilhelm University in Berlin on 15 October 1926], in *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Heft* I, edited by the Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht (Berlin and Leipzig: de Gruyter, 1927), 5–40.

Honored gathering! Respected colleagues! Dear fellow-students!

. . . Carl Friedrich von Gerber's book on public law contains the clearly outlined program of a new school that makes it its business to cleanse the theory of the law of the state of everything political. Literally, he says that *conceptual legal constructions* should take the place of political and philosophical *raisonnements.* The meaning is: What is law can be understood only through what is law. Considered from the standpoint of legal scholarship, the political can only be the material, never the goal. In the law of the state, one must employ the entire sum of *legal concepts,* analyzed in their simplicity and unspoiled purity in private law, either directly, or where this is not possible because of the variety of material content, then in such a way that they are altered according to the principles of exact interpretation and consistency developed in private law. Gerber then immediately illustrates the usefulness of this method by way of a particular problem in which the "legal nature" of the rights of the monarch, the civil servant, and the subject in public law are revealed. In it, we encounter a series of constructions that would later play a major role—for example, the view that a monarch's rights are his "own" and "genuine" rights, and the claim that the subject's so-called rights of freedom are not rights but instead simply express certain effects of legal precepts on the exercise of state power. Practical consequences are

immediately drawn from the conceptual construction—for example, the consequence that in public law almost none of a citizen's rights can be enforced in court.

The new method, which incidentally can be traced back to earlier suggestions by [Wilhelm Eduard] Albrecht, was later employed by Gerber in his appealing *Principles of the German Law of the State* [*Grundzüge des deutschen Staatsrechts*]. Then [Paul] Laband—Gerber's intellectual executor, as [Ernst] Landsberg aptly called him—took over the method and treated it with consummate artistry. And Laband's *State Law of the German Reich* [*Das Staatsrecht des deutschen Reiches*], the first volume of which appeared exactly fifty years ago, completely dominated more than one generation of German public law scholars and exercised an influence even beyond Germany's borders, particularly in the Romance countries. Few from my generation failed to be entranced by the Gerber-Laband school when we began our careers. Its effect was checked neither by the strong opposition of [Otto] Gierke and Edgar Loening nor by [Felix] Störk's courageous, if somewhat misdirected, attack.

In treating problems of the law of the state, this school was interested in nothing but analyzing public law relations by establishing their "legal nature," discovering the general legal concepts to which they were subject, and developing conclusions from the principles discovered. This analysis means, all in all, an unfolding of the logical elements of which the concept of a legal institution is composed. Any teleological examination is frowned upon, for the goal served by a legal institution lies beyond its concept. The conclusion thus follows of itself that the law of the state must shun all *political* considerations, since they include considerations of goals. The school bestows the honorable title "strictly legal" only upon writings that avoid any contact with the political as with the Evil One. Those who do not bow to this tyranny that on occasion almost resembles a court of the Inquisition are, at best, ignored. . . .

Now it is true that the word "politics" is ambiguous, and thus the relationship between the conceptual approach of public law scholarship and the "political" could be structured in various ways.

One can understand politics as state *action;* one might see politics, as does [Johan Caspar] Bluntschli, as leading the state and influencing it, as a "deliberate handling of all practical problems in and around the state" [*bewußte Staatspraxis*]. We need not concern ourselves with the question of where to draw the dividing line between the truly political and other state activity—perhaps by using the idea of integration that Rudolf Smend fortunately introduced into the world of state law. For in any case, states' political action, as well as mere technical administration, can support an assessment not only from the standpoint of expediency but also from that of law. Basically,

the law of the state has no object other than the political. Thus, a scholar of the law of the state cannot avoid judging political processes and intentions by the standards of public law. . . .

Until a few decades ago, politics was seen as the theory of the state per se, more or less in the way in which it was treated in antiquity. Thus [Georg] Waitz, for example, refers to politics as the scholarly discussion of the conditions of the state, with consideration of the historical development of states as well as states of the present day. Under this view, constitutional law is part of a comprehensive political science, and the question arises whether the law of the state should be practiced with or without considering the other aspects of this theory of the state. The question remains the same, however, or shifts only superficially, if we assume that the formerly unified concept of politics has dissolved and that the state has now become the object of various disciplines, with one examining its legal aspects and others considering it from the historical or social or psychological or some other standpoint. Whether there can also be politics in a more narrow sense—and with it a scholarly theory of state interests—is controversial but immaterial to us for the time being. For the question is solely whether it is methodologically correct for scholarship to place the law of the state in relation to other disciplines concerned with the state. Everyone would probably agree to this without reservation, were it not being fought passionately in the interests of methodological purity by the newest trend, which likes to describe itself as the logical legacy of the Gerber-Laband school. The young Austrian school led by [Hans] Kelsen, taking as its starting point the epistemologically irrefutable contrast between the "is" and the "ought," would exclude any *causal* considerations from jurisprudence in general and the law of the state in particular, since it is a *normative* discipline. *Political* discussions are rejected with particular hostility as alien to law, because they are said to be discussions of goals. Although Laband was still willing to admit that the purposes of a legal institution could influence its legal structure and be important in understanding it, such a thought would be anathema to Kelsen, who would declare it "meta-legal," as it is unattractively called. In this way law, as mere form, is of course and deliberately emptied of any content. Kelsen has gone so far as to call the state a mere legal concept, a point of reference for certain actions; in the end he has equated it with the legal order itself—that is, with a system of norms.

Now, the critical distinction between knowledge gained from legal logic and from causal science is an undeniable advance. But it is a different question whether the brusque one-sidedness with which the latest trend limits legal scholarship to the formal is a benefit. If we assume, without accepting, that the lawyer is no longer doing jurisprudence, but sociology, history, or whatever when he supplements formal, logical, conceptual work with social, historical, ethical, and other considerations, this seems merely a matter of

labeling, of no significance to the substance of the issue. But it is this supplementation against which they inveigh. The masters of the new school banish any legal thought that cannot be certified as logical from the field of jurisprudence, as the guild-master chased the bunglers from the town precincts. Certainly the law of the state may be pursued with such methodological exclusivity; but the cost, in the end, is the impoverishment of our scholarship, which must indeed pay a high price for the glory of methodological purity. Methodological syncretism, as Adolf Menzel correctly states, is not a crime against the crown! Where would we be today if we had pursued church law without church history, trade law without considering business economy! In the same way, however, the law of the state cannot be carried on without consideration of the political. Even [Samuel] Pufendorf was incensed at scholars of the law of the state who treated the German Constitution without knowing the *res civiles*—that is, politics. He scoffed that they were as suited to their work as donkeys to violin playing. What would that old fighter say to those most modern scholars of the state who do not even want to know anything about politics! The logical purism that protects jurisprudence from any contact with other disciplines, that makes it an esoteric doctrine comprehensible only to the initiated, and that gives all state institutions, constitution, parliament, kingship, self-government, and much more the appearance of bloodless schemes and leaves their ethical content uncomprehended; this must necessarily lead to the withering away of the theory of law and state. Let us hope that our next generation of public law scholars, more interested in life than the last, will turn their energies to placing the norms of the law of the state in the closest of contact with the political forces that create and form them, and which, in turn, are mastered by the state's laws—a task we have only just begun to take on and which has been far better accomplished by foreign, particularly Anglo-Saxon, theory of the law of the state than by the German.

However, it is not even correct that legal scholarship, even if taken in the most narrow sense, must limit itself to constructs of a formal logical conceptual quality for the sake of its object. The logical school of law has fallen back on a concept of law that, though not wrong, is arbitrarily narrow. It cannot reasonably be disputed that the law concerns an "ought," not an "is." However, our discipline deals not only with the transcendental content of law but also with empirically existing legal orders consisting of rules that govern the ordered communal life of people, rules that come and go and differ according to places and times. Therefore, despite everything, every legal system is in itself a "given," an "is," and this fact cannot be understood without considering the social relationships that the law orders with its norms. Further, the rules of "ought" in law are always an expression of universal valuations, and their meaning refers to objects seen as means for achieving certain ends. Thus one cannot arrive at an understanding of legal precepts at all

unless one has an image of the goals to which the legal refers and of the *interests* whose recognition, disapproval, or balancing form the primary task, or, if you will, the prerequisite of the legal system. Now if we describe as "political"—this is yet another new meaning of this dubious word—anything referring to state goals or their distinction from individual goals, it is clear that a comprehensive understanding of the norms of the law of the state is not possible at all without inclusion of the political.

Looked at in the light, it is a mere self-deception for jurisprudence to believe it can construct the entire substance of the legal order formally, logically, and without value judgments. Let us look somewhat more closely at the operation commonly called "legal construction." First, some simple examples. One constructs when one understands the contract concerning a visit to the theater as a work contract, i.e., a contract for the production of work, namely the performance. One does this in order to apply the civil code provisions on work contracts to the relationship. Or, if I may present an example from the law of the state, there are lawyers who construct the abdication of a head of state as an act of government, in order to bring the act within the scope of the constitutional provisions that require government acts by the head of state to be countersigned by a minister. What does such a construction consist of? Strangely enough, many different explanations are offered. Max Rümelin, who I believe has most closely studied the issue, sees construction as assigning a single phenomenon a place within the system by analyzing and synthesizing its conceptual elements. I will accept this definition. However, somewhat differently from Rümelin, I would like to see construction not as the linkage of a factual predicate to its legal consequence, but as the classification of a factual predicate or a legal consequence within the system for the purpose of such linkage. Construction always refers to legal phenomena or events that cannot easily be subsumed under an established concept. If we bring a blow with a stick under the concept of bodily harm, this is mere subsumption, not construction. Construction is only the preparation in a subsumption that has yet to occur; its purpose is to make the legal phenomenon ready for subsumption. Again, unlike Rümelin, I consider it immaterial whether the concept under which a phenomenon is included is already known or newly created. Numerous concepts familiar to us today, some of which have already become statutory concepts, were originally created by scholars for the purpose of construction—think of the legal transaction, or of rights *in rem* and *in personam,* or of confederation and the federal state; it was a construction when Georg Jellinek invented the concept of "state fragment." The only requirement is that the new concept should work to further the system—perhaps to remove a phenomenon from subsumption under other already familiar concepts, thus giving it a place in the system.

We will thus have to distinguish between two types or two levels of construction. For the first, it is enough to present familiar legal materials as a unity by viewing individual legal precepts as flowing from higher principles, and seeing these, in continuous upward progression, as deriving from concepts placed at the top of the large pyramid. This seeks to view the single as part of the whole, and the whole with its inner connection and cohesion. It is construction for its own sake. We might describe it as *comprehending,* or, to paraphrase Max Weber's well-known formulation, as *understanding* construction. A second step, not always taken but quite obvious, consists of taking from the postulated unity of the legal order the authority to derive new legal precepts from the discovered principles—that is, to fill the gaps in the familiar legal material. From the standpoint of the constructing lawyer, what is filled only seems to be a gap, as for him consequence and analogy are mere logical operations that only confirm what is already contained in the existing legal material. Thus here, construction is used for finding law. Philipp Heck has called this the method of inversion. We will call it the *gap-filling* construction. It is not always possible to tell immediately whether a legal construction aims to reach only the first level or has its eye on filling a gap. The Gerber-Laband school is at any rate devoted to construction in the fullest sense. One may have doubts about its legacy in the Kelsen school, as here jurisprudence is no longer viewed as a practical discipline whose task it is to prepare the administration of law by interpreting the existing and finding new law.

It seems to me to be the failure to distinguish between understanding and gap-filling construction that leads to a disagreement about the historical, and especially the intellectual-historical, foundations upon which the jurisprudence of construction is based. It has been said that the displacement of the politicizing method of the law of the state by the approach of construction may be explained by the fact that the period in which our nation still struggled to find its constitutional form has been superseded by a period of quiet in constitutional politics. This is undoubtedly true to a certain degree. But this would have explanatory power only for the law of the state, while the predominance of construction in the second half of the previous century was found in all areas of legal scholarship. How can this be explained? Many trace it back to the effects of the *historical school of law,* others to the influence of Hegel—which would, incidentally, not necessarily be a conflict. I consider both of these to be incorrect, or only partially correct.

There is no doubt that even the leaders of the historical school of law use construction in their presentation of subsisting law. [Friedrich Karl von] Savigny's famous monograph on possession is, for many, a model of jurisprudential construction, and Albrecht's *Gewere* forms the Germanist counterpart to it. But is not Savigny's inclination toward construction a part

of the natural law residues one rightly believed to have discovered in his thought? Besides, his methods were surely far more understanding than they were gap-filling constructions, except, perhaps, for the last part of his system: international private law. Since Savigny, the process of bringing to light the conceptual and of building it into a system has endowed jurisprudence with the dignity of a science. [Georg Friedrich] Puchta and [Friedrich Ludwig von] Keller were the first to consciously and energetically take the step down from constructed concepts to the solution of individual cases not settled so far by law. But for Puchta the special influence of dialectical philosophy probably played a role. Admittedly, even someone like [Karl Friedrich] Eichhorn had not scorned construction—for example, in proving the impossibility of establishing a federal court on the basis of the "nature" of the Deutsche Bund as an association under international law. However, the basic ideas of the historical school lead not to a method of construction but away from it. The doctrine of the logical completeness of law is a legacy of natural law and did not, as many believe, develop out of the historical school. Its most persistent advocates—recall, for example, Wilhelm Arnold—were determined opponents of construction. When others adopted the method of construction, they did so despite the school's basic principle. For according to this, law is after all the life of the people, seen from a particular angle. How could this lead to logically deriving legal precepts from invented concepts? [Alfred] Manigk has shown convincingly that the gap that has opened between the historical school and modern teleological jurisprudence is by no means unbridgeable. It is true that the historical school had to oppose any attempt to fill gaps in the law with subjective value judgments. However, it was certainly able to acknowledge the law creating power of objective values that exist in society and are thus universal; for these, too, are the result of history, part of the stream of history. As far as the relationship between the law of the state and the political, in particular, it may be true that the quietistic bent that clung to the historical school of law brought in its wake an aversion to political *raisonnement,* "which breathes the spirit of obsession for reform." And after all, the chief advocates of the antipolitical school in the law of the state, Gerber and Laband, came out of the historical school. Yet they were already more-or-less degenerate children of the great mother. About Gerber—who characteristically called Puchta, not Savigny, his master—Gierke made the harsh judgment that he had killed the German soul in German law with his romanist constructions. But the example of [Rudolf von] Gneist, certainly a son of the historical school of law, proves that even this school could achieve a relationship to the political.

The result is similar when we try to trace the jurisprudence of construction back to Hegel. Hegel unquestionably exercised a great influence on the lawyers of the first half of the previous century, and to some extent even beyond. Public law and, besides criminal law, the law of the state and

international law in particular bear his mark—[Romeo] Maurenbrecher, the young [Johann Stephan] Pütter, [August Wilhelm] Heffter, [Carl Viktor] Fricker, finally Otto Mayer, besides some who were only superficially touched by Hegel. Undoubtedly, specific elements of Hegel's philosophy can be found in the jurisprudence of construction. When [Rudolf von] Ihering, in his younger period, oriented towards construction, was sustained—like Puchta and others—by the belief that a "higher" jurisprudence led to production of new legal material by virtue of the inner dialectic of legal relationships, this was obviously Hegelian thinking. Some concepts that were formed and played a role in the period of the jurisprudence of construction can be traced directly to Hegel. Yes, Hegel expressly, though admittedly with a pronounced tone of contempt, ascribed to legal scholarship the task of collecting, deriving, splitting given legal provisions through deduction from the positive legal material. But according to him, this was all merely a matter of the external order, a matter of understanding; it had nothing to do with true comprehension, with reason. Hegelian constructions cannot be compared with the constructions of jurisprudence at all. Those who assume the opposite confuse formal logic with Hegel's metaphysical logic, the conceptual in the ordinary sense with the Hegelian concept, which is the living spirit of the actual, developing in incessant progression. Thus Hegel's construction is only understanding construction, and even when it refers to law, it is construction through history. State and law take their places in the unfolding of the spirit in history. Hegel's construction thus leads beyond law; it does not serve the conceptual systematic of law itself. Therefore it comes as no surprise that, of the latest offshoots of Hegelianism in public law, neither Lorenz von Stein nor Gneist, the historically oriented Hegelians, but only Otto Mayer cultivated legal construction in the technical sense. And conversely, the latest guise of construction in state law theory, Kelsen's logic of norms, does not have the slightest connection to Hegel. How could it in a school that is consciously ahistorical, while Hegel was historically oriented, branding the creative self-movement of the spirit as axiomatic, that is, in a school that ultimately has the state disappear entirely into law, when for Hegel, law merges entirely into the state. In fact, the logical school itself seeks its point of departure not in Hegel but in Kant—whether rightly or wrongly is another question. The jurisprudence of construction shares its preference for the system and its belief in the completeness of that system not only with Hegel, but with all of idealist philosophy—perhaps with philosophy in general.

But the main point is that legal construction existed long before the historical school of law and long before Hegel; one might even say it has existed since people began to feel and satisfy a need for an immanent order in legal material, except that it was not always consciously treated as a method or as the only method. Often it was used only to model systems or for didactic purposes; often it served only as understanding, not as gap-filling construction.

Roman lawyers were already using construction—how exquisitely Ihering has described Paulus the constructor!—and glossators as well as post-glossators have used construction, as have Scholastics and Ramists, the Syntheticists and Systematicists of the sixteenth century, as well as natural law scholars and those of the Enlightenment. We find construction to an especially great extent in natural law. Except here it takes place first at another level; first, natural law as such is mastered through a priori concept formation and deduction, and the outcome is employed in positive law only if the lawyer wishes to employ natural law to fill gaps in positive law. Not all, but most natural law scholars have taken this second step. What is it but gap-filling construction when Hugo Grotius, for example, seeks to prove the inalienability of the demesnes—there was disagreement on whether or not state property could be sold by the monarch—by interpreting the rights of princes to the demesnes as usufruct, and when [Augustin von] Leyser tries to refute this by branding the ruler the true owner by virtue of the original social contract? Certainly, in natural law jurisprudence logical deductions from concepts often coexist peacefully side by side with considerations of purpose and value. To remain with the example of the demesnes, Pufendorf agrees with Grotius's theses and their justifications, but points to the necessity for the state to protect the economic needs of the respective government successor, and thus remove the demesnes from the control of the monarch. In any case, however, it is certain that the method of construction in finding law was quite familiar to natural law—except that natural law replaced the Roman legal concepts, from which German scholars of the law of the state originally constructed public legal relationships, with a different basis for construction. . . .

None of these various ways of describing and finding the law can be related to any particular legal philosophy. On the contrary, each attempted to accord with its period's *Weltanschauung*s and forms of cognition. They are as related to the conceptual realism of scholasticism as to the abstracting tendency of the Enlightenment and of Kantian and post-Kantian idealism, and finally to the positivist narrowing of thought in general in the most recent eras—a way of thinking that does not look beyond the subject matter and only considers valid what it can extract from it. All the types of the jurisprudence of construction have in common only *one* principle. It is, if I may say so, a professional lawyer's view. The method of construction aims to serve the needs of the theorist and the practitioner, to create certainty about the legal precepts that guide life in society. Legal *certainty* is necessary to reassure the citizen whose interests are affected by law, as well as to reassure the conscience of the legal researcher and of the lawmaking authority. The infallibility of the logical conclusion, the obviousness of its outcomes, alone seems to be capable of creating this reassurance. Thus it was believed that the best legal method was found in operating with crystal-clear

concepts and granite-hard deductions, guaranteeing firm predictability of results.

Thence also the popular comparison of jurisprudence with mathematics, the description of law-finding as "calculating with concepts," the demand that legal doctrine determine for each his own with mathematical precision. It has been claimed repeatedly, from Leibniz to Wolff and Kant, that legal scholarship is related to mathematics. Hints of this may be found even in Savigny. Even more recently this idea has appeared among philosophers, for example in [Wilhelm Max] Wundt and [Hermann] Cohen; and Kelsen, a student of Cohen's, calls jurisprudence a geometry of the total legal phenomenon, though he also admits that this comparison does not work in every respect. At one time the matter was taken quite literally, and there were even attempts to solve questions of the law of the state through simple arithmetic. A famous debate turned on the question whether, in a dispute between the three *curia* of the old Reichstag, the Kaiser could join the majority and elevate their decisions to Reich law—whether he could, for example, join the college of electors and the council of princes to override an opposing vote by the free cities. Here, some based their views on the doctrine, defended by [Dietrich] Reinkingk, that the Kaiser and the Reichstag possessed sovereignty [*Majestät*] *pro partibus indivisis*—thus the Kaiser held half and each of the three estates one-sixth. From this, it was derived with mathematical certainty that the Kaiser and the two Reich estates together, with ten-twelfths, or the Kaiser even if he had only one estate on his side, with eight-twelfths, would be able to achieve more than the remaining two- or four-twelfths. Pütter still had to fight such nonsense.

But what is the truth about the apodictic certainty that is the aim of the intellectualist methods of formal logic? It is nothing more than deceptive facade. No lawyer has yet achieved a reasonable result using this alone, and if he thinks so, he deceives himself; for a seemingly pure logical analysis and synthesis of concepts, if it is to make sense, cannot be made at all if not supported by value judgments. . . . Even more so concept-creation and concept-classification growing out of a legal construction cannot be achieved without teleological ingredients. Thus it can easily happen that the constructor is seduced into filling a concept from the start with what he hopes to take from it later—thus arriving, by hook or by crook—at the desired result in a bona fide way. In the law of the state in particular, hundreds of constructions can be found with which results considered useful are brought about in this way. One example in place of many: A young scholar of the law of the state was once interested in the aforementioned question whether the abdication of the monarch required countersignature by a minister. It required this only if it were an act of government. Now, in order to have it appear to be one, the scholar broke it down into two acts: the monarch's petition to the state to release him from office—this petition was made by

the ruler as an individual—and the grant of release, which he accepts as a state organ, and whatever he does in this capacity must be countersigned. Few would be satisfied by such an artificial construction. It would never have occurred to the scholar had he not wanted by all means to arrive at an outcome that was, in his eyes, a political necessity. In reality, abdication is a declaration made by the monarch not in the name of the state, but to the state; that is, it is definitely not an act of government. Thus if one wishes, in opposition to the text of the constitution, to require a countersignature on it, this *might* be achieved if, judging the relevant political interests, the legal principles of the constitution referring only to genuine acts of government are extended by analogy to cases in which it seems reasonable for a personal decision by the head of state that strongly affects the national interest to be treated like an act of government. However, I do not believe that the analogy would be justified in this case, because I believe it absolutely imperative, in the state's interest, that the head of state be able to decide with complete freedom whether he considers his remaining in office or his removal to be necessary.

The jurisprudence of construction in the law of the state is not loaded with goal-oriented political considerations, consciously or unconsciously, not when it deals with modest questions of detail. It is no exaggeration when I say that the majority of theories of state that have become influential for the law of the state—a majority of them legal constructions—were posited with regard to political goals and used to justify political acts. The doctrines of the state or social contract, of sovereignty, and of separation of powers were not mere products of theoretical speculation, but have been from the start the pillars of state and church policy. This can be followed into the modern period. The doctrine of the legal person of the state, like its opposite, the private-law construction of the state, were, as Albrecht correctly saw, decisive elements in the programs of political parties. The construction of the right of the monarch as his own right to state power, the concept of the bearer of state power, the formulation of the concept of the federal state were fashioned or used as crutches for political movements. Even Laband's doctrine of the contrast between statutes in the material and in the formal sense, apparently politically quite neutral, grew out of the Prussian budget conflict of the 1860s; it certainly had a political tendency, and the passion with which it was fought by [Albert] Hänel had a political background. Gierke correctly perceived an "unmistakably absolutist streak" in Laband's law of the state [*Reichsstaatsrecht*], and something similar may be observed in Otto Mayer's supposedly entirely apolitical administrative law constructions.

Yet in all these cases, it ultimately became clear that the most contradictory conclusions could be drawn from concepts; one could interpret the concepts more broadly or narrowly without being logically incorrect, and their so-called rightness generally depended only on the breadth of the inductive

soil from which they sprang. Hobbes could have based his absolutism on the social contract as easily as the Monarchomachs or Milton and Sidney based on it the right to resist and depose, and Rousseau his democratic doctrine. The organic theory of the state could be used by [Nikolaus Thaddeus von] Gönner as the starting point for absolutist, by the Romantics for feudal, and by Hugo Preuss for democratic conclusions. The concept of sovereignty was formulated by [Jean] Bodin so as to support the French kingdom in its foreign and domestic policy. . . .

Thus it becomes clear that the logical school of the law of the state quite correctly accuses traditional scholarship of having used political goals and values to mold its own concepts, often in contradiction with its own basic methodological views. But we draw different conclusions from this than the intellectual purists. It is *not* our opinion that teleological considerations should be banned from legal theory. We believe that, instead of hiding behind the mask of logic, they must openly seek and claim their place in legal doctrine. Because law itself is nothing but a complex of value judgments on conflicts of interests, the teleological method is the suitable method for the object of legal theory. Thus in the law of the state too, we are not afraid of, but *demand,* a linkage of *political* considerations with logical, formal conceptual work. Today we make a stricter distinction between purely political and legal considerations than did the liberal public law scholars of the time of [Carl von] Rotteck and [Karl Theodor] Welcker or the conservatives, such as [Friedrich Julius] Stahl and others; we do not desire a return to the days when the law of the state was replaced by politics. And we especially loathe it when political trends try to distort the subsisting law. But we so little avoid the political that we even declare ourselves unable to interpret law without considering the political. Yet far be it from us to scorn legal construction as such. On the contrary, we recognize in it perhaps not the only, but certainly one valuable, and as yet unsurpassed, means of modeling systems, without which we would have had a difficult time mastering the material. We scholars of public law, especially, have much to be grateful for in this respect. Otto Mayer's method of construction was what actually allowed us to master the virtually limitless bulk of administrative law. Thus we make obeisance to *understanding* construction. We even appreciate construction, though with some reservations, when it serves as preparation for the second main task of the lawyer—supplementing the legal material by developing new legal precepts. For it provides us with comfortable labels we temporarily may give to legal phenomena that have yet to be examined, until we pass final judgment on them according to a principled weighing and judgment of interests. Thus construction may serve as a "hypothesis for subsumption and analogy." But should it try to play more than this heuristic part, should it dare to take on *gap-filling* functions, should it even behave as though it were the only method of salvation, then we will throw down the gauntlet.

It cannot be ignored that instrumental jurisprudence is exposed, and sometimes succumbs, to the danger of shallow relativism or raw utilitarianism; even Ihering did not always escape this danger. For the law of the state, above all, a method that bases all its interpretation and gap-filling on values seems questionable. "A state," said Gerber, "based on opinions can have only an insecure, unstable existence." But is the formal method of logic based any less on "opinions"? There is no doubt—and I ask you, my fellow students, always to remember this—that many public law concepts and axioms wearing the guise of the purely legal are nothing more than manifestations of political, even party-political tendencies. But teleological jurisprudence is forced to show its colors. It makes no secret of the fact that its results depend on value judgments. For a jurisprudence of interests that sets itself the task of "weighing" interests against each other must, if it is not to stop halfway, spell out the standards against which this weighing takes place. Instrumental jurisprudence makes it obvious, generally even to the untrained eye, when it reaches the border between subjective and objective assessment of interests. It is clear, however, that its task is to seek the standards it will follow in the objective sphere. We are all subject to error, and it can happen that we confuse subjective belief with objective validity. But such error is easier to discover than the mistake of logical construction. In any case, when we interpret and fill gaps we consider it our duty, in the law of the state as in private law—for there is only one legal method—we consider it our duty to stick, first of all, to the values we see expressed in laws. If this fails to help us, we are obliged to apply the standards we find in the legal consciousness of the legally bonded community. Even if we ultimately look into our hearts—if we decide, as required by the by-now classic provision of the Swiss civil code, on the basis of the rule we would create if we were legislator—we do not act according to individual caprice. The legislator also must create its norms not capriciously, but on the basis of factually justified considerations. Thus perhaps it could be better put as follows: In case of necessity, we decide as we *would have to* if we were the legislator. After all, our consciousness is merely part of an extra-individual spirit. When we look into our hearts, we are also reaching for eternal stars. For the jurisprudence of interests, the guiding star remains the *idea of law,* eternal *justice.* To serve only this is our duty; to serve it faithfully should be our vow.

Dante Alighieri (Vienna and Leipzig: Deuticke, 1905). *Spinoza,* whose pantheism must be seen as a turn from metaphysics to empirical cognition of nature, is a democrat; the metaphysician Leibniz, with his preestablished, God-given harmony, is, consistently, in favor of autocracy.

Kant takes a unique position. His system is usually termed "idealism," and *opposed* to positivism. But this is certainly incorrect. Precisely Kant's idealism is, by virtue of its thoroughly *critical* character, itself positivist. Transcendental philosophy can be understood correctly only as an epistemology. Thought through to its logical conclusion, it must lead, also in the field of values, to a rejection of all metaphysical absolutes, to a relativist position. As much as the anti-metaphysical, and thus *positivist,* character of Kant's natural philosophy is emphasized, it is traditional to place Kant's ethics and political reasoning in sharpest contrast to a relativist-skeptical philosophy; and this view can undoubtedly be supported by Kant's own words. Kant's ethical-political system is entirely metaphysically oriented, and his practical philosophy, with its conservative-monarchic theory of law and the state, is thus directed entirely to absolute values. (On this, see my "Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus," *Vorträge der Kant-Gesellschaft,* no. 31 (Berlin-Charlottenburg: Heise, 1928): 75 f.)

His critical system of pure reason, however, makes cognition an eternal, never-completed process, relegating truth to infinity, and thus declaring it essentially as unreachable, as does skepticism. As cognition can never entirely seize hold of its *object,* in Kantian philosophy the question of the object of cognition is replaced by the question of the *method* of cognition; the two questions are in fact made practically identical. Kantianism has been attacked for this *methodologism,* this preference for questions regarding method. Are there not obvious parallels to a political conception that, instead of asking for the right content of the social order, poses the question about the *way,* the *method* of creating this order?

2. HUGO PREUSS

1. Hugo Preuss, "Volkstaat oder verkehrter Obrigkeitsstaat?" *Berliner Tageblatt* (14 November 1918), in Hugo Preuss, *Staat, Recht und Freiheit* (Tübingen: Mohr, 1926), 365 ff.

2. Hartmut Pogge von Strandmann, "The Liberal Power Monopoly in the Cities of Imperial Germany," in Larry E. Jones and James Retallack, eds., *Elections, Mass Politics and Social Change in Modern Germany* (Cambridge: Cambridge University Press, 1992), 93 ff.; on Preuss in particular, Celia Applegate, "Democracy or Reaction? The Political Implications of Localist Ideas in Wilhelmine and Weimar Germany," in Jones and Retallack, eds., *Elections, Mass Politics and Social Change,* 253 ff.

3. Sobei Mogi, *Otto von Gierke: His Political Teaching and Jurisprudence* (London: P. F. King & Son, 1932), gives a good English introduction to Gierke's legal thinking.

4. Christoph Schönberger, *Das Parlament im Anstaltsstaat: Zur Theorie parlamentarischer Repräsentation in der Staatsrechtslehre des Kaiserreichs (1871–1918)* (Frankfurt am Main: Klostermann, 1997), 165 ff. On Laband's constitutional thinking in general, see the excellent account by Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham, N.C., and London: Duke University Press, 1997), 13 ff.

5. Hugo Preuss, "Verwaltung," in David Sarason, ed., *Das Jahr 1913: Ein Gesamtbild der Kulturentwicklung* (Leipzig and Berlin: Teubner, 1913), 120.

6. See Ernest Hamburger, "Hugo Preuss: Scholar and Statesman," Leo Baeck Institute, *Yearbook* 20 (1975): 193 ff.; Günther Gillessen, "Hugo Preuss: Studien zur Ideen- und Verfassungsgeschichte der Weimarer Republik" (Dissertation, University of Freiburg, 1955), 129 ff.

7. See Dietrich Orlow, *Weimar Prussia 1918–1925: The Unlikely Rock of Democracy* (Pittsburgh: University of Pittsburgh Press, 1986); Dietrich Orlow, *Weimar Prussia 1925–1933: The Illusion of Strength* (Pittsburgh: University of Pittsburgh Press, 1991); Horst Möller, *Parlamentarismus in Preußen 1919–1932* (Düsseldorf: Droste, 1985).

8. Hugo Preuss, "Denkschrift zum Entwurf des allgemeinen Teils der Reichsverfassung vom 3. Januar 1919," in Preuss, *Staat, Recht und Freiheit,* 387 ff.

9. Edmond Vermeil, *La Constitution de Weimar et le principe de la democratie allemande* (Paris: Librairie Istra, 1923), 303 ff., 347 f.; Horst Möller, "Parlamentarismus-Diskussion in der Weimarer Republik: Die Frage des 'besonderen' Weges zum parlamentarischen Regierungssystem," in Manfred Funke et al., eds., *Demokratie und Diktatur: Geist und Gestalt politischer Herrschaft in Deutschland und Europa. Festschrift Karl Dietrich Bracher* (Düsseldorf: Droste, 1987), 140 ff.

10. See especially Ernst Fraenkel, "Die repräsentative und die plebiszitäre Komponente im demokratischen Verfassungsstaat" (1958), in Ernst Fraenkel, *Deutschland und die westlichen Demokratien,* enlarged ed. (Frankfurt am Main: Suhrkamp, 1991), 194 ff.

11. Hugo Preuss, "Die 'undeutsche' Reichsverfassung," in Preuss, *Staat, Recht und Freiheit,* 473 ff. On the anti-Semitic attacks on Preuss, see Hamburger, *Hugo Preuss. Scholar and Statesman,* 202 ff.; Kurt Töpner, *Gelehrte Politiker und politisierende Gelehrte: Die Revolution von 1918 im Urteil deutscher Hochschullehrer* (Göttingen: Huster-Schmidt, 1970), 212.

12. Hugo Preuss, *Das deutsche Volk und die Politik* (Jena: Diederichs, 1915), 196.

3. GERHARD ANSCHÜTZ

1. Richard Thoma, "Besprechungen," *Zeitschrift für Politik* 7 (1914): 280–86.

2. Georg Meyer and Gerhard Anschütz, *Lehrbuch des deutschen Staatsrechts,* 6th ed. (Leipzig: Duncker & Humblot 1905), 906.

3. Gerhard Anschütz, "Redebeitrag," in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer,* vol. 4 (Berlin and Leipzig: de Gruyter, 1928), 74 ff.

4. Gerhard Anschütz, "Redebeitrag," in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer,* vol. 3 (Berlin and Leipzig: de Gruyter, 1927), 47 ff.

5. Gerhard Anschütz, "Redebeitrag," in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer,* vol. 6 (Berlin and Leipzig: de Gruyter, 1929), 57.

6. Gerhard Anschütz, *Die Verfassung des Deutschen Reichs* (Berlin: Stilke, 1926), 405.

7. On this category and its limited value, see Peter Gay, "The Community of Reason: Conciliators and Critics," in his *Weimar Culture: The Outsider as Insider* (New York and Evanston: Harper & Row, 1968), 23 ff.

8. Thomas Mann, *Von deutscher Republik: Gerhard Hauptmann zum sechzigsten Geburtstag* (Berlin: Fischer, 1923), 1.

4. RICHARD THOMA

1. Biographical information is derived from the single most important secondary work on Thoma, Hans-Dieter Rath, *Positivismus und Demokratie: Richard Thoma, 1874–1957* (Berlin: Duncker & Humblot, 1981), 19–31.

2. See the recollections of Ottmar Bühler in "Finanzgewalt im Wandel der Verfassungen," in *Festschrift für Richard Thoma zum 75. Geburtstag am 19. Dezember 1949* (Tübingen: Mohr, 1950), 2.

3. *Jahrbuch des öffentlichen Rechts der Gegenwart* 4, ed. Robert Piloty (Tübingen: Mohr, 1910), 196–218.

4. Thoma, "Rechtsstaatsidee und Verwaltungsrechtswissenschaft," 199.

5. Long before National Socialism ("Nazism") as a movement came into being, the leading German progressive Friedrich Naumann had formed the "National Social" reform party. Similarly, the reformist Social Democrat Hermann Heller proclaimed the need to combine "nationalism" and "socialism" as part of an anti-fascist republicanism in the Weimar Republic. Thoma in no way relied on racial thinking in his formulations, concentrating instead on the "Emanzipation des vierten Standes" and the achievement of "social equality." See Thoma, "Rechtsstaatsidee und Verwaltungsrechtswissenschaft," 201.

6. Thoma, "Rechtsstaatsidee und Verwaltungsrechtswissenschaft," 204; summary of entire position, 214. See also the formalist critique of the Labandian tradition in state law, Richard Thoma, "Der Vorbehalt des Gesetzes im preußischen Verfassungsrecht," in *Festschrift für Otto Mayer* (Tübingen: Mohr, 1916), 167–221.

7. Thoma, "Der Vorbehalt des Gesetzes," 205–206.

8. Thoma, "Der Vorbehalt des Gesetzes," 206.

9. Herbert Döring, *Der Weimarer Kreis: Studien zum politischen Bewußtsein verfassungstreuer Hochschullehrer in der Weimarer Republik* (Meisenheim am Glan: Anton Hain, 1975), esp. 158–61, 187, 222–23.

10. Hermann Mosler, "Richard Thoma zum Gedächtnis," *Die öffentliche Verwaltung* 10 (1957): 826.

11. See especially Carl Schmitt, *The Crisis of Parliamentary Democracy* (Munich: Duncker & Humblot, 1926), trans. Ellen Kennedy (Cambridge, Mass.: MIT Press, 1985), 26. Thoma criticized Schmitt's notions on more than one occasion. See especially "The Ideology of Parliamentarianism," in Schmitt, *The Crisis of Parliamentary Democracy,* 77–83, and Richard Thoma, *Das Reich als Demokratie,* in *Handbuch des deutschen Staatsrechts,* 2 vols., ed. Richard Thoma and Gerhard Anschütz (Tübingen: Mohr, 1930–32), 1:186–200 (above, pages 157–70).

12. By the mid-1920s, Thoma had already proposed reforms to the system of proportional representation, including the two-ballot system allowing for both party and local candidate to receive separate votes: Richard Thoma, "Die Reform des Reichstags," *Germania* (morning edition), 30 April and 1 May 1925, cited in Mosler, "Richard Thoma zum Gedächtnis," 828.

13. The positivist position on Article 76 occasioned a long-running debate

on the limits to constitutional change that continues up to the present day. For a summary of the Weimar debate with the most important literature, see Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte seit 1789,* vol. 8, *Die Weimarer Verfassung* (Stuttgart: Kohlhammer, 1981), 418–21.

14. Richard Thoma, "Das richterliche Prüfungsrecht," *Archiv des öffentlichen Rechts* 43 (1922): 270.

15. Thoma, "Das richterliche Prüfungsrecht," 274. "Constitutions" referred to those of the Länder as well as the Reich Constitution.

16. "Grundbegriffe und Grundsätze," *Handbuch des deutschen Staatsrechts* (Tübingen: Mohr, 1932), 2:153; see also Rath, *Positivismus und Demokratie,* 147 ff. Review by ordinary courts is different from review by a constitutional court, of course. Thoma came to favor the latter, within the strictly formal limits of the Constitutional Court designed by Kelsen for the Austrian constitutional system. See Richard Thoma, "Grundrechte und Polizeigewalt," in *Festgabe zur Feier des fünfzigjährigen Bestehens des Preußischen Oberverwaltungsgerichts 1875—20. November 1925,* ed. Heinrich Triepel (Berlin: Heymann, 1925), 222–23.

17. See Dieter Grimm's critique "Verfassungserfüllung-Verfassungsbewahrung-Verfassungsauflösung. Positionen der Staatsrechtslehre in der Krise der Weimarer Republik," in *Die deutsche Staatskrise, 1930–1933,* ed. Heinrich A. Winkler (Munich: Oldenbourg, 1993), 183–99.

18. Richard Thoma, *Die Staatsfinanzen in der Volksgemeinwirtschaft: Ein Beitrag zur Gestaltung des deutschen Sozialismus* (Tübingen: Mohr, 1937).

19. See, for example, Thoma, *Die Staatsfinanzen in der Volksgemeinwirtschaft,* 2 ("*rettende Tat*"), 6 ("*mit intuitiver Klarheit*").

20. See, for example, the pessimistic formulations in Richard Thoma, *Über Wesen und Erscheinungsformen der modernen Demokratie* (Bonn: Dümmler, 1948), 29–30.

21. Richard Thoma, "Über die Grundrechte im Grundgesetz für die Bundesrepublik Deutschland," in *Recht, Staat, Wirtschaft,* vol. 3, ed. Hermann Wandersleb (Düsseldorf: Schwann, 1951), 9–19.

22. See esp. Richard Thoma, "Ungleichheit und Gleichheit im Bonner Grundgesetze," *Deutsches Verwaltungsblatt* 66 (1 Aug. 1951): 457–59, which repeats virtually verbatim the arguments surrounding Article 109 in the Weimar Constitution.

23. As a consequence, Reich and Länder legislation were, and are, *obligated*—according to Article 1, paragraph 2, with its concept of the "people" that reappears in Articles 21, 41, and 73—to grant equal, direct and secret suffrage to "*all* men and women of the German Reich" (Art. 17) in cases not specifically regulated in the Constitution (presidential election, popular referendum and popular initiative in the Reich, the Länder, and, through Article 17, paragraph 2, municipalities). The same holds for the structure of the Prussian provincial constitution, since otherwise an element would be inserted into the frame of the Reich (Art. 63) and Prussian state (through the rights of the State Council) whose part in "state power" would not emanate from the "people," i.e., in the sense of Article 1, paragraph 2.

24. Hermann Heller, *Die Souveränität* (Berlin: de Gruyter, 1927), reprinted in *Gesammelte Schriften,* ed. Martin Drath et al. (Leiden: A. W. Sijthoff, 1971), 2:95–96. As soon as one abandons the strict—and only then correct—terminology that applies the word sovereignty only to states, one sinks into the caprice and confusion of linguistic usage. In this case, one could, according to one's point of view, designate

as sovereign the "people" just as well as the Reichstag ("parliamentary sovereignty" is a concept familiar to the English theory of the law of the state) or, with Carl Schmitt, the organ that has jurisdiction over the state of emergency. Carl Schmitt, *Die Diktatur,* 2nd ed. (Berlin: Duncker & Humblot, 1928). Gerhard Leibholz asserts that the concepts of state sovereignty and people's sovereignty are synonymous.(Gerhard Leibholz, *Das Wesen der Repräsentation unter besonderer Berücksichtigung des Repräsentativsystems: Ein Beitrag zur allgemeinen Staats- und Verfassungslehre* [Berlin and Leipzig: de Gruyter, 1929], 131.) However, since he has previously explained that by "people" one must understand a "politically ideal unity" that is identical with the state, that is a mere tautology. Naturally, it is always linguistically permissible to name the people of a sovereign democracy a sovereign people, the legislator of a sovereign state a sovereign legislator, the National Assembly a "highest sovereign."

25. "Statistik der Vermögensteuer-Veranlagung," published by the Reich Office of Statistics, 1929. On what follows, see Walther Kamm, *Abgeordnetenberufe und Parlament: Die berufliche Gliederung der Abgeordneten in den deutschen Parlamenten im 20. Jahrhundert* (Karlsruhe: G. Braun, 1927).

26. "When two people say 'democracy,' it is most likely that they mean something quite different." Thomas Mann, *Betrachungen eines Unpolitischen* (Berlin: S. Fischer, 1918) [trans. by Walter D. Morris as *Reflections of a Nonpolitical Man* (New York: Ungar, 1987), 205—EDS.]. Widespread usage, following Aristotle, designates as democratic only the institutions of a radical and direct democracy. Thus, Wilhelm Hasbach, in his two richly detailed works, *Der moderne Demokratie: Eine politische Betrachtung* (Jena: Fischer, 1921), and *Die parlamentarische Kabinettsregierung. Eine politische Beschreibung* (Stuttgart: Deutsche Verlags-Anstalt, 1919), tends to qualify as truly democratic only foolish institutions (election of judges, imperative mandate, filling all offices with the supporters of the victorious party, and so on). On this, see my extensive critique in *Archiv des öffentliches Rechts* 40 (1921): 228–42. There are identical tendencies in, for example, Carl Schmitt, and similar terminology in Kelsen and others. See the following note.

27. On the following see my inquiry: "Der Begriff der modernen Demokratie in seinem Verhältnis zum Staatsbegriff: Prolegomena zu einer Analyse des demokratischen Staates der Gegenwart," in *Hauptprobleme der Soziologie: Erinnerungsgabe für Max Weber,* ed. Melchior Palyi (Munich and Leipzig: Duncker & Humblot, 1923), 37–64. (Also notable: Karl Landauer, "Die Wege zur Eroberung des demokratischen Staates durch die Wirtschaftsleiter," in ibid., 111 ff.) Further, see my essay, "Zur Ideologie des Parlamentarismus und der Diktatur," *Archiv für Sozialwissenschaft und Sozialpolitik* 53 (Tübingen: Mohr, 1924), 212 ff. [and in Carl Schmitt, *The Crisis of Parliamentary Democracy,* trans. Ellen Kennedy (Cambridge, Mass., and London: MIT Press, 1985), 77–83—EDS.]; and my article "Staat," in *Handwörterbuch der Staatswissenschaften,* 4th ed., vol. 7 (Jena: Fischer, 1926), 724–56. Carl Schmitt, who allows only a specific, radical ideology as democratic, does not give a true portrait of the meaning and content of my conceptual and investigative approach in his remarks directed against me in the foreword to the second edition of his clever but one-sided essay, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Munich: Duncker & Humblot, 1926) [*The Crisis of Parliamentary Democracy,* trans. Ellen Kennedy—EDS.]. See also, based on Schmitt, Werner Becker, "Demokratie und moderner Massenstaat," *Die Schildgenossen* 5 (1925): 459 ff. In Carl Schmitt's *Verfassungslehre*

(Berlin: Duncker & Humblot, 1928), esp. 221–82, the interesting remarks on democracy keep emphasizing that there is only *one* democracy, diametrically opposed to all liberalism, whose essence lies in a series of "identities" (by which is doubtless meant: fictive identifications). A conceptually critical engagement with Schmitt over the history of ideas and politics is as little possible and appropriate here as with the following authors, whose investigations of the concept and essence of democracy I cite without commentary: Friedrich Naumann, *Demokratie und Kaisertum: Ein Handbuch für innere Politik,* 2nd ed. (Berlin: Buchverlag der "Hilfe," 1900), and *Der deutsche Volksstaat: Schriften zur inneren Politik* (Berlin: Fortschritt, 1917); Gustav F. Steffen, *Das Problem der Demokratie* (Jena: Diederichs, 1912); Hugo Preuss, in several of the articles included in *Staat, Recht und Freiheit: Aus 40 Jahren deutscher Politik und Geschichte* (Tübingen: Mohr, 1926); as well as the literature cited therein (ibid., 583–88), and, summarizing, *Reich und Länder: Bruchstücke eines Kommentars zur Verfassung des Deutschen Reiches,* ed. Georg Anschütz (Berlin: Heymann, 1926), 39 ff.; Theodor Heuss, *Die neue Demokratie* (Berlin: Siegesmund, 1919); James Bryce, *Modern Democracies* (London: Macmillan, 1921), 1:23 ff.; Leo Wittmayer, *Die Weimarer Reichsverfassung* (Tübingen: Mohr, 1922), 44 ff.; Hans Kelsen, "Vom Wesen und Wert der Demokratie," *Archiv für Sozialwissenschaft und Sozialpolitik* 47 (1920): 50–85, so-called second edition (greatly changed), *Vom Wesen und Wert der Demokratie* (Tübingen: Mohr, 1929) [above, pages 84–109—EDS.]; Moritz Julius Bonn, *Die Krisis der europäischen Demokratie* (Munich: Meyer & Jensen, 1925) [*The Crisis of European Democracy* (New Haven: Yale University Press, 1925—EDS.]; Reinhold Horneffer, *Hans Kelsens Lehre von der Demokratie: Ein Beitrag zur Kritik der Demokratie* (Erfurt: Stenger, 1926); Max Adler, *Politische oder soziale Demokratie: Ein Beitrag zur sozialistischen Erziehung* (Berlin: Laub, 1926); Edgar Tatarin-Tarnheyden, "Kopfzahldemokratie, organische Demokratie und Oberhausproblem," *Zeitschrift für Politik* 15 (1926): 97–122; Adolf Grabowsky, "Formal- und Realdemokratie," *Zeitschrift für Politik* 15 (1926): 123–25; Ferdinand Tönnies, "Demokratie," in *Verhandlungen des fünften Deutschen Soziologentages* (Tübingen: Mohr, 1927), 12–36; Hans Kelsen, "Demokratie," in ibid., 37–68; Otto Koellreutter, "Demokratie," in *Handwörterbuch der Rechtswissenschaft* (Berlin: de Gruyter, 1927), vol. 2; Heinrich Triepel, *Die Staatsverfassung und die politischen Parteien* (Berlin: Otto Liebmann, 1927); Leo Wittmayer, *Demokratie und Parlamentarismus* (Breslau: Hirt, 1928); Wilhelm Stapel, *Die Fiktionen der Weimarer Verfassung: Versuch einer Unterscheidung der formalen und der funktionalen Demokratie* (Hamburg: Hanseatische Verlagsanstalt, 1928); Arnold Wolfers, "Vorwort," in *Probleme der Demokratie. Erste Reihe: Schriftenreihe der Hochschule für Politik in Berlin und des Instituts für Auswärtige Politik Hamburg* (Berlin-Grunewald: W. Rothschild, 1928), v–ix; Carl Schmitt, "Der Begriff des Politischen," in ibid., 1–34; Hermann Heller, "Politische Demokratie und soziale Homogenität," in ibid., 35–47 [above, pages 256–65—EDS.]; Max Hildebert Boehm, "Volkstum und Demokratie," in ibid., 48–66; Ernst Michel, "Die Demokratie zwischen Gesellschaft und Volksordnung," in ibid., 67–87; Fritz Berber, "Die Dezentralisierung des Britischen Reiches als Problem der demokratischen Selbstverwaltung," in ibid., 88–97; Gertrud Bäumer, *Grundlagen demokratischer Politik* (Karlsruhe: Braun, 1928); Abbott Lawrence Lowell, *La Crise des gouvernements représantifs et parlementaires dans les démocraties modernes* (Paris: Giard, 1928); Ferdinand Tönnies, "Demokratie und Parlamentarismus," in *Soziologische Studien und Kritiken,* vol. 3 (Jena: Fischer, 1929), 40–84; Otto

Pfeffer, "Mensch, Volk, Staat," in Arthur Krause, ed., *Wissen ist Macht: Ein Handbuch des Wissens unserer Zeit und der Kulturfortschriffte der Menschheit,* vol. 3: *Technik, Staat, Volkswirtschaft* (Nordhausen: Volkshochschul-Verlag, 1930), 577–610, 604 ff.; and on anti-democratic ideologies, Hermann Heller, *Europe und der Fascismus* (Berlin: de Gruyter, 1929).

28. See Hermann Heller, "Politische Demokratie und soziale Homogenität," in *Probleme der Demokratie,* 1. Reihe, Politische Wissenschaft. Schriftenreihe der Deutschen Hochschule für Politik in Berlin und des Instituts für auswärtige Politik in Hamburg, H. 5 (Berlin: Walter Rothschild, 1928), 35–47, reprinted in Hermann Heller, *Gesammelte Schriften, zweiter Band: Recht, Staat, Macht,* 2nd ed., ed. Christoph Müller (Tübingen: Mohr, 1992), 421–33 [above, pages 256–65—EDS.], on the conditions under which the proletariat, despite the economically based class struggle, can fit into the democracy.

29. Namely, for "the democratic self-organization of the German people as a political unity" (Hugo Preuss). [Hugo Preuss, "Denkschrift zum Entwurf des allgemeinen Teils der Reichsverfassung" (3 January 1919), in Hugo Preuss, *Staat, Recht und Freiheit: Aus 40 Jahren deutscher Politik und Geschichte,* ed. Theodor Heuss (Tübingen: Mohr, 1926), 370—TRANS.].

30. Richard Thoma, "Der Begriff der modernen Demokratie in seinem Verhältnis zum Staatsbegriff," in *Hauptprobleme der Soziologie: Erinnerungsgabe für Max Weber,* ed. Melchior Palyi (Munich and Leipzig: Duncker & Humblot, 1923), 39–41.

31. Gustav Fredrik Steffen, *Das Problem der Demokratie* (Jena: Diederichs, 1919), 101—TRANS.

32. Friedrich Meinecke, "Die Revolution. Ursachen und Tatsachen," *Handbuch des deutschen Staatsrechts* 1 (1930): 95–119—TRANS.

33. Cf. Carl Bilfinger, *Nationale Demokratie als Grundlage der Weimarer Verfassung: Rede bei der Feier der zehnjährigen Wiederkehr des Verfassungstags, gehalten am 24. Juli 1929* (Halle a. d. Saale: Max Niemeyer, 1929), 18.

34. In principle, statutes accepted or confirmed by popular referendum have no heightened validity and can be either superseded or amended by the Reichstag: thus Gerhard Anschütz, *Die Verfassung des Deutschen Reichs vom 11. August 1919,* 14th ed. (Berlin: Stilke, 1933), 385–87, and, agreeing with him, Carl Schmitt, *Verfassungslehre* (Munich and Leipzig: Duncker & Humblot, 1928), 98, and others. The question remains, however, whether the same holds in an unrestricted way for constitutional amendments launched by popular initiative and approved by popular referendum. For a full account, see Erwin Jacobi, "Reichsverfassungsänderung," in *Die Reichsgerichtspraxis im deutschen Rechtsleben: Festgabe der juristischen Fakultäten zum 50. jährigen Bestehen des Reichsgerichts* (Berlin: de Gruyter, 1929), 233–77. Following careful consideration of the discussions in the National Assembly and its committee, Jacobi comes to the conclusion that popular referenda have priority over decisions of the existing Reichstag but that any future Reichstag, following a new election, can amend or supersede statutes approved by the people. I withhold final judgment on this theory, which would interpret the express rule of Article 8 of the Bremen Constitution into the Reich Constitution.

35. See on the following my lecture, "Sinn und Gestaltung des Deutschen Parlamentarismus," in *Recht und Staat im neuen Deutschland,* vol. 1, ed. Bernhard Harms (Berlin: Reimar Hobbing, 1929), 98–126; Graf zu Dohna, "Das Werk von Weimar,"

ibid., 68 ff. See also my essay on the legal significance of the basic law in *Die Grundrechte und Grundpflichten der Reichsverfassung,* vol. 1: *Kommentar zum zweiten Teil der Reichsverfassung,* ed. Hans-Carl Nipperdey (Berlin: Reimar Hobbing, 1929), 1 ff.

36. See Rudolf Smend, *Verfassung und Verfassungsrecht* (Munich and Leipzig: Duncker & Humblot, 1928), 108, 158 ff.; Richard Thoma, "Die juristische Bedeutung der grundrechtlichen Sätze der Deutschen Reichsverfassung im allgemeinen," in *Die Grundrechte und Grundpflichten der Reichsverfassung,* vol. 1: *Kommentar zum zweiten Teil der Reichsverfassung,* ed. Hans-Carl Nipperdey (Berlin: Reimar Hobbing, 1929), 9–11. Comprehensive categories of basic rights and rights of freedom are essential not only for the beginnings of modern democracy but also for their contemporary evolutionary level, as follows from the valuable collection of all declarations of basic rights in today's states, edited by Alphons Aulard and Boris Mirkine-Guetzévitch under the title *Les Déclarations des droits de l'homme* (Paris: Payot, 1929).

37. See Thoma, "Begriff der modernen Demokratie," 58 ff.

5. HEINRICH TRIEPEL

1. Heinrich Triepel, "Empfelt es sich, in die Reichsverfassung neue Vorschriften über die Grenzen zwischen Gesetz und Rechtsverordnung Aufzunehmen" [Is it advisable to include new provisions on the boundary between statute and regulation in the Reich Constitution?], in *Verhandlungen des 32. Deutschen Juristentages* (Berlin and Leipzig: Jansen, 1922), 11–35.

2. Heinrich Triepel, "Die Vereinigung der Deutschen Staatsrechtslehrer," *Archiv des öffentlichen Rechts* 43 (Tübingen: Mohr, 1922): 349–53 (349).

3. Ulrich Scheuner, "Die Vereinigung der Deutschen Staatsrechtslehrer in der Weimarer Republik," *Archiv des öffentlichen Rechts* 97 (Tübingen: Mohr, 1972): 349–74.

4. Scheuner, "Die Vereinigung der Deutschen Staatsrechtslehrer," 355.

5. Alexander Hollerbach, "Zu Leben und Werk Heinrich Triepels," *Archiv des öffentlichen Rechts* 91 (Tübingen: Mohr, 1966): 417–41 (424).

6. Heinrich Triepel, "Zweierlei Föderalismus," *Süddeutsche Juristenzeitung Heidelberg* (1947): cols. 150–52.

7. Heinrich Triepel, *Die Reichsaufsicht: Untersuchungen zum Staatsrecht des Deutschen Reiches* (Berlin: Springer, 1917), 169. See also Heinrich Triepel, "Die Kompetenzen des Bundesstaats und die geschriebene Verfassung," in *Staatsrechtliche Abhandlungen: Festgabe für Paul Laband zum 50. Jahrestage der Doktor-Promotion,* ed. Wilhelm von Calker and Fritz Fleiner, vol. 2 (Tübingen: Mohr, 1908), 326 f.

8. Triepel, *Die Reichsaufsicht,* 173.

9. Klaus Rennert, *Die "geisteswissenschaftliche Richtung" in die Staatsrechtslehre der Weimarer Republik: Untersuchungen zu Erich Kaufmann, Günther Holstein und Rudolf Smend,* Schriften zum Öffentlichen Recht 518 (Berlin: Duncker & Humblot, 1987), 57; Hollerbach, "Zu Leben und Werk Heinrich Triepels," 432.

10. Manfred Friedrich, "Der Methoden- und Richtungsstreit," *Archiv des öffentlichen Rechts* 102 (Tübingen: Mohr, 1977): 161–209 (196).

11. Gerhard Anschütz and Richard Thoma, *Handbuch des deutschen Staatsrechts,* vol. 1 (Tübingen: Mohr, 1930), 4; see also Rennert, *Die "geisteswissenschaftliche Richtung" in die Staatsrechtslehre der Weimarer Republik,* 52.

12. Friedrich, "Der Methoden- und Richtungsstreit," 195.

13. Günther Holstein, "Von den Aufgaben und Zielen heutiger Staatsrechtswissenschaft," *Archiv des öffentlichen Rechts* 47 (Tübingen: Mohr, 1926): 1–40 (31).

14. Heinrich Triepel, *Unitarismus und Föderalismus im deutschen Reiche: Eine staatsrechtliche und politische Studie* (Tübingen: Mohr, 1907), 119; see also Heinrich Triepel, "Die Entwürfe zur neuen Reichsverfassung," *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft,* vol. 43 (Munich and Leipzig: Duncker & Humblot, 1919), 64.

15. For example, Heinrich Triepel, *Die Entstehung der konstitutionellen Monarchie* (Leipzig: Seele, 1899), 35; Triepel, *Unitarismus und Föderalismus im Deutschen Reiche,* 125.

16. Heinrich Triepel, "Wesen und Entwicklung der Staatsgerichtsbarkeit," in *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* 5 (Berlin and Leipzig: de Gruyter, 1929), 2–29 (28).

17. See Triepel, "Die Entwürfe zur neuen Reichsverfassung," 102–105.

18. Heinrich Triepel, *Staatsrecht und Politik: Rede beim Antritte des Rektorats der Friedrich-Wilhelms-Universität zu Berlin am 15. Oktober 1926* (Berlin and Leipzig: de Gruyter, 1927), 40; Triepel made a similar comment on the draft of the Weimar Constitution: see Triepel, "Die Entwürfe zur neuen Reichsverfassung," 55–106 (65).

19. Heinrich Triepel, *Goldbilanzen-Verordnung und Vorzugsaktien: Zur Frage der Rechtsgültigkeit der über sogenannte schuldverschreibungsähnliche Aktien in der Durchführungsbestimmung zur Goldbilanzen-Verordnung enthaltenen Vorschriften. Ein Rechtsgutachten* (Berlin: de Gruyter, 1924), 28.

20. Triepel, "Wesen und Entwicklung der Staatsgerichtsbarkeit," 28.

21. Heinrich Triepel, *Die Staatsverfassung und die politischen Parteien* (Berlin: Liebmann, 1927), 33 ff.

22. Triepel, *Die Staatsverfassung und die politischen Parteien,* 30.

23. Heinrich Triepel, "Nationale Revolution und deutsche Verfassung," *Deutsche Allgemeine Zeitung,* no. 155–56 (2 April 1933).

24. Triepel, "Nationale Revolution und deutsche Verfassung." Triepel expressed similar sentiments in his *Die Staatsverfassung und die politischen Parteien,* 35 ff.

25. Triepel, *Die Staatsverfassung und die politischen Parteien,* 30.

26. Heinrich Triepel, *Die Hegemonie: Ein Buch von führenden Staaten* (Stuttgart: Kohlhammer, 1938).

27. Heinrich Triepel, *Delegation und Mandat im öffentlichen Recht: Eine kritische Studie* (Stuttgart and Berlin: Kohlhammer, 1942).

28. Triepel, *Die Hegemonie,* 14–31.

29. Heinrich Triepel, *Vom Stil des Rechts: Beiträge zu einer Ästhetik des Rechts* (Heidelberg: Schneider, 1947), 123.

6. ERICH KAUFMANN

1. See Helge Wendenburg, *Die Debatte um die Verfassungsgerichtsbarkeit und der Methodenstreit der Staatsrechtslehre in der Weimarer Republik,* Göttinger Rechtswissenschaftliche Studien, vol. 128 (Göttingen: Otto Schwartz, 1984), 146–51; Klaus Rennert, *Die "geisteswissenschaftliche Richtung" in der Staatsrechtslehre der Weimarer Republik: Untersuchungen zu Erich Kaufmann, Günther Holstein und Rudolf Smend,*

Schriften zum Öffentlichen Recht 518 (Berlin: Duncker & Humblot, 1987), passim; D. Stephen Cloyd, "Weimar Republicanism: Political Sociology and Constitutional Law in Weimar Germany" (Ph.D. diss., University of Rochester, 1991), 24–43.

2. Rennert, *Die "geisteswissenschaftliche Richtung" in die Staatsrechtslehre der Weimarer Republik,* 29–35.

3. Hermann Heller, *Hegel und der nationale Machtstaatsgedanke in Deutschland: Ein Beitrag zur politischen Geistesgeschichte* (Tübingen: Mohr, 1921), in *Gesammelte Schriften,* 2nd ed., ed. Christoph Müller (Tübingen: Mohr, 1992), 235–37, quoting Kaufmann. Heller suggested here that Kaufmann was "the only recent writer who [had] truly felt his way into Hegel's thought."

4. Erich Kaufmann, *Kritik der neukantischen Rechtsphilosophie* (Tübingen: Mohr, 1921), in Erich Kaufmann, *Gesammelte Schriften,* vol. 3 (Göttingen: Schwarz, 1960), 81.

5. Kaufmann, *Kritik der neukantischen Rechtsphilosophie,* 240 (Kaufmann's emphasis).

6. Cloyd, *Weimar Republicanism,* 25, 73–81.

7. Kaufmann, *Kritik der neukantischen Rechtsphilosophie,* 244.

8. Kaufmann, *Kritik der neukantischen Rechtsphilosophie,* 244–45.

9. Erich Kaufmann, "Über die konservative Partei und ihre Geschichte," in *Schriften der Deutschen Gesellschaft für Politik an der Universität Halle-Wittenberg,* no. 2, ed. Heinrich Waentig (Bonn and Leipzig: Deutsche Gesellschaft für Politik an der Universität Halle-Wittenberg, 1922); Kaufmann, *Gesammelte Schriften,* 3:133–75.

10. Erich Kaufmann, "Vorwort zum Bande 'Rechtsidee und Recht'," in Kaufmann, *Gesammelte Schriften,* 3:xxviii–xxix.

11. Erich Kaufmann, *Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung* (Berlin and Leipzig: de Gruyter, 1927), in Kaufmann, *Gesammelte Schriften,* 3:246–65.

12. In his own view, Kaufmann remained within that tendency, Kaufmann, "Vorwort," *Gesammelte Schriften,* 3:xxxi. Klaus Rennert suggests he moved outside it, in Rennert, *Die "geisteswissenschaftliche Richtung" in die Staatsrechtslehre der Weimarer Republik,* 64.

13. Kaufmann, *Gesammelte Schriften* 3:xxxvii, xliii. See also Wendenberg, *Die Debatte um die Verfassungsgerichtsbarkeit und der Methodenstreit,* 147.

14. Kaufmann, "Vorwort," *Gesammelte Schriften,* 3:xxix. He and Rudolf Smend made common cause in arguing for such an institutional understanding.

15. Erich Kaufmann, "Vorwort zu Autorität und Freiheit," *Gesammelte Schriften,* 1:xxiv.

16. Rudolf Smend, "Zu Erich Kaufmanns wissenschaftlichem Werk," in *Um Recht und Gerechtigkeit. Festgabe für Erich Kaufmann zu seinem 70. Geburtstage -21. September 1950,* ed. Hermann Jahrreiss et al. (Stuttgart and Cologne: Kohlhammer, 1950), 397. Erich Kaufmann, "Was will Oberst Beck?" in *Deutsche Zukunft—Wochenzeitung für Politik, Wirtschaft und Kultur* (11 March 1934) (unpaginated).

7. RUDOLF SMEND

1. Rudolf Smend, "Integrationslehre," in *Evangelisches Staatslexikon,* 2nd ed., ed. Hermann Kunst, Roman Herzog, and Wilhelm Schneemelcher (Berlin: Kreuz-Verlag, 1975), 1075, col. 1026.