

**The Collected Works
of Eric Voegelin,
Volume 4:
The Authoritarian State:
An Essay on the Problem
of the Austrian State**

*Ruth Hein, Translator
Gilbert Weiss, Editor*

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THE COLLECTED WORKS OF
ERIC VOEGELIN

VOLUME 4

THE AUTHORITARIAN STATE
AN ESSAY ON THE PROBLEM
OF THE AUSTRIAN STATE

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VOLUME 4



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AN ESSAY ON THE PROBLEM
OF THE AUSTRIAN STATE

TRANSLATED FROM THE GERMAN BY
RUTH HEIN

EDITED WITH AN INTRODUCTION BY
GILBERT WEISS

HISTORICAL COMMENTARY ON THE PERIOD BY
ERIKA WEINZIERL

UNIVERSITY OF MISSOURI PRESS
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THE AUTHORITARIAN STATE

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Editor's Introduction

This edition of *The Authoritarian State* presents Eric Voegelin's fourth book to an American public for the first time. Two years after its 1936 publication in Vienna by Springer Publishers, when Hitler invaded Austria in March 1938, sale of the book was stopped immediately. During the war the Springer publishing house was bombed, and with its destruction the entire edition of *The Authoritarian State* was lost. It was not until 1997 that Springer finally reissued this important early work by Voegelin. It is a happy coincidence that this American edition can follow so soon after the first reprinting of the German original.

The Authoritarian State is divided into three parts. Part I provides a critical examination of the symbols "authoritarian" and "total" with regard to the most prominent European theories of state and constitutional law of the time. Part II offers a historical analysis of the problems specific to the founding of the Austrian state in 1918–20 and connects these problems to constitutional development in the nineteenth century. Part III presents an investigation into the Austrian situation in the 1930s, the so-called authoritarian constitution of 1934, its theoretical context (*Verfassungslehre*), and the sociopolitical reality underlying these theoretical ideas (*Verfassungswirklichkeit*). This third part of Voegelin's book opens with an in-depth discussion and radical criticism of the pure theory of law of Hans Kelsen, Voegelin's early mentor and the "father" of the Austrian Constitution of 1920. Since Erika Weinzierl's introduction to this volume provides detailed information on the historical and political context of *The Authoritarian State*, I will limit myself here to a few remarks concerning its significance within the larger context of the development of Voegelin's political theory.

In his *Autobiographical Reflections* (1973), Voegelin characterizes *The Authoritarian State* as his first serious attempt to understand the role and structure of ideological systems, both left and right. For this attempt, the distinction between theoretical concepts on the one hand and political symbols on the other was of crucial importance. In the first part of *The Authoritarian State*, Voegelin elaborates that distinction as a conceptual basis for explaining the nontheoretical and speculative character of ideologies. In this context it is shown that "total" and "authoritarian" are symbols of ideological self-interpretation, but that they have no theoretical value. This distinction between theoretical concept and political symbol worked out in 1936 becomes essential to Voegelin's later work. In *The New Science of Politics* (1952), it is reformulated and further elaborated in terms of the Aristotelian *episteme* and *doxa*, the "language symbols of political science" and the "symbols used in political reality."¹ In his final writings, after having developed a highly differentiated philosophy of consciousness as the basis of his political theory, Voegelin ultimately refines the distinction between theoretical and nontheoretical symbols in terms of "noetic" and "non-noetic" modes of knowledge²—then entering a field of experience in which the theoretical concepts are strengthened as symbolizations of transcendental and cosmic experiences (referred to by the Platonic *metaxy* and the Aristotelian *metalepsis*). This experiential philosophy of the "late" Voegelin, of course, goes far beyond the original distinction between scientific concept and doxic symbol. However, Voegelin's approach to political symbols and their ideological constructions as elaborated in *The Authoritarian State* was not as new for him in 1936 as it might seem after one reads his *Autobiographical Reflections*. Already in *Race and State* (1933) he had framed his analysis of the political "race idea" and its adoption in theories of the state with the thesis that "race theories" and "race ideas" have to be sharply distinguished from each other. The conclusion of *Race and State* was therefore a clear criticism of race (especially in its National Socialist, i.e., racist meaning) as a theoretical concept.

1. Eric Voegelin, *Autobiographical Reflections* (Baton Rouge, 1989), 41; Voegelin, *The New Science of Politics* (Chicago, 1987), 28ff.

2. See, for instance, Eric Voegelin, "Was ist politische Realität?" in *Anamnesis: Zur Theorie der Geschichte und Politik* (Munich, 1966), 318ff.

Besides the basic distinction between theoretical concepts and political symbols, other important elements of the later Voegelin can be seen in *The Authoritarian State*. With regard to the content of the political symbols under investigation, Voegelin uncovers in the fascist and National Socialist speculations on a "total" state a "religious idea"³ in which the individual human being is subsumed into a transpersonal being, that is, a collective totality like Hitler's *Deutsches Volk* or Mussolini's *Italita*. This is further explained, with reference to the Arabian philosopher Averroes (1126–1198), as an "Averroist" form of speculation that replaces the singularity and immortality of the individual soul by a collective *intellectus uno in numero*.⁴ Two years later, in 1938, Voegelin extends the argument and describes these political movements, as well as Russian bolshevism, as "political religions" constructing an intramundane *corpus mysticum*, i.e., as replacing the transcendental by a worldly-immanent *summum bonum*.⁵ During the 1940s, in his *History of Political Ideas*, Voegelin scrutinizes this thesis in extensive historical studies, which then leads him to his famous definition of modern gnosticism as an "immanentistic eschatology" in *The New Science of Politics*.

From the perspective of the development of Voegelin's early political theory, however, the most significant aspect of *The Authoritarian State* is his fifty-page-long critical discussion of Hans Kelsen's pure theory of law and its neo-Kantian frame. This discussion reveals not only Voegelin's radical departure from his former teacher's theory but also his definitive break with neo-Kantian epistemology in general. Without a doubt, this part of the book can be considered its theoretical heart. Günther Winkler, in his illuminating introduction to the 1997 reissue of the German original, even notes that one cannot help feeling that, for Voegelin, the emergence of the authoritarian constitution in Austria functioned merely as a vehicle for expressing his criticism of Kelsen.⁶ Although there were other,

3. Eric Voegelin, *The Authoritarian State*, 73 herein. Further citations will be given parenthetically in the text.

4. See also Voegelin's essay "Siger de Brabant," in *Philosophy and Phenomenological Research*, IV, No. 4, p. 524.

5. Eric Voegelin, *Die Politische Religionen* (1938), ed. Peter J. Opitz (Munich, 1993), 49ff.

6. Günther Winkler, "Geleitwort," in Eric Voegelin, *Der autoritäre Staat* (Vienna, 1997), xv. This "Geleitwort" is an important biographic source because it focuses particularly on the personal relationship between the teacher and the student.

professional reasons why Voegelin dealt with the topic—he wanted to extend his *venia legendi* from sociology to the field of political science—this observation definitely bears some truth. Let us briefly summarize the main points of Voegelin's criticism.

Already in various writings before 1936, Voegelin had taken an increasingly negative stance toward Kelsen's theoretical approach.⁷ This criticism is most explicitly formulated at the beginning of *Race and State*, where Voegelin argues that Kelsen had reduced the theory of state (*Staatslehre*) to a theory of law (*Rechtslehre*), thereby banishing all sociological, philosophical, and cultural dimensions from that field. Problems that could not be treated within the realm of positive law were declared sham problems (*Scheinprobleme*). In this context, one aspect completely neglected by Kelsen seems to be especially crucial for Voegelin: the tracing back of the "normative sphere" to its roots in the nature of man.⁸ Because it is still man who creates and organizes the state, Voegelin regards this point as a major task of all future theories of state and law; a goal, by the way, that he set for himself in *Race and State*. In *The Authoritarian State*, he radically strengthens his criticism of Kelsen by extending it to the entire epistemological framework of the pure theory of law, culminating in his verdict of a "positivist metaphysics." What does Voegelin mean by this? And what consequences does it have for his own work?

For Voegelin, Kelsen's "purification" of a theory of state includes two reductive steps: first, the reduction of state to law, and second, the reduction of law to a logical system of norms. This limitation of the object of a theory of state is epistemologically based in neo-Kantian preassumptions or, rather, in the specific form of neo-Kantianism developed by the Marburg school (Hermann Cohen, Paul Natorp).⁹ Very much simplified, the main point of this neo-Kantian epistemology is the following: the scientific method constitutes the object of science, and the unity of a scientific object—in

7. See, for instance, Eric Voegelin, "Die Einheit des Rechtes und das soziale Sinngebilde Staat," in *Internationale Zeitschrift für Theorie des Rechts*, V (1930–31), 58–89, and particularly, Eric Voegelin, "Die Verfassungslehre von Carl Schmitt," *Zeitschrift für öffentliches Recht*, XI (1931), 89–109.

8. Eric Voegelin, *Race and State* (1933), trans. Ruth Hein, ed. Klaus Vondung (Baton Rouge, 1997), 7.

9. For more details on neo-Kantianism and its different schools, see Jürgen Gebhardt and Barry Cooper's introduction to Eric Voegelin, *On the Form of the American Mind* (1928), trans. Ruth Hein, ed. Jürgen Gebhardt and Barry Cooper (Baton Rouge, 1995), ix–xlii.

other words, its exact delimitation from other objects—is guaranteed by the unity of a methodological system of categories. As a consequence, (a) the object, i.e., a certain segment of reality (depending on what discipline is referred to), is always subordinate to the method that is used to approach it, and (b) since methodology is a closed system of categories, the object, which is determined by this closed unity, turns into a “closed” phenomenon as well. Those aspects of the object that do not fit into the categorical system are simply not relevant. From the scientific perspective, the object does not exist before the method with its specific categorical apparatus comes into play. Ontology is replaced by methodology. To be sure, neo-Kantianism does not neglect the prescientific reality; but, and this is the decisive point, it is not relevant to scientific knowledge and therefore can be ignored. In the context of Kelsen’s theory of law, this means that the object “state” is constituted by the normative-logical (*normlogisch*) method, and its unity is ensured by the logical unity of the system of categories. This theory finds its ultimate ground (*Letztbegründung*) not in *reality itself*, i.e., in the reality of state, but in the constitutive act of a transcendental subject of knowledge. Consequently, questions about the ontological basis (*Seinsgrundlagen*) of norms are eliminated. Purity of method means a radical separation of the realm of what ought to be (*Sollenssphäre*) from the realm of being (*Seinssphäre*).

Voegelin calls this theorem “positivist” because it applies the categorical logic of the natural sciences to the realm of *Geisteswissenschaften*. That there is no prescientific constitution of meaning might be true for the reality investigated by the natural sciences. In this arena, reality becomes meaningful only through the very fact of the investigation itself, that is, through the description and categorization done by the natural scientist. The phenomenon “man in society and state” is, however, different. In the social world, meaning is already there before the social or political scientist starts an investigation. The state is a meaningful phenomenon existing independently from the science that investigates it. In this respect, the later Voegelin speaks of human society as a “cosmion”: “a little world . . . illuminated with meaning from within by the human beings who continuously create and bear it as the mode and condition of their self-realization.”¹⁰ In 1936, this concept is not yet fully

10. Voegelin, *New Science of Politics*, 27.

developed; it is still framed by friction with Kelsen's neo-Kantian epistemology.

For Voegelin, the transfer of the categorical logic of the natural sciences into the field of the social sciences—which Kelsen calls “purification”—has further consequences: Kelsen's object is indeed a “pure” object, “since by definition it cannot be grasped under different categories simultaneously, since it is precisely such categorization that constitutes an object distinct from all others.” In Voegelin's view, this clearly represents a prohibition of the discussion of all aspects of the object “state” that go beyond the one categorical system established by Kelsen. When the state is reduced to law, and law to an order of norms, then the problems of what things like *demos*, *nation*, and *rule* mean are theoretically excluded. But, for Voegelin, it is precisely these problems or rather the neglect of these problems that has played a crucial role in the creation and development of the Austrian constitution. As he points out in a short piece written as a memorandum for the International Studies Conference on Peaceful Change, held in Paris in 1937 and included as an appendix to this volume because, written some eight months before the Anschluss, it shows very well the dramatic character of the Austrian situation: “The Austrian constitutional problem may be put in one sentence: Austria is a nationally uniform state without being a national State. The population of the present territory of Austria has never formed in history a political unit. Austria has a long and glorious history, but it is not the history of the present Austria as an independent body politic; it is the history of Austria as part of the mediaeval Empire or as an integral and dominating part of the old Austrian monarchy.” For Voegelin, these problems culminating in the question of “the will to common and independent political existence” are the problems of the *reality* and indeed the very existence of the Austrian state. They become apparent to the theorist only when state and constitution are seen as phenomena deeply embedded in the tension between history and society. Since Kelsen denies the theoretical relevance of that tension, Voegelin accuses him of “eliminating the state reality from the object of the theory of the state.”

Voegelin's interpretation of Kelsen's system as positivist *and* metaphysical is grounded in the fact that, on the one hand, Kelsen in effect denies historical and social manifestations of the human mind, but, on the other, makes one major exception to that denial:

the legal norm. "The mind is recognized, but only insofar as it is a norm." For Voegelin, this position can hardly be rationally argued, and that is why Kelsen needs to develop an entire system of "metaphysical battle concepts" (*metaphysische Kampfbegriffe*) to defend his position. As a result, critical questions concerning other phenomena of the human mind, such as democracy and rule, are suppressed. In *Wissenschaft, Politik, und Gnosis* (1959), Voegelin describes the prohibition of questions in more detail by analyzing the theoretical constructions of Hegel, Marx, and Comte. His criticism of Kelsen in *The Authoritarian State* presents only a first attempt to explain the contradictory combination—typical for modern ideologies of—a positivistic denial of the existence of the mind (*Seinsleugnung des Geistes*) and, at the same time, a metaphysical claim on the mind needed to defend this position, i.e., to defend the denial.

To properly understand Voegelin's intellectual position in the mid-1930s, we should say a few more words about his stage of theory development at that time. Voegelin started his academic career in the early 1920s as a hermeneutic sociologist in the tradition of Max Weber. Weber focused on the construction of a categorical apparatus (*Idealtypen*) as a necessary medium for "understanding" social reality; an immediate, direct grasping of reality seemed not possible for him. This involved a certain degree of theoretical abstraction from reality based on the skeptical attitude of the scientist toward the object of science. Voegelin's early writings were very much influenced by this epistemological attitude. It was primarily his intense contact with American pragmatism and common sense philosophy during his stay in the United States from 1924 to 1926 that revealed to him a less abstract, more direct—in other words, pragmatic—approach to the problems of social and political reality. When he returned home from the United States, he felt considerably freer of the neo-Kantian limitations of Weber's thinking as well as of the abstract discourses of the German-speaking intellectual world in general, which increasingly were becoming ideological discourses. The skeptical position toward reality now turned into a profound skepticism about the abstract and closed theoretical constructions themselves. A provisional result of that turn was his elaboration of the category of the "open self" in contrast to the construction of a "closed self" in the tradition of transcendental

epistemology.¹¹ This was Voegelin's first step in moving away not only from certain epistemological categories but from the modern epistemological model as a whole. He then began to radically question the strict separation between subject and object, between consciousness and reality, as entities closed from each other. During those years, he discovered "new" theoretical resources that were crucial in helping him overcome the cognitivist model of objectification (*Vergegenständlichung*) and its adoption by the social sciences: these were, on the one hand, the philosophical anthropology of Helmuth Plessner, Georg Misch, and, particularly, Max Scheler, and, on the other, the classic and Christian philosophy of Plato, Aristotle, Augustine, and Thomas Aquinas.¹² Providing the tools to understand man as radically open to all realms of being, these resources became the philosophical and anthropological foundations of Voegelin's increasingly experiential approach to historical and social reality. As a consequence, he started to grasp the mutual relations between man, nature, society, and God without reducing one sphere of human experience to another. Reality was no more an external object determined by the *a priori* structure of a neo-Kantian subject of cognition but a process *in* which man participates in a variety of ways.

Later, in his American years, Voegelin further elaborated the "specifically human mode of participation in reality"¹³ by developing an "anamnetic" approach to the constitution of the "concrete" consciousness instead of theorizing about consciousness as an abstract entity. The result was the ultimate reversal of modern epistemology: consciousness is not an inner *entity* separated from the outer reality, but an *event* within reality, and, accordingly, consciousness is constituted by reality, and not the other way around.¹⁴ Something like a transcendental consciousness or subject has no ground in the "reality of common experience." The

11. Voegelin, *On the Form of the American Mind*, 9ff.

12. With regard to Plessner, Misch, and Scheler, see these major writings: Helmuth Plessner, *Die Stufen des Organischen und der Mensch* (1928; rpr. Berlin, 1975); Georg Misch, "Die Idee der Lebensphilosophie in der Theorie der Geisteswissenschaften" (1924), in *Materialien zur Philosophie Wilhelm Diltheys*, ed. Frithjof Rodi and Has Ulrich Lessing (Frankfurt, 1984), 132–46; Max Scheler, *Die Stellung des Menschen im Kosmos* (1928; rpr. Munich, 1947).

13. Eric Voegelin, "Remembrance of Things Past," in Voegelin, *Published Essays, 1966–1985*, ed. Ellis Sandoz (Baton Rouge, 1990), 306.

14. *Ibid.*, 312ff.

only thing we know from experience, and therefore can talk about, is the consciousness of concrete human beings living in concrete social and historical settings. Theories of a *pure* consciousness are "imaginative constructions" replacing the reality we experience by a "second reality."

In 1936 this distinctive terminology of the later Voegelin was not yet developed, of course. Nevertheless, the foundation was sketched out already in *The Authoritarian State*. Voegelin's criticism of Kelsen's pure theory of law and the formative role it played in the development of the Austrian constitution during the 1920s and 1930s shows very well the strategies of a "second reality" construction as well as its consequences—even if it is not yet called this.

GILBERT WEISS

Historical Commentary on the Period
by Erika Weinzierl
English translation by Fred Lawrence

When Eric Voegelin as a ten-year-old moved with his family from his birthplace in Cologne to settle in Vienna, Vienna was still the capital of a multinational empire whose collapse many of its elite members either feared or expected in the foreseeable future.¹ It occurred when the defeat in the First World War made possible the formation of those "succession states" to whose nationalities the Habsburg monarchy had not accorded the desired autonomy earlier.² The political and economic future of the new small republic, which had been prohibited by the victorious powers from joining with the German Reich (Anschluss), seemed very uncertain. This uncertainty affected the climate at the universities, especially at the University of Vienna. Until 1918 its faculty had for the most part been of a liberal orientation. In the Herrenhaus (Upper House), whose members had been appointed by the Kaiser, of the forty-six University of Vienna professors belonging to it between 1861 and 1918, thirty-four were members of the German Liberal Constitutional Party. The law faculty constituted the largest group, which is explained by the affinity between law and politics.³ In the

1. For biographical data on Voegelin, see Herbert A. Strauss and Werner Roeder, eds., *International Biographical Dictionary of Central European Emigrés, 1933-1945*, Vol. II (Munich, 1983), 1193; and Eric Voegelin, *Autobiographical Reflections*, ed. Ellis Sandoz (Baton Rouge, 1989).

2. See Robert A. Kann, *Das Nationalitätenproblem der Habsburgermonarchie, 1848-1914* (2 vols.; Graz, 1964).

3. Erika Weinzierl, "Universität und Politik in Österreich," *Universitätsreden*, XXXIII (Salzburg, 1969), 6.

First Republic as well, the leading professors—not in terms of party leadership but in those of sociopolitical influence—were members of the faculty of law, which indeed is also true of Voegelin.

In the last years of the nineteenth century, particularly the dueling fraternities had become not just increasingly German nationalist, but also more and more anti-Semitic. In 1895 they accepted the Waidenhofer Resolution, which denied Jewish students the right to fight a duel. The German nationalist students also opposed the Habsburg state composed of many nationalities for nationalist reasons. Hence at the beginning of October 1918 they supported the proclamation of the Republic and the annexation to the German Reich. On October 30, 1918, there gathered in the presence of Rector Beck in the grand ballroom of the University of Vienna about three thousand students, who demonstrated against Austria's proposal to the Entente for a separate peace as a "betrayal of the Habsburgs" and for annexation to the German Reich. Afterward the students marched to the parliament, where some of them tore down the black and yellow flags hoisted there.⁴ Thus they furnished a precedent for the oft-cited act of the members of the Red Guard, who tore the white middle stripe out of the flag of the new Austrian nation on November 12, 1918, during the proclamation of the Republic.⁵

Under the influence of their war experiences, the German nationalist and Catholic student associations, which had up until then feuded bitterly, resolved to work together in the universities. In July 1919 in Wurzburg the general association of "German Student Corporations" was constituted on a pan-German, nationalist basis, of which the Austrian Student Corporations formed the Eighth Administrative District. The association's central committee in Berlin was in charge of their business affairs. Nevertheless, the most important corporate structure was the Deutsche Studententag (German Student Assembly) that met each year. Like the Wurzburg Constitution of the several associations, the first district assembly of the Austrian Student Corporations resolved that only "German-Aryan" students could become members of the German Student Corporations by matriculation and called for a *numerus clausus*

4. Paul Molisch, *Geschichte der deutschnationalen Bewegung in Österreich von ihren Anfängen bis zum Zerfall der Monarchie* (Jena, 1926); Molisch, *Politische Geschichte der deutschen Hochschulen in Österreich* (2nd ed.; Vienna, 1939), 255.

5. *Wiener Zeitung und Reichspost*, November 13, 1918.

(limited admission) for Jewish students.⁶ Like the National Socialist German Student Union, the Waffening, and the Styrian Home Defense, a militia group, the German Student Corporations were dissolved by the Federal Ministry for Education in July 1933.⁷

Many professors adopted this attitude of the students, whose anti-Semitic excesses assumed terrorist proportions in the following years⁸—if they did not already share it anyway. What other explanation is there for the large participation on the part of the academic senate and the faculty at the placement of the “Head of Siegfried” in the university auditorium in 1923,⁹ or the application of the term “odd ones” (*Ungeraden*) to the Jews in committee meetings of the law faculty in 1925, which was directed against Jewish colleagues,¹⁰ or the introduction of the *numerus clausus* for Jewish students through the Student Law of 1930, sponsored by rector and criminologist Wenzel Graf Gleispach,¹¹ which was only prevented by a decision of the constitutional court?

The course offerings also were in line with the “interests” of the majority of the students—the Socialist Student Union was always only a small minority.¹² Although there were abundant offerings in the departments of history, German, art history, ethnology, and others in the philosophy faculty that had only to be expanded in 1938, in what follows here we can discuss only the courses in the departments of law and political science,¹³ where Eric Voegelin

6. Franz Gall, “Alma mater Rudolphina, 1365–1965,” *Die Wiener Universität und ihre Studenten* (3rd ed.; Vienna, 1965), 90.

7. See, among others, Minna Lachs, *Warum schaut Du zurück: Erinnerungen, 1907–1941* (Vienna, 1986), 152ff.

8. Erich Witzmann, *Der Anteil der waffenstudententischen Verbindungen an den völkischen und politischen Entwicklung, 1918–1938* (Vienna, 1940), 151ff.

9. Ulrike Davy and Thomas Vasek, *Der “Siegfried-Kopf”: Eine Auseinandersetzung um ein Denkmal in der Universität Wien* (Vienna, 1991), 10ff.

10. Oliver Rathkolb, “Die Rechts- und Staatswissenschaftliche Fakultät der Universität Wien zwischen Antisemitismus, Deutschnationalismus, und Nationalsozialismus 1938, davor, und danach,” in *Willfähige Wissenschaft: Die Universität Wien, 1938–1945*, ed. Gernot Heiss et al. (Vienna, 1989), 197ff.

11. Brigitte Lichtenberger Fenz, “*Deutscher Abstammung und Muttersprache*”: *Österreichische Hochschulpolitik in der Ersten Republik* (Vienna, 1990), 79 ff.

12. Helge Zoitl, “Kampf um Gleichberechtigung: Die sozialdemokratische Studentenbewegung in Wien 1914–1925” (Ph.D. dissertation, Salzburg, 1976), *passim*.

13. Gernot Heiss, “Von Österreichs deutscher Vergangenheit und Aufgabe: Die Wiener Schule der Geschichtswissenschaft und der Nationalsozialismus”; Sebastian Meissl, “Wiener Ostmark-Germanistik”; Peter Haiko, “‘Verlust der Mitte’ von Hans Sedlmayr als kritische Form im Sinn der Theorie von Hans Sedlmayr”; Olaf Bockhorn, “Der Kampf um die ‘Ostmark’: Ein Beitrag zur Geschichte der national-

studied and taught, and we will focus particularly on Kelsen and Spann, those antipodes who most interested Voegelin.

In the summer semester of 1919 the new Vienna-born full professor for national economy and social sciences, Othmar Spann (1878–1950),¹⁴ having just come from the Technical University in Brünn, lectured for one hour per week on the nature and history of socialism, in addition to his regular main course on finance. We may conclude on the basis of his published works that in those lectures he radically rejected socialism.¹⁵ Beginning with the winter semester of 1921–22, Spann entitled the course he had by then taught several times “History and Critique of Socialism.” Nevertheless, in those days there was still a certain pluralism of teaching, thanks to some of the faculty. Already in the winter semester of 1919–20 two Marxists, Karl Gruenberg (1861–1940) and his student Max Adler (1873–1937), who had already been teaching during the monarchy, each also held an hour-long weekly course on socialism in the same department. In addition, Adler began holding regular lectures of several hours per week on the theory and history of socialism, and he continued these until the winter semester of 1932–33. In the summer semesters of 1922–24 the professor of constitutional law Hans Kelsen (1881–1973),¹⁶ the “father” of the Austrian Constitution of 1920 and of the “pure theory of law,” dealt with the political theory of socialism. During those same semesters he gave a lecture entitled “On Democracy” for an hour a week. Thus he was the only Vienna professor of the entire period between the wars to devote a whole series of courses *exclusively* to democracy, which he still defended passionately in 1932 when he had already been teaching for two years at the University of Cologne.¹⁷

With Kelsen as well, we may infer that the fundamentals of the above-mentioned courses coincide with those in his relevant

sozialistischen Volkskunde in Österreich,” all in *Willfähige Wissenschaft*, 39–76, 133–95, 77–88, 17–38, respectively.

14. J. Hans Pichler, *Othmar Spann oder die Welt als Ganzes* (Vienna, 1988).

15. Especially Othmar Spann, *Der wahre Staat* (Jena, 1921), and *Hauptpunkte der universalistischen Staatsauffassung* (Berlin, 1931).

16. See especially Rudolf Aladár Metall, *Hans Kelsen: Leben und Werk* (Vienna, 1969).

17. Hans Kelsen, *Sozialismus und Staat* (1920, 1923, 1965); *Vom Wesen und Wert der Demokratie* (1920, 1929).

books.¹⁸ In his books, Kelsen, who belonged to no political party and who was not a Marxist, submitted the Marxist conception of the death of the state and its anarchist and utopian tendencies to empirical social criticism.¹⁹ On the other hand, he defended democracy and the parliamentary system against the "partisan dictatorships of left and right," against "bolshevism and fascism," as he put it more succinctly in 1929. In doing so he derived the majority principle of democracy from freedom and saw in the parliamentary system "the only real possibility of doing justice to the idea of democracy."²⁰

After the collapse of the two great totalitarian systems of the twentieth century the validity of Kelsen's statement for modern democracy has been as little refuted as the definition of democracy he presented at the Fifth Sociologists' Convention in Vienna in 1926.²¹ However, Kelsen declared relativism the world view "which the idea of democracy presupposes"; and he defined democracy itself not as the content of a state but as describing a method of production.²² Thus, at that time—before the horrors of National Socialism and bolshevism—he deprived democracy, as well as his pure theory of law, which could ultimately legitimate every state,²³ of its appeal for personal engagement, from which the political radicalism and mysticism of that period benefited so richly.

This is especially true of Othmar Spann. According to their own statements, at least four generations of students listened to his radically antidemocratic and antiparliamentarian lectures on the universalist society and on the "true, organic corporative state" "full of enthusiasm, captivated, convinced."²⁴ Law students were not the only ones paying attention when Spann expounded: "One shouldn't count the votes, but weigh them; not the majority, but only the best, ought to rule. . . . Only the corporative organization makes possible in its form the rule of the best. . . . Only those

18. "Verteidigung der Demokratie," published first in the *Blättern der Staatspartei*, April 2, 1932 (Berlin); now in Hans Kelsen, *Demokratie und Sozialismus: Ausgewählte Aufsätze*, ed. Norbert Leser (Vienna, 1967), 60–68.

19. Kelsen, *Sozialismus und Staat* (3rd ed.), 79.

20. Kelsen, *Vom Wesen und Wert der Demokratie* (2nd ed.), 2, 9ff., 28ff.

21. Hans Kelsen, *Verhandlungen des 5. Soziologentages vom 26.–29.9.1926 in Wien* (Tübingen, 1927), 37ff.

22. Kelsen, *Vom Wesen und Wert der Demokratie*, 101, 98ff.

23. Kurt Sontheimer, *Antidemokratisches Denken in der Weimarer Republik* (2nd ed.; Munich, 1983), 75.

24. Hans Raeber, *Othmar Spanns Philosophie des Universalismus* (Hildesheim, 1961), 155ff.

who are individualists, wanting mechanization and equality, can be democrats; but those who want a civilized state, who demand something spiritual of the state, cannot be democrats any more."²⁵

Spann's influence upon the Catholic and German nationalist students and some militia groups, with which especially his students Walter Heinrich and Walter Riehl were in close contact,²⁶ was considerable. In the 1920s and 1930s students of Spann, such as Jakob Baxa, Wilhelm Andraea, and Ferdinand Westphalen, taught at the Universities of Vienna and Graz. However, Spann disapproved of the Christian corporative state proclaimed by Federal Chancellor Dollfuss and his government on May 1, 1934, after the civil war of February 1934. Its constitution will be discussed in more detail below. For Spann that state was not the realization of his "true" state.²⁷ In contrast to his students, Spann discontinued his special courses on corporative issues. During that time he tried—in vain, alas—to make the National Socialists in Vienna and Berlin understand his ideas,²⁸ which were, however, rejected by the National Socialists as too intellectualistic and theocratic.

Since 1933 the Gestapo had been keeping an eye on Spann's followers living in the German Reich. Immediately after the Anschluss he was arrested at the very moment he was about to empty a bottle of champagne with his family "to celebrate the finest day of my life." For five months he was imprisoned in Munich before being released for poor health and other reasons. Thereupon he withdrew to his Mariasdorf property in Burgenland, where he died in 1950. The National Socialists regarded him as an opponent because he had openly criticized their primitive racism and radical centralism.²⁹ He was removed from his university chair on April 22, 1938. On the same day Voegelin's *venia legendi* (license to teach) was canceled.³⁰

In part because of the constitutional amendment of 1929, Kelsen accepted a professorship in Cologne in 1930, and in April 1933 he

25. Othmar Spann, *Der wahre Staat* (Leipzig, 1921), 109ff., 208, 118.

26. Josef Hofmann, *Der Pfrimer-Putsch* (Vienna, 1965), 16.

27. Klaus-Jörg Siegfried, *Universalismus und Faschismus: Das Gesellschaftsbild Othmar Spanns. Zur politischen Funktion seiner Gesellschaftslehre und Staatskonzeption* (Vienna, 1974), 140ff.

28. Klemens von Klemperer, *Konservative Bewegungen zwischen Kaiserreich und Nationalsozialismus* (Munich, n.y.), 222ff.

29. *Ibid.*; J. Hans Pichler, *Othmar Spann oder Die Welt als Ganzes* (Vienna, 1988), 63ff.

30. Rathkolb, "Rechts- und Staatswissenschaftliche Fakultät," 208.

was removed from his office as a "Marxist." His student and friend Adolf Merkl, a professor of administrative law, tried in vain to have him recalled to Vienna. Then Kelsen accepted a chair at the Institut Universitaire des Hautes Études Internationales in Geneva and a professorship at the university in his native city of Prague before emigrating to the United States in 1939.³¹ World-famous and highly respected, he died there at Berkeley in 1973 at the age of ninety-two.

The unsettled history of the Austrian Republic in the years between the wars—including the plight of the economy in the early 1930s, 600,000 persons out of work—is assumed here as essentially known to readers. The strength or weakness of democracy in Austria can be gauged from the Constitution of the Republic of October 1, 1920, its amendment in 1929, and the corporative state constitution of May 1, 1934.

One of the most important tasks of the National Constitutional Assembly elected on February 19, 1919, was to create a new constitution for the young republic. For this purpose a special committee was established to which Chancellor of State Renner, Vice-Chancellor Fink, Secretary of State Michael Mayr, and the scientific consultant to the chancellor of state, Hans Kelsen (professor of constitutional and administrative law at the University of Vienna since 1919) belonged. Initially, at any rate, the preparations began only hesitantly. A proposal introduced by the Christian Social Party in May 1919 was never debated. In the same month, Chancellor of State Renner, prior to his travels to the peace negotiations at St. Germain, asked Kelsen to prepare, together with the constitutional department of the state chancellery, a draft of a federal constitution. During the summer Kelsen drew up several drafts in cooperation with Froehlich, department head and director of the division for constitutional issues, who later became vice-president of the constitutional court, and with the director of the division for administrative reform, and their staff. Within the framework of the instructions he had received, Kelsen himself strove to take the Swiss Federal Constitution, on the one hand, and the Constitution of the Weimar Republic, on the other, as models. In addition, useful ideas were adopted from the Provisional Constitution of 1867, and also from the Constitution of the Monarchy of 1867,

31. Metall, *Hans Kelsen*, 68ff.

among them the institutions of the higher administrative court and the supreme court of the Reich. Kelsen turned the latter into the constitutional court, the first in Europe,³² as was specifically mentioned on the occasion of the seventieth anniversary of the Constitution of 1920; "Austria's pioneering role" in this area was expressly acknowledged.³³

After the breakup of the coalition between the Social Democratic and Christian Social parties on June 10, 1920—owing to parliamentary controversy over the rights of the confidential agents of the popular defense forces—no consensus could be arrived at within the government. Consequently, in June 1920 the negotiations about the constitution were transferred to the special constitutional committee of the National Constitutional Assembly. The Social Democrat Otto Bauer chaired this special constitutional committee. He set up a seven-member subcommittee made up of representatives of the three great parliamentary parties—the Social Democratic, the Christian Social, and the Pan-German parties—and the experts Kelsen, Froehlich, Mannlicher, and Merkl. The Christian Social Party's representative on this subcommittee was Ignaz Seipel. The subcommittee began its deliberations on July 11, 1920, and on the basis of the results achieved by the two provincial conferences, in Salzburg in February 1920 and in Linz in April of that year, it drew up a federal constitution with a strong parliament.

At the request of the Social Democrats, the Federal Assembly (the Bundesrat, or Upper House of Parliament, and the National Council, or Lower House) was to elect the federal president. After the breakup of the coalition, agreement about basic rights was no longer possible because of the resistance of the episcopacy. Therefore those from the Basic State Law of 1867 were adopted, and they are still in effect to this day.

The subcommittee finished its work on September 23, 1920. On the following day at the behest of the subcommittee, Seipel reported to the special constitutional committee, which also elected him to report to the plenary session. The National Assembly debated the constitution from September 29 to October 1, 1920. On that date

32. Hans Kojas, ed., *Hans Kelsen oder Die Reinheit der Rechtslehre* (Vienna, 1988), 63ff.

33. Gerald Stourzh, "Festvortrag: Verfassungsgerichtsarbeit und Grundrechtsdemokratie, die historischen Wurzeln," in *70 Jahre Bundesverfassung*, ed. Verfassungsgerichtshof der Republik Österreich (Vienna, 1991), 32.

the constitution was adopted unanimously.³⁴ The president of the National Assembly paid special tribute to Kelsen for his services.³⁵ Unlike in the elections of February 1919, the Christian Social Party gained a relative majority on October 20, 1920. From 1920 to 1933 the Social Democratic Party was the opposition party.

In the second half of the 1920s, antidemocratic and fascist tendencies increased all across Europe. This was true especially in the Weimar Republic, but it is true of Austria as well. Only the Republic of Czechoslovakia remained democratic until September 1938. In Austria the militia, patterned on the example of fascist Italy, gained ground after the burning of the courthouse (*Justizpalast*) in 1927. The Social Democrats found themselves on the defensive. The antidemocratic forces also demanded a "reform" of the Constitution of 1920. Their attacks were joined not only by professors but also by the prelate Ignaz Seipel (1876–1932),³⁶ who had founded the 1922–32 coalition of the Christian Social and Pan-German parties and been federal chancellor several times. However, he preferred to launch his attacks from the setting of the German universities. In 1929, before students in Munich and Tübingen, he harshly criticized the abuses of "formal democracy," which he hoped—at that time at any rate—the militia would eliminate. It was a bad omen that a person such as Seipel, formerly a professor of moral theology and the most significant Catholic politician of the First Republic, in 1929 emphasized his faith in a "higher" democracy, not expecting or hoping for very much from a corporative parliament, and declared: "In my opinion, the one who will salvage democracy is the one who purges it of party rule and restores it."³⁷

For that reason, Seipel led that part of the "bourgeois block" that set about reforming the Constitution of 1920.³⁸ Yet because the "bourgeois block" and the militia had only a relative majority in parliament and a two-thirds majority was required for a change in

34. For the precise course of the deliberations and the text, see *Die Bundesverfassung vom 1. Oktober 1920*, ed. Hans Kelsen in conjunction with Dr. Georg Froelich and Dr. Adolf Merkl (Vienna, 1922).

35. Kojas, ed., *Hans Kelsen*, 18.

36. Klemens von Kemperer, *Ignaz Seipel: Staatsmann einer Krisenzeit* (Graz, 1976). Also, Friedrich Rennhofer, *Ignaz Seipel, Mann und Staatsmann: Eine biographische Dokumentation* (Vienna, 1978).

37. Ignaz Seipel, *Der Kampf um die österreichische Verfassung* (Vienna, 1930), 167ff., 177ff., 181ff.

38. *Ibid.*, 113ff.

the constitution, the consent of the Social Democrats had to be obtained by way of negotiation. Thanks to the skill of the chief negotiator for the Social Democrats, Robert Danneberg, this consent was attained, and in fact for a very sensible amendment: the federal president in the future was to be elected directly by the people and was given more powers (the power to issue emergency decrees, the power to appoint and dismiss members of the federal government, the power to disband the National Council, supreme command of the federal army, and the power to appoint the president of the constitutional court) than before.³⁹ With this amendment, the Constitution of 1920–29 became the Constitution of the Second Republic through the Transitional Constitution Law of May 8, 1945.

In contrast, the constitution of the corporative state of May 1, 1934, marked the end of the most turbulent year of Austrian domestic politics in the between-the-wars period, and at the same time also the “official” end of the First Republic. Because of a voting error regarding a motion of no-confidence on the part of the Pan-Germans against the Dollfuss government, which had only a one-vote majority in the National Council, on March 4, 1933, all three presidents of the National Council resigned. The coalition between the Pan-German and the Christian Social parties had ceased to exist in 1932, and since the November elections of 1930 the Social Democrats had been the strongest party in terms of votes and seats. Federal Chancellor Dollfuss used this blunder that had not been included in the Parliament’s order of business, and which could have easily been redressed with some good will, to dismiss the Parliament.⁴⁰ Henceforth he ruled with the aid of the Wartime Enabling Act of July 24, 1917 (RGBl 307). This gave the government the power to decree laws concerning wartime economic measures without consulting Parliament. Although members of Parliament from the Pan-German and Social Democratic parties had tried several times since 1919 to get this law repealed, their attempts remained unsuccessful.⁴¹ Department head Robert

39. Resolved by the National Congress on December 7, 1929, with the votes of the government and of the Social Democrats. BGBl Nr. 392/1929.

40. Gerhart Botz, “Die Ausschaltung des Nationalrates und die Anfänge der Diktatur Dollfuss im Urteil der Geschichtsschreibung von 1933–1937,” in *Vierzig Jahre danach*, ed. G. Botz (Vienna, 1973).

41. On this and for what follows, see Peter Huemer, *Sektionschef Robert Hecht und die Zerstörung der Demokratie in Österreich* (Vienna, 1975), 138ff.

Hecht, until 1932 legal counsel to Vaugoin, the Christian Social party's minister of the army, and legal counsel to Dollfuss from the inception of the Dollfuss government, drew the chancellor's attention to the possibilities this law offered an authoritarian government beyond merely economic measures. Under this aspect on October 1, 1932, Minister of Justice Kurt Schuschnigg, in concert with the minister of finance, issued an emergency decree on the basis of the Wartime Enabling Act according to which financial penalties could be imposed on those responsible for the collapse of the Creditanstalt. This was popular with the people at large, and to oppose it publicly was difficult even for the Social Democrats, even though they clearly realized the significance of the form of the decree. On October 4, 1932, the *Arbeiter-Zeitung* printed on its front page the bold headline, INFRINGEMENT OF THE CONSTITUTION. Because of criticism from various sides the law would have "sunk into oblivion and would perhaps never again have been applied, had it not been for the events of March 4, 1933."⁴²

From then on until April 30, 1934, Dollfuss issued more than four hundred emergency decrees on the basis of the Enabling Act. Any intervention by the constitutional court had become impossible, because those of its members belonging to the Christian Social Party had resigned their mandate according to the wishes of the government and no one had replaced them. Thus, according to a resolution of the Council of Ministers of May 23, 1933, the court was incapable of acting. Nevertheless the government regarded the ongoing application of the Enabling Act as only an emergency measure and as only an interim solution.

In addition, the victory of the executive branch and the militia over the Republican Defense Corps in the civil war of February 12–15, 1934,⁴³ the immediate ban on the Social Democratic Party and its organizations, and the annulment of all Social Democratic seats on all levels, from the National Council down to the district councils, also prepared the way for a new corporatist-authoritarian constitution.

The groundwork for the new constitution was already in place,

42. *Ibid.*, 139, 150.

43. See Erich Froeschl and Helge Zoitl, eds., *Februar 1934: Ursachen, Fakten, Folgen. Beiträge zum wissenschaftlichen Symposium des Dr. Karl Renner Instituts 13.–15.2.1984* (Vienna, 1984).

and Federal Chancellor Dollfuss had on July 19, 1933, charged Otto Ender, former federal chancellor and the head of the government of the province Vorarlberg, with the agendas concerned with constitutional and administrative reform, making him a minister without portfolio. Although a convinced federalist and thus not entirely without democratic ideas, Ender was immediately ready to work out an authoritarian constitution. This task, however, exceeded his strength owing to the conflicting interests even within the government and to the demands for consideration for the various "estates" brought to him from outside the government. Therefore he often consulted Dr. Hecht, vice-governor of the Austrian Postal Bank since November 1933. The higher county officials of Vorarlberg were his assistants. In March and April 1934 the Council of Ministers deliberated for twenty-seven and a quarter hours and thirty-two hours respectively the final proposal presented by Ender. On April 24, 1934, the Council of Ministers resolved to decree the new Constitution of the Federal State of Austria on the basis of the Enabling Act. This decree was issued on April 30 (BGBl I Nr 239/1934) on Hecht's advice, and on the same basis the Christian Social and Pan-German party members were convened by the former Christian Social president of the National Council, Dr. Ramek, on April 30, 1934. According to Hecht's reckoning there should have been ninety-one delegates. Nonetheless, at the first and last session of this "rump parliament" only seventy-six delegates were present. Of these, seventy-four voted in favor of the draft; that is to say, they "sanitized" retrospectively all the laws issued by the government since March 1933, and they accepted the "Constitution 1934" along with the Concordat of June 5, 1933, embodied in it. Foppa and Hampel, the two Pan-German delegates, voted against the draft. Foppa made a speech in which he accused the government of "violating the constitution for more than a year and of suppressing the expression of the will of most of the Austrian populace."⁴⁴

The Constitution of 1920 was made up of 152 articles; the "Constitution 1934" had 182. The Constitution of 1920 began with the declaration that Austria was a democratic republic and its laws issued from the people. The "Constitution 1934" had the following preamble: "In the name of God the Almighty, from whom all

44. *Ibid.*, 311.

laws proceed, the Austrian people receives this Constitution for its Christian, German federal corporatist state. Article 1. Austria is a federal state. Article 2. The federal state has a corporatist organization and consists of the federal city of Vienna, and the provinces of Burgenland, Kärnten, Niederösterreich, Oberösterreich, Salzburg, Tyrolia, Vorarlberg."⁴⁵

In his comments on the most important elements of the new constitution—from the abolition of parliament and its replacement by corporative councils down to the election of the federal president by the mayors from a triple proposal of the Federal Assembly (Council of State, Council of the Provinces, Federal Cultural Council, Federal Economic Council [Article 52]) and the restriction of basic rights (for instance, freedom of press and assembly)—Ender left no doubt about the authoritarian character of this constitution. But he referred to the people in his explanation: "The people no longer expected any help from the Parliament in their dire need and longed for a strong, authoritarian government." According to Ender, the "authoritarian line" runs through the entire constitution: "Throughout, there are confirmations and the revocability or dismissibility comes from above downward." At the close of his commentary even Ender poses the question: "How long will this constitution last? . . . Will the curtailing of popular rights, of local autonomy—which is undeniable—will the limitation of popular representation with respect to the right of questioning and of initiating laws be lasting?" As an answer Ender hoped for the full unfolding of the estates.⁴⁶ History's answer was more precise: the constitution lasted not even four years.

In Peter Huemer's painstakingly compiled relevant chronicles, Voegelin's name does not come up either as an adviser or as a coworker on the "Constitution 1934." And yet even before the publication of his book *The Authoritarian State* in 1936 he had published on April 27, 1934, an article entitled "Making a Constitution for Austria" in the *Wiener Zeitung*. In it he conjectured that the German "revolution" of 1933 brought about a renewal of Austrian political life.⁴⁷ In my opinion, at any rate, the dismissal

45. *Die neue österreichische Verfassung, eingeleitet und erläutert von Bundesminister Dr. O. Ender* (Vienna, 1984), 33ff.

46. *Ibid.*, 4, 21, 32.

47. Cited by Huemer in *Sektionschef Robert Hecht*, 198117.

of parliament in March 1933 was more likely to have been a consequence of the nomination of Hitler as German Reichschancellor on January 30, 1933. At that time the "Constitution 1934" was not yet under discussion.

Before turning our attention entirely to *The Authoritarian State*, we ought to say something about Voegelin's situation from the start of his studies until 1938. Since Eric Voegelin did not come from a wealthy family—his father was a civil engineer—he decided in 1919 on the shortest possible course that still agreed with his interests in studying political science in the department of law and political science. In the shortest possible time, as early as 1922, he received the degree of *Doctor rerum politicarum*. Looking back, he depicts the atmosphere at the university as we did here in the beginning. He also used the three years of studies to build up a circle of friends whom he had met in the private seminars of Spann, Kelsen, and von Mises. All were highly intelligent and later on had internationally acclaimed careers as scholars and scientists. The national economists and political scientists Friedrich August von Hayek, Oscar Morgenstern, Fritz Machlup, Gottfried von Haberler, Alfred Schütz, the psychoanalyst Robert Waelder, the art historian Johannes Wilde, and the historian Friedrich Engel-Janosi formed the so-called *Geistkreis*. This circle of friends met once a month, with one of the participants giving a presentation on a theme of his choice but not pertaining to his specialty.⁴⁸ The group was interdisciplinary and elitist; throughout its existence, from 1921 to 1938, it was limited to only twelve active members. Aside from the wife of the person giving the presentation, women were not admitted. According to the opinion of more than one of the participants, Voegelin was "the only one of us who could be named practically a true genius."⁴⁹

As a young student and academic, Voegelin was already marked by the unrelenting drive for encyclopedic knowledge and the capacity for learning that marked his entire life. Over the years he learned Greek, Russian, Hebrew, and Chinese so that he could study the sources in the original. After completing his studies, he took part in a summer school in Oxford. With the aid of a Weininger scholarship

48. Voegelin, *Autobiographical Reflections*, 3, 5ff.

49. Cited by Friedrich Engel-Janosi in "Aber ein stolzer Bettler": *Erinnerungen aus einer verlorenen Generation* (Graz, 1974), 117.

he was able to study in Berlin and Heidelberg from January until July, 1923. In Berlin the lecture course of Eduard Meyer on Greek history particularly impressed him. In Heidelberg it was especially the sociologist Alfred Weber who attracted him. He was able to hear Weber's first course on the sociology of culture in 1929. Weber's work had a decisive influence upon Voegelin, although the two did not become personally acquainted. Studying Weber made it clear to Voegelin that the comparative method, which had already been employed by August Comte, was most important to his growing research in political philosophy and cultural criticism, research that took on ever more global contours throughout his life.⁵⁰

We must also stress what Voegelin himself often emphasized: his growing sensitivity for purity of language thanks to Stefan George and Karl Kraus. The more Voegelin studied ideologies, the more he regarded ideologies of any kind as harmful.

Finally, Voegelin was of the opinion that gnosticism is the essence of modernity, which has led to the gnostic revolution and to the fall of Puritanism. He placed his hope for the future in the revival of the conservative American and English democratic tradition.⁵¹ Positive references to this tradition can already be found in *The Authoritarian State* of 1936. Before this Voegelin was scientific assistant to Hans Kelsen, the chair of government and administrative law in 1923. With the help of a fellowship from the Rockefeller Foundation, Voegelin attended the American universities of Columbia, Harvard, Wisconsin, and Yale from 1924 to 1926, and was at the Sorbonne in Paris in 1926–1927. Thus Voegelin spent the relatively calmest and economically best years of the First Republic abroad. When he returned to Austria in 1927, he came back to a tense situation—as described above—in domestic politics, one already characterized in part by violence. He perceived this immediately and was especially open to Karl Kraus's linguistic and political criticism;⁵² Voegelin then took a more lively interest in politics than before.

Voegelin's professional prospects—in 1927 he was again scientific assistant in the department of law and political science—did

50. Voegelin, *Autobiographical Reflections*, 8ff., 14.

51. Eric Voegelin, *Die neue Wissenschaft der Politik: Eine Einführung* (Munich, 1959).

52. Voegelin, *Autobiographical Reflections*, 17ff., 40.

not match his constantly growing list of scholarly publications.⁵³ The result of his penetrating work on “race theory” was an analytic history of its diverse forms down to the publications, so prized by the National Socialists, of “Rasse-Günther.”⁵⁴ Although Voegelin’s books were published in Germany, no sympathies for German racism are to be found in them; instead Voegelin sets forth in calm, objective language the unreality and danger of the “German Nordic idea”: “The German tension between cosmopolitanism and the nation-state is reflected in the sphere of body ideas.”⁵⁵

In 1928 Voegelin qualified as lecturer at the law faculty for social theory under Spann and Kelsen with the book *On the Form of the American Mind*.⁵⁶ In 1932 the badly paid assistant—until 1930 with Kelsen, afterward with Merkl—became assistant professor. In 1935 he attained the title of associate professor. He taught a course at the Geneva Institute for Higher International Studies in 1931. In contrast to those scholars, such as the historian Ludo Moritz Hartmann,⁵⁷ who were prohibited from scholarly careers on political grounds, Voegelin also taught adult evening classes in Vienna to improve his financial situation.⁵⁸ From 1936 to 1938

53. That list included *Über die Form des amerikanischen Geistes* (Tübingen, 1928); *Rasse und Staat* (Tübingen, 1933); *Die Rassenlehre in der Geistesgeschichte von Ray bis Carus* (Berlin, 1933, 1938). American editions of these books are now available from the University of Missouri Press: *On the Form of the American Mind*, trans. Ruth Hein, ed. Jürgen Gebhardt and Barry Cooper (1995); *Race and State*, trans. Ruth Hein, ed. Klaus Vondung (1997); *The History of the Race Idea: From Ray to Carus*, trans. Ruth Hein, ed. Klaus Vondung (1998). The young Catholic conservative historian Alexander Nowotny (professor of modern history in Graz after 1945) wrote a critical review of Voegelin’s work, faulting Voegelin for not making use of the works of ethnologists Father Wilhelm Schmidt, SVD, and Father Wilhelm Koppers, SVD, an omission that led to a certain one-sidedness in his work. *Reichspost*, January 22, 1934, p. 7.

54. A work used by Voegelin in his *Race and State*: Hans F. K. Günther, *Rassenkunde des deutschen Volkes* (1930).

55. Voegelin, *Race and State*, 222.

56. He was confirmed by the Ministry for Culture and Education on November 19, 1928. *Personalakt Voegelin* (University Archives, Vienna).

57. Günter Fellner, *Ludo Moritz Hartmann und die österreichische Geschichtswissenschaft* (Vienna, 1985), 239ff.

58. See Eric Voegelin, “Volksbildung, Wissenschaft, und Politik,” *Zeitschrift für Politik und Kultur* (1936), 504–603; “Meinungsausserung und Meinungsbild,” *Neue Freie Presse*. The Viennese educational system also was altered by the corporative state in 1936. An educational council was established by the security service and by Mayor Schmitz, which was responsible for expert opinions, requests, advice regarding content, and important questions. The council consisted of one director and four members, including Eric Voegelin. See Walter Goehring, *Volksbildung in Ständestaat und Ostmark: Österreich, 1934–45*, Schriftenreihe österreichische

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he was also secretary of the Austrian Coordinating Committee for International Studies.

From the summer semester of 1929 until 1938 he taught the following courses and seminars at the University of Vienna:

Interpretative and Cultural Sociology	2 hrs. summer semester 1929
Systematic Problems of Sociology	2 hrs. winter semester 1929-30
Sociology of the Constitution	1 hr. summer semester 1930
Kant and Schiller	1 hr. winter semester 1930-31
Sociology of Power Relationships since the 16th Century	2 hrs. summer semester 1931
Principles of Political Theory and the Political Theory of Race since 1800	2 hrs. winter semester 1931-32 1 hr. winter semester 1931-32
Principles of Political Theory	1 hr. summer semester 1931
Race and State	2 hrs. winter semester 1932-33
General Theory of Law	1 hr. summer semester 1933
General Theory of Politics. I. General Theory of Law	2 hrs. winter semester 1933-34
German Ideas of the State at the Close of the 18th and The Beginning of the 19th Centuries	1 hr. winter semester 1933-34
Constitutional Theory with Special Consideration of Technical Legal Problems	1 hr. summer semester 1934
Imperial People and National State	1 hr. winter semester 1934-35
Jean Bodin and the Cosmological Political Theory of the 18th Century	1 hr. summer semester 1935
Authoritarian and Totalitarian State	1 hr. winter semester 1936
Modern French Political Theory (Institutionalism)	1 hr. winter semester 1936-37
Political Theory and Austrian Constitutional Law	4 weeks summer semester 1938

Voegelin did not teach in the summer semester of 1928 and in the winter semesters of 1928-29. Seminars he regularly taught on

Gesellschaft für Schule und Erwachsenenbildung (Vol. 2, Vienna, 1985), May 30, 1937, pp. iff.

sociology and in government and administrative law are not listed here.⁵⁹ The connection between his research projects and his course offerings is quite evident.

Voegelin himself has summed up his political development in those years in terms of having voted for the Social Democrats in the October 1920 election. After 1927 and especially after 1933, he drew ever closer to the Christian Social Party. In this, two factors were decisive: The first was that the politicians of the Christian Social Party represented the traditions of European culture, something that, in Voegelin's opinion, the Social Democrats did not do. However, he expressly regarded the Austro-Marxist tradition as eminently democratic and "habit-forming." Nevertheless, the majority still believed in the Socialist revolution. But what disturbed Voegelin most "was the stupidity of ideologists as represented by the leaders of the Social Democratic party. While I agreed with them regarding economic and social politics, the silliness of their apocalyptic dream in face of the impending Hitlerian apocalypse was simply too much to stomach." His stance at that time was identical with that of Karl Kraus, who after the courthouse fire in 1927 had posters demanding the resignation of Vienna police chief Schober printed at his own expense, and from 1934 until his death in 1936 supported Dollfuss and Schuschnigg. Voegelin was clearly aware of the consequences for himself and for Kraus: "Ideological intellectuals who survived the disaster have not forgiven Kraus for being too intelligent to sympathize with their foolishness. Of course, they have not forgiven me either." The outcome of the political tensions after 1933 was his study *The Authoritarian State*, which also served to broaden his qualifications to teach political science at the university. In retrospect this book was his first attempt to investigate the role of the ideologies of the left and right in the situation at that time and to understand "that an authoritarian state that would keep radical ideologists in check was the best possible defense of democracy."⁶⁰

In Voegelin's opinion the book was "heterogeneous." In Part I he discusses the symbols "total" and "authoritarian." According to Voegelin, theretofore no one had dealt with problems of this type and there was no intellectual apparatus or method in place

59. *Vorlesungsverzeichnis der Universität Wien, 1928–1938.*

60. Voegelin, *Autobiographical Reflections*, 41, 51.

for the examination of such terms. This is true, but just as true is Kurt Sontheimer's diagnosis, made almost thirty years later, that in the practically identical authoritarian and corporatist states—as has already been remarked—the idea of the authoritarian state “has to result in a totalitarian practice”⁶¹ under existing conditions. It must nevertheless be conceded that after 1945 it was easier to come up with such a diagnosis than in 1936.

Voegelin's hatred for National Socialism had its roots in the 1920s. He wanted to preserve what Max Weber called intellectual honesty. Since for Voegelin National Socialism was a phenomenon of intellectual dishonesty, it was out of the question for him. The second reason for his hatred: “I have an aversion to killing people for the fun of it.” For him people of this type were always “murderous swine.” The third reason for his hatred was the National Socialist vulgarization, indeed, destruction of language. Voegelin's turn toward the Christian Social or anti-National Socialist corporatist state therefore was closely connected with his rigorous rejection of National Socialism. In Part I of *The Authoritarian State*, which he devotes to the critique of ideology, Voegelin distinguishes between *topoi* and concepts. For him this distinction is the basis for an adequate treatment of language problems in politics. Then he makes the distinction between political symbols as theoretical or nontheoretical concepts. “To this class of political symbols, which are definitely not theoretical concepts, belong such symbols as *total* and *authoritarian*.”⁶²

Voegelin based his interpretation of the Austrian state on, among others, the work of Maurice Hauriou on institutionalism.⁶³ He acknowledged that the acceptance of a collective unity would legitimate treating its members as subordinates who agree with the ideas of the representatives of the unity. In this he saw certain parallels with Averroes' (1126–1198; the most famous Arab philosopher) conception of the *intellectus unus* as the unity of a world-immanent *nation* or *race*,⁶⁴ whose representatives would be murderous for humanity, and Voegelin was aware of the significance of this insight. Hauriou and his school assumed that the power of

61. Sontheimer, *Antidemokratisches Denken*, 206.

62. Voegelin, *Autobiographical Reflections*, 45ff., 52.

63. Maurice Hauriou, *La théorie de l'institution et de la fondation: Essai de vitalisme sociale* (Paris, 1925).

64. Voegelin, *Autobiographical Reflections*, 52.

a ruler or of a government is based on the function of the ruler as a representative of an institution, i.e., the state. "For Hauriou the state is a national community in which a central sovereign power conducts the enterprise of the *res publica*. The central sovereign power performs the feat first to produce the unity of the nation politically by turning the disorganized national community into an organized body capable of taking action."⁶⁵

According to Voegelin, the concept of the total state emerged for the first time in a theoretical-systematic context in a highly rationalized form in Carl Schmitt's *Hüter der Verfassung* (Defender of the Constitution).⁶⁶ In this connection, Voegelin also cites two other works by Schmitt from the years 1933 to 1936, in which the author was trying to establish himself as the "chief jurist" of the Third Reich.⁶⁷ Schmitt, the famed legal scholar, who just a few weeks after the murder of his own friends during the so-called Röhmputsch on June 30, 1933, published a horrifying "justification" of Hitler's crimes,⁶⁸ came from a Catholic Conservative milieu. Prior to 1933 he had built up a reputation that was again celebrated relatively soon after 1945 not merely by reason of significant works of scholarship, but especially by his astute and severe critique of democracy in general and of the Weimar Republic in particular. There is no doubt that his critique, which had broad repercussions, contributed to the downfall of the Weimar Republic.⁶⁹ Voegelin, always a relentless opponent of National Socialism, nevertheless made use of many of Schmitt's analyses. Today Schmitt still has followers among German law professors, but also a great number of opponents. That the highly gifted conservative Voegelin at the age of thirty-five made the same mistake as many equally honorable

65. Page 99 herein. Further references will be cited parenthetically in the text.

66. Carl Schmitt, *Der Hüter der Verfassung* (Tübingen, 1931); p. 58n herein.

67. Carl Schmitt, *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (Hamburg, 1933); *Staatsgefüge und Zusammenbruch des Zweiten Reiches* (1934). These works are cited by Voegelin herein, p. 62n.

68. Carl Schmitt, "Der Führer schützt das Recht," *Deutsche Juristenzeitung*, 1934, col. 945ff.

69. See Bernd Ruethers, *Rechtslehrer und Kronjuristen im Dritten Reich* (Munich, 1988), especially 103ff. On Schmitt's conduct at the University of Cologne during the National Socialist period, see Frank Golscewski, *Kölner Universitätslehrer und der Nationalsozialismus: Personengeschichtliche Ansätze* (Cologne, 1988), 298ff. Likewise on the contemporary Schmitt renaissance among groups on the right in the German Federal Republic and Austria, especially in the Free Austrian Party, see Klaus Richter, "Freunde und Feinde: Über Rezeption und Einfluss von Carl Schmitt," *Juridikum-Zeitschrift im Rechtsstaat*, II (1992), 11ff.

conservative enemies of National Socialism and tried to rob Peter to pay Paul, replacing one evil with another, is easier to see for later generations than it was for contemporaries. Nonetheless, this should not be concealed in a critical commentary. After all, under certain circumstances yesterday's mistakes can become those of tomorrow.

Part II of *The Authoritarian State* contains a brilliant history of the Austrian constitution since 1848. In Part III, devoted to the "Constitution 1934," Voegelin includes a critical discussion, running to almost fifty pages, of Kelsen's pure theory of law and its connection to a specifically Austrian theory of politics. That he did not uncritically accept the positivistic, neo-Kantian theory of his teacher had already become clear earlier.⁷⁰ But never before had he explained in such detail and so comprehensively that the pure theory of law cannot be a substitute for a political theory. "I had to stress the inadequacy of a theory of law for understanding political problems and the destructive consequences of the claim that one should, or could, not deal significantly with political problems." This critique affected Kelsen deeply. His relationship with Voegelin was never again what it had been earlier, although they still kept in touch in the United States. Many years later, when Voegelin's *The New Science of Politics* appeared in the United States in 1952, Kelsen wrote a book-length critique. He sent Voegelin the manuscript to read and in the end did not publish it. Possibly a letter from Voegelin, cautiously indicating that the publication of this manuscript would harm Kelsen more than Voegelin, was a decisive factor in Kelsen's decision.⁷¹

In 1938 the sale of *The Authoritarian State* was forbidden immediately upon the Anschluss. During the capture of Vienna by Russian troops in 1945, a bomb fell on the headquarters of the Springer Verlag in Vienna, and all that was left of the edition burned in the cellar. Voegelin was of the opinion that for this reason the book did not attract much attention before 1938 and after 1945.⁷² However, as a document of contemporary history and a testimony of high intellectual value, it still merits today the interest of historians,

70. Eric Voegelin, "Reine Rechtslehre und Staatslehre," *Zeitschrift für öffentliches Recht*, IV (1924); Voegelin, "Kelsen's Pure Theory of Law," *Political Science Quarterly*, XLII (1927).

71. Voegelin, *Autobiographical Reflections*, 33, 53.

72. *Ibid.*

philosophers, experts in constitutional law, and political scientists on both sides of the Atlantic.

Voegelin starts from the assumption that Dollfuss set forth his theory about authority several times both orally and in writing: in the Trabrennplatz speech during the Catholics' Convention on September 11, 1933, in a lead article in the Christian Social paper the *Reichspost* of December 24, 1933, and in a radio address of May 1, 1934. Voegelin summarized the contents of this theory as follows:

1. The government has authority because it is the representative of the state;
2. the authoritarian function of the government, in the literal sense of authorship, is the arrangement of the multitude of society's intellectual and material interests into a unified whole;
3. the authoritative effort puts the government into a relationship of representation with regard to the state as a whole;
4. therefore authority is not despotism or dictatorship, but is defined as ordered power in accordance with authorial representation;
5. the state is to be given a hierarchic-authoritarian structure by concentrating the power of sovereign jurisdiction more strictly than before in the hands of the government, while more than before, the corporate authorities are granted greater freedom of self-administration;
6. the *consentement coutumier* at the foundation of the institution is to be given the greatest possible sphere of spiritual freedom; it should grow freely from the historical community of the people rather than being the consequence of a totally imposed ideology. (102)

The authoritarian ideas of Dollfuss came so close to the French ones that there were even some formulations similar to those of Hauriou, and Voegelin attributed this to the situation of Dollfuss. The latter had to reflect upon "the fundamental questions of the state's existence and of the authority of government." Such a reflection, if it was consistent, had to lead directly back to the classical European ideas of the state as they have been developed, for example, in France since the sixteenth century. "The revolution from below against state authority, the last phase of which we know as Central European postwar parliamentarianism, can never be more than an episode and a symptom of decline as long as the type of the modern state has the power to shape history" (103). In this context Voegelin mentions Ernst Jünger's "total mobilization" just as he had already cited Mussolini and Giovanni Gentile.⁷³ In the

73. Ernst Jünger, "Die totale Mobilmachung," in *Krieg und Krieger*, ed. Ernst Jünger (Berlin, 1930); Benito Mussolini, *La Dottrina del Fascismo* (Rome, 1933);

modern state it is also impossible in the long run to do without the apparatus of psychological influence, and, Voegelin continues, "To play with arguments of freedom of thought in the current technological milieu is a matter for the opposition; for the ruler it means suicide" (105).

In line with these theses, Voegelin points out in his summary that trying to define the concept of a "total" or "authoritarian" state is a task wrongly put. For him, today these adjectives are political symbols that can be understood "only based on a particular situation of struggle." Moreover, Voegelin considered it pointless to compare the English or French liberal state of his time with the Italian or German totalitarian one. The former instances have already gone through their struggle with totalitarianism and do not need a new one. This first part of the book, on the theory of state and politics, is an unequivocal attempt at support for the authoritarian state. Not here, but only in the third and final section does Voegelin examine the corporative order of society propagated in the 1931 encyclical of Pope Pius XI, *Quadragesimo anno*.⁷⁴

Part II deals with the evolution of the Austrian constitution, and here Voegelin tackles the problem of nationalities with logical consistency based on the history of the Habsburg monarchy since 1848. Voegelin concludes that the principle of nationality is *not* compatible with the liberal and democratic principles of freedom and equality, with the dynastic state, with the continued existence of transnationally oriented privileged strata of society, or with the principle of sovereignty of the people and majority within existing states.

This and Voegelin's other conclusions can be read in the text following this introduction, and so here we will examine only some aspects of the intentions he has clearly stated. We already mentioned that his historical diagnoses for the Austrian past are accurate. Amazingly, however, Voegelin's statement that "unfreedom in the political sphere can be accompanied by considerable latitude for the nonpolitical existence of the citizens" (116) came true at least in part in the collapsing Communist systems prior to 1989. Furthermore, Voegelin rightly cites formulations of the

Giovanni Gentile, "Origini e del Fascismo," in *Quaderni dell' Istituto nazionale fascista di cultura* (Vol. 3; Rome, 1934).

74. See pp. 275ff. herein.

Hungarian historian Joseph von Eötvös from the mid-nineteenth century, according to which the Revolution of 1848 was primarily a national affair. Where this principle was not involved, the majority of the participants were fighting for the elimination of class privileges, but not for the abolition of the monarchy in favor of a republic of the Austrian people, for "there was no such entity as an Austrian *Volk* that could embody the claims of a sovereignty of the *Volk*" (123).

Also astonishing is Voegelin's statement that with the period of the founding of the First Republic (1918–1920) a period of "undemocratic state leadership under the guise of democracy" (153) came to an end. In terms of a grass-roots democratic decision, this is as true of 1918 as it is of the founding of the Second Republic in 1945. In each case the founders of the government were representatives of political parties that had been elected in 1911 or 1930 respectively and that were politically free of the burden of either Austro-fascism or National Socialism. The decisive difference is that the First Republic had almost no democratic tradition, which, as already mentioned above, drew more and more publicly vocal opponents, while the Second Republic was and is affirmed by almost the whole of its citizenry.

Historians also can agree only in part with the closing sentences of Part II, where Voegelin formulates only the arguments in support of the authoritarian government: "The nonexistence of a national people expressed itself in the Social Democrats' politics of class struggle and in the conflicts between a party organization and the state, which were pushed to the point of civil war . . . the beginnings of an Austrian national consciousness showed itself in the militia movement, . . . which had its first, though still weak, success in the constitutional amendment of 1929, and since the German revolution, in the movement for the establishment of an authoritarian and corporative Austrian state" (159).⁷⁵

Part III, entitled "The Authoritarian Constitution Since 1933," as we already mentioned, contains the comprehensive discussion of Kelsen's theory of state and law, which Voegelin thinks leads to the elimination of the reality of the state, to the dissolution of the person and of the constitution. Only with chapter 7, entitled,

75. Compare C. Earl Edmondson, *The Heimwehr and Austrian Politics, 1918–1936* (Athens, Ga., 1978).

"Constitutional Transition (March 1933 to May 1934)," does Voegelin begin the problematical reconstruction of a "legal continuum," the explication of legality and legitimacy. This of necessity had to include his evaluation and examination of the legality of the Enabling Act. In Voegelin's view, the issue of the authorization of the Enabling Act as *praeter legem* and *contra legem* is not highly significant in legal terms since the existence of any decrees that do not alter existing laws is hardly likely.⁷⁶ "The legal order in force provides an ordering of being that may be more or less satisfactory to us; but from its point of view, there is no being that is not ordered. From the standpoint of the legal order in force, there is no realm of being *praeter legem*" (228).

An important line of Voegelin's argument was already anticipated in March 1933 by Federal President Miklas, although no contact between Miklas and Voegelin can be proved. In a session on March 17, 1933, of the Upper House of parliament—that is, before its dismissal—the following motion was introduced by the Social Democratic delegate and vice-mayor of Vienna, Emmerling:

The Bundesrat wants to lodge a protest against the government's violation of the constitution in this time of economic hardship. Furthermore the Bundesrat protests against Dr. Dollfuss' government taking away its right to participate in federal legislation and against the government's attempt to prevent a session of the National Council by sending a contingent of armed police. Finally, the Bundesrat demands that all decrees and injunctions of the federal government be repealed. The chairman is charged with communicating to the Federal President that the federal government no longer has the confidence of the Bundesrat or that of the Styrian provincial government and thus no longer has the confidence of the overwhelming majority of the people of the Austrian federal state. The Federal President is requested to remove the government from its office.⁷⁷

This motion was accepted, as were the motions to rescind the dissolution of the Tyrolian Defense Corps, to abolish the penalties imposed on the railroad employees whose strike had been the topic of the day of the March 4 session of the National Council, and to present a vote of no-confidence to the federal government and to order new elections, and ask for the quickest possible activation of the National Council by the Federal President.

76. See pp. 226ff. herein. On this, see Huemer, *Sektionschef Hecht*, 154f.

77. Cited according to Huemer, *Sektionschef Hecht*, 174.

The government responded on the very same day, declaring the Bundesrat an assembly not authorized to legislate on its own and therefore not empowered to present motions of no-confidence, its resolutions thus being of no importance in terms of constitutional law.⁷⁸ Bundesrat Emmerling took the resolutions to Federal President Miklas on March 20. This federal president from the Christian Social Party was not elected by the people in spite of the constitutional amendment of 1929; he was not malicious but weak.⁷⁹ Before responding to Emmerling, he obtained the approval of the federal government. Then he rejected out of hand the accusation of having violated the constitution, claiming that such a serious accusation could be brought only if one could also prove that the government "had imposed" one or several acts "knowing them to be unconstitutional; in other words, that it consciously and deliberately, against its own knowledge of the law, undertook a step that clearly and obviously violated the constitution."⁸⁰ Miklas also rejected all the other motions, since what they concerned was done on the basis of the Enabling Act or that of precedents, which are part of "diametrically opposed conceptions of law" (the resignation of the three presidents of the National Council on March 4, 1933). In no such case would he as federal president agree to make any decisions, even though he also regretted the serious conflict over the parliament's capacity to act.

On May 23, 1933, the government resolved to dismiss a constitutional judge from his office on the basis of the Enabling Act.⁸¹ Others had resigned of their own accord, whereupon the government, based on its own view, which was already then criticized by authoritative jurists, dismissed the constitutional court—as we have already mentioned above—calling it incapable of acting.⁸² The only law scholar who stood behind this opinion, although not without qualifications, was Voegelin:

Though the decree did not formally rescind the constitutional court's authority to review regulations but merely through a technical stipulation made it impossible for the court to carry out its function, from

78. *Ibid.*, 174.

79. See Hilde Verena Lang, "Bundespräsident Miklas und das autoritäre Regime, 1933–1938" (Ph.D. dissertation, Vienna, 1972).

80. Huemer, *Sektionschef Hecht*, 175.

81. Decree of May 23, 1933, BGBl Nr. 191.

82. Huemer, *Sektionschef Hecht*, 216ff.

the overall political situation it was quite clear that for the foreseeable future there was no intention of enabling the constitutional court again to review the wartime statutory regulations, which proved to be the case. From the day this decree was issued in the given political situation the unlawfulness or unconstitutionality of the wartime regulations could no longer be determined. Quite aside from the political dubiousness of such a ruling, it was also wrong from a scientific point of view, because the basis in reality for such a determination had been removed, namely, the possibility of identifying the constitutional court as the forum for reviewing regulations. (232)

Following this critical description of the situation, Voegelin introduced some not fully convincing possibilities for a scientific assessment of the Enabling Act and then arrived at the following summation: "The regulations were lawful and constitutional, and there was no 'error' in their interpretation" (234-35). The federal government's concept of law was the valid constitutional law; science had only to register this historical fact. From this Voegelin inferred that the dismissal of the constitutional court by the Austrian federal government rendered the latter the supreme legislator and constitution-maker, "and it held this position legitimately" (235).

However, these explanations were preceded by a footnote warning readers to see this argument "as restricted to the Austrian situation" (232) and not to generalize it. In any case, according to Voegelin, with the decree of May 23, 1933, on the inadmissibility of the constitutional court's review activity, Austria found itself not in a "normal" situation, but in an "exceptional" one: "In the concrete case of Austria, we believe that a very crucial indication of the existence of an exceptional situation is given by the regulation of May 23, 1933, cited in the text. Assessment of the wartime economic regulations after this date seems to us impossible, but not because the constitutional court was prevented from reviewing the regulations, but because we regard the act that made review impossible the decisive symptom for the abolition of the 'normal situation'" (232-33).

Peter Huemer sees this as a "circular argument," but does not deny the coherence and logic of Voegelin's argumentation.⁸³ In accordance with the sophistic interpretation of the situation after May 23, 1933, Voegelin had no other choice but to justify also

83. Ibid.

the federal government's decree of April 24, 1933, concerning the constitution of the Austrian state ("Constitution 1934") with undertones not fully cited by Huemer:

The federal government had become the supreme legislator and author of the constitution for Austria, and held this position legitimately because it had prevailed as such and was sufficiently supported by its practical means of physical power and the *consentement coutumier* of the population. According to this view, there were no longer any problems of legality. The regulations served as a means for creating provisions of ordinary law and constitutional law. And even extending their scope to a complete revision of the constitution—whose legality, aside from the questions of the content of the Enabling Act, could be questionable in a formal sense because the National Council itself was not authorized to this—presented no problems, for the new legislative authority was after all no longer delegated by the federal constitutional law of 1920–1929. The regulation dated April 24, 1934, BGBl I, No. 239, concerning the constitution of the federal state of Austria, drew the necessary conclusions from the situation and issued a new constitution for Austria. Reference to the Enabling Act was just as superfluous for this regulation as it was for all the others that were issued after May 23, 1933.

For Voegelin this legal situation was completely clear. Therefore he considered the attempt of the federal government to establish a "legal continuity" with the Federal Constitution of 1920–1929 through the Enabling Act an unnecessary complication. He saw the solution of this issue in ascertaining that the National Council of April 30, 1934, was "no longer a national council as defined in the B-VG [Federal Constitution] of 1920–1929 but a new legislative organ" (245). Thus there was no possibility of challenging the resolutions of this organ. Consequently for him the question of the constitutionality of the April 30, 1934, session of the National Council and the decision on the constitution taken in that session are legally moot questions and of a "purely theoretical nature" (237). The discussion simulates the possibility of judicial review for the sake of being able, with the aid of this fiction, to present "an interesting issue from Austria's constitutional problematic" (237).

The contents of the "Constitution 1934" are also criticized by Voegelin. On the issue of legal control there is "a vacillation in style among constitutional, authoritarian, and dictatorial forms" (344). Voegelin found an explanation for this "peculiar mixture of styles" (344) in the history of the review of decrees, which dates

back to 1867. He considered the mechanism of the plebiscite “for the present and immediate future . . . difficult to apply because of the nonexistence of a political people that is called upon to render its plebiscite—unless, that is, the positivist concept of the *Volk* is used as the basis of the interpretations; according to this concept, the people in the political sense is identical with the sum of those citizens enfranchised in accordance with the constitution and the administrative law to be issued” (359). According to Voegelin, the organization of the estates stipulated in the constitution was not sufficiently secured against representation of interests, and in this context he referred to Hauriou’s criticisms against any syndicalist chamber. In the process Voegelin hit upon a sentence that captures the sum and substance of the Austrian parliamentarianism of the day and which, in my opinion, ought to be relativized, just like the above-cited statement about the consent of the majority of Austrians to the “Constitution 1934”: “*Under the constitution of 1920, the Austrian parliament was not a parliament in the Western European, especially the French, sense but precisely an instance of that type of representative council that Hauriou describes as the utmost contrast to representation of the people based on the principle of political freedom. It was what he called ‘la tyrannie, la plus redoutable de toutes.’ No one who does not keep in mind this phrase can understand the problem of the Austrian parliament*” (327–28, italics in original).

Voegelin closed his deliberations, which at his time were as brilliant as they were antidemocratic, by pointing to freedom and basic rights, which for him were bound up with the metaphysics of the person. They are relevant for any—even the authoritarian—type of government organization: “Their discussion, however, would open up basic questions of philosophy of the state that we do not want to address in a study of the particular problems of the Austrian state” (362).

The conclusion needs no further commentary.

THE AUTHORITARIAN STATE

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Foreword

The scholarly discussion of a historical subject uses sharply outlined concepts, which confer on it a definitiveness the reality never holds. Therefore the danger arises that the uncritical reader will turn the author's evaluations into dogma, while the critical reader believes them to be dogmatic. A monograph on the Austrian authoritarian state must, by the choice of subject, detach the elements of the authoritarian state from the more richly structured historical field and join them into a closed typology of legal and political science. The more successful the work and the more self-enclosed the picture, the more it must lure the reader into the—false—assumption that the reality has been exhausted and adequately comprehended. Therefore we will stress two points regarding questions of Austria's overall political situation; though in the course of the work these are discussed in the appropriate context, they may perhaps be overlooked, and their scope may not be sufficiently appreciated. Primarily, in the overall area of the European political powers, Austria is a small power; its national problems and its problems as authoritarian state carry relatively little weight; everything that will be said about them must be accompanied by the careful consideration and awareness of its being outwardly conditioned by factors of the history of ideas and power politics. Furthermore, domestically the significance of the organization of the authoritarian state and the possibility of strengthening it in the direction of totalitarianism or weakening it must be evaluated with a view to historical factors, especially the liberal tradition, which is very strongly expressed in the constitution of 1934. We hope by these indications of additional factors of foreign and domestic policy to prevent the appearance of one-sidedness, which arises

easily if, for reasons of scholarly delimitation of the subject matter, a single element of reality is chosen as relevant while all others are pushed into the background.

Concerning the author's approach to his subject and the purpose of the book, no more needs to be said than might be said about any theoretical discussion of a political subject. Every work of this kind depends on a belief in the myth of knowledge. And the theoretical mind that reads it will primarily follow the dramatic exchange between the theoretician and reality, an exchange animated by that myth. He will want to know whether the struggle for the transformation of reality into truth ended in victory or defeat. The sentences of this book have been formed with this theoretical mind as the ideal reader.

A different kind of reader expects the book to provide principally information on the subject announced in its title. I hope that, within the technically necessary limits and despite the inevitability of human error, I have given a systematic treatment of the subject according to the present state of the art, and I am grateful for any additions, corrections, proposals to improve the system, and the like, the reader may take the trouble to make for the sake of the cause.

And then there is a third class of readers, those who take neither a dramatic nor an objective interest in a work of political science but expect from the author a confirmation of their political sympathies and antipathies. As on earlier occasions, I will disappoint this group of readers on the present occasion as well. The intention of a theoretical work is diametrically opposed to the desire for political enthusiasm.

Finally, I wish to extend my deepest thanks to Professors Dr. L. Adamovich and Dr. A. Merkl, for the unusual generosity with which they furthered a work that deviates in essential points from their own fundamental scholarly convictions.

VIENNA, DECEMBER, 1935

ERIC VOEGELIN

Introduction

This significance of the problem concerning the Austrian state goes far beyond the question of how a small European nation is to be organized internally. At first glance, focused on the immediate view, it might appear that the government operating under the new authoritarian constitution, which went into effect in 1934, was merely a device to regulate the confusing situation left in the wake of the parliamentary-democratic period, and looking back further, to the establishment of the state in 1918, we may perhaps not be able to discover more than the problem of an independent existence for the nation of Austria. But the two concrete problems—the general existence of the state and the regulation of the domestic political situation—are subsidiary problems within an all-encompassing historical process that we can call Austria's growth to statehood.

The concept of the state that applies to the European political area is historically informed by the Western European national states, especially the development of the Continental model of France. Understood along these lines, the state is a political construct that grew out of the sphere of influence [*Mächtefeld*] of the Middle Ages through the establishment of a centralized governing and administrating organization for a larger territory and the spiritual [*seelisch*] shaping of the population of this territory into a political people, a nation. In this sense of the word, the state is not the essentially human form of existence in a political alliance but a historical type; its development began in Western Europe during the Middle Ages and spread from this geographical center as the model for political organization.

Central and Eastern Europe—especially the area of particular importance to our questions, the Austrian monarchy—began this

development later than did the West. Since we are not here concerned with historical research, we cannot examine the reasons for this—we will stick to describing the results. A central jurisdiction [*Herrschaftsgewalt*] and the administrative organization were established later than in the West; in Austria this process was not completed until the time of Maria Theresa and Joseph II. The formal emergence of the state from the complicated power relations of the medieval empire did not occur in Austria until 1867; the spiritual welding of the population of the territory into a political people was never accomplished at all. The existential connection of the nation to an area and to institutionalized sovereignty [*Herrschaftsorganisation*] in this area, such as is found in Western Europe, did not become a reality in Austria until the 1918 collapse; the political area never became a "state"; to its end it retained essential traits of the prestate "empire." Institutionalized power [*Machtorganisation*] in the Austrian monarchy was never able to acquire the authority Western European institutions hold by virtue of their representative nature as the institutionalized power of the nation, nor could Austria acquire it, because the precondition of such an authority as a national representative—the people in the political sense [*Volk*], which experiences the institutionalized power as the expression of its political will to existence—did not develop. The political style of the Austrian monarchy was therefore characterized by a trait we will call "administrative." The "administrative style" emerges whenever a "Reich" grows into the administrative organization of a "state" while at the same time failing to develop the necessary foundations for existence and the legitimizing order of the Western European state—that is, when it has a Western European administrative organization but does not have a political people, so that the power organization lacks the authority it can acquire only when it is the representative organization of a people. In such a political structure, the use and application of national power [*Staatsmacht*] is not representative of the national state; the acts of those in power [*Machtakte*] do not reveal a will to national existence and supremacy. The ruler and the statesman are not the symbols of the nation in these acts; instead, the national power apparatus is an anonymous, non-representational instrument that is at the disposal of anyone so entitled by the stipulations of the constitution. Ruler and statesman are the administrators of a power organization that has become historical and is utilized in the interests of its own

preservation and the intellectual and material welfare of the people; as persons they are not manifestations of state power.

The constitutional and legal theory of such a political structure, which hews to the middle line between "empire" and "state," tends to place special emphasis on the "administrative" legal phenomena and to remove the originally nomothetic acts from the field of observation. It tends (aside from questions of civil and penal law, which we will not touch on more closely here) to focus within public law on the area of administrative law, and when it deals with constitutional law, it examines it as much as possible from the viewpoint of the administration of norms. The stress is placed on the "constitution" primarily as being a system of norms, which is placed *over* the highest state institutions. The origination of laws in an emergency situation, the thesis, itself not subject to norms, of order based on a decision made by virtue of power becomes secondary and its nature as a legal phenomenon becomes doubtful.

The state of Austria, established in 1918, inherited the problems of the monarchy. The organization of a state in the new Austrian territory did not overnight transform the ethnic populations of the monarchy living within its borders into one people, one nation in the Western European sense. And the power structure established for the population of this area, like the old Austrian authority, lacked the weight of authority of the Western European states, which results from their being the manifestation of the nation's will to political existence. And the dominant constitutional theory of this political construct, pure theory of law, manifests—as ideal type—the traits we have just shown to be those of the "administrative style." The legal phenomenon was principally limited to the phenomenon of the norm; the non-normative prescriptive legal acts of ordering and establishing the state were fundamentally divested of their character as legal phenomena. An idea of the constitution as a normative order was developed; acts of the constitutional sphere, to be legal acts, necessarily had to be acts of the administration of the constitutional norms. This administrative character was stressed by the demand that these acts be subjected to checking by a court, and the demand was widely realized in the way the state was organized.

As long as the monarchy remained in force, the administrative, apolitical character of the state institutions was offset by the authoritarian traits that the political structure drew from the sources

of the "empire," especially in the person of the "emperor." The national sovereign could, thanks to his authority as emperor, establish the necessary non-normative acts (those Friedrich Tezner called "procuratorial for the empire"). The breaches of the national constitution drew their legal character from the "regent's duty" [*Regentenpflicht*] and the medieval authority of the monarch, even if it could not "juridically" be incorporated into the constitutional system. The national leadership of the new Austria lacks "national procuratorial" legitimation of its actions, and if, in an emergency situation, it is forced to engage in non-normative prescriptive legal acts, these appear in the light of constitutional theory of the "administrative style" not under the category of acts originating a constitution and laws but as breaches of the latter two.

Since 1933, under the pressure of external events, the problem of Austrian statehood now inevitably requires a solution. The "administrative" situation has turned into a "political" one, which demands resolutions. The national leadership had to leave behind its position as administrator of the constitution and proceed to laying down a constitution [*Verfassungsthesis*]¹—it became difficult to preserve the "administrative style." Austria's reorganization into an authoritarian state did more than raise problems concerning the new meaning of constitutional law—the change was more complex than merely replacing one cluster of norms with another one of a different content; existential steps in Austria's becoming a state also occurred, in the sense that the highest national organs became crucial because the political situation legitimated them as the embodiments of the will to existence of the state of Austria. Since 1933 Austria has not only replaced its democratic-parliamentary constitutional law with an authoritarian one but has also taken a step from the "administrative" to the "political" style, a step from "Reich" to "state."

Our investigation seeks to present the overall complex of the problems of the Austrian state; in this way we hope to clarify the context of the cluster of questions that has so far been paid scant attention. At the same time our investigation is an attempt to overcome Austria's "administrative" constitutional theory and design a "political" one. The attempt meets with great difficulties, and we are fully aware that, since it is a first try, it has serious flaws. Essentially, we had to attack four complexes of problems: (1) The political idea of the "authoritarian" state—which is not specifically

Austrian but is European and which, further, cannot be observed separately from the problems of the "total" state—necessitated a study using national typology that would clarify the European significance of the political symbols "total" and "authoritarian" at least in a basic outline. Part I of our investigation is devoted to this task. (2) The connection of the problems of the Austrian state with the old problem of the Reich required categorization of the old and new Austrian political situation, with reference to the materials of constitutional history. Part II deals with this task. Significant help, both in providing material and in furnishing the overall picture, here was offered by the writings of Tezner and Heinrich von Srbik, and especially by Josef Redlich's great work on the problem of the Austrian state and Reich. (3) The close connection between constitutional theory and constitutional reality necessitates a discussion of old and new Austrian constitutional theory, concentrating on the principal features of its content and its history. The introductory chapters of Part II and Part III especially serve this purpose. The reader of the sections dealing with constitutional theory will note that our critique of Austrian constitutional theory and the attempt to develop particular theses are based principally on French constitutional theory. The reason is that in France, an old "state," a constitutional theory has been developed since the sixteenth century that is a theory of the "state" or political science [*Staatslehre*] par excellence. Whenever it becomes necessary to establish a new constitutional theory because a political structure "becomes a state," the formulation of the problem in French constitutional theory will offer valuable help. For the rest, we are in no way of the opinion that French constitutional theory, especially that of Maurice Hauriou, to which we refer frequently as the most significant, could not be much improved, but in the context of our investigation—which does not offer any discussion of fundamental theoretical questions but touches the problems only occasionally—we could not deal with this aspect. For the same reason that we referred to French constitutional theory, we frequently relied on Carl Schmitt's constitutional theory. The national problems of the German Reich, a Central European state, share many traits with Austria's. In developing a German constitutional theory, Schmitt relies very heavily on his knowledge of French theory. Because of its eminently French content, therefore, his constitutional theory also offered much valuable help. (4) The main part of our treatise

consists of the presentation of the new authoritarian constitutional law [*Verfassungsrecht*], which we offer in Part III. In our presentation, we have tried as far as possible, without going beyond the scope of this treatise, to integrate the new institutions into the contexts of the problems of European state organizations, and in particular we have considered the related French and English reform projects. For this part, the outline of the new constitutional law by Merkl and the annotated edition of the constitution by Adamovich and Froehlich, in which the legal material was first subjected to thorough study, were particularly useful.

We have said that our attempt at an Austrian constitutional theory is flawed. The reader will understand the principal reason for this imperfection if he realizes that we could have written a monograph as long as the present study on each of the four problem clusters without exhausting the subject. With every legal, historical, and theoretical problem, we had to decide how far to carry description and analysis. Every time we set limits, we were guided by carefully considered reasons—but a different decision could have been just as justified. Should it give critics pleasure, they will find unlimited occasions to determine that this or that historical or theoretical question should also have been touched on or that the presentation of the legal material [*Rechtsstoff*] is too detailed on one point while leaving out essentials on another. They will be sure to cite good reasons for their opinion—let them consider that our reasons for our choices are likely just as good.

Because the material is so diversified, certain difficulties arose in structuring it. We arrived at an arrangement designed to satisfy three ordering principles. The division into three sections reflects levels of concretizing the problem. Part I consists of the analysis of the European preconditions for the new state organization. Part II presents the shared traits of the old and the new Austrian state problems. Part III concretizes the presentation to the current constitutional law. Second, we observed the principle that contextual interpretation of constitutional theory must precede investigation of the reality. According to this principle, Part I is a content analysis of constitutional theory, which precedes our treatment in Parts II and III of the questions concerning the constitution. Within Parts II and III, in turn, theory was treated ahead of history and law in each case. And third, the materials dealt with in Parts II and III are presented in their historical sequence.

Part I
“Total” and
“Authoritarian” as Symbols

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The Elements of Meaning Contained in the Symbols "Total" and "Authoritarian"

§I. Political Symbol and Theoretical Concept

Radical changes in the structure of the state are accompanied by interpretations in the area of verbal expression. The situation of political struggle gives birth to new formulations, from the coining of a symbolic name through reassessments to the systematic images of the old and the new conditions, in which the meaning of events in its crucial substance is captured and thus given intellectual shape. These acts of verbal creation are just as much political battles as are the more concrete manifestations of the struggle, including physical confrontations. They derive their rationale not from the will to knowledge but from their usefulness as tools in subduing the enemy and from their power to serve as symbols for the new political substance.

For scientific knowledge this results in a number of problems. The context of scientific judgments is not identical with the context of the political struggle and the resulting linguistic forms. The one context—the political—must be recast into the other, that of scientific propositions, by relating the political reality to the system of scientific concepts. Such recasting produces a conflict between the two contexts because precisely in the verbal symbols it has produced, political reality touches very closely on the verbal expression of scientific ideas, even though the effects of language in the two areas differ fundamentally. The political form of language is valuable for the struggle and as symbol, while the value of scientific language has knowledge value. The same verbal expression appearing in both contexts has different meanings in each, and the meaning in one context is useless for the other. Measured by

the demands of knowledge, as a rule the political expression will appear ambiguous, vague, devoid of specific content; measured by the requirements of the political situation, the scientific concept will be of no use because it appears thin, lacking substance, force, symbolic value, and it will be confusing precisely by its precision.

It seems to me that there is only one logical way out of these difficulties for the knowledge required for political science: to abandon the impossible. It is impossible to assign to political verbal expression a meaning that is "correct" in an epistemological context; applied to our concrete case this means: the expressions *authoritarian* and *total*, authoritarian and total state, are political forms of speech and must remain such; we cannot "define" a total state and an authoritarian state. Doing without a "definition," however, does not mean abandoning scientific perception of the reality of the state. By recognizing political language for what it is, we integrate it into the reality of the state as one of its components. Refusing to misunderstand the creation of a political symbol as an act of perception, renouncing the assumption that the political symbol has to *mean* something and not just *be* something, allows us to understand it as a symbol in the full richness and force of its expression. However, this must not be understood as a sign of resignation—as if the scientific concept were unable to grasp the same wealth of meaningful content as the political symbol—but as a demand the fulfillment of which alone makes possible the adequate penetration of this meaningful content. The elements of the situation in which the political symbol has its place become visible only when we do not act as if the perspective of the concept were identical with the perspective of the symbol.

§2. Carl Schmitt's Concept of the Total State

In examining the reality of the state in which the expression *total state* can emerge as a forceful political symbol, we have the great advantage of finding the expression appearing for the first time in a theoretical-systematic context in a highly rationalized form in a work by Carl Schmitt.¹ Building on Ernst Jünger's phrase, "total

1. Carl Schmitt, *Der Hüter der Verfassung* (Tübingen, 1931), vol. 1 of *Beiträge zum öffentlichen Recht der Gegenwart*.

mobilization,"² Carl Schmitt contrasts the type of the total state with the "neutral" state that preceded it in time and finally traces a line of development, designed to be dialectical, leading from the absolute through the neutral to the total state with an internal lawfulness. The agent of this development is seen to be "society," which grew so strong in the absolute state that in the constitutional state it could advance to parliamentary representation, passing to the phase of self-organization into a state after the destruction of the old dynastic state authority. The line of development and the political configurations that emerge and follow in it are drawn by Carl Schmitt with his unique precision and persuasiveness as he presents political powers—we can find nothing immanent to correct in these and will merely point to the statement of facts that can be considered as characteristic of the type.

In the nineteenth century the two kinds of powers confronting each other, maintaining the structural tension of the neutral state, are, on the one hand, the monarchic military and bureaucratic state and, on the other, "society" as the paragon of all social forces not contained in the "state" (and perhaps not even in the church). The tension between "state" and "society" results from the continuing supremacy of the holder of absolute power, socially based on the nobility, and his military and administrative apparatus and the advance of a "society" constituted as an economic and cultural connection, gradually growing into the "state" from this historical position. It would be possible to put together a series of images in which this relationship was grasped in all its phases in German theories of the state, beginning with the coexistence of the two spheres with a minimum of intervention by one in the other and ending with the stage in which society takes complete possession of the state or abolishes it altogether. The series would have to begin with Wilhelm von Humboldt's effort to determine the limits of the state's function—the self-enclosed sphere of society, which depends on the state for its internal peaceful order and for protection against external forces, without allowing the state to intervene in society beyond this protective function and without society's being further interested in the state's self-enclosed organism. The pictures conceived by Kant and Schiller would have to come next: society

2. Ernst Jünger, "Die totale Mobilmachung," in *Krieg und Krieger*, ed. Ernst Jünger (Berlin, 1930); Ernst Jünger, *Der Arbeiter: Herrschaft und Gestalt* (Hamburg, 1932).

engaged in developing into an ideal final condition, in which it fuses with the state by removing the contradiction of morality and legality that necessitates the otherwise detested institution of the state; or society divided into a nucleus that has already achieved perfection, and the masses, which during this development will gradually become assimilated into the way of life of the elite. Then Lorenz von Stein's realistic concepts: the national-economic and the industrial societies. The national-economic society is understood along the lines of Hegel's definition of it as the human order resulting from the gainful employment of free and equal human beings. But Stein's concept is richer than the images of the German classical thinkers, since it already encompasses the political dynamics of society; it is no longer true that in an unending developmental process the state is dissolved at the end of time into a perfect society; rather, the national-economic society has taken over the state here and now, in the July Revolution of 1830 in France. The concept of the industrial society goes even further in its realism; to interpret events, it considers the split of society into bourgeoisie and workers. The contemporary problems of revolution are interpreted, not as political, but as "social"; the revolutions of 1848, the argument goes, are not political movements but the expression of an internal social split and can be understood only as the expression of this conflict. The respective constitutions are said to be the expression of social power relationships; the state of the July Revolution is the state of the bourgeoisie, and the future constitution will accordingly express the power of the new social class of the workers. This argument brings us close to the ideas of Karl Marx and the demand that the new class, which is becoming socially relevant, seize the state and rebuild it according to its own interests. We now confront the idea that the state be absorbed by society and become "total."

"Neutral" is the name Carl Schmitt gives to the state that acknowledges the authority of the social sphere and maintains a "largely neutral and noninterventionist" attitude toward it.³ A state becomes increasingly "total" to the degree that it turns into the "self-organization of society."⁴ The tension between state and society is lost, the national-political and the social-unpolitical are no longer separate spheres; instead, all spheres of human life in

3. Schmitt, *Hüter*, 73.

4. *Ibid.*, 78.

society acquire immediate political relevance. Parties are no longer significant as the representatives of special interests and intellectual trends within society but opposed to the state; because of their tendency to take over the state, they themselves become political. "In the state that has become the self-organization of society, there is, quite simply, nothing that is not at least potentially national and political."⁵ During the phase of its dissolution, the "neutral" state is replaced by the "party state"—the state in which ideological, economic, bureaucratic, and military organizations, firmly established, fight for possession of the state; such possession would enable them by "legal" means to accomplish their further goals, among them primarily the destruction of the opponent. Within each individual party the conditions characteristic of the total state have already largely become reality, conditions that arise when one of these warring organizations seizes the state and sees it as identical with the party.

The extension to all spheres of human existence, the abolition of the liberal separation and neutralization of such different areas as religion, economics, and education—in a word, everything that earlier was defined as the turn toward the "total"—is to some degree already realized for a part of the citizenry by some social organizational complexes, so that though we do not have a total state, we already have some social party formations striving toward totality, fully covering their membership from an early age. Each of these has, as Eduard Spranger put it, "a complete cultural program," and their coexistence forms and upholds the pluralistic state.⁶

Thus Carl Schmitt not only coined the concept of the total state but also forcefully rationalized it and placed it in a scientific context. He constructed the line of ideal and typical development for the progression of the forms of the state. The process itself is characterized as dialectical, because each of its phases contains the element that leads beyond it and makes the historical necessity of the immediately following phase comprehensible. If the monarchic military and bureaucratic state is given, and if, further, social forces within it are stirring that are essentially characterized as negative or as apolitical through their contrast to the state, the result is the process of change from absolute monarchy to the constitutional

5. *Ibid.*, 79.

6. *Ibid.*, 83–84.

state, in which the elements of the old governing state and the newly developing legislative state are mingled. After this the social powers give themselves firm organizations, and at the same time the authority of the military and bureaucratic monarchy weakens, leading to the abolition of the monarchic authority—which was neutral toward the social forces and their organizations—and to direct battles among the party organizations, that is, to the pluralistic party state. This struggle ends in the victory of one of the party organizations and the establishment of the total state. Not only is the line of progression masterfully elaborated to construct the type, but it also has the great advantage of building historically on German theories of the contrast between state and society, to analyze this cluster of theories, to bring it to a conclusion and to point to new ways to categorize the German problem of the state. In the context of Schmitt's ideas of the state, this concept acquires a justification we do not doubt, and independent of this context it has great truth value. In fact, it perfectly captures a truth content relevant to theories of the state.⁷

For various reasons we are nevertheless determined to go beyond this concept. Though Schmitt coined the concept of the total state, the word *total*, in another context, in the work of Ernst Jünger, had been given a semantic content that includes aspects that Carl Schmitt partly subordinates and partly omits altogether. Second, Schmitt's felicitous coinage gave rise to a political function of the expression that also goes beyond the systematic limits its creator drew around it. Third, Schmitt bases his concept on components of the current state reality that are not *essentially* grounded in the dialectical development he sees as ending in the total state but that *coincidentally* appear at this end stage and might just as easily have appeared, and may still appear, in situations where the development sketched by Schmitt does not occur. These aspects of reality are not then systematically incorporated in the developmental context of Schmitt's concept, although Schmitt treats them with uncommon thoroughness. And fourth, essential aspects of Schmitt's type appear in Western European national history in earlier periods,

7. See two works by Carl Schmitt: *Staatsgefüge und Zusammenbruch des zweiten Reiches* (1934), for an analysis of the contrast between the Prussian military state and bourgeois constitutional politics; and the earlier *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (1933), for new categories.

entirely unconnected with the unique content of the dialectical development from the absolute through the neutral to the total state.

§3. Economic and Political Phases of the Reality of the State (Lorenz von Stein, Maurice Hauriou)

We do not believe that we are mistaken in looking for the common ground of these theoretical flaws in the concept of the total state as developed by Schmitt in the fact that it is not enough of a scientific concept and too much a political symbol. The very property that secured for it such great political success limits its usefulness in the sphere of science. There can be no doubt that the antithesis of state and society is primarily caused by the political situation of the German constitutional state in the nineteenth century, and the concept of the total state is intended not only to define a current set of problems of the state in scientific categories but at the same time to furnish the fighting slogan for the dialectical closure and overcoming of the German constitutional-state antithesis. The limits of the objective relevance of this concept are set by the fact that in investigations of the European problem of the state in general and of the German one specifically, aspects must be considered that are in no way contained in the antithesis of state and society and their dialectical resolution by self-organization into a state. We gain a preliminary glimpse of such aspects when we contrast the assessment of a particular phase of the European revolution of the nineteenth century by Lorenz von Stein with that by a French political theorist, such as Maurice Hauriou.

Lorenz von Stein, to whom Carl Schmitt repeatedly refers, thinks within the conceptual area of state and society. A constitution is the expression of a specific order of social forces. The great Revolution of 1789 was, for him, the dispossession of the feudal class of French society and its replacement by a "national economic" society—a replacement that was effected in the battles of several decades and became final and definitive with the July Revolution of 1830. Now, however, it became apparent that through the Industrial Revolution, the national-economic society had become transformed into a class society and that the July Revolution could not bring about a final resolution but led to the new revolutionary era that culminated in the events of 1848. From the standpoint of social class formation and its embodiment in the state organization, Stein

views 1830 as the turning point, the year in which one phase ends and a new one begins.⁸ The history of the peoples of Europe in the present time is, Stein believed, social history and no longer political history. By removing the last feudal political remnants from the reality of the state, the July Revolution had made clear that the nature of the constitutional struggles was purely social.⁹

Maurice Hauriou's reading of the same period is completely different. For him, the revolutionary period of 1789 to 1875 is not a history of social movement but a time when *political* forces confronted each other. Two powers were struggling for the formation of the French state: the *gouvernement conventionnel*, which rises up in the periods of revolutionary attempts, and the directorial, consular, imperial, presidential power, which turns reactively against the revolutionary assemblies and makes an effort to strengthen "le pouvoir exécutif légué par l'ancienne monarchie" (the executive power devised by the former monarchy). In doing so, it relies directly on the plebiscitary approval of the people. In the compromise of these two powers—one of which, the national-revolutionary, tends to what we today call the total state, while the other strives for the creation of the sovereign and administrative authority—parliamentary systems develop as the respective final forms of a period of struggle. According to this concept, the power system of the state has principally nothing to do with questions of liberalism; the problem of liberalism appears only with the emergence of the question concerning the purpose of the state and the protection

8. Lorenz von Stein, *Geschichte der sozialen Bewegung in Frankreich*, ed. Gottfried Salomon, II, 11:

The July Revolution is, first, the act by which industrial society arrives at definitive rule in that the last remnants of feudal society are destroyed by it. If we recognize that this industrial society inevitably had to emerge from the first revolution and that it was this society that after 1795 daily became more and more established in its power and development under Napoleon as well as under the Restoration, then the July Revolution is the actual conclusion of the first revolution in this aspect. And to this extent it belongs to the history that begins in the middle of the previous century with the first theories about liberty and equality; it is the end point of that history. However, by bringing this social order of free acquisition to the fore in human society, it is also the point at which the contradiction inherent in this society begins. It is this society that first brings up the question of whether the idea of liberty is truly completed with this form, for which humanity has striven for a century; it is this order, therefore, which, second, marks the beginning of the real social movement.

9. Stein, *Geschichte der sozialen Bewegung*, II, 98.

of individual existence as expressed in material and intellectual *humanitas*. For the state as *political* phenomenon there are only the powers of the national substance, which strives for totality, and the authoritarian power structure, which is legitimized by plebiscite. The parliamentary system does not in principle have anything whatever to do with liberalism but comes into being through the compromise of total revolution and authoritarian order. In this view, French constitutional history can be divided into two great cycles, the one from 1789 to 1848 and the other from 1848 to the present. In the first cycle, the Jacobinic excesses are followed by executive-dictatorial excesses and the compromise of a constitutional monarchy. The second cycle, with the same excesses, which find their compromise, is still in existence, in the republic of 1875. The crucial point is the year 1848 because that year saw the resurgence of the Jacobin-revolutionary spirit, which had not been fully satisfied by the compromise of constitutional monarchy—the monarchy was "censitaire," it was "trop bourgeois," and it had failed to incorporate the masses of the people, who shared in the revolutionary will, into the parliamentary system by instituting universal suffrage.¹⁰

Contrasting the two ways of defining periods by Lorenz von Stein and Maurice Hauriou does not represent an attempt to label one "correct" and the other "false" (if for no other reason than that there are still quite other ways to subdivide this period) but is meant to show the very different elements of social structure that become relevant for the classification of the modern state. Stein, influenced by his concepts of state and society, stresses those factors in the French reality that agree with his two categories and neglects the others, which are primarily essential to the political order of power in France. Hauriou thinks in categories of French power and subordi-

10. Maurice Hauriou, *Précis de droit constitutionnel* (2nd ed., 1929), 293–331. See further the division into periods in Seignobos, *Histoire sincère de la nation française: Essai d'une histoire de l'évolution du peuple français* (Paris, 1933). Seignobos, like Hauriou, makes the division into two cycles and, again like Hauriou, subdivides each of them into the period of struggle from revolution to dictatorship and the following period of pacification. The periods of struggle are discussed under the titles "La révolution" and "L'introduction du suffrage universel"; the periods of pacification are given the titles "L'essai de la monarchie libérale" and "La république démocratique parlementaire."

On the current breakdown of the parliamentary regime and possible solutions, see André Tardieu, *L'heure de la décision* (Paris, 1933), and his essay "Réformer ou casser" in *Revue des deux mondes* (March 1, 1934).

nates to them the problems of economic positions and social groups, which, for the rest, are not denied. More than in Hauriou's work, the shifting of the basic political forces and extrapolitical structural elements becomes very evident in the above-mentioned *Histoire sincère* by Seignobos, whose deliberate methodology presents his political history on the basis of changes in the economic and social structure. This coincides on all essential points with Stein's description, though it uses the political category as the overriding structural category. None of these constructs is more correct than the others, but the fact that all can coexist points out the strong differentiation of the structure, which today is encompassed by the term "total," as a unit without sufficient differentiation of its separate elements. Thus, in a preliminary attempt to understand the concept "total state," we must distinguish between elements of the total state structure that are primarily determined by the economic structural changes and the consequent shifts in the way of life and the sentiments of many groups of people, and on the other hand, those elements that primarily arise from the emergence and disappearance of political substance.

§4. The Economic Element in the Reality of the Total State

We will begin with an attempt to isolate the economic element with the help of some references to the literature. The concepts Lorenz von Stein developed to discuss the communist movements in England and France of the 1830s and 1840s and the emergence of the proletariat remain valid for the current situation, as do those of Marx and Engels, because these concepts encapsulate the first symptom of totalitarianizing the social context in which we live today. The situation of the proletariat first revealed those traits in modern society that characterize today's overall social structure and that Carl Schmitt also included as essential factors in his concept of the total state. The essential characteristics of the proletarian type, developed in early European communism beginning with Babeuf and captured in Stein's and Marx's systems (we will address only those that become relevant to the problems under discussion), are the following:

1. the separation of the worker from his means of production, brought about by mechanical-technical conditions;

2. the resulting dependence of the worker's existence on the functioning of an operating context he himself is unable to influence;

3. the material and emotional threats to his existence from events in this sphere, which is outside his influence; the emergence of the "pauper" and the "destitute";

4. the resulting social-ethical shift of the industrial unit from a "private" to a "public" concern: the slow process of the economy becoming a "*res publica*."

These characteristics, which were originally ascribed to the life of the proletariat within its environment today apply to the entire population, with only minimal casuistic changes. The peculiar dependence on the larger organizational context caused by machine technology is found in the existence not only of workers in industry but of all workers who labor in a larger organizational context and are therefore separated from their "means of production" in the broader sense. With the extension of the type of industrial large enterprise and the emergence of a huge bureaucracy in the private sector, with the expansion of national administrative activity and the emergence of the public civil service required for these purposes, the social structure has seen the birth of the enormous categories of public and private employees who principally find themselves in the same typical position as manual workers, even though the arrangements for their protection against the threats arising from changes in the organization in which they work are significantly better. And finally, a similar situation applies to the huge mass of great and small enterprises whose existence depends on national measures that create the conditions for it—whether the enterprise is a small farm or a big industrial business, whose existence is supported by national tariff policy, import and quota policies, and the like. The pervasive dependence and interdependence of all individuals and public and private enterprises in the broadest sense deprivatizes these persons and enterprises and transforms them everywhere into the "public concern" [*öffentliche Sache*]; this is precisely the change that creates the "total" social structure within which the antithesis of public and private, of state and society, of political and unpolitical, daily loses ground.

The development of this totality out of economic structural change is excellently formulated by the encyclical *Quadragesimo anno*; its construction of types, based on economic questions, arrives at conceptual formulations quite similar to those that caused

Carl Schmitt to propose the concept of the total state. The encyclical deals with the question under the title of "Domination." More remarkable today than the concentration of capital, the encyclical notes, is the resulting concentration of power and economic authority to rule in the hands of a few. This accumulation of power (by which is principally meant the power of industrial and financial capital) generates three kinds of conflicts: a struggle for economic supremacy itself; second, a struggle for supremacy over the state, which itself is intended to be used as a power factor in the struggles of economic interests; and finally, a power struggle between states themselves. The first two instances of this struggle coincide most closely with Schmitt's types of the neutral and the party-pluralistic state, except that they are viewed from the economic aspect. The struggle is first waged in the social sphere, without touching the institution of the state itself; it then moves on, turning into the struggle for power over the state, with a view to using the state as an instrument of party interests. Though the third step has no parallel in Schmitt's typology, it does lead politically, as can be seen from the encyclical's further exposition, to the problems of the dependence of the state itself on the complexities of the world economy and the countermovement against this dependence, which we know by the name of *autarchy*.

The conclusions the encyclical draws from the fact of domination and the struggle for power over the state, however, lead directly to the area of domestic policies. While the problems of the conflicts among economic interests and the formation of political substance combine in the concept of the pluralistic party state, the encyclical superbly isolates the question of the economic conflict and its significance for the state authority: "To these are to be added the grave evils that have resulted from an intermingling and shameful confusion of the functions and duties of public authority and those of the economic sphere, such as—we will mention one of the worst—the virtual degradation of the majesty of the State, which although it ought to sit on high like a queen and supreme arbiter, free from all partiality and intent upon the one common good and justice, has become a slave, surrendered and delivered to the passions and greed of men." The forward push of "society" into the realm of the state, the so-called "self-organization of society," leads politically to the question of state authority—the authority that must exist if a state is to exist. The authority of the state,

which in Schmitt's dialectical line of development appears in the neutral state as the antithesis to society, is here posited as a basic demand, which is to be met practically and politically anew when the economic process has eroded the old authority to such an extent that by virtue of its movement the state has become "total" in the sense that it has become integrated into the interdependent context of the "dominated" economy.¹¹

After having thus pointed to some attempts to approach the problem of "totality" based on structure of the economy, we are now able to formulate with greater systematic precision the type element involved here. The strongly political symbolic expressions of "society," of "economic" and "industrial" society, of "social movement," of "proletariat," of "domination," and the like, may in part be roughly translated into the following scholarly concepts. During the nineteenth century the type of economic context on which the classical systems of national economics focused underwent a consistently unidirectional change. The amorphous field of independent economic subjects that, being essentially private, are brought into a structured [*gestaltlich*] relation by the phenomenon of the social division of labor is fundamentally and structurally altered by the growth—first slow, then increasingly rapid—of units of action [*Handlungseinheiten*] more powerful than the individual. The prerequisites for the ideas of laissez-faire and free competition of individuals is the belief, based on classical mechanics, that a balance of power must of necessity result when each element of

11. On classifications of the situation of the proletariat, see Lorenz von Stein, *Geschichte der sozialen Bewegung in Frankreich*, II, 55–99, as well as Babeuf, *La Doctrine des Egaux: Extraits des œuvres complètes*, ed. Albert Thomas, Bibliothèque socialiste, no. 37 (Paris, 1906), and the writings of Marx and Engels.

On the problem of domination, see the encyclical "Quadragesimo anno," in *Die sozialen Rundschreiben Leos XIII and Pius XI*, ed. Gustav Gundlach, pp. 125, 127. On the question of the general population's entry into the situation of the worker see Ernst Jünger, *Arbeiter*. In addition, see Jules Romain, *Problèmes européens* (Paris, 1933), specifically the essay "De la misère à la dictature" and "La crise du Marxisme." See also Carl Schmitt's comprehensive discussion of the problem of economic totality in *Die Hüter der Verfassung* (1931), 80ff. See also the specialized monograph based on Schmitt's formulations: Ernst Rudolf Huber, *Die Gestalt des deutschen Sozialismus* (1934).

For a critique of Schmitt's concept of the total state and the line of development he completes, from the point of view that he ignores the newly raised problem of authority, see Heinz O. Ziegler, *Autoritärer oder totaler Staat* (1932).

On the process of the legitimate authority becoming dissolved in the pluralistic party state, see the exemplary analysis in Carl Schmitt, *Legalität and Legitimität* (1932).

the field of force moves according to the laws of its own weight. This idea assumes an identical power of all the elements that are intended to be brought into harmonious equilibrium and an automatically balanced relationship. The liberal idea of Locke, for example, takes its direction from the image of the settlement of America by pioneers, each of whom, relying on his own ability to work and that of his family, was to form the unit of the economic field of force. "In the beginning, the whole world was America"—this is the formula that articulates the timeless ideal beginning phase of the interdependence of units based on the division of labor; these units are so "private" that the question of the power organization of this context has only secondary meaning. From the political point of view, the field of forces is anarchic, not because it lacks the appearance of power—after all, each unit in this field is a power center—but because it lacks the appearance of "predominance" that would disturb the power balance and thus introduce moral problems not given in Locke's natural state of the private coexistence of equally powerful individuals.

If we take this speculation on natural right not as such but as the ideal type, then it is an excellent instrument with which to gauge, in the sense of Max Weber, how much reality deviates from it. Each intrusion of supremacy into the field of equal forces, which for Locke is given by institution of money (understood as a durable good with exchange value in a human society), must disturb the natural state and give rise to problems of dependency to a greater or lesser degree. Even the interdependence of the division of labor with a barter system for a total commodity supply is a system of dependency relations when compared with the natural state, containing the elements of the separation of each individual engaged in economic activity from the goods he requires to maintain his existence. A comprehensive casuistry, which need not concern us here, would describe the steps and forms of the dependency relations whose significance is increasingly the dependence of individual existence on processes in communal life—processes that escape immediate control on the part of individual existence. Each step away from the anarchic pioneer community is a step toward greater precariousness of the individual existence by placing it at the mercy of overall context of a society in which the division of labor prevails. Each further distancing from the ideal beginning of the pioneer, who secures his existence on his own soil with his own powers, at the

mercy of external nature and the weakening of his personal powers, at the same time leads to his incorporation into a social power structure, in which the individual occupies a higher or lower position, depending on the nature and extent of his means of production. In this casuistry the only questions are those of the degree of dependence and power relationships, which reveal the total dependence of each individual on a total context similar to a communist planned economy, as the polar opposite to Locke's state of nature. Locke's state of nature as an anarchic field of equal forces that are dependent only on themselves and nature but not on social forces, and the total supremacy of a social organization to which each individual is subject without question are the ideal end points of a series along which the entirety of a social-existential problems can be casuistically arranged. Phenomena such as the proletarian situation in the first third of the nineteenth century become important in this series as symptoms and stages of a process aimed toward the increasing "domination" of society. In this context "totality" means a high degree of "domination"—that is, the presence of "dominant" formations in the social structure, be they of a "private" or a "public" nature; it is against this that the great mass of all people in society live their lives in the more or less radical situation of "subjection." In ethical-political terms, the process means that the existence of the individual increasingly turns from a problem of private ethics into a problem of public ethics. Seen politically, the problems of the welfare state result. Then again, between the polar opposites of radical independence and radical incorporation lies the entire series of situations whose social-ethical problems are determined by the power relations between those involved. The specific meaning of "neutrality" is abstention from intervention in a conflict between equally important powers, with the assumption that such a conflict acquires its peculiar legitimacy precisely from this equilibrium. To the degree that the conflicting powers are unequal, the nonintervention of a third power potentially capable of intervening can become an act of intervention in favor of the stronger power. The "neutrality" of a power organized by individuals or superindividually becomes less and less possible on the moral plane the more the separate powers of a specific social field of force are different and nonintervention becomes equivalent to intervention. The differentiation in power within a social context deprivatizes the separate power centers because each of these centers, whether individual or su-

perindividual, is increasingly placed under the pressure of accountability for social processes taking place outside its proper sphere; or the "proper" sphere is expanded more and more until it reaches its maximum: coincidence with the sphere of the total context. The individual subject is pressured by the obligation of solidarity toward others who find themselves in the same situation; the attempt at privatization appears as "sabotage" or "betrayal" when measured against this obligation. (Today the joint liability of all individuals for the actions of the collective is not yet equally clear; nevertheless, the domestic struggles of recent years would lead us to suspect a future institution of this sort.) In the same way, the superior center is placed under the pressure of accountability both for its inactions and its actions. The "totality" of the context can also be understood both as the destruction of the independent "private" sector by the claims of social responsibility and as the expansion of the "individual" sector into the total context.¹² But the prerequisite for this entire cluster of problems is the existence of a social context experienced as obligatory, within which the phenomena of differentiation of power and domination occur. And with this, we touch on the borderline at which the questions of total economic power pass over into the questions of political totality in the narrower sense.

§5. The Averroist Factor in Speculations on Totality

The comparison of the historical constructs by Lorenz von Stein and Maurice Hauriou has demonstrated that political events may be classified based on the process of domination or they may be incorporated in political cycles with quite different dynamics. But the area of the political in the narrower sense, which we will now enter, has an internal structure that is by no means homogeneous but once more richly structured, so that it is not possible to repeat the comparatively simple observation under ideal types at opposite poles, with an interpolated casuistry. We will begin by singling out

12. See Ernst Jünger, *Der Arbeiter: Herrschaft und Gestalt* (Hamburg, 1932). The work contains the most profound insights into the question of the total community context as affected by developing technology and the way of life technology enforces. If we refer to this outstanding work only summarily, in a note, it is because Jünger's concepts, placed in the service of the metaphysics of a new type of human being, cannot be incorporated into our context without extensive explanations.

a phenomenon that attracts attention today especially because it is most clearly related to the increasing process of domination in certain totalitarian phenomena. This is the permeation of people in a shared social context with a common idea, a common spiritual and intellectual outlook—the totality of ideology. Wherever a theory has been applied to this element of the totality, it led to the formation of theories of surprising uniformity. This uniformity is due to the fact that the theory was forced in part to adapt to an a priori speculative construction. We will point to Ernst Rudolf Huber's remarkable discussion of totalitarianism in the *völkisch* state as, so far, the best German effort to arrive at a theory of the totality of the idea in a social context.¹³ In this essay Huber expresses the opinion that the basis of any genuine totality is an all-encompassing and pervasive political idea and that any genuine total state is upheld by such a universally binding idea. The National Socialist total idea, in his view, is that of the political *Volk*. This idea has the status of a twofold reality: First, it is "an objective, historical law of life, an unalterable historical mission"; it has "suprapersonal existence," is "objective mind" in Hegel's sense of the word, is "mind and will of the people in the sense of German idealism and romanticism." Second, it is "subjective mind" and resides in each individual's personal consciousness; it "pervades everything that happens in the *Volk*—and it does so not by force from the outside, but intellectually and spiritually from the inside." "It is not content with external adaptation and coordination but, wherever it prevails, proceeds to a change of essence and substance."

It will be hardly possible to find a difference in meaning between these formulations and, for example, the words Mussolini used to describe the fascist state and the way it is realized in individuals. For Mussolini, fascism is a religious idea, in which men are placed in relation to a suprapersonal being, to a *volontá obgettiva*. The fascist state is a spiritual force, which pervades all of human moral and intellectual life. It is therefore not limited to the functions of order and protection, like the liberal state; rather, the fascist state is the inner form and discipline of the total person [*Gesamtperson*]; it permeates the will and the intellect. It is the inspiration of the human person living in community; it sinks to its depths and

13. Ernst Rudolf Huber, "Die Totalität des völkischen Staates," *Die Tat*, XXVI, No. 1 (1934), 30-42.

nestles in the hearts not only of active men but also of thinkers, artists, and scholars. It is the *anima dell'anima*. For the Fascist, everything is within the state; nothing can have value that exists outside it: "In tal senso il fascismo è totalitario" [In this sense, fascism is totalitarian].¹⁴

The astonishing coincidence between the German and the Italian theoretical versions, each claiming that its formulations have grasped the innermost essence of the National Socialist and Fascist total idea respectively, becomes less astonishing when we realize that nothing essential connects these formulations with the Fascist and National Socialist state—not even with any state at all. Instead, they represent a possible theoretical construction of the relationship between the individual and the supra-individual community that can be applied to *every* concrete community. The problem of the relationship of man in his substantial individuality to the substance of an all-encompassing entity allows for different solutions. The one often chosen by preference today—associated with the name of Averroes—stipulates that the objective idea is distributed among all men or pervades the present population and is assimilated into its substance or in which individuals are splinters of the entity or in some formulation or other are intended to be entirely identical in substance with the entity.¹⁵ We need not examine the difficulties of this question in detail here, since today's political speculations hardly attain the degree of penetrating the object at which the problems first become obvious; we may find it sufficient to refer to the Averroist solution as fundamental to the problem of the communal substance and the individual-personal substance. It has no essential connection with the further problem of the total state but only an accidental one to the extent that it is a more suitable instrument than any other for the one will, which aims to take hold of people all the way to the ground of their personality. The fact that it appears in such similar formulations in contemporary German and Italian thought may be traced back to the circumstance that the derivation of the theories of the national spirit (*Volksgeistlehren*) of German

14. Benito Mussolini, *La Dottrina del Fascismo*, Biblioteca della Enciclopedia Italiana, I (1933). On the meaning of the word *totalitario*, see also Giovanni Gentile, *Origini e dottrina del Fascismo*, Quaderni dell'Istituto nazionale fascista di cultura, (3rd ed., rev. and expanded; Rome, 1934).

15. For a discussion of this solution, see Thomas Aquinas, *Summa Theologica*, Pars prima, Qu. LXXVI, Art. II.

idealism, to which Huber refers, is probably just as valid for Italian thought. Its political and community philosophy, most particularly that of Kant and Hegel, if it is characterized by anything, bears the trait of Averroism.

§6. State and *Volk* as Total Substances (Fascism and National Socialism)

It is therefore impossible to characterize the total state in general on the basis of the element of "totality," which is nothing more than a speculative formulation of the relationship between individual and community in general.¹⁶ Nor is it possible on this basis to distinguish it from other social organizations or to set the reality of a specific total state apart from other efforts at totality, as Huber attempts to do. The differences between total states become clear only when the substance of the idea that utterly permeates its individuals is given a name and thus a new element of political reality is introduced to characterize the total state in question. By naming such a further element in his previously cited essay, Huber now has hit on an extremely essential point, in which various European historical national constructs—though not all of them are total states—differ very significantly from each other. Huber identifies the *people in the political sense* as the content of the National Socialist idea; on the other hand, he continues, in the Fascist doctrine the *state* is the content of the idea. Trenchant though such a distinction is, it raises more new problems than it solves. The reason is quite evident: no matter how the reality of the modern European state is reflected in political symbols, it is nevertheless arranged in a total structure that in every case includes certain basic elements. Among them we may note: (1) the people (*Volk*) as the prepolitical context of an association of neighbors and marriage partners, sharing a common culture; (2) the people as a related arrangement of working groups—the people that can be organized according to classes, corporations, trade unions,

16. We are here speaking of this solution as a speculation on the relations between individual and society, but the same problems, with related possibilities for solutions, has a much wider sphere of application even in the stages of subhuman existence—animal and plant life. The relation of the human-individual substance to the suprahuman general substance is a special case of the general problem of universality and the reality status of the universalities in relation to the individual.

cooperatives, and the like; (3) the people as a political entity of will [*Willenseinheit*] that, as such, develops the agencies of its political existence, the state institutions; (4) the political leadership, with the authority peculiar to it, such as nobility, governing class, and elites belonging to various associations. None of these elements may be omitted from the political symbolic system of a state that in actuality contains these structural elements; the only possible difference that can distinguish one system of symbols from another lies in emphasis. So we see that Huber's classification, with its simplistic contrast of the totality of the people in the political sense and the totality of the state-national idea cannot possibly be correct and requires further refinement. Empirically, it does in fact turn out that the difference in ideas cited by Huber must be derived from different evaluations of the emphasis in each case, for in general the same elements are found in both symbolic systems. The frequently cited passage from Mussolini's *Dottrina* that Huber also refers to as characteristic—"The nation does not produce the state. . . . Rather, the nation is created by the state"—is no doubt extremely significant, but it does not exhaust Mussolini's system of ideas. The idea of the nation produced by the state is accompanied by a theory of the people [*Volk*] that in its formulations does not significantly differ from any theory that can be called national-socialistic. Nation and people are not identical in the idea of Fascism. The nation is the "will," the "*effettiva esistenza*" [real existence] of a people, a "*coscienza attiva*" [active conscience], "*una volontà politica in atto*" [a political will in action], a "*realtà etica*" [ethical reality]. It is given to the people by the state, but it is not the people. This people, on the other hand, can possess "*una letteratura e ideale coscienza del proprio essere*" [a literature and ideal consciousness of its own being] without the state or before its development; as against the state activation, it is "*una situazione di fatto più o meno inconsapevole e inerte*" [a factual situation more or less unconscious and inert]. The state has certain protective functions toward this prepolitical people; the state is "*il custode e il trasmettitore dello spirito del popolo così come fu nei secoli elaborato nella lingua, nel costume, nella fede*" [the custodian and transmitter of the genius of the people the way it was elaborated through the centuries in the language, custom, and faith]. And this prepolitical nation, the "*spirito del popolo*," the genius of the people [*Volksggeist*], is also the origin, the source, by which the leadership

of the Fascist state is legitimized, since the genius of the people becomes concrete in the consciousness and will of a few, the elite, in the will of a single individual. And the genius of the people that erupts here is now eagerly actualized further in the consciousness and will of the many. Mussolini places particular stress on the historicity of the Fascist idea; it is not an external compulsion, intent on newly creating the nation from above, but the eruption of the true genius of the people in the elite. This is the source of the strongly traditionalist trait in fascism—the high value it places on historical traditions, language, mores, and customs in the various social groups.

For each of these elements of Mussolini's *Dottrina* Huber supplies an equivalent that he regards as specifically National Socialist. Though he does not use the term *nation* to distinguish the political entity of will from the prepolitical *Volk*, Huber too feels it necessary to separate the "political *Volk*"¹⁷ from the "*Volk* of the multitude [*Vielheit*]." In this distinction, the *Volk* of the multitude defines the concept of *Volk* that we cited above as the second—the *Volk* as the interconnection of working groups. The "political *Volk*," on the other hand, is a particularity, a concretion of the phenomenon of the prepolitical *Volk* and the *Volk* that is politically united by will—the nation. For he sees the "political *Volk*" both as the genius of a people in the sense used by Herder and the Romantics, the "spirito del popolo" of Mussolini, and as the unity of action and consciousness of a mission. Since the concept encompasses both elements of the definition, as the description of the people is expanded, the *Volk* can be defined as "the original element of total political existence," as "origin and substance of the state," and as "embodiment of total political events." In spite of this "primitivity [*Urständigkeit*] of the *Volk*" and its "permanent existence" (in contrast to its unity in a non-*völkisch* state, which occurs only occasionally, in situations of crisis), however, the further process of actualizing the political entity must be described in the very same formulations that caused Mussolini to differentiate between the *Volk* as the politically inert configuration and the nation as the *Volk* politically activated by

17. Referring for this term to the essay by Hans Freyer, *Der politische Begriff des Volkes*, Kieler Vorträge über Volkstum- und Grenzlandfragen und den nordisch-baltischen Raum, No. 4 (1933), seems to me not entirely justified. Freyer's concept of the political *Volk* cuts through the entire set of problems raised here and moves in the direction of historical-metaphysical questions.

the leadership. For the political entity of the *Volk* is brought about by the movement and its leader, who—precisely as is the case with Mussolini—derives the legitimacy of his position from the fact that in his person he is the revelation and embodiment of the genius of the people; this point forms the center of the will on which the political entity is built. “The leader is pervaded by the idea; it acts through him. . . . In him the spirit of the people is realized and the will of the *Volk* is formed. . . . He is the representative of the *Volk* . . . in the genuine sense, in that he incorporates and represents the *völkisch* entity.” At this point, the structure of his speculation forces Huber to distinguish between the existence of the *Volk* as prepersonal, not yet capable of acting, and therefore prepolitical, and the “effetiva esistenza.” He writes, “Through the leader, the dull sense of the masses is changed into the conscious spirit of the *Volk*, mass striving is reshaped into the will of the *Volk*.” And on the question of legitimation he notes, “The leader gains the internal justification for his actions from his immediate congruence with the being of the *Volk*. The rule he exerts, because it is grounded in the idea and being of the *Volk*, is based neither on naked force nor on pure legality; rather, it possesses legitimacy and authority.” Finally, in describing the achievements of the leader and the movement, Huber completely abandons his formulation of the “primitivity” of the *Volk* and creates new formulations, opposed to the earlier radical statements, which are almost identical with Mussolini’s oft-quoted statement of the state that creates the nation: “The movement . . . has the mission of shaping the people of the multitudes into the people of unity, into the political people”; it is a political order, “which actualizes the people and leads it from within.”

This comparison and the discussion of the parallelism of the systems is not intended either to degrade the significance of the differences or to label Huber’s disquisition contradictory. On the contrary: Huber’s treatise is a model of conscientious political speculation; the contradictions are merely the result of the fact that he transferred the symbols of political reality into the realm of scientific analysis without any change in the terms. Surely it has become clear that the construct of both situations demonstrates the same elements: the political formation of a *Volk* through a leader and a movement, both of them utilizing the state apparatus for this purpose. But the shifts in emphasis remain in force: in the Italian system, the primacy of the state; in the German system, the primacy of the *Volk*. I believe that the difficulties in constructing

the system that result from including questions of emphasis become more evident in Huber's treatise than in Mussolini's *Dottrina* because Huber, a theoretician, proceeds more logically and neatly than does the politician. In Huber's work they become apparent in the equivocation of the political *Volk* as an entity of will actualized by the leader and the prepolitical *Volk* as the genius of a people that is made flesh in the leader, so that the "political *Volk*" is both "primitive"—preexistent—and nonexistent, waiting to be created. In Mussolini we find an equivocation that is equivalent within the system, except that it is more deeply concealed in the formulations, when the political nation created by the state is identified more or less clearly with the state that preexists the former as an institution and is supposed to create the political nation.¹⁸ We therefore believe that the problem of the total state can be presented on this level with flawless science if such expressions as "lo Stato" and "the *Volk*" are not adapted by scientific language in their political symbolic wealth but if the parallel structural elements are separated from the symbolic emphases in which a situation of political struggle is reflected. Only if we insist on this differentiation will we, as originally noted, be able to adequately grasp the significance of the situation; it must remain concealed from us if we accept political symbols into the scientific context without translating them into the language of science. There's no help for it: science and politics are simply not identical.

§7. The Substances as Symbols in the Situation of Struggle

In *Dottrina*, Mussolini occasionally indicates how the situational value of the symbols is to be interpreted; he does so when he speaks of the reason why today (in Italy) it is not the idea of the people but the idea of the state that must be overemphasized. He argues against

18. See the following formulations in Mussolini: "Questa personalità superiore è bensì nazione in quanto è Stato" [This superior personality is rather a nation *qua* state]. And: "La nazione come Stato è una realtà etica che esiste e vive in quanto si sviluppa" [The nation *qua* state is an ethical reality that exists and lives as it develops]. The identification becomes clear when the nation is described as "volontà di esistenza e di potenza: coscienza di sé, personalità" [will to existence and power: consciousness of itself, personality], and when at the same time it is said of the Fascist state that it is "forma più alta e potente della personalità, è forza, ma spirituale" [the highest and most powerful form of personality, (it) is force, but a spiritual one].

the national idea of the nineteenth century, which advocates the primacy of the nation over the state, because, in Mussolini's view, it has fulfilled its historical function. For him the national idea has its situational value in the struggle against the absolute dynastic state; it is in opposition to the dynastic state's system of legitimation that the nation must assert itself as the source that legitimates the predominance of the state. Mussolini's view is quite easily supported by the history of Italian political movements and the ideas of the Risorgimento. Mazzini's ideas contain essentially the same elements as fascism;¹⁹ the only difference is in the emphasis appropriate to the situation. The wording of the oath sworn by Giovine Italia, for example, expresses the belief that God had willed the birth of the political nation (which does not yet exist in Italy) and that for that purpose He had also created the forces needed for Italy to become a nation and a state: "Il Popolo è depositario di quelle forze" [The Nation is the depository of these forces]. For Mazzini, there is a people as the source of strength, but not yet a nation—it must first be created by the means of *educazione* and *insurrezione* under the leadership of a fighting organization, namely, Giovine Italia. Here, then, nation and state are still completely in the background, giving way to the people and the revolutionary movement as elements of the political position. In its situation the movement is anti-dynastic, republican, contractual by natural right, and intent on establishing the sovereignty of the future nation as opposed to the sovereignty of the prince. This historical function, however, Mussolini argues, is exhausted "da quando lo Stato si è trasformato nella stessa coscienza e volontà popolare" [from the moment that the state has become transformed in the consciousness of itself and the will of the people]. The state is no longer the state of the prince against whom the nation must prevail; rather, it has become the state of the nation, and if this new situation is to avoid falling into anarchy, it requires a new consolidation of state authority; the state, not the people, is the symbol of the new political situation.

These reflections on the situational value of the symbols, and particularly on the restoration of state authority as opposed to the populist symbols of the nineteenth century, must make it abundantly clear that a similar problem will be found in the National

19. Concerning the fundamental idea of "Pensiero ed Azione," see especially Giovanni Gentile, *Origini e dottrina del Fascismo*, 12.

Socialist system of ideas as well. The restoration of state authority after a period when it was called into question is an inexorable necessity for the effectiveness of any state. And in returning once more to such a conscientious study as Huber's, we will therefore not be surprised to find formulations in the concluding section that come extraordinarily close to the state symbolism of Fascism. "The final meaning of the total state," Huber writes, "is the unity of *Volk* and state. . . . *Volk* and state are one, just as essence and form, content and shape, are two modes of one and the same substance. Because of this inextricable connection of the nature of *Volk* and state, the political totality cannot be exhausted in the totality of the idea, of the *Volk* or of the movement, but must culminate in the totality of the state. Without the totality of the ruling order there can be no genuine political idea and no real unity of the *Volk*." Thus, state and *Volk* are identical in substance; one distinguishes between them only as between content and form of an object. Beside the symbol of the *Volk*, though admittedly in second place, we find the symbol of the state.

By making these distinctions, we have come significantly closer to the problem of totality. First, it appears that the question of the total inclusion of the individual in the idea—that of the state or that of the *Volk*—is a question of the speculative construction of the relationship between the individual and the supra-individual entity of the community. In general, the proposed solution to this problem was Averroistic (we cannot here address the deeper grounds in European history of society and religion that make this solution crucial today). Second, it became clear that the content(s) of the total idea is determined by the political symbols required for the situation of struggle. In Fascism, this is the tendency to push the people [*Volk*] into the background in favor of the state symbol. In National Socialism, it is the trend to place the state behind the symbol of the *Volk*.

§8. The Historical Significance of the Symbols

Before continuing our analysis of traits, we must devote at least a few clarifying sentences to the process that has brought us this far and will now take us further. Mussolini's remarks have called attention to the fact that the political symbols around which a rationalization of the respective types of political existence is attempted are by no means an adequate theoretical description of the

political structure; instead, they are added to the structure, serving as further reality elements. The basic construct of the genius of the people, arrangement into working groups, political *Volk*, leading elite, and state institutions may remain relatively constant, while the symbols, corresponding to the respective situation, change very significantly, producing shifts in the emphasis by which the structural elements are evaluated. These shifts then also manifest themselves in the reality of the structure in the different emphasis placed on the elements in their interrelationships. If the theories with which we began state that society is progressing toward self-organization, absorbing the state, this is not, of course, meant as a realistic description, with the meaning that society and the state or the state and society were arriving at a point where they become congruent—given such a formulation, we are totally unable to imagine anything in the reality of the state. Rather, the statement means that the ruling class within the state is losing its authority and that following a longer or shorter transitional phase, in which this loss of authority is expressed in the national leadership's strong inclination to be influenced by other social powers, a new ruling class with its own authority emerges. This new elite, in turn, faces other social groups that are relatively apolitical—that is, groups whose particular influence on the will of the state leadership is relatively slight. Neither the state and its leadership nor the working groups in society have disappeared—on the contrary, they are more markedly distinguished from each other than before, even though their form, in part even their personnel, and their interrelationships may have undergone considerable changes. Further, as a result of the fundamental structural uniformity of the modern states, which persists despite their simultaneously very different sets of symbols and different emphases on the structural elements in their interrelationships, an essential part of the respective total reality can be interpreted from the historical ranking of the elements and their consequent significance in the situation. Surely it is clear that the proportions of the political realities are different when a state makes the transition from dynastic state authority to one that takes its legitimacy from other sources in the eighteenth century than when that transition occurs in the twentieth century. Clearly, it is not the same whether the dynastic state authority over a *Volk* and a territory has been consolidated and has prevailed in the course of half a millennium or whether it is not until the

nineteenth century that in relation to a territorial principality it finds itself in a situation that was abolished in England and France in the sixteenth century. The idea of *Volk* is different when the *Volk* arrives at consciousness of its political unity and ability to act under the impact of the eighteenth-century idea of personality rather than achieving that condition under the influence of the collectivist and race ideas of the nineteenth and twentieth centuries, and so on. From these situations, cited as examples, we believe it follows that we cannot develop a state type such as the total state or the authoritarian state without including questions of the historical significance of the elements. It further follows that in our opinion the formation of types by listing traits in a static cross section of political existence is altogether impossible. Any attempt at such a classification brings up the difficulties Huber fell prey to in his essay, analyzed above. It further seems to us impossible to characterize certain cross-sectional types as "typically German" or "typically French" features. Perhaps it would be possible to wrest the basis for the definition "German," "French," "Italian," and the like from the historical structure of the process that produces a state, but certainly it cannot be done through the construction of types in which the historical significance of elements and symbols is not manifest or only insufficiently so. We must therefore take great care to contrast, say, a "German" concept of *Volk* with a "Romance" concept of nation if such adjectives are to be understood as anything but a convenient designation for the geographic and ethnic site of particular political ideas and concepts. We wish to provide two further examples, which will also advance our material analysis, to show that certain ideas that today are perceived as peculiarly German can also be decisive in other political contexts, but those ideas are overlooked in the German view of said contexts because such images are not primarily scientific but serve as political symbols.

§9. The Relative Emphasis Placed on the Elements in the Overall Picture of the State. I: The French Race Idea (Hauriou, Martial)

The first example to be cited is the class analysis of the foundation of *Volk* and nation carried out by Maurice Hauriou.²⁰ For Hauriou,

20. Maurice Hauriou, *Précis de droit constitutionnel* (2nd ed., 1929), 80ff.

territory is the basis for the formation of a nation. Only when nomadic tribes settle an unclaimed territory or conquer a settled area and establish themselves there will the tie to the territory and the countryside initiate the process of deeper neighborly involvement and interdependency, a process that must precede any formation of an ethnic unity in a particular territory. But not every settlement or conquest of this sort will automatically grow into a state-shaping *Volks*; the process, Hauriou argues, is possible only in the presence of a core of a homogeneous *race* that is also quantitatively able to prevail biologically and spiritually. There must be a "population core" that is sufficiently marked physically and mentally to assimilate whatever populations are found in the area and, later, immigrating groups and individuals. Further, the assimilation must proceed in such a way that the core group determines the nature of the resulting mixture. Further strata of the entity may then develop on this racially determined basis, with particular attention to language and religion. The growing structure is given its spiritual power by the shared history on a particular territory. Community of soil and blood, mental traits, language, religion, and history, and the consequent community of life, interests, and customs are the preconditions for the gradual emergence of a "communion spirituelle"—the nation, which achieves consciousness as such and compels organization in the form of state institutions. A monograph by René Martial²¹ clearly shows that this theory is not an isolated phenomenon in France. The objective of Martial's work was to trace the racial composition of the French people throughout history, with a special view to the question of which foreign elements could still be absorbed in the French national context in the future because they are particularly well adapted to assimilation into the French racial core.

This theory of the nation is closely akin to the German theories. Blood and soil as the foundations of *völkisch* existence; a racial core that determines the physical and mental character of the nation; that predominates even in the mixed-race groups and shapes the foreign elements according to its own image, physically and mentally; a racial policy intent on determining which foreign nationalities are to be admitted because on average they more closely resemble the French racial core than others (these latter are therefore

21. René Martial, *La Race française* (Paris, 1934).

to be excluded); laments about the flight from the countryside and the depopulation of certain rural districts; the lament about the destructive influence of the cities on the people; the call for new settlements in farm country; the struggle against materialism, which leads to a reduction in the number of children; and the like: We find all these elements in French as well as in German theories of the nation. Moreover, there are historical studies like the one we mentioned by Martial, that give an overall picture of the race components of the French people after its entry into the historical process. But although there is a French race theory and even a very distinct race consciousness in this theory, when it comes to the homogeneity of the racial core as the basis for the unity of the nation as a spiritual entity, theory and consciousness nevertheless occupy a position very different from the one they have in German political thought. French race theory is *realistic*—it recognizes the real connection between racial structure and the higher stage of intellectual and political elements of ethnic and national existence, but it does not elevate these elements to the *symbolic* and ideological level. There is a knowledge of the significance of blood, but no myth of blood. Symbolism distributes its emphases differently. No matter how clearly the dangers arising from an admixture of alien blood are seen, and no matter how strong the determination to avoid them, what prevails here is a great serenity based on the awareness of an underlying Gallo-Roman history that, in the course of two thousand years, absorbed the Franks as well as the Normans and the Arabs and can absorb many others, allowing them to contribute as ferment to the unity of the French mind. The feeling of an uninterrupted historical connection between the original racial stratum and the Mediterranean cultural area causes a writer such as Martial to speak of France as an Islamic power—with a sense not of alienation but of pride in France.

§10. The Relative Emphasis of the Elements in the Overall Image of the State. II: The French Idea of the People (Rousseau)

As a second example of the misunderstandings that come about when political symbolic images are mistaken for perceptions of reality we may be allowed a few short references to Rousseau, whom many treat so shabbily today. Depending on the observer's

particular dislikes, Rousseau is seen as a democrat, an individualist, a pioneer of the great revolution, a liberal, a rationalist, a man of the Enlightenment, a theoretician of contracts, an atomist, a mechanist, a destructive spirit—in short, the proverbial bad guy.²² Those who so freely claim these traits may be less familiar with the twelfth chapter in Book II of the *Contrat social*. There Rousseau establishes the four types of laws essential to the total structure of the “chose publique.” The first is the political law, by which the form of the state is given—this and only this law is the one Rousseau discusses in the *Contrat social*. The second and third laws are the civil and the penal law. And as a fourth, Rousseau introduces a law that is no more the subject of the *Contrat social* than are the second and the third. This law Rousseau calls “la plus importante de toutes” [the most important of all], a law “that is not etched in marble or bronze but in the hearts of the citizens”; the law that is “the true constitution of the state,” that gains new strength with each day and rejuvenates and revives the other laws when they have become old and weak; the law that preserves a people in the spirit of its institutions; “les moeurs, les coutumes, et surtout l’opinion” [the manners, customs, and, above all, opinion]. Rousseau’s works in concrete constitutional policy reveal the more specific meaning of this “law.” The constitution for Corsica contains the following statements. In order to draft a plan for a constitution, “one must first know the national character of the people that is to be subjected to a ruler; and if it were to have none, it must be given one. A man who does not, as it were, wear the uniform of his country in his soul cannot be a good citizen or a good subject; and a law must not render what all laws in the world have in common but what

22. Justice, however, requires us to note that the grotesquely distorted picture of Rousseau did not first emerge in the present day, nor is it by any means an exclusively German picture. Such an outstanding historian as Renan gives us the following remarks on the constitutional work of the Revolution: “Mais la fausse politique de Rousseau l’emporta. On voulut faire une constitution *a priori*” [But he let himself be carried away by his false politics. What was intended was the creation of an *a priori* constitution]. Nothing was further from Rousseau’s mind; furthermore, his influence on the National Assembly is questionable indeed. The constructive unrealistic element in its constitutional policy probably has quite other roots. See Eric Voegelin, “Der Sinn der Erklärung der Menschen- und Bürgerrechte von 1789,” *Zeitschrift für öffentliches Recht*, VIII (1928). Even a formula such as calling the law *volonté generale*, in spite of its particular coinage in Rousseau’s system, has its precursors; Montesquieu, too, occasionally refers to the law as *volonté generale*, without giving special emphasis to this term; there does not seem to have been anything unusual about it.

makes them different from each other." "The first rule we must follow [in issuing a constitution] is the national character; every people has a national character—or should have one!" The constitution for Poland contains a carefully elaborated plan to produce a national type capable of becoming a good citizen: beginning with children's games, public festivals, reinvigoration of traditions, all the way to boys' communal gymnastics as the basis for character formation. According to Rousseau, the constitutional law can contribute precious little to all this. The idea of a legislative state [*Gesetzgebungsstaat*] is quite foreign to Rousseau: "To place people under the laws is a problem in politics that I compare to squaring the circle in geometry." If anything characterizes Rousseau's political thinking, it is not the *volonté generale*, so often recalled and so little understood, which he saw as a term in the construction of the "political law," but the great educator's acute awareness of the physical, characterological, historical, and intellectual bases of the existence of the people and his understanding of the significance of youth and its education into good, patriotic citizens. This trait of French political thought has also survived; it is as alive today as ever, but it, too, is a realistic trait, affecting educational policy but comparatively kept in the background, without particular stress being placed on it.²³

§ 11. The Element of Education in the Reality of the Total State

The two examples have a dual function in our context. (1) They show how very cautious we must be in judging the typically national character of an idea; how absolutely necessary it is to separate the problems of the elements of a construct in a static cross section and the problems of their relative weight in their interrelationships and the problem of their situationally related symbolic functions. But (2) in response to our concrete questions concerning the total and the authoritarian state, they show that certain problems peculiar to it exist not only where they appear specifically under the name of "total." If we recognize that the question of how the

23. On the tradition of Rousseau's thinking, see the study by Emile Durkheim, "Le contrat social de Rousseau," *Revue de Mét. et de Mor.* (1918), 1-32, 129-61. See also the writings of Duguit, who continues Durkheim's theories in political science.

characterological and spiritual unity of the people is to be brought about on a specific physical basis is fundamental for the total state, we see this question as an essential one, one that becomes unavoidable at the moment when the broad mass of the people appears or is supposed to appear in history as an actor in domestic or foreign policy. At this moment the question of "education" begins to take on a significance in Europe that is very different from the one it had hitherto. While earlier the question of educating the political individual principally came down to the question of educating the ruler and the ruling class (giving rise to an enormous literature of "Fürstenspiegel," codes for the education of princes, education of the nobility), the question that now arises concerns the "education" of the populace. As far as the objects of education are concerned, the question is basically answered the same way everywhere. The educator intent on creating the political people must take charge of the youth. As far as the subjects of education are concerned, the solution is more richly shaded, but in principle it remains the same: those who are to do the educating are an elite, an alliance, a party—and very frequently the elite itself is to be an elite of youth, which is to conduct its work of education in the political struggle against the older generation. A very broad historical arc vaults from the beginnings of these problems to their current manifestations, without any major changes in the plans' outlines. The manifesto of Mazzini's *Giovine Italia* agrees in every detail with the formulations of Mussolini's *Dottrina*. The principles enunciated in the plans for political education of the German classical thinkers—Fichte in particular—are already uncannily close to the ideas of the National Socialist movement. The problem of education raised by Rousseau has remained the great French problem, during a century and a half of fighting for the soul of the French youth, for education by Catholic or lay teachers, today in the fight against the teachers' Communism.

§12. Elite²⁴ and the Masses: Authoritarian Leadership

The question of political education, which is connected with the emergence of the people as the political substance, calls for a monograph, which has unfortunately not yet been written, covering the subject from its beginnings in Rousseau, Franklin, and Herder up to the appearance of the "movements" of the present day. Here we cannot even give the broadest outlines of this historical question and must content ourselves with singling out one or two symptomatically valuable cases that relate directly to our question of totality and authority. The process by which the people develops into a coherent unity through "education" of necessity raises a number of questions: (1) In education, teacher and pupil face each other, connected by the shared idea in which one stands as educator and into which the other is drawn by the education. (2) But if they face each other as, on the one hand, the full representative of the idea, capable of introducing others to it, to awaken it in them, to help bring it to the fore in them, and as pupils on the other who—at least in the educational situation—are inadequate representatives of the idea, then there is a problem of an intellectual hierarchy in which the ranks are arranged according to proximity to or distance from the fullness of the idea. Theoretically, the educational situation can have different possible outcomes, and these are in fact found in history. In one scenario, the educational process ends in the pupil's being raised to the level of the teacher; the political consequence is a theory of the democratic republic, in which all members of the populace are equally close to the idea of the community, the idea republic; as George Santayana characterizes it, it is the state of the "patrician plebeians"—"The masses would have to be plebeians in their position and patricians in their emotions."²⁵ In the other scenario the educating elite permanently occupies a higher rank in the intellectual hierarchy and raises the masses only to certain levels of *participatio* in the idea: the permanent separation of the elite, which embodies the state, from the masses. This is evident in

24. We will use the expressions "elite" and "educational elite" as established technical terms, although their judgmental content makes them suspect as scientific terms.

25. George Santayana, *The Life of Reason*, II, *Reason in Society* (1922), 132ff.

Mussolini's works when he claims the "vita eroica" as a privilege for the Fascist elite while incorporating the rest of the people in the welfare state. Regarding the question of state authority, this situation in turn leads to a number of different options. The educational process can be regarded as a one-time historical occurrence, in which an enlightened elite reforms the masses of the people into a true people; the transition period might require authoritarian rule by the elite until the people is re-created in the new spirit, to be followed by a period of radical democracy. Alternatively: the educational process is regarded as a procedure without a time limit, one that must be kept constantly active in order to keep the people in shape; the educating elite, coopted by specific rules or self-contained in general, remains institutionally separated from the people; the totality is not a limited condition but a permanent process that requires the authoritarian state as a permanent form. Or: the educational process is understood as something that can be completed—without, however, giving way to a radical democratic condition; rather, it is understood that the *participio* in the idea can vary in intensity for the individuals that make up the populace, and therefore precautions are taken so that the formation of the will of the state is placed in the hands of persons who presumably attain more intensive degrees of such *participio*; the forms of an authoritarian state are found without having a formal, orderlike educational elite in permanent possession of the ruling power.

The second case, that of the authoritarian state in which an educational elite seizes permanent possession of state leadership—in which, therefore, the creation of the total unity of the people is connected with the authoritarian manner of the formation of the state will in a permanent process—is found in the contemporary German and Italian states. For the first and third cases, on the other hand, we must examine some symptomatically essential attempts and sketches in greater detail.

§13. Blanqui's Theory of the Elite (1869)

The first case, that of temporary authoritarian rule by the elite and its resolution in a democratic republic of equals, is described in an exemplary way in an essay by Auguste Blanqui.²⁶ The work

26. Auguste Blanqui, "Le communisme: Avenir de la société, 1869-1870," in *Critique sociale*, I (Paris, 1885), 173-220.

may be one of the first (if not indeed the first) political treatises to suggest that after it has seized power, a revolutionary elite should organize itself not only as a government but also as the educational organ of the people in order to raise the people to the same level of understanding as the elite. Let us trace the most important ideas that converge in Blanqui's plan.

Blanqui—like almost every thinker who has dealt with the question of totality since the nineteenth century—puts the phenomenon of "domination" ahead of all others. Blanqui is a communist, and he understands communism as the final phase of the civilization process as he sees it; its essence consists for him in the increase of communist element. As symptoms of communism he lists: a state-controlled taxation and fiscal system, state-controlled monopoly enterprises, cooperatives in industry, trade, banking and insurance; the army; state schools; the establishment of state legislation, administration, and justice. Compared to these beginnings, the "communist regime" consists in their perfection, in the complete interconnection of all members of society. It differs from the current situation principally in that private ownership of the means of production, through which the masses are kept in a condition of dependency, is expropriated and enterprises are turned into public property. To that extent Blanqui's solution to the "question of domination" appears to be similar to Marx's expropriation of the expropriators. But it does not lead further to a dictatorship of the proletariat, not even as a transitional phase to the classless society, but rather takes the course prescribed by the French national idea. The basis of the communist society is not the proletariat but the French nation insofar as it is "republican" in feeling; what are excluded are banking and industrial capitalists, the nobility, and the church. Blanqui's idea carries on the tradition of the revolutions that were supported and waged by the "people of Paris," with strong support among the peasantry as well. The communist revolution is also seen as a Parisian one, and the transitional phase to the ideal social order is the "Dictature Parisienne." The Parisian dictatorship is legitimated not as the rule of the proletariat—that is, one interest group in conflict with all others—but by the national authority of the city. "Paris n'est point une cité municipale, cantonnée dans ses intérêts personnels, c'est une véritable représentation nationale"²⁷

27. *Ibid.*, 208.

[Paris is not at all a municipal city, divided into cantons based on personal interests, but rather has a veritably national purview]. The Parisian dictatorship must now start on the great work of education that may take decades and in the course of which the entire population of France will be “enlightened” to such an extent that the communist context of the nation is supported by the freely given consensus of all citizens. The educational phase, on the other hand, is characterized by the all-encompassing formula: “Aucune liberté pour l’ennemi!”—most particularly, no freedom of education—demands that in part, especially in their laicistic part, were realized by the Third Republic.²⁸ In spite of its explicitly utopian traits (belief in the noncoercive rule of justice and reason as a result of sufficient education), Blanqui’s project realistically lists all the elements of the total state as we understand it today: the revolution of the elite, arming of its supporters, a propaganda monopoly, economic and moral destruction of its opponents, the purge of the bureaucracy, reorganization of the educational system, monopoly of state positions for supporters. The whole program is embedded in the revolutionary tradition of France and the image of the representative nature of a movement that is based on the example of Paris.

28. On the assertion of the principles of freedom, the person, the right to property, freedom of conscience and religion, freedom to teach, and equality before the law through legislation separating church and state, on church property and religious congregations, see Maurice Hauriou, *Précis de droit constitutionnel*, 290ff. and 686ff. Of particular note are the legal considerations on pages 290ff., which show the new shape that can be assumed under certain circumstances by the total-state traits in France when the assertions of the fundamental right are directed not against the church and the congregations but against communism. Like Duguit, Hauriou believes that laical legislation cannot be reconciled with the principles of the Declaration of 1789. And he considers discrimination against the churches and congregations to be particularly unjust, since today these are no longer the enemies of the state and this role has been assumed by communism of the Moscow stamp, though it is granted full freedom of participation where civil law is concerned. He feels that this differential treatment is all the more inequitable because the C.T.G.U. shares some characteristics similar with the congregations and is nevertheless treated differently by the authorities. It is Hauriou’s argument that when the much more dangerous enemy of the state enjoys the full freedom of civil rights, the same freedom cannot really be denied to the congregations, whose defamation and lower standing under law had their basis in a conflict long since overcome.

It is indeed conceivable that in a future situation these arguments will be turned around and that discrimination against the congregations will be expanded to include other organizations of the nature of associations or orders that participate in actions against the state.

§14. Elite and Authority in Renan (1871)

The third case is that of an authoritarian regime that presupposes the total unity of a people but makes arrangements for organizing institutions in such a way that with at least some certainty the leadership of the state will always be held by persons representing as intensively as possible the soul of the nation. As an example for this third case we will cite the constitutional theory and constitutional projects of Ernest Renan.

Influenced by the collapse of 1870–1871, Renan gathered together the ideas he had developed—some as early as the 1860s—concerning France's constitutional situation and published them in his major essay, *La Réforme intellectuelle et morale de la France*.²⁹ Renan traces the collapse to the supremacy of the democratic system and universal suffrage. In criticizing democracy, he is cheerfully open in his extraordinarily strong and apt remarks on matters that we cannot record here in full and that go far beyond what is offered nowadays in the way of critical objections to the democracy of universal suffrage and the state by the grace of party compromises. For Renan, the people is not the sum of currently living individuals but a soul, a consciousness, a person. This soul does not live in all individuals and at all times with the same intensity; under certain circumstances it may be fully realized in only a small minority of people.³⁰ The majority of the masses has only a more distant connection with the soul of the nation and is radically incapable of guiding the state through its representatives. A people organized on principles of democracy, Renan argues, is the Golem, a clay figure shaped like a man, able to accomplish some puny mental tasks when the magic tetragram is placed under its tongue but destroying and annihilating everything if it is not supervised. The hierarchic structure of the system of rule [*Herrschaftsordnung*] is the vital law of every people: "On supprime l'humanité, si l'on n'admet pas que des classes entières doivent vivre de la gloire et de la jouissance des autres" [One suppresses humanity if one does not admit that entire classes must live off the glory and pleasure of others]. Just like Nietzsche, Renan demands for the masses the same apolitical status

29. Ernst Renan, *La Réforme intellectuelle et morale de la France* (Paris, 1871).

30. The parallels to Mussolini's thought are obvious. See also the long quotation from Renan and his designation as a "prefascista" in Mussolini's *Dottrina*.

assigned to slaves in the classical age as the precondition for the existence of the people organized along the principles of the state. But unlike Nietzsche, who saw this necessary structure as morally questionable, as tragic, enabling a small minority to live in the light while the masses doze in darkness, Renan's organizational projection of the life of the people sees no disadvantage to the masses in this. He argues that (1) they would draw no benefit (except perhaps some satisfaction of their *ressentiment*) if this organization did not exist; and (2) it was only in the corroded condition of the state after the grand revolution that the position of the ruling class may have seemed an undeserved privilege, while in times of flowering statehood the ruler is experienced as a symbol and his glory as a communal possession. It is completely erroneous, Renan notes, to consider the question of social hierarchy as a question of justice and merit. "One always begins with the idea that the nobility has its origin in merit, and since it is obvious that merit is not hereditary, it can be easily proven that a hereditary nobility is an absurdity. . . . But the social rationale of the nobility as an institution for the public good was not to reward merit but to evoke certain kinds of merit, to make them possible, even to make them easy."³¹ This statement introduces a principle of a theory of society that does not refute any particular argument for democracy in detail but denies its possibility altogether. The total citizenry as it is organized into a state is seen as a whole requiring institutional organization so as to be able to carry out the military, administrative, and cultural work of the modern state. The hierarchy of the institutions is the precondition for the state's valid existence, and any attempt to apply the arguments of a distributive justice to the personnel occupying the ranks of these institutions is infantile. Though the institution of the nobility can be badly managed by those who happen to occupy it, it does not therefore follow that the nobility should be abolished; at most, it may be argued that a new nobility should take the place of the old. On the whole, according to Renan, the system of hereditary privilege still offers greater chances for a qualified state leadership than any other, most especially the suffrage system.

Drawing on these fundamental ideas, Renan proposes two reform projects—one that appears to him desirable, and a second in case

31. Ernest Renan, "La Monarchie constitutionnelle en France," *Revue des deux mondes* (1869), reprinted in *La Réforme intellectuelle et morale*, 244.

the first cannot be realized. The first calls for the restoration of the monarchy and the nobility and the gradual creation of a landed gentry on the English model. France, Renan argues, is the product of the Capetains, the nobility, the clergy, and the third estate—anything coming after, the "people," is breaking into a house it has not built and that it cannot be given. "L'âme d'une nation ne se conserve pas sans un collège officiellement chargé de la garder." A dynasty and a council of nobles are the best institutions to fulfill this function. Reading Renan's lament of the suicide the nation committed when it cut off its head, the king, is reminiscent of a history of the Germanic tribes during the migration of the peoples. Only in dynasty and nobility, Renan believes, does the feeling of obligation toward the coming generation reside; only a ruling class freed from anxiety about its material existence can develop the culture of the intellect, society, and character in which the nation finds the flowering of its consciousness and being—the culture that alone is capable of pursuing state interests for their own sake, without selfish considerations. This is also the culture that gives the nation its right to exist in the historical world. Renan writes quite bluntly that he would not shed a tear if at some time a conqueror were to destroy the republican society whose cohesion depends on party compromise and which is guided by something so unintellectual and unaesthetic as a democratic political class—and he is thinking here of a "Germanic" conquest by the German Reich. Restoration would be, for him, the best solution; since royalty created France, thanks to its creative endeavors it is the soul of France, and as an institution it commands an authority that cannot be derived from any source other than precisely this achievement. The authority of the sovereign cannot be replaced with that of the will of the people, by plebiscite. It is not important that the will of the majority—which in any case is always merely an individual will—be done; what matters is that the "raison générale de la nation" [the general reason of the nation] prevails. "La majorité numérique peut vouloir l'injustice, l'immoralité; elle peut vouloir détruire son histoire, et alors la souveraineté de la majorité numérique n'est plus que la pire des erreurs" [The numerical majority may want injustice, immorality; it may wish to destroy its history, and thus the sovereignty of the numerical majority is nothing but the worst

of errors].³²

Should restoration of the dynasty prove impossible, Renan suggests a second constitution that is to weaken, as far as possible, the democratic-republican threat and to secure a representation of the state that would find itself at least to some extent in harmony with the "soul" of the nation. This second proposal is especially significant for current attempts at designing a constitution, especially that of Austria, because Renan's suggestions are based on principles that were in part realized in the "Constitution of 1934." If the political system must be based on popular representation, it is to be assumed that the "people" consists of two elements: (1) the citizens taken as isolated units, and (2) the social or trade associations. Representation must therefore be arranged in *two* chambers, the first of which would have to represent the citizens, while the second represents groups.

The first chamber, Renan continues, is not to be elected on the basis of universal suffrage; instead, to avoid the most severe damage, it must be assembled by indirect elections. Every one hundred direct voters are to choose one trustworthy individual, whom they know in their own neighborhood, to act as an elector. In this way a college of 80,000 electors would be created, and this should be arranged by districts: the electors are to meet in the district capital and, after conferring in a number of sessions, elect district deputies. Election based on lists compiled by the various parties [*Listenwahl*] could also be employed within this district electoral college, though as a method of direct popular election it is an absurdity. The electors' votes would not be secret, since in this way the moral quality of the election would be enhanced. The office of elector should be conferred for a period of fifteen to twenty years so as to create a sort of local political aristocracy with increased responsibility and relative independence from the direct voters.

For the second chamber Renan's proposal envisions the following composition. Assuming a number of about 360 members, about 30

32. Retrospectively, compare these formulas with Rousseau's *volonté générale* as it relates to the genius of the people, especially *Contrat social*, II, 3, "Si la volonté générale peut errer," in which the alternative of rule by the *volonté générale* and rule of a particular majority will is expressed. Looking ahead, compare Huber's very interesting exploration in "Die Totalität des völkischen Staates." In this work, the Führer "embodies the objective idea of the Volk and the truly *völkisch* essence under certain circumstances and against the subjective despotism of mere Volk opinion. The Führer gains the internal justification for his actions from the immediate concurrence with the essence of the Volk."

seats are to be hereditary and assigned to the old families whose titles can stand up to historical scrutiny. The remaining members are to be named for life as follows: one member is to be named by the general counsel of each department (about ninety in all); the head of state will name a further fifty members; the second chamber itself has the right to coopt thirty members; thirty more members are appointed by the first chamber. The remaining 130 members represent "les corps nationaux, les fonctions sociales" [national bodies, social functions] as follows: army and navy are represented by generals and admirals; the municipal officials, the educational bodies, and the clergy by their leaders; each class of the institute is to name one member; further, representatives of the industrial associations, chambers of commerce, and so forth are to be members; and finally, provisions must be made for representing the large cities with more than 100,000 inhabitants. "Cette chambre représenterait ainsi tout ce qui est une individualité dans l'Etat; ce serait vraiment un corps conservateur de tous les droits et de toutes les libertés" [This chamber would thus represent everything that is an individuality in the state; it would be truly a body for the preservation of all rights and of all liberties].³³

Renan's second proposal agrees with the first in one very crucial trait—its conservatism. Renouncing the restoration of the dynasty and the nobility does not mean complete renunciation of the old institutions. What remains of the work created by the *ancien régime* is to be kept alive and must withstand the onslaught of the masses. But even as far as his second proposal is concerned, Renan doubts its effectiveness as an organ of conservation; he does not believe that time will stand still. He knows that new forces urge on to new forms of social and governmental organization, and he raises the question of the future organizational type of the nation. In his day he could see two types of organization: the structure of the *ancien régime* in modern form, embodied in Prussia, and the American type of organization, characterized by freedom of work, of competition, of property, of personal abilities, and nonintervention from the state. Renan saw no signs indicating that the European states would develop toward Americanism, and he thought it hardly likely that conservation of the institutions of the *ancien*

33. The parallels with the composition of the Fascist chambers are obvious; we will discuss an English proposal below in connection with the construction of the Austrian Bundestag.

régime would succeed. Renan predicted the advent of a third form of organization—on this point concurring with Blanqui, who is otherwise so different from him—namely, the socialist order, a “type social,” in which, as he puts it with the dread of the liberal, “l’Etat interviendra dans les contrats, dans les relations industrielles et commerciales, dans les questions de propriété” [the state will intervene in contracts, in individual and commercial relations, in issues involving property]. The appearance of the total domination of the economy is the determining experience for his doubts that the old institutions could be preserved and with them also the Europe that was worth preserving. For Renan, the future seems to belong to socialist democracy and, in its political organization, to autocratic dictatorship. “Une série de dictatures instables, un Césarisme de basse époque, voilà tout ce qui se montre comme ayant les chances de l’avenir” [A series of unstable dictatorships, a caesarism of the age of decline, that is the sum total of what reveals itself as having a possibility of a future].³⁴

§15. The Institutional Theory of Authority (Renan, Hauriou)

Renan’s proposals and prognoses have thrown a brighter light on a number of elements in the overall complex of *total* and *authoritarian*. We need not deal further with two of them: The first, the element of economic totality, was already treated above sufficiently for our purposes. On the second, the question of the unstable dictatorships of late Caesarism, there is still very little to say today, since adequate historical material is lacking. To draw parallels with the Roman Empire, which Renan is clearly considering, is a very dangerous undertaking, since the Caesarian empire did not contain an essential element of the modern state: the politically active people. It is futile to make predictions about future problems that will arise from the relationship between the people, the political elite, the leaders, the armies and weapons technology, the total material dependence of the individual on the state, and so forth—although we could attempt some speculations that are not entirely groundless. A third element in Renan’s ideas, however, does call for some clarification; this is his theory of the authority of institutions.

34. Renan, *La Réforme intellectuelle*, 115.

The contexts in which Renan develops the theory of the autonomous authority of institutions and their organs indicate the source from which similar theories of authority have repeatedly been derived, most recently the fully elaborated institutionalist authority theory of Maurice Hauriou and his school. The source is the achievement of the French monarchy in creating a state. The core of this theory of authority, which is found in Renan and Hauriou as well as in classical French political theory of the sixteenth century, in Bodin, can be summarized in the following statements, in which we follow their most recent formulation, namely, Hauriou's. The power of the sovereign or the government is legitimized through the function of the sovereign as representative of an institution, the state. For Hauriou, the state is a national community in which a central sovereign power conducts the enterprise of the *res publica*. The central sovereign power performs the feat first to produce the unity of the nation politically by turning the disorganized national community into an organized body capable of taking action. The core of the state institution, he argues, is the idea of realizing precisely this institution, expanding it, and providing for the development of its internal authority. And the work of the sovereign is to establish the concept of this idea and, after its establishment, to see to its further realization in history. The state institution has perfected its type if in the course of history there is success in subordinating the sovereign completely to the idea of the institution, depersonalizing him while bringing about the *consentement coutumier* [customary consent] of the members of the state to the institution. To be the "representative" of the state means, according to this concept of the state, to guide the work of realizing the institution as its sovereign; "authority" is an attribute of the power of a sovereign insofar as he succeeds in relating his factual exertion of power to the idea of the institution as its "representation." Regarding the relationship of sovereignty to the legal system, this leads to the following principles: The authority of power that appears as representative of an institution existentially precedes all regulations in positive law of this power. Rather, the power is a legal phenomenon by virtue of its basis in the institution, and since it is the representative of the institution, it can establish positive law; the origin of law, however, is not legal regulation [*Rechtsregel*] but individual decision, which by virtue of its ordered power takes the place of a situation of conflict.

Since the institution of the state is intended to be permanent, the problem of transferring representative power from one representative to the next arises. Where the depersonalization of the sovereign power prevails and the particular sovereign is experienced merely as one in a series of workers on the realization of the *res publica*, where the sovereign position itself becomes the institution and the individual is merely its occupant, attempts are undertaken to regulate the transition of sovereignty itself through the creation of a basic law containing norms for succession, change of government, renewal of parliaments, and the like. If the ruler has changed repeatedly over the years in accordance with the regulations of such a basic law, the conviction is easily formed among people that the ruler derives his legitimacy from the legality with which he took possession of the rulership in accordance with the regulations of the basic law; what is created is the peculiar legality fetishism in the constitutional sphere. In constantly repeated phrases Hauriou goes to great lengths to dispel this fundamental misunderstanding of the legitimization of rulership: "On ne doit pas oublier que la justification première du pouvoir n'est pas dans la loi, mais dans l'institution, et que la loi organique de transmission ne résulte elle-même que du fonctionnement pratique de l'institution" [One must not forget that the primary justification of power does not rest with the law but in the institution, and that the organic law of transmission results per se only from the practical functioning of the institution]. And again: "Il faut surtout se garder de croire qu'il n'y ait de pouvoir justifié que celui qui existe *en vertu d'une loi*" [One must above all be on one's guard not to believe that there is no justified power except that which exists by virtue of a law]. And then: "Observons surtout, en remontant aux principes généraux et aux origines premières, que ce n'est pas le pouvoir de droit qui naît de la loi, mais, au contraire, la loi qui naît du pouvoir de droit. Le pouvoir de droit naît du consentement coutumier à l'institution au nom de laquelle il commande, et c'est lui qui établit des lois" [Above all, we must be mindful of the fact, as we go back to general principles and first origins, that it is not the power of right that is born from the law, but, quite the contrary, it is the law that is born of the power of right. The power of right is born of customary consent to the institution in whose name it commands and it is (this power) that establishes the laws]. And finally: "Le pouvoir de droit appuyé sur une institution

coutumière, est antérieur à toute règle de droit" [The power of right that rests upon a customary institution precedes all rule of right].³⁵

We can see how the idea of the representative of the institution as it relates to the spiritualist idea of the people, according to which the soul of the people is realized to different degrees in different individuals, will develop into a theory of authority that makes it possible to assign a meaning to the word *authority* relevant to the examination of the current reality of the state. If the state is understood as an idea that is conceptualized and actualized in the medium of a human community living in one territory, then the work of founding, preserving, and increasing is an authoritarian effort, taking the adjective *authoritarian* to mean precisely originating [*urheberlich*], creative. A ruler has authority because he creatively carries on the work of realizing an idea of the state; to the extent that he accomplishes this feat, he is the originator not only of the state but also of the law. It is not permissible to skew the real relationships—as Hauriou explicated so masterfully—in order to derive the legitimacy of a ruler from the regulations for the transfer of power that for their part derive their validity as legal rule from the authoritarian power. To the extent that the institution of the state is based on a people, the consensus of the people is a codeterminant element for the authority of the ruler, but it must be understood in the sense Hauriou elaborated—that is, as consensus for the institution, not consensus for every separate action of the ruler. *Consentement coutumier* is essential for the establishment of authority, but a formal plebiscite is in no way necessary. If we think about the principle of authority at greater length, perhaps along the lines of a theory of gradations of the state, then lower levels of authority can contribute, either directly or more remotely, to the rulership; this, in fact, is the basic idea of the proposals of the type Renan developed, according to which the representatives of the member institutions within the state—military, cultural, economic, municipal, and so on—as well as individuals distinguished by personal authority are granted a higher degree of influence on affairs of state than the bulk of the population. The entire people is structured in a hierarchy of authority.

35. Hauriou, *Précis*, 21ff.

§16. The Austrian Theory of Authority (Dollfuss)

The institutionalist idea of authority is of special significance for the question of Austria's authoritarian constitution precisely because it is the idea which Engelbert Dollfuss, in various verbal and written statements, gave as the source of the new constitution.

The principal writings in which his idea of authority is embodied are the Trabrennplatz Speech of September 11, 1933, the editorial in the *Reichspost* of December 24, 1933, and the radio address of May 1, 1934.³⁶ In these speeches and articles Dollfuss developed a concept of authoritarian rule marked by the following characteristics:

1. The government has authority because it is the representative of the state;³⁷

2. the authoritarian function of the government, in the literal sense of authorship, is the arrangement of the multitude of society's intellectual and material interests into a unified whole;³⁸

3. the authoritative effort puts the government into a relationship of representation with regard to the state as a whole;³⁹

4. therefore authority is not despotism or dictatorship but is defined as ordered power in accordance with authorial representation;⁴⁰

5. the state is to be given a hierarchic-authoritarian structure by concentrating the power of sovereign jurisdiction [*hoheitsrechtliche Gewalt*] more strictly than before in the hands of the government, while more than before, the corporative authorities are granted greater freedom of self-administration;

6. the *consentement coutumier* at the foundation of the institution is to be given the greatest possible sphere of spiritual [*seelisch*] freedom; it should grow freely from the historical community of the people rather than being the consequence of a totally imposed ideology.

The close contact between the authoritarian idea as understood by Dollfuss and the French idea (which we stressed for items 1-4

36. All three reprinted in *Dollfuss an Österreich*, ed. Hofrat Edmund Weber (*Berichte zur Kultur- und Zeitgeschichte*, ed. Nikolaus Hovorka, 10th special issue).

37. Hauriou, *Précis*, 21-22, 23.

38. *Ibid.*, 14-15; further, Hauriou, *La Théorie de l'institution et de la fondation: Essai de vitalisme social*, Cahiers de la Nouvelle Journée, vol. IV, La Cité moderne et les transformations du droit (Paris, 1925).

39. Hauriou, *Précis*, 20.

40. *Ibid.*, 25ff.

by reference to the parallel formulations in Hauriou's work) cannot be traced back to conscious influence, nor is it purely coincidental; it is conditioned by a situation that compelled the head of government to consider the basic questions of a state's existence and the sovereign authority, and such considerations, if they are logical, lead precisely to the classical European theories of the state as they were developed in France, the model European state, beginning in the sixteenth century. The revolution from below against state authority, the last phase of which we know as Central European postwar parliamentarianism, can never be more than an episode and a symptom of decline as long as the type of the modern state has the power to shape history. We must point out that Hauriou's attempt at a theory of the state explicitly presents itself as restoration of classical state theory as opposed to the legalistic theory of the normativity [*Normativität*] of law. A theory of authority in the modern state can change its philosophical language; at the time when the *Volk* substance is the political symbol, the theory can support the ruling authority by the thesis that the most intensive embodiment of the genius of the people [*Volksgeist*] is in the person of the leader. Whereas toward the end of the sixteenth century the authority of the ruler was supported by means of the concept of the state hierarchy as terrestrial member in the hierarchy of the cosmos, the core of the theory of authority is unalterable. Certain elements, such as the distinction between legally ordered power, the *pouvoir de droit*, and personal, nonrepresentative power, go back to the classical distinction between monarchy and tyranny.

§17. The Activist Element in the Reality of the Total State

The investigations we have conducted here into the total and the authoritarian state cannot claim to have described the phenomenon completely. That such completion is impossible within the external framework set here is proved by the simple consideration that the questions of totality and authority in the modern state do not touch on a single element in the structure of the state that might have altered from the earlier type but rather raise basic questions about the existence of the state, perhaps even in the sense—which, along with so much else, we could not discuss here—that the problems of totality are the first shadows hinting at the decline of the era of nation-

states. But we would nevertheless leave unacceptable gaps in our concise summary of the problems if in closing we did not devote a few words to an essential element of the reality of the total state. The questions of education, the relationship between the leader and the masses, between the elite and the masses, the reestablishment of authority in the face of the liberal destruction of the state, the unified ideology that must pervade a people, and so on, become questions only under the precondition that the great masses of the population are in a condition of spiritual [*seelisch*] activation that constitutes the true novelty of the modern situation of the state. The previously cited works by Ernst Jünger—his essay on total mobilization and his book on the workers—attempt to give a historical-metaphysical interpretation of this condition in the context of the development of technology and the way of life of workers. Without entertaining these broader questions here, we must nevertheless consider the state of activation in the people in the modern European state, which can already be ascertained, as a basic element of the reality of the total state. The phenomenon went through phases, and these were not left behind, but all are reflected in the current situation. For our study, the French Revolution and the creation of a people's army [*Volksheer*] must be considered the appropriate beginning. The military activation of the people was a beginning that inevitably led to a further step: political activation. The political activation takes a long time before it is completed; in Central Europe it was only the "politization" of the postwar period that brought about the pervasive activation of all strata of the population in this regard. A third instance of activation is most closely connected with the economic and social-ethical phenomena of "domination" [*Vermachtung*]*—*activation through integration into a milieu undergoing constant change as technology advances and the ensuing required mobility and adaptability of each individual; this technological activation does not even stop at the original ranks and takes hold even of the peasants. A fourth instance of activation is enforced by the necessity that individuals have at least minimum skills in reading and writing so they can be integrated into the technological context. They must also attain intellectual mastery of the technical milieu, which in connection with other means of communication—such as motion pictures and radio—presses upon the individual from all sides with intellectual influences he cannot escape, and only a very few, rationally highly disciplined persons are capable of offering

the resistance necessary to maintaining good mental health. The enormous density and pressure of the web of psychic influences has two essential consequences. (1) No individual achievement, no matter how highly qualified, provides an opportunity to create the intellectual space in which an idea could be cultivated and take effect in order to form an intellectual style, since it is pressed upon by competition from all sides. We see the phenomenon of isolated intelligence, which nowadays people like to call "decline." If the technical instruments of press, public oratory, radio, and so on are available to it thanks to sufficient capital, (2) any concerted effort to exert mental influence can achieve extraordinary feats of integrating the masses. Under certain circumstances, such integrative effects can very quickly develop into a threat to the existing regime in the state. It follows that those holding the power in the state must control the apparatus of psychological influence, if possible monopolizing it, in order to deflect the threat to their survival; it further follows that they necessarily must make use of the apparatus to diffuse the mental influences advantageous to themselves and to prevent a psychological vacuum in the highly activated milieu that could potentially be occupied at any time by other influences. Though there are differences in the degree of intensity of activation, it nevertheless seems to us impossible that in the modern state the apparatus of psychological influence can be given up in the long run. What is questionable is not *whether* but the exact point in time *when* it will be introduced in response to antigovernment influences threatening the regime. To play with arguments of freedom of thought in the current technological milieu is a matter for the opposition; for the ruler it means suicide.

§18. Summary

In summarizing the results of our reflections, we must conclude that defining a concept of the total or authoritarian state is the wrong approach. Today the expressions *total* and *authoritarian* are political symbols that can be understood only in a specific situation of conflict in which it is a matter of liquidating a condition of political fragmentation and establishing new authorities. Scientific concept formation has to clarify the structure of this situation, to reveal the symbolic value of certain expressions, and beyond these, to illuminate the state's problems of order that culminate in the demands

for authority and totality. It therefore becomes clear that cross-section types leave essential questions unanswered and that an adequate analysis must address the historical significance of elements and their relative importance within the structure of the state. It is useless to contrast an English or French liberal state with a German or Italian total state, since even the French and English have elements of totality—except that they occur in different historical places and therefore are of different significance today. Greater degrees of liberalism are possible today in the French and English states because they have already gone through a struggle with totality—the French at the time when the laicist state prevailed, the English when the Anglican state prevailed until its relaxation after 1829⁴¹—and because a new conflict concerning totality has not yet become necessary. In the modern state, total and authoritarian elements with very different origins appear side by side: the idea of unity, in which every member is substantially identical, is of a speculative nature; the idea of the *pouvoir de droit* goes back to the classical age; other elements of the idea of authority originated in the time of the medieval monarchy in France. The economic and technological elements of totality penetrate the political structure as accidental elements. The awakening of the people brings with it problems of the educational community, the educational elite, and the leadership of the masses. The psychological pressure on the individual, caused by the technological development of the means of communication, gives rise to the problem of a propaganda monopoly. The spiritualization of the idea of the people makes possible the doctrine of the incarnation of the genius of the people in the leader and the suppression and devaluation of the material expression of the will of the currently living members of the people, and the like.

The concept and its rigid definition must be incorporated into a relatively loose description of the elements that are relevant to the problem of authority and totality. So far we have conducted this description on a level of generality that encompasses the shared problems of the Central European and Western European (but not the Eastern European) states. We will now proceed to examine questions of a lower level of generality—problems that are primarily essential to the problems of Austria.

41. See Harold Laski, *The Problem of Sovereignty* (1917).

Part II
The Austrian Constitutional Problem
after 1848

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The Foundation of Austrian Constitutional Theory: Baron Eötvös

The historical and systematic point at which we must begin our discussion of the particular Austrian constitutional problems is clearly given by the year 1848. Essential traits of the power situation that was meant to be ordered by the acts of drawing up a constitution in this and the following year, and the technical legal means used for the purpose of establishing this order remained the same throughout the history of the Austrian monarchy right up to its end, and they have remained alive even in the history of the republic to the present. A constitutional theory of the present-day Austrian state must go back to the period of 1848 in order to enable us to understand certain basic problems. This task is made very much easier by the fact that the movement of 1848 was introduced and accompanied by a political literature that offered insight into the basic questions of the constitutional situation. The depth of the insight and the personal and factual perspective from which it is gained is astonishing in comparison to the quality of the literature around the turn of the twentieth century. And if today the works of Josef Redlich and Heinrich von Srbik once more arrive at a similar level of understanding, this is possible primarily because of a renewed and in-depth familiarity with the works of those aristocrats, all of them well educated and statesmen too, who before and after 1848 strove to explain the Austrian problem; aside from Metternich himself, these were Count Hartig, Baron Andrian-Wehrburg, and Baron Eötvös, to name only the most important. In what follows we will refer principally to the works of Baron von Eötvös.¹

1. For the following, compare Heinrich von Srbik, *Metternich* (1925), and Josef Redlich, *Das österreichische Staats- und Reichsproblem: Geschichtliche Darstel-*

His reflections surpass subsequent attempts during the liberal era in the breadth of the political horizon in which they are undertaken. Eötvös is as openly opposed to the new forces of the national and liberal movement as he is to the old ones of the formation of the dynastic state and the organization of the state by the administrative apparatus of Maria Theresa and Joseph II. He is as receptive to the political vital consciousness [*Lebensgefühl*] of the upper class and the people as he is to that of the aristocracy and the clergy. He does not force the political events occurring around him either into concepts of the Austrian *ancien régime* or into those of liberalism or nationalism; instead, he is always prepared to raise his vocabulary above the terminology of a particular political system and to bring the phenomena themselves, old and new, into a meaningful relationship to each other by tracing them back to the layers of human spiritual life [*Seelenleben*] in which they are all rooted.

The will to a radical and psychological understanding of political forces that reveals their roots compelled Eötvös to analyze the principle of nationalities or ethnic groups [*Nationalitäten*]. The results of his analyses are ignored in the present-day thinking about this issue even though they go to the heart of the matter and relate the principle of nationality to the other political structural principles in Europe. According to Eötvös, there can be no question that understanding the issue of nationality requires insight into its emotional aspect [*Gefühlscharakter*]. This thesis lays the foundation for all further elucidation of the cluster of problems in its emotional-psychological, anthropological, social, and political-institutional dimensions. The national problem, Eötvös argued, cannot be solved by establishing objective criteria for national affiliation; furthermore, the essence of the nation is not to be found in what happens on the higher levels of the national consciousness, but only in the depths of feeling. For Eötvös, national feeling [*Nationalgefühl*] is

lung der inneren Politik der habsburgischen Monarchie von 1848 bis zum Untergang des Reiches, vol. 1 (Leipzig, 1920) and the sources cited there. In particular we have consulted: *Österreich und dessen Zukunft* (2nd ed., Hamburg, 1843) (Andrian-Wehrburg); *Zentralisation und Dezentralisation in Österreich* (Vienna, 1850) (Andrian-Wehrburg); *Genesis der Revolution in Österreich im Jahre 1848* (Leipzig, 1850) (Count Hartig); *Über die Gleichberechtigung der Nationalitäten in Österreich*. [Pest, 1850] (Eötvös); Baron von Eötvös, *Der Einfluss der herrschenden Ideen des 19. Jahrhunderts auf den Staat* (Vienna, 1851); *Die Garantien der Macht und Einheit Österreichs* (3rd ed., Leipzig, 1859) (Eötvös).

an inner drive, hard to grasp but irresistible. At first glance, its content is defined not by the unique characteristics of a particular nation but by higher, universally human psychological needs for emotional expansion of the individual person through the experience of belonging to a collective. The basis of all national feeling, according to Eötvös, is the conviction that it is an advantage to belong to a particular people because this people surpasses others in intellectual or moral qualities and either has proven this greater talent in the past or is destined to demonstrate it in future. Eötvös concedes that such a conviction is not entirely an illusion and that therefore national sentiment as such is not vain, because the real basis for conviction and feeling is given in the actually existing differences between the natural gifts of various peoples. The real differences that Eötvös regards as "natural" are the point of crystallization to which the various aspects of the national experience are connected: the affection for the unique character of a people, the experience of the value [*Werthhaftigkeit*] of the human gifts that are to be realized unrepeatably and only through this people, the experience of a calling and a mission, the mythic consciousness of future greatness and future glory, even if due to rational knowledge of the particular people's past its future appears less bright and rosy to an outside observer. Those imbued with national feeling live at the creative center of history, drawing from this central life the impetus for political action and faith in its meaning.

In the area of political action the spiritual elevation and expansion is transformed into purposive-rational measures intended to give the people's higher gifts their full social and political authority "especially with regard to developing the forces dormant in the people in order to secure for it the rulership over others that is its due." The will to rulership is the inner boost of feeling superior and of higher value translated into the medium of politics—according to Eötvös' formulation: "The basis of all national striving is the sense of greater gifts; its purpose is rulership."

A third essential element of nationalism is, for Eötvös, heredity. The peculiarity of a people is "nature"; the dormant powers that are to be aroused and brought to bear are natural, inherited forces. One is born into a nation. More recent considerations concerning membership in a nation on the basis of intellectual integration, on the basis of a profession of loyalty to it, or on the basis of a community of life, are not yet to be found in Eötvös. At the

time he wrote, when means of transportation were not yet so fully developed, migration played a lesser role in Europe; the cohesion of a people is of necessity based, in his view, on the context of a shared territory, national consciousness growing unequivocally from the real physical connection with the body of the people, which is individuated according to its talents. Membership in a people is an inheritance passed down through the generations by means of reproduction.

Thus Eötvös categorizes the phenomenon of nationality by listing its traits: (1) the experience of superiority; (2) the will to rulership; (3) heredity. This arrangement allows him to rank it with other social phenomena that exhibit the same type—with hereditary, political, privileged groups striving for power in general and with the phenomenon of the European nobility in particular. According to Eötvös, however, the similarity between the principles of hereditary nobility and ethnic nationality is not one established merely by logically subsuming them under the same type concept; rather it is based on a real kinship between the two phenomena. "Everyone familiar with history knows that the origin of hereditary nobility is based in large part on the principle of specific ethnic nationality. It is highly probable that the caste system in Asia has the same origin and that the higher castes are really nothing more than specific ethnic groups that have subjugated others; and such an origin of the hereditary nobility can be established with the greatest certainty in almost every European country. The consequences cannot differ if the causes do not differ, and at the roots of the nobility that rules the state we find the ethnic group that has conquered it." In his work Eötvös elaborates in all its essential parts the doctrine of the origin of the state through conquest and the development of the nobility out of the class of conquerors. The occasion for developing the theory—the comparison of ethnic nationality and hereditary nobility—throws a further light on the genesis and the numerous branches of the theory in the second half of the nineteenth century. For both the aristocrat Eötvös and, soon thereafter, for the aristocrat Gobineau, the problem of the nobility is the model that illustrates the internal structure of rulership in the European state. Eötvös, too, already points out that—because of the hereditary principle of both ethnic nationality and nobility—the ruling class is a class based on race. And the particular question of the Austrian state, which for Eötvös leads to the theory of conquest because of the prob-

lem of ethnic nationality, comes to the fore once again in the work of Ludwig Gumplowicz, who renders it in cruder terms, dresses it up in a positivist metaphysics, and translates it into a much more primitive theory of nationalities, in keeping with the constriction of the horizon in civics and general education soon after 1848.

After thus explaining the new political phenomenon, Eötvös then relates it to the other political powers: the absolute dynastic state and liberalism. The type of "state" is defined on the basis of the Continental states, where at the time there was only one nation-state, France. But its genesis is so recent that there is still a vivid memory of the preceding political situation, which was more closely related to that in the other European states than the condition after the Revolution. The Continent is seen as occupied by states of a single type: the dynastic-absolute state, in which fragments of various peoples are ruled and administered by a central power. The author then presents laws concerning political movements in this type of state; events must run their course according to these laws if the various political powers are included in the calculation:

1. The liberal and democratic principles of freedom and equality are incompatible with the principle of ethnic nationality.
2. The principle of ethnic nationality is incompatible with the dynastic state.
3. The principle of ethnic nationality is incompatible with the existence of the privileged strata of the society that are supranationally oriented.
4. The principle of ethnic nationality is incompatible with the principle of sovereignty of the people and majority within the existing states.

We have enunciated the laws of incompatibility and placed them at the beginning of our discussion in order to show the guidelines along which our reflections will proceed, for in discussing the concrete political situations they cannot be treated one after the other but must be alternately applied to the individual problems.

The absolute-dynastic states emerged from the Middle Ages as multinational states. All major European empires encompass elements of various population groups [*Völkerschaften*] that, if their national consciousness is aroused and they want to appear independently as political actors, must fundamentally break apart the unity of the state [*Staatsverband*]. Eötvös names Austria, Turkey,

and France as well as Switzerland as states that would be faced with disintegration if ethnic nationalities were made the political building principle of Europe. He clearly formulates the Austrian problem in particular as an alternative of expansion or dissolution. "By recognizing differences in ethnic nationality as the basis of the provincial divisions of the monarchy, Austria has either prepared its future expansion to the point where the boundaries of the empire coincide with those of the ethnic groups that inhabit Austria or it has taken the first step toward its own dissolution in that it has drawn the lines along which its individual parts will gradually break away from it." Eötvös predicts that the ethnic movement in the Ottoman Empire will eventually break up not only that empire but subsequently Austria as well. According to Eötvös, as a result of the threat of disintegration the dynastic states well into the eighteenth century developed the political tendency to prevent as far as possible the formation of a national consciousness within the ethnic groups ruled by the empire. The effort was supported by the fact that "those classes that were never wholly deprived of influence and everywhere served as a model to their compatriots because they were closest to the throne, the clergy, and the nobility, were based on institutions outside any particular ethnic nationality. The clergy had its overall point of juncture in the Roman Pope. For the nobility, a certain community continued to exist in the idea of chivalry, even after the latter had lost its more exalted meaning, and the concepts of equality of rank, professional honor, and the like, created ties among the nobility of all countries that were stronger than those that bound the individual nobleman to his own people."

The direct juxtaposition of the principles of the dynastic multinational state and the nation illuminates primarily their contrast, one of them being the disruptive principle in relation to the other. The dynamics change considerably when further political principles—the liberal principle of liberty and the democratic principles of sovereignty of the people and majority rule—are seen as working concurrently with the first two. As Eötvös understands the liberal principle—namely, as the preservation of each unique political entity's own way of life, whether this entity consists of persons, nations, or supranational organizations—it consists in the peaceful coordination of all entities, which excludes by definition any relationship of ruler and ruled between them. Crucial contradictions arise between liberalism interpreted in this way and the principle of

nations. Eötvös was not alone in noting these; they were also seen by the majority of his contemporaries and even earlier by Wilhelm von Humboldt, who was so often misunderstood on this point. When Humboldt, under the recent impressions of the French Revolution, tried to determine the scope of the state's role, he arrived at a picture of a liberal state and a social order that differs significantly from what we are accustomed to calling liberalism today. His understanding of a liberal state order was *not* a state in which the citizen participated in the formulation of political objectives; on the contrary, Humboldt envisioned a social and political order in which the "actual" political mission, namely, keeping the domestic peace and defending the state against external forces, is accomplished by a strong state authority, while the citizens for the most part were apolitical and concerned with their property and personal advancement. This image of the state was liberal in two aspects: first, the state, limited to political work, interfered as little as possible in the economic and cultural spheres; and second, its defensive and protective function guaranteed that the individual citizen could develop in peace. This is the German classical liberal idea, which continued to be felt in the history of ideas until the liberalism of the Victorian age: Goethe and Humboldt are the two authorities evoked by John Stuart Mill when he enunciated his liberal claims. Humboldt understood very clearly and showed in the example of the city-states of antiquity that the liberty of individuals must necessarily be restricted considerably when the citizens themselves become the political substance of the state. In the German area, beginning in the second half of the nineteenth century, along with so much else in the political sphere, it was also no longer understood that politically liberal institutions can function in society only on the basis of illiberal subordination, verging on social terror, of the individual to the spirit of the community [*Volksgemeinschaft*]. These days, Schindler, the Swiss expert in constitutional law, has again presented an exemplary formulation of this problem, one that is based on the experience of Swiss democracy and, in the area of history of ideas, on Humboldt. According to Schindler, the problem is one of political institution and social environment. The liberality of one must be balanced by the pressure of the other if the state is not to disintegrate. Liberalism in the political sphere is possible only if at the same time the individuality is restricted in the nonpolitical

realm. Unfreedom in the political sphere can be accompanied by considerable latitude for the nonpolitical existence of the citizens.

Eötvös understood the problems of intrastate dynamics very well and therefore considered the absolute state of his day the one in which—always presuming that the existence of the world of states of his day was to be preserved—the ethnic nationalities have a better guarantee of unimpeded development than a state in which liberal and democratic ideas prevail. For in the political principle of ethnicity the will to rulership is closely connected with the sense of emotional and value superiority, and when in a multinational state the reins of state authority are loosened in favor of a liberal-constitutional development of the constitution, the result will be a struggle of each national individuality to become accepted and prevail over the others. Of necessity, the quantitatively strongest ethnic nationality will win out over all others and over the nonnational entities in the state. According to Eötvös, the events of the French Revolution provided the proof for his views. The principles of liberty, sovereignty of the people, and majority resulted in removing the French clergy and nobility from their role as contributory elements in the establishment of the state and subjecting France's non-French peoples to a far more intensive process of Frenchification than had been the case in the centuries of absolute monarchy. From the point of view of a political order in Europe that consists of dynastic multinational states, Eötvös therefore draws the following conclusions: Either the principle of majority rule is recognized—in which case in the age of nationalism the strongest ethnic nationality will suppress all others in the state, "until the concept of the state has become identical with the ethnic-national character [*Volkstum*]." Or the absolute sovereignty of the majority is not recognized and the rights of the ethnic nationalities are protected—in which case the principles of liberty and equality are fundamentally jeopardized; the idea of the sovereignty of the people is restricted. The idea of nationality must recede into the background to the degree to which the idea of liberty and equality is realized, "while the ethnic privileged position is nowhere preserved longer than in absolute states, even if absolute force were used to suppress it."

Beyond the general rules of political dynamics, knowledge of which is the essential precondition for formulating the problem of the Austrian state, Eötvös elaborated the characteristics of the

nation problem, problems that belong to a historically more concrete level than the ones dealt with earlier, which were of a piece with the principle of hereditary nobility. The new, concrete historical problem is the formation of a political substance that did not exist before. Eötvös starts out with the assumption that the idea of the ethnic [*volkhaft*] determination of politics had been all but abolished in the eighteenth century. The peoples [*Völkerschaften*] of the time of the migration of nations had been incorporated into the structure of the absolute dynastic states, in part as rulers and in part as subjects. A *Staatsvolk* as a political substance that materially encompasses the population of the realm did not, in his opinion, exist. He examines the various constituencies that even in the more recent definition of the state contribute to its structure, and he arrives at the conclusion that except for language none is any longer effective. The connection of people through shared race, "by which a physical basis is given to national isolation," had, except for the Jews, lost all significance in Europe. The migration of nations and the subsequent formation of states, Eötvös argues, created historical individuals for whom the actual physical community [*Leibgemeinschaft*] of its members was meaningless. All of Europe was populated by mixed races. The European religion, Christianity, also worked against national differences by virtue of racial community. Religion, Eötvös points out, thus also is no longer a factor in forming the nation—in contrast to antiquity, when the fatherland included the gods and in turn was unified by them. The formation of nations by means of technological isolation, Eötvös continues, was also seriously impeded by increasing population density and the development of means of transportation. Only differences of language remained, but in themselves they were not yet constitutive for the nation but served merely as a means for bringing about the independent development of the linguistic community through intellectual isolation. Nations in the process of forming are not, Eötvös argues, the old tribal groups awakening to new life but new structures. The concept of such a new nationality is difficult to realize politically precisely because the nation is not yet fully present, because it does not yet have a proper position in history.

What is "new" in the nations that enter the European arena as political powers is, for Eötvös, more or less closely related to the extent that the nation is a "people" and that the assertion of the national principle is combined with the political principle of sovereignty of

the people and majority rule. The principle of ethnic nationalities is revolutionary not only because it threatens the old state federations and the will to rule that aims at making nation and state into one, but also because of the disintegration of the nonnational forces in the state, through the revolution against the existing ruling order. The emergence of the nation leads to the disappearance of the existing system of authorities, legitimations, and institutions and its replacement by new sources of legitimacy and authority and state institutions appropriate to them. In human terms, this revolution is carried by a class that until that time had not been influential in the state, a body of human beings gradually forming a firm entity and animated by a vital consciousness completely different from that of those people who created the European system of states and cultures. The new element that enters European politics with the awakening of the peoples is not the people as the basis and source of state power—throughout history the subject of politics has never been anything else but the populace, the community of a people. Even the European nobility, as Eötvös sees it, was a people, and in the period when it conquered and ruled the state, it was *the* people that built and supported the state. What is new is the type and the vital consciousness of the people who want to monopolize for themselves the national characteristics and the nation and who in the course of the nineteenth century were more or less successful in monopolizing them in the various European states. What is new is that political activity is carried out not only by the “ruler” but also by the “subjects,” that is the citizen and little man, for whom profession and business form the material and spiritual basis for existence, takes his place next to the aristocrat for whom ruling is a way of life.

Eötvös very carefully characterizes the new phenomenon in a number of remarks offering an excellent outline of a psychology of the “people” as the subject of political will. He finds in the people “in the spheres of its usual activity” an astonishing degree of insight and correct judgments, even a greater prevalence of cold reason than in the educated classes. In the concerns that lie outside the sphere of private everyday activity, however, the relationship is reversed: the tendencies and opinions of the people are determined not by reason, but by emotion—and in a constitutional state all governmental affairs belong to this sphere outside the quotidian concerns. Using the language of his anthropology, which works

with the antithesis of reason and feeling, Eötvös expresses the great transformation in political vital consciousness that began in the nineteenth century and in the midst of which we find ourselves today: the transformation from rational to emotional politics, the transformation from the calculation of power to a sense of power, the transformation from the principles of state leadership to political convictions, opinions, attitudes, ideologies—in short, the entire class of emotionally determined state dogmatism that rejects rational discussion of its substance and no longer classifies substantial objections under the rational category of “argument” but under the emotional one of “provocation.” Out of his deep insight into this turning point in European politics, Eötvös defines the types as follows: for the statesman the state is the means of his power, for the so-called higher classes it is the precondition of their prosperity, but for the people “the state, and all that relates to it, the concept of liberty and national rights, is a second religion to which it bows and by which it feels elevated, for which it feels enthusiasm and for the sake of which it is prepared to sacrifice anything, not because it has come to understand the expediency of its institutions but because it has never doubted that expediency for a moment.” If we consider the great intellectual breadth of the time when these sentences were written and if we consider that they are contemporaneous with Schelling’s philosophy of mythology, we will understand more clearly that in those days Eötvös was already plainly stating what today, following the consistent further development of those beginnings, has become clearly visible for everybody: the genesis of the modern nation is less important as a political phenomenon than as an event in the theogonic process. New gods have arisen in the struggle with the old ones, new sources of religious ecstasy have appeared, new emotional forces have become active, still untempered by reflection and reason, with the relentlessness of intellectual blindness. “The *Volks* pursues its objectives with the inevitability of one of the elements. Once it is convinced of something, it does not want to find fault with its own convictions. Even the slightest modification in its leaders’ intentions and even the warning that it can attain its objectives only step by step seems an apostasy. And those who once were its leaders find themselves abandoned, not because the people was too volatile but because it was too consistent.” The dangers of the age of national feeling are already becoming evident: the emotional leader, forced into the *ratio* of the

matter by the state affairs he has taken on, is the prisoner of those he has stirred and is caught in the conflict between ideal-emotional ecstasy and genuine politics. Metternich's remarks on the occasion of his resignation express his view: the age of politics had come to an end, and the age of social forces had begun.

The high degree of insight into fundamental political conditions is not a personal advantage enjoyed only by Baron von Eötvös. Though he went to the trouble of analyzing the political situation in great detail and of publishing his findings, we nevertheless find the same insights among his contemporaries. They are the findings not of any individual person but of a political and scholarly culture that, insofar as we can deduce from the writings of the time, oriented their theory principally on Montesquieu. The laws of political movements that were to lead to an understanding of the Austrian problem are found in applying Montesquieu's doctrine of principles. The guiding idea for assessing questions of state may have been enunciated most crucially by Baron Andrian-Wehrburg:

Therefore even the principle is as old as bourgeois society itself, although Montesquieu was the first to put it into words, namely, the basic idea that each state must be based on a principle permeating the individual citizen as well as the whole, motivating the firm, voluntary cohesion of the individual parts, and transforming the state from a merely factual aggregation of heterogeneous elements, from a merely negative, customary bond, into a firm, rational union based on universal will, determination, and interests.

In order to promise continuity, the argument continues, any state must "be based on a clearly enunciated principle at every moment of its existence." This precondition, essential to the continued existence of the state, is not satisfied—contrary to what was believed when the Austrian state was founded in 1918–1920—when the text of the constitution is constructed uniformly with great legal skill as a political principle; it is met only when the principle shapes the citizens' vital consciousness and standard of living. Baron Andrian supplies criteria to detect the presence of such a principle, and today we find the same criteria reemerging in the works of Max Weber and Carl Schmitt, where they appear as criteria for the existence of a political union because it has been tried and proven its worth in an emergency situation, that is, in the fulfillment of the principle with the pathos of death. On this view, the reality of the principle is tested when the citizen brings his utmost to bear to prevent the

undoing of the state; this effort would require "an enthusiasm for an idea that is personified in the state."

The theory of principles, as we will call it for short, is the backbone for interpreting political phenomena. It is the place from which the conflict between liberalism and sovereignty of the people is recognized as such, as well as the contrast of liberty and nationalism, of national principle and the dynastic multinational state. In *Vormärz*, as the period from 1815 to the March revolution of 1848 is generally called, it is given its coloration by the special consideration and attention to the new principles that are emotionally and politically suited to rouse to enthusiasm great masses of people who find themselves in nonruling positions and—to use the language of today—to integrate them into a political entity. Characteristically, for Eötvös, the models that give direction to the insight into the problem of principles are, besides the national movements unleashed by the French Revolution and the Wars of Liberation, religious mass movements. The study of Luther and the Reformation is placed on a par with the discussion of Robespierre and the Reign of Terror. He uses these models to work out his understanding of the effectiveness and statesmanlike treatment of "principles." That the powers brought into being by Napoleon and the wars of 1809 and 1813 could not again be made to disappear was clear to everyone. For Austria it was a matter only of bringing them under control and of using the constitution constructively to lead them into channels where, as far as could humanly be foreseen, they would not break apart the monarchy. The possibility was greeted with skepticism. It was not in anyone's power, Eötvös believes, to contain within specific limits the effect of a principle that has been established and accepted as absolutely true. "Principles are never more dangerous than when they have been generally recognized in the hope that this further development can be guided. Principles can be resisted, but not their inevitable consequences." The recognized principle, especially the emotional principle, gains a legitimacy that makes even the most dreadful events seem only right as long as they are logical consequences of the principle and its enforcement. "The Terror was possible only because those who wanted to combat it lacked the legal basis for doing so, because everyone found his resistance condemned by the very principles he himself recognized." We must fully grasp this theory of principles and its findings if we are to correctly evaluate certain traits in Metternich's policies that,

in spite of Srbik's brilliant work, have gone unappreciated. To this day it seems that Metternich failed because he lacked an adequate understanding of the new political forces, as if his undeniably great political mind was closed to the national movement and the forces stirring within it. This judgment is based in part on an equivocation between the definition of the word *understanding*, which is emotionally neutral, emphasizing knowledge, and its definition in everyday language, "showing understanding for something," meaning that the person who understands is sympathetically inclined toward the matter in question. In part the judgment is based on a lack of insight into the cosmic nature of human communities as a source of evil as well as good. Not enough thought is given to the fact that it is possible to understand something thoroughly but that precisely because one understands it better than do its partisans, one will turn from it in horror and will fight it. Metternich's political attitude was still strongly conditioned by the ideas of the eighteenth-century Enlightenment and by the high esteem given to rational action; from an existential point of view, it was rooted in the position of the ruling statesman—understood philosophically, in the mind. Based on all three conditions of the formation of such an attitude, those holding it could respond only negatively to ideas that were not reasonable in the sense of the Enlightenment nor statesmanlike in the existential sense nor intellectual in the philosophical sense but merely emotional. Metternich understood very clearly indeed what was happening, but strengthened by the experience of the French Revolution, he could see the horrible outcome of the sentimental, ideal, emotional-political beginnings. His understanding of the national idea is beyond reproach; we can criticize merely his methods of dealing with it and averting the dangers implicit in it.

That it is not lack of understanding that accounts for those instances where the national idea was not accepted enthusiastically but was regarded with skeptical coolness is seen in Eötvös' work when he applies the preceding reflection on principles to the Austrian problem. That the national idea, left to its own devices, must destroy the Reich is an unalterable axiom; that, now that it has become the power that led to the revolutionary outbreaks of 1848, it cannot be extinguished is just as obvious to him. It is only a matter of finding a constitutional construction that reconciles the central state organization with the vital needs of nations. Eötvös

arrives at his solution deductively based on the theory of principles as the embodiment of the rules of calculation and on the Austrian political forces as the constants of the equation: (1) the movement of 1848 was primarily national; (2) where the principle of nationality was not involved, the movement was for the majority of the participants about removing class privileges, but not about abolishing the monarchy and substituting a republic of the Austrian *Volk*; because (3) there was no such entity as an Austrian *Volk* that could embody the claims of a sovereignty of the *Volk*, and the principle of the unity of the monarchy is represented by the crown alone. The revolutions in France could by their internal logic lead to a constitutional monarchy and from there to a republic because under the historical circumstances in France the French people was—despite non-French national remnants—the subject of the state and could replace the monarch and the nobility in their functions regarding the unity of the state. In Austria the situation was radically different. “The concept of a unified state suggested itself to the peoples only insofar as it appeared in Austria to be the natural consequence of the monarchic principle. In itself this concept nowhere took root in the conviction of the people, and if after a long struggle all separatist tendencies and principles finally had to make way for unity, this outcome must be credited exclusively to the force of the monarchic principle. It was not the concept of unity that saved the monarchy in Austria but the concept of monarchy preserved the unity.” While in France the national idea is naturally connected with the demand for constitutional institutions because the demand for a constitution can be advanced in the name of the people as a power on the same level with the monarch, for Austria the connection between the national claim and the constitutional one is just as inherently irreconcilable. Here Eötvös’ reflections on principles prove their worth above all. He again compares the national claims with those of the hereditary nobility and the modern constitutional problem with the feudal constitution. Just as there the alternative of breaking up the state by the feudal powers or absolute monarchy arose, so does Eötvös believe his own time to be faced with the same choice. Post-medieval absolutism rose on the ruins of the feudal “constitution”; the nobility accepted the situation as long as it did not hurt its material interests and class prejudice. “What is class prejudice for the nobility is nationality for the *Volk*, and given quite analogous conditions, we can expect

nothing else from the *Volk* than what the history of all aristocracies has shown us." The "prejudices" must be satisfied if the unity of the state is to be preserved; they can be satisfied without destroying the state only if the monarchy remains absolute. "The principle of nationality does not seem to be in conflict with the existence of the unity of the monarchy in general but only with that of the monarchy as constitutional state, and it may even seem to some that this is merely one more reason to hold on to the principle." The facts of the Austrian problem—the unity of the state, embodied in the crown; the national forces; the impossibility for political-liberal claims to prevail to the point of a constitutional monarchy—add up to the basic demands of constructing the constitution: absolute monarchy, active provincial and municipal life, a state under the rule of law. Throughout the entire period of the old monarchy these formed a firm central axis around which attempts at a constitution revolved. Since the facts are similar in Austria's contemporary political situation, those demands are just as mandatory now as they were in 1848 if Austria is to be an independent state. They can be formulated in a general way as follows: authoritarian state leadership, decentralization through autonomous administration in territorial and personal bodies, constitutional state.

Eötvös saw clearly that drawing up and imposing a constitution would not solve all problems. The old authorities had been shaken too deeply, and as a consequence of the changed economic and military-technical conditions, the problem of the state had become too much a problem of the entire people's emotional ties to the empire. He recognized the essential role of feeling in establishing the state; the moving force in the state, he noted, lay in the feelings of the people; not the most perfect constitution, but the strongest ties of the citizens to the state were what made the state great.

But an Austrian feeling for the state did not exist. "No statesman will ever be able to change the idea 35,000,000 people connect with the word 'fatherland' overnight by force of will or power of persuasion; and this concept is—perhaps with the exception of the province of Austria—nowhere related to the monarchy but everywhere to the particular province." The old as well as the new Austrian problem is expressed here in one sentence: the great threat to the constitution [*Verfassungsgebung*] after 1848 was the presence of national sentiment and provincial patriotism along with a lack of feeling for the empire—with the exception of the

province of Austria, where, as Eötvös correctly saw, emotional ties other than those to the province were politically relevant. Precisely this province was made into an independent state in 1918. Eötvös saw the beginnings of an Austrian feeling for the state among the leading statesmen, in the administration, in the army, and in segments of the educated classes; among the great masses of the *Volk*, ties to the individual provinces predominated. Eötvös hoped that all the people would be permeated with Austrian patriotism through the developing history of a unified Austria and the spread of the conviction "that Austrian citizenship is synonymous with the concept of constitutional liberty." In this last phrase Eötvös once again summarized his demands for a constitution, according to which absolute monarchy must go hand in hand with securing civil rights and local autonomy. He explicitly cautioned against any extension of the centralizing principle beyond the "government" to the administration, and he specifically warned against carrying the central administration all the way into the smallest functional or regional departments as that would kill any feelings for the state in the bud and would promote the national will destructive to the state. Baron von Stein is not cited, and it must remain moot whether Baron von Eötvös' ideas are oriented directly on those of the Prussian statesman or whether the analogy of the situation prompted them—in any case, Eötvös sees himself facing the same problem Stein confronted: the transformation of a purely emotional politicization, which so scandalized Goethe, into a firm civic attitude. Eötvös comes up with a similar solution as Stein; he calls for far-reaching autonomy, under which loyalty to the state is expected to develop gradually through the citizens' participation in affairs that suit his personal and functional horizon.



The Constitutional Situation of 1848–1849

Eötvös' statements on constitutional theory are based on the experience of the crisis of 1848. We shall try to extrapolate from the constitutional documents of that time the outlines of the political situation that became a chronic one during the monarchy and the repercussions of which were felt even in the constitutional problems of 1934. The conditions are favorable for carrying out this task because the relevant documents are replete with proclamations, manifestos, preambles, and lesser stipulations of a declarative nature. These allow us to gauge the slightest shifts in the balance of the political powers and the decisions each of them tended toward.

The constitutional documents of importance to us begin with the Supreme Patent of March 15, 1848 (*P.G.S.*, vol. 76, no. 29), concerning the granting of the constitution and abolition of the censorship laws. To characterize in more detail the tone and mood of this document, one would probably have to point out above all the displeasure so clearly audible in it—a mood expressed, as we will see, even more strongly on subsequent occasions. This imperial patent is not a free, resolutely statesmanlike act, promising and introducing a piece of legislation, but it very obviously comprises a set of concessions made to the will of the people, which expresses itself turbulently, concessions made with the intention of restoring the peace. We need only listen to the tone of the statements:

We, Ferdinand I, etc. . . . have now made such dispositions as we acknowledge to be necessary to fulfill the wishes of Our loyal peoples.

This declaration is an expression not of free will but rather of the consideration that, very much against the monarch's free will and reluctantly, "now" something will be done not because it is necessary for the positive construction of the state in accordance

with the ruler's will but merely because it cannot be left undone without leaving the "wishes" of the "loyal" peoples unfulfilled. And these deeds themselves:

By our declaration that censorship is abolished, freedom of the press is assured in the same manner as in all the states where it exists.

The National Guard . . . is already providing the most beneficial services.

As regards the convening of delegates in the shortest possible time, the necessary arrangements have been made.

We cannot find in any of these specifics the expression of a will to create but always and only the imploring reference that whatever must and can be done was being done (freedom from censorship even exactly as it existed abroad—surely one could not ask for anything more), followed by the *ratio* of the moment:

Hence We confidently expect that tempers will become calm again, studies will run their orderly course, the trades and peaceful business activity will revive.

The intention is appeasement of the current revolutionary agitation through yielding to the will of the citizenry, which had become active politically, and this yielding hardly bothers to transform the will of the people, to which concessions are made, into the will of the emperor, so as to hold on to leadership and supremacy in politics. The ominous introductory phrasing of "fulfilling the wishes" of the loyal peoples is hardly balanced by the formulation that the delegates will convene "for the purpose of the constitution of the fatherland, *which we have decided upon.*"

The interpretation of the Patent in terms of the will for organizing the state that imbues it makes sense in regard to the transition from the absolute to the constitutional state. A new will forming the state enters the political force field and demands of the old will that it at least share the power. For the particular organization of the emergent constitutional state the response of the imperial power is crucial. Does it see itself as so weak that it must unconditionally accede to the new demands? Or is it strong enough to retain a significant position in the new structure, making only minimal concessions? Or is it also brilliant enough to incorporate the new structure of the body politic positively into its constructive desires and to allow the new political forces to act within a system it has

prescribed? To understand the Austrian situation, it seems to me essential to realize that the Austrian monarchy was not an absolute state of the pure type, against which new forces had to assert themselves in revolutionary ways; instead, the struggles over the constitution were influenced by a relationship between the ruler and his people that was still almost medieval. As was still obvious in 1848 and in subsequent years, in Austria the relationship of ruler and subjects was not that of an absolute monarch to absolute subjects but that of a medieval prince whose relationship to his people was characterized by ruling and obedience and was based on a negotiated social contract. Only when we take this trait of the Austrian *ancien régime* into consideration can we understand the peculiar Bohemian Charter of April 8, 1848, and use it to understand some characteristics of the years of struggle preceding as well as following it. On March 29 the revolutionary people's assembly in Wenzelsbad had addressed a petition to the monarch, which was subsequently granted in its essential points and designated the Bohemian Charter, issued on April 8, 1848, in a royal proclamation. In this document the Emperor appears as the King of Bohemia and comes to an agreement with the petitioners regarding their relationship to the other lands and peoples that are also under his rule. The proclamation recognizes Bohemian nationality and assures its linguistic parity with the German language in administration and education; the convening of a Bohemian Diet was promised at which all the estates of the province would be represented. What is peculiar and important to our purposes in this proclamation is that it was by no means meant for the Bohemian estates, which were to be the king's partners in the corporative-monarchical state, but for the revolutionary petitioners of the Wenzelsbad assembly. This case shows us with special clarity how the old corporative-monarchic idea overshadowed the new revolutionary events and obscured their meaning for contemporaries. The revolutionary outbreaks are indicative of the growth of a new power in the political field, though the monarch continues to deal with it as if it were the old power of the province and its estates. We find that a similar transitional delusion prevailed in the early stages of the French Revolution; there, too, awareness of the revolutionary nature of the events as generating fundamentally new political forces grew only very gradually. Many delegates to the national assembly believed that

the reforms they demanded were nothing more than a restoration of the constitutional conditions of the Middle Ages.

The Austrian transitional situation lasted for several decades. The Bohemian Charter did not remain an isolated instance; if it had been, insight into the new constitutional problems would soon have prevailed. Rather, subsequently, even in the years after the constitutional work of 1867, the heated conflict between the Bohemian Diet and the Emperor in his role as King of Bohemia developed, a conflict during which the legal situation between monarch and province was clearly and thoroughly formulated. The declaration of the Czech delegates of August 22, 1868, speaks of a legal relationship between the king and the political Bohemian nation, brought about by a contract between the nation and Ferdinand I. The present king, the declaration argues, on accepting the Bohemian crown, had assumed all the rights and duties exercised by his predecessor, Ferdinand V; in particular he was committed to his predecessor's proclamation (the Bohemian Charter). Those issuing the declaration deny the existence of an Austrian state and insist instead on the existence of a plurality of states, whose relationships to the dynasty are not all the same. Between these states, the declaration continues, there was no real union but only a dynastic connection. After the current ruling house has died out, the kingdom of Bohemia, according to the declaration, will be free to elect a new monarch without taking the other provinces into consideration. Changes in the constitutional matters of Bohemia could come about only by means of a new contract between the Bohemian king and the duly and lawfully represented political nation of Bohemia.

After the constitutions of 1860-1861 and 1867 the idea of a contractual relationship between the monarch and his province was newly and very authoritatively formulated in the face of the idea, increasingly gaining acceptance, of the constitutional centralized state. But even though this idea was not expressed as authoritatively in 1848, it nevertheless determined then the constitutional reality just as strongly but so much as a matter of course that there was no immediate reason for strong formulations. We may perhaps see the stipulations in the provincial constitutions concerning the delegates' taking the oath as symptomatic of the development from the idea of the individual relationship of the ruler to each of his provinces to that of the centralized empire. According to the first (but not subsequent) provincial constitutions of 1850, the oath is

to be sworn to the emperor-king, emperor-duke, emperor-margrave, and so on; according to the provincial regulations of 1861, the oath is sworn to the emperor.

The peculiar phrasing of the Patent of March 15, 1848, may be understood in light of the contractual idea. Though the grudging concessions were not explicitly clothed in the form of contractual obligations, they are concessions to the wishes of a partner. They may cause annoyance but are nevertheless seen as somehow comprehensible in light of the previous conditions and not as a revolutionary threat. Other laws [*Rechtsakte*] dating from those weeks were animated by the same spirit, as can be seen in the Patent of March 20, 1848, concerning an amnesty law for Galicia, Lodomeria, and the Kingdom of Lombardy and Venetia (*P.G.S.*, vol. 76, no. 32). Here, too, the reason for the law is presented in a tone of annoyed concession:

To give Our loyal subjects further proof of Our trust, and to show them how much We are inclined to show mercy even to those who have strayed, to make use of Our right in this matter, We have found ourselves moved

and so forth (the amnesty follows); and this is followed again by the expectation:

Therefore We confidently expect that through this Our resolution, tempers will be soothed, calm and order will return everywhere, and Our loyal subjects will prove to Us the love and devotion they have most commendably demonstrated on so many occasions.

The same construction is found in the Cabinet Paper of March 14, 1848, concerning the establishment of a national guard (*P.G.S.*, vol. 76, no. 28).

All political elements of the Reich problems can be found in the Patent of April 25, 1848, to which is attached the constitutional charter of the Austrian imperial state (the Pillersdorff Constitution). The document claims to be the fulfillment of the promise given in the Patent of March 15, 1848: the emperor's word given to the people is to be made good by the constitution. This introduction is essential to an understanding of the octroi in Austrian constitutional legislation. The term *octroi* designates an action of the monarch performed without the collaboration of any democratic legitimating authority; specifically, a constitutional octroi is a unilateral act on the part of the monarch in which he "grants" a

constitutional charter. The fact that such an act on the part of the absolute monarch is called an *octroi* (and not, for example, as just any kind of law enacted by the monarch as the supreme lawmaker) is due to the political conflict implicit in the constitutional *octroi*. Because the constitution does not go into effect as the work of a revolutionary assembly, does not even come about with the collaboration of a council that legitimates itself as a parliament but is issued as the free act of the absolute monarch, the supremacy of the monarch vis-à-vis the political power of the people is maintained—more than that: the relationship is to appear under the idea of the monarchic monopoly of state authority. The monarch cedes a few elements of state authority to the parliament; the parliament has no authority in its own right, and the power thus awarded can potentially be withdrawn again. Under the political idea of the *octroi* it may become questionable whether the constitutional monarchy is more than a special temporary form of absolute monarchy, one that, by an act of the monarch as unilateral as the one that created it in the first place, may at any time be changed back into a pure absolute monarchy in which the state authority is not shared with a parliament.

In Austrian constitutional legislation of the revolutionary and postrevolutionary period, the idea of the *octroi* is variously modified and surrounded by elements of political ideas of a different origin. In the patent that introduces the Pillersdorff Constitution the *octroi* appears as the fulfillment of a fundamental obligation toward the contractual partner, the people. And the people, provinces, political nations may not necessarily see an *octroi* as a unilateral absolute action but as satisfaction of their own demands. Thus in its address accompanying the basic articles of October 1871, the Bohemian parliamentary commission requested that election regulations be granted for the monarchic diet of Bohemia, Moravia, and Silesia. The requested *octroi* is apparently understood as something to be granted or bestowed, not as something to be imposed. And the monarch is the authority to whom each individual province must turn with the request for an *octroi* because, as the shared dynast, he is the connecting link among the provinces, which are otherwise separate. And in the same way, in order to introduce a new legal relationship between the ruler and his people—a relationship to be manifested in new parliamentary institutions—the monarch must take the initial step by means of an *octroi* because he is the

sole legally empowered, functional authority. The same thought is expressed in the above-cited Declaration of August 1868, which mentions new octrois, detrimental to the fatherland, "which in Bohemia, without the complete consent on the part of a rightful and just representation of this Kingdom, can *never* attain to legal validity." Thus the octroi is not necessarily always a unilateral action, which as such would be legally binding as the action of the absolute monarch; rather, it may appear as an act requiring the consent of the other contractual partner in order to attain legal validity—unless, as in the Patent of April 25, 1848, it is presented as the fulfillment of a contractual promise.

Only in the explanation of the political-psychological reasons that prompted the ruler to agree to the octroi (of April 25, 1848) demanded of him do we find motivations of a different political caliber. Among these is the conviction (1) "that the state institutions must keep pace with the progress that has occurred in the cultural and intellectual development of the peoples"; and (2) that the duty to see to the welfare of the people necessitates the granting of a secure legal situation and participation in the regulation of the affairs of the fatherland on the part of the people. Here, in the ruler's duty to see to the welfare of the people in a manner appropriate to the times—which is rooted in guardianship understood partly as inherent in the ruler's sovereignty and partly as an aspect of early German law—is the source of the authoritarian supremacy of the monarch vis-à-vis his peoples. This supremacy is expressed in the pathos of the phrasing: that the monarch had "decided" to "grant" the constitution, that he "decreed" that in future the constitution must serve as a guideline for all subjects and for the clerical, civil, and military authorities. The authoritarian gesture of the monarch, appointed by the grace of God to see to the welfare of his subjects, captures the revolutionary element of the movement for a constitution and transforms it into an act by the monarch. Thus, in this element of meaning of the total act we find the characteristic of the octroi that is generally meant by the word in the prevailing theory—that of imposition, of decreeing from above. The new political power, which is already clearly making itself felt, is reinterpreted as progress in the development of the peoples that allows the monarch, out of his insight, to grant them legal forms in keeping with their higher level of maturity. And in the same way the problem of organizing the Reich into a firmer unity than the

bunch of provinces overshadowed by the imperial title had been (as resulted inevitably from the development of the institutions into a constitutional monarchy and the creation of a central legislative body based on election by the total population) was twisted into a welfare measure on the part of the monarch toward the peoples belonging to the Reich; "the union, having existed for centuries, of the realms belonging to the monarchy" is to be more firmly welded "for their joint well-being," although the arrangements of the Pillersdorff Constitution actually replace, or at least attempt to replace, the "union of the realms" with the "Austrian Imperial State," which is based on entirely different political foundations.

The Patent of April 25, 1848, is ambiguous since it claims to be the fulfillment of the promise of March 15 and at the same time attempts to retain the ruler as the authoritative political institution by turning the revolutionary desires into an act of will of the monarch, based on his insight into his obligations as a ruler, to pull back from his relationship of obligation to his people. But the patent is not only an attempt to salvage monarchic authority through the form of the proclamation; it is also an attempt to materially sidestep the promises of the Patent of March 15, 1848. The Pillersdorff Constitution is a self-contained work, and the new Imperial Diet [*Reichstag*] to be convened would be convened on the basis of the constitution granted by the monarch. Though the wording of the March 15 Patent was somewhat obscure, the phrasing was such that the unbiased reader had to assume the delegates would be convened in order to create a constitution in the first place. The passage in question reads verbatim:

For the convening of delegates from all the provincial ranks and the Central Congregations of the Lombardo-Venetian Kingdom at the earliest possible time, with stronger representation from the middle class and with consideration of the existing provincial constitutions, for the purpose of the Constitution of the Fatherland we have concluded, the necessary steps have been decreed.

This sentence surely had to be understood to mean that the monarch had decided to grant a constitution but that this constitution was to be the work of a formal session of the delegates, or that at the least this assembly was to have a crucial part in producing the constitution. Thus, while the March 15 Patent promised at least a share in the *pouvoir constituant*, the Patent of April 25 attempted to keep power entirely in the hands of the monarch.

The attempt to transform the octroi from the fulfillment of an incurred obligation into an authoritarian act failed. Even the Patent of May 9, 1848, which issued the provisional election regulations to go with the constitutional charter of April 25, in its first paragraph silently altered the composition of the senate considerably, reducing its importance vis-à-vis the house based on nationwide election. But even this concession was not sufficient, and a few days later, on May 16, a proclamation was issued that proclaimed the first Imperial Diet a constitutive one consisting of one house only and abolished any census for the election. With this, the octroi was once again based on the promises of March 15—and even went beyond them by ordering a general national election for the constitutive chamber. This substantive retreat to the basis of the Patent of March 15 is again accompanied in the new patent by a tone of displeasure and annoyed concession and the explicit expectation that now, at last, peace would be restored. The authoritarian monarchic mood of the Patent of April 25 has disappeared. The proclamation begins, "To allay the agitation that arose on May 15, 1848, in Our Residential City of Vienna, and to prevent violent disturbances of the peace, Our Cabinet [*Ministerrat*] has resolved to rescind the order of the day issued to Our National Guard on May 13, 1848, concerning the course of events at the political Central Committee," and so on. The proclamation continues:

To these resolutions We add, in order to obviate all other occasions for displeasure and agitation, on the advice of Our Cabinet, the further proviso that as a preliminary the Constitution of April 15, 1848, is subject to discussion by the Imperial Diet, and that the provisions of the electoral law, which have given rise to misgivings, will be reconsidered.—In order that the establishment of the constitution by the constitutive national assembly be effected as reliably as possible, We have decided that only one house is to be elected for the first Imperial Diet, and accordingly, therefore, there will be no census of any kind for the elections and all doubts that the people will be insufficiently represented will thus be allayed.

The proclamation concludes with the expectation that: "Hereupon We have confidence that all classes of the citizenry will look forward calmly and confidently to the speedy inauguration of the Imperial Diet."

Thus we find ourselves once again politically based on the monarch's obligation toward the people as negotiating partner, and the

obligation that has been incurred is fulfilled through the change in the Provisional Election Regulations of May 30, 1848 (*P.G.S.*, vol. 76, no. 75).

In the constitutional documents of the period from March 15 to May 30, 1848, therefore, we find the following political ideas to be at work:

1. The revolutionary idea of reshaping the political system due to the emergence of a new political power, the people and its representatives; this idea, however, is in part obscured, in part deliberately absorbed by

2. the corporative-monarchic idea of a relationship of obligation between the monarch and the historical-political individuals represented in traditional legal forms (provinces, peoples, political nations, and the like);

3. the sovereignty-related concept of the obligation to organize the state for the welfare of the subjects in accordance with their level of maturity;

4. the authoritarian idea of the octroi, according to which the right of the people and their representatives to participate in the formation of the will of the state emanate solely from the absolute ruler and under certain circumstances can be rescinded by the authority from which they emanate.

Due to the simultaneity of these sometimes contradictory ideas, it is impossible to determine unequivocally what the constitution of Austria was during this period. The sequence of legal acts can be interpreted in such a way as to prove that the foundation of an absolute monarchy was never abandoned. Alternatively, one can assume that during this period there existed not an absolute monarchy but a peculiar, contract-like relationship between the monarch and the people, who found themselves politically on the move, with the concrete substance of this contract being negotiated in the period under discussion. Finally, one can assume that with the Pillersdorff Constitution a step toward a constitutional monarchy was undertaken but that this constitution was broken again by the Patent of May 16 with the promise of the constitutive Imperial Diet and as a result a period began during which the constitutional monarchy was based on a more radical foundation. But it is equally possible to assume that the Pillersdorff Constitution of April 25 for its part broke the promise of March 15 and that the Patent of May 16 fulfilled the promise, and so forth. All these constructions of the

legal position are possible, but all of them seem to us inadequate insofar as they attempt to forcibly reduce a very complex situation to a single thread of meaning, none of which deserves priority over any of the others since all of them equally contributed to the creation of the constitutional situation.

The following period, from the convening of the Kremsier Diet to its dissolution and the granting of the Constitution of March 4, 1849, is unified through the sharp antithetical formulation of the monarchic and the rights of the people that characterized that time. The legal acts from March 15 to May 16, 1848, covered up the fundamental political changes heralded under partly patriarchal, partly corporative-monarchic language. The entrance onto the stage of history of the people as a politically decisive power that bears its legitimation within itself was captured and practically talked out of existence in the traditional turns of phrase; the revolution was presented not as a revolution but merely as unruly behavior of the "Volk," the latter being defined as the object of the sovereign's solicitude or at least as the "lawfully represented" partner in the corporative-monarchic system. With the work of the Kremsier Diet on the one hand and the determined, energetic rule of Prince Felix Schwarzenberg on the other, the revolution breaks through to the area of the constitutional documents and on both sides coins new formulas, more precise than any found in the preceding period of uncertainty.

The Patent of December 2, 1848, which proclaimed Franz Josef's ascension to the throne, already repeated the authoritarian gesture of the Manifesto of April 25 to introduce the Pillersdorff Constitution, sharpening its contours. The "conviction," formulated with neutral modesty, that the institutions of the state must keep pace with progress turned into a strongly emphasized "*personal conviction*."¹ Though the Reich still consisted of numerous nations and peoples, as it did on April 25, above the "Crowns of Our Reich" the glow of "*the crown*" shone very brightly, and the place of the "union of the nations belonging to the monarchy" is taken by the "total monarchy" and "the *one* great national body

1. "Recognizing the need for and the high value of institutions that are free and appropriate to the time, We confidently enter on the course that is to lead us to a salutary transformation and rejuvenation of the total monarchy."

[*Staatskörper*]."² There is no mention of any independent rights of the people; instead, the monarch is willing to share *his* rights with *representatives of the peoples* [Völker] (not, however, with the people [Volk]). And for the success of the constitutional work, which emanates from him, the monarch counts on understanding and honest cooperation—again, not of the people, not even of the peoples, but, formulated carefully as above, of the peoples through their representatives.

In contrast, the Kremsier Diet's draft constitution represents the clearly enunciated and uncompromising theory of the people's *pouvoir constituant*. The Diet lists the basic rights of the "Austrian people," and provides in Article 1: "All government authority proceeds from the people and is exercised in the way determined by the Constitution." Regarding the relationship to the emperor, Article 41 of the proposed constitution prescribes that: "The rights and powers due to the emperor are determined by the Constitution." With this, the political content of the revolution has finally found its constitutional expression. The people establishes itself through its representatives as the source of all political powers and rights; the execution of these rights is regulated by the provisions of the constitution, which has been decided upon by the representatives of the people, and the position of the emperor is circumscribed by the constitution, that is, he has become an organ of the constitution emanating from the people.

The result of this declaration was the Manifesto of March 4, 1849, in which a new constitution was imposed by octroi—this time without the idea of an agreement with the people or a concession to its wishes. Rather, the manifesto proclaims:

We have therefore decreed for the entirety of the Reich: to grant Our peoples, out of Our own free will and from Our own Imperial *Power*, those rights, freedoms, and political institutions that Our illustrious uncle and predecessor, Emperor Ferdinand I, and We Ourselves promised them and that, to the best of Our knowledge and belief, We have recognized as the most salutary and beneficial for the welfare of Austria. Accordingly, We proclaim this day the constitutional

2. "Firmly determined to preserve the glory of the crown and the total monarchy undiminished, but prepared to share Our rights with the representatives of Our peoples We expect that, with God's help, and in agreement with the peoples, We will succeed in uniting all lands and tribes of the monarchy into *one* great national body."

charter for the united and indivisible *Empire of Austria* [*Kaisertum Österreich*], thus concluding the assembly of the diet in Kremsier, dissolving it, and ordering its members to disband immediately upon publication of this decree.

The manifesto also unmistakably indicates the actual foundations of the new constitution when it refers to "the victorious advances of Our armies in Hungary" and declares that it is the emperor's desire to put an end to the misuse of a misunderstood freedom: "To remedy this misuse, to end the revolution, is Our duty and Our will." Combined with the reference to the material control of the situation, this latter statement is the perfected constitutional formula of the founder of a state, in which he establishes himself as the originator, the author of the new order, functioning as an order of power and also as a legal system. In its content the manifesto defines this order in more detail with the use of three principles that recur constantly as the structural laws of the Austrian state:

1. "a strong force, preserving law and order, over the entire Reich," "the foundation of a strong administration," which
2. "equidistant from confining centralization and splintering dissolution, grants sufficient scope to the noble powers of the land" and brings "the freedom of the individual, the communities, the lands of Our crown, and the various nationalities" into harmony with the state authority;
3. "the securing of genuine freedom through the law."



The Cycles of the Constitutions

The constitutional theory of Baron von Eötvös and the events of 1848–1849 pertaining to constitutional history reveal a political situation that is characterized by the following features:

1. The national idea as a political agent intruded itself into the system of the *ancien régime*, and this leads to a number of foci of political will and the accompanying structuring tendencies are in part newly created and in part activated by the conflict situation, in particular;

2. the monarch is thrust into the role of a constitutional ruler of a state;

3. the peoples of the old empire are thrust into the role of elements of one unified people [*Staatsvolk*] of the constitutional state developing out of the empire;

4. at the same time, through the multiplicity of the peoples who, under the influence of the national principle, are becoming so many political nations, the formation of the *Staatsvolk*, the Austrian nation of the Austrian state, is made impossible;

5. therefore the monarch cannot unequivocally exercise the function of a constitutional ruler, because each of the developing political nations wants to enter into a direct relationship to him by circumventing the constitutional state institutions; his function as medieval dynast and ruler of multinational peoples is thus intensified by the principle of nationality;

6. the overall political structure remains in a peculiar state of suspension between an "empire" (the ruler and *the* peoples) and a "state" (the monarch and *one* political people);

7. forcing a decision in favor of the liberal-constitutional solution also reinforces the movement for national states and threatens the empire with dissolution. That is why any such attempt

is followed more or less clearly by retrogressive movements that seek to counter the imminent collapse by authoritarian methods of strengthening the central state authority.

Until the monarchy collapsed, these features of the political situation remained unchanged, and the spiritual substance of Austrian domestic policy became so thoroughly molded by it during the seven decades this situation lasted that it continues to influence the history of the Republic of Austria after 1918. A number of typical phenomena resulted from this situation in the course of the old and new Austrian constitutional acts. The existence of the empire depended on the political situation remaining undecided and uncertain, and as a consequence Austria's constitutional movements typically were not triggered by the powers of domestic politics but began only in response to an impetus from outside. Austrian constitutional history therefore can be organized clearly and meaningfully according to the occasions that in each case set in motion a kind of internal paroxysm and a concomitant wave of constitutional acts. The February Revolution in Paris gave impetus to the constitutional draft of 1848, which led to the absolutist New Year's Eve Patent of 1851 by way of the Pillersdorff Constitution, the Kremsier draft, and the March Constitution of 1849, which was imposed by octroi. The loss of prestige suffered by the monarchy during the 1850s because of its stance in the Crimean War and the unfortunate Italian campaign of 1859 led to a number of constitutions, beginning with the Patent of March 5, 1860, concerning strengthening of the Reich Council [*Reichsrat*] and continuing with the October Diploma of 1860 and the February Patent of 1861 and ending in the suspension [*Sistierung*] of the constitution in 1865. But this paroxysm is not yet fully expressed; it is exacerbated by the defeat of 1866 and eventually leads to the December Constitution of 1867. Subsequent numerous smaller acts of democratization through electoral reform were followed—essentially as a result of the impact of the Russian Revolution of 1905—by the introduction of universal, equal, secret, and direct male suffrage through Max Beck's electoral reform of 1907. The collapse of 1918 begins the series of constitutions of the new Austria with its first wave of 1918–1920; this did not solve the Austrian problem, and the militia movement [*Heimwehrbewegung*] made the Reform of 1929 necessary. The German revolution of 1933, finally, initiates the period of reform in which we find ourselves at present.

This general outline is fleshed out by individual traits that we must consider typical for Austrian constitutions in general and persisting continuously from the monarchy to the present time. The constitutional laws are characterized by the typical phenomena of the provisional solution and the draft. Even before the Pillersdorff Constitution could take effect, which was intended to be a constitution of the Reich, it was turned into a provisional constitution supposed to provide only for a constitutive Imperial Diet. The draft written by the Kremsier Imperial Diet did not take effect. Of the 1849 constitution, imposed by octroi, only the Reich Council, the least characteristic agency, was realized. The Patent of March 5, 1860, was a provisional solution, the October Diploma of 1860 did not take effect. The February Patent of 1861 contained some more lasting elements (especially the regulations for the provinces [*Landesordnungen*]), but the continuing Reich Council, the central organization, never met. The strongly federalist constitution of 1867 could not include a solution for the federal state, and the 1873 Reform reestablished the centralized state for the Austrian half of the Reich. The work on the constitution of 1918 began with a series of provisional measures that led from the centralized state to the federal state of 1920. The Constitution of 1920 suspended an essential element, the new federal distribution of authority; it did not take effect until 1925. Another essential element, the list of basic rights and liberties was not completed at all and had to be provisionally replaced with the relevant sections of the Constitution of 1867. The constitutional amendment of 1929 again suspended a crucial section, namely, the new establishment of the provincial and corporatist council [*Länder- und Ständerat*]; it never took effect. The provisional solution of an authoritarian constitution, based on the wartime Enabling Act of 1917, lasted from March 1933 to May 1934. The "1934 Constitution" was issued on May 1, 1934, but the constitutional situation is characterized by the fact that important sections of this document were suspended and replaced with a transitional constitution.

Thus, the Austrian constitutional acts are not unequivocal decrees that end a power struggle and settle the situation prevailing at the end of the struggle in favor of the victorious power. Rather, we are dealing here with a number of documents that were each prompted by a particular impetus and that can be grouped together because of their typical, recurrent cyclical nature. Each

of the series of drafts, provisional documents, and temporary and permanent suspensions describes a curve in the political arena; the curve swings from the basic position of absolutism in the democratic direction, only to turn back sooner or later to the absolutist (or authoritarian) construction. Nevertheless, the cycles do not repeat with total uniformity; each subsequent one has absorbed some of the substance of the preceding ones because of the accumulation of historical meaning, and since the political agent of the movement is the liberal and national-democratic set of ideas, the democratic content grows ever stronger as the cycles run their course so that finally even the authoritarian final stage of the later cycles are veiled in democratic locutions. Only the first cycle, ending with the New Year's Eve Patent of 1851, concludes with an openly declared authoritarian constitution. The subsequent authoritarian phases are covered up with constitutional features in the monarchy (legislation by decree on the basis of §14 of the StGG, concerning Reich representation) and with democratic ones in the republic.

Austrian constitutional history does not consist of individual constitutional acts, each standing by itself as a ruling decision binding for a longer or shorter time, but of a series of documents in which an unsettled and uncertain situation becomes stabilized anew, and that is why it is impossible to say with certainty what the constitution of Austria was at any particular time. The claim that a state has a particular constitution at any one time is meaningful only when a decision has been made; when, however, the nature of the political situation is such that the decision must be suspended in order to preserve the political structure, then the constitution can be characterized only by noting the forces that hold each other in balance. We must look beyond the letter of the various constitutions that present the Reich now as an absolute monarchy, now as a constitutional one, now as a federal state, now as a centralized state, the republic now as parliamentary-democratic, now as authoritarian—we must understand the permanent power situation that in each instance is to be given legal form by the different constitutions. Austria's constitution cannot be discerned from the various separate legal instruments and their formal language but only from the total series of documents following one after the other.

The peculiar constellation in which a people as the subject of the political will does not develop while at the same time the power of the democratic idea and the political activation of the

population increases necessarily leads to the specifically Austrian problems of authoritarian state construction, problems that become ever clearer after each of the cycles following the democratic waves: Given the political power situation, the authoritarian organization of the state is the only one that assures the continuing existence of the state; but at the same time, the strongest legitimation is the democratic one. What is missing is the authority of the state in itself and beyond all doubt, the authority that in the West European national states is the heritage of the absolute-monarchic centralized organization of the state and the transformation of the various peoples into one *Staatsvolk*, which began at the same early stage. Austria entered the period of political peoples as a "Reich." Its domestic political problems are almost entirely the result of the delayed transformation into a "state."

The details of the very complicated cluster of meanings that emerges in the authoritarian phase of the constitutional cycle will be described in Part III when we discuss the constitutional transition of 1933-1934 and the 1934 constitution. Here we will append some documents from the first constitutional cycle that show very clearly certain basic traits of the Austrian problem of the authoritarian state. To this day little has changed in this regard. The documents concern the formation of political clubs, the position of the civil servants in the state, the education of the citizens for the state through their incorporation in autonomous corporate bodies, and the organization of the state under consideration of the principle of subsidiarity.

Appendix

1. From the decree of the Ministry of the Interior of December 6, 1848, to all heads of provinces, whereby the dissolution of all democratic and workers' clubs is ordered. (*Allgemeines Reichs-Gesetz- und Regierungsblatt für das Kaiserthum Österreich*, Vienna, 1850, annual volume for 1849, supplementary volume, that is, "die Sammlung der vom Regierungs-Antritte Seiner Majestät des Kaisers Franz Joseph des Ersten angefangen, nämlich vom 2. December 1848 bis Ende Oktober 1849 noch nach den früher bestandenen gesetzlichen Kundmachungsarten einzelnweise verlautbarten Gesetze und Verordnungen, von Nr. 1-144.") No. 11.

Just as in every state, even in those that are most free, all political rights of the citizens are limited by the principle of the state, so too the right to form associations is limited.

Associations whose purpose and objectives openly oppose the foundations of a given state, that is, its constitution, the safety of life and property of the individual citizens—foundations the state is obligated to maintain and preserve—and that attempt to undermine them are not a result but a misuse of liberty. The executive power in the state, which is called upon and obligated to enforce all laws but above all the constitutional principles, would be guilty of gross dereliction of duty toward the throne and the people, and would prove itself incapable and unworthy of governing, if it tolerated associations, allowing them to operate, whose goals are the overthrow of the legal order, the creation of anarchy, and the instigation of civil war rather than the development of a free constitutional foundation and the collaboration in stabilizing the state principle. Among others, the so-called democratic clubs and the workers' clubs belong to this kind of association. . . .

It is therefore high time to put an end to these associations that are as inconsistent with the principles of an ordered state as with the laws of reason itself.

2. From the decree of the Ministry of the Interior of December 7, 1848, to all the provincial heads by which the political authorities are obligated to behave in a way consistent with the principles of the central power. Supplementary volume, no. 13.

One of the first and most important preconditions of a strong executive power in the free constitutional state is the completely harmonious working together of the political administrative organs, whether they have to work in a higher or lower sphere. This harmony, however, can be achieved only when each individual official precisely and conscientiously follows the direction the central power prescribes for the whole political administration.

The ministers as central powers are alone responsible for their orders and instructions; from this accrues to them the right and the duty to insist with the utmost severity that their decrees are followed promptly and that each individual official both within and outside his office maintain an attitude that clearly demonstrates to the world that he is going hand-in-hand with the government, because only in this way is a strong, confidence-inspiring, truly fruitful administration possible.

Everyone whose personal views and conviction deviate from that of the central power is free to resign his position, to leave the bond of service to the state. No one will deny him respect because he follows his conviction. But that man would be acting dishonorably who would let the state pay him and yet, forgetful of his sworn duty, cause the state embarrassment by word or deed and prevent the

harmonious collaboration of all members of the administration. And the central power would clearly be ignoring its duty and completely misunderstand its task if it were to tolerate such a course of events.

There follows the instruction to instruct all officials in these principles and to make clear to all, without distinction, that each official either has to give up his position or has to speak and act, both on and off duty, in such a way that his honest work in accordance with the intentions and the spirit of the government can in no way be doubted. At the same time the officials must be explicitly informed that the central power is firmly determined to remove from office without delay any official who would allow himself to counter the central power by open criticism of its decrees or even to forget himself so far as to work directly against the government or the principles it has established.

3. From Alexander, Freiherr von Bach's lecture, published as "I. Beilage zu Nr. 352" of the supplementary volume, of July 31, 1849.

The Reich constitution, though it establishes the principle of the "unity of the total state" as fixed and indivisible, is nevertheless far from the mania to uniformity that forces completely diverse elements into one given form and allows the individual parts of the state their natural independence insofar as this could be reconciled with the existence of a unitary, strong central power. Without consideration of the population numbers and size of territory it included those provinces among the crownlands of the Reich that due to their unique position or historical development have a right to autonomous existence, leaving it to the experience of the future and to the further implementation of the constitutional system to find a more definitive answer to the question how far the autonomy of the provinces may go and to what extent the conditions of independent internal existence and progressive development are inherent in each crownland.

The same spirit of recognition and respect, appropriate to true freedom, of each viable person, the harmonious unity in variety, the organic connection of the parts to the whole also pervades the principles of the municipal laws.

The local municipality must be regarded neither as an accidental aggregate of individuals nor as a local association of a number of people formed for the purpose of administration and for the facilitation of national life. It must not be seen as a mere cog in the state machinery that could be shifted, divided, or cemented together at will. Having grown out of a free union of several families settled in one territory who found their lasting connection in the communality of partly local, partly higher interests, the local municipality appears on the one hand as a simultaneous household [*Simultan-Hauswesen*], whose participants are entitled to the independent regulation of their domestic budget, and on the other hand, as the actual basis and keystone of the entire

state organism and as its lowest nodal point of political life, one that does not splinter into separate subparticles. The municipality is thus the unit to which the state can transfer those of its own attributes that can be taken care of in the household of every municipality by its organs and more directly than the agents of the government could do it.

The parallel consideration of the district organization follows:

Therefore the political organization, without grouping the communities and districts arbitrarily or according to artificial patterns, must chiefly be based on granting legal expression and protection to the different needs as well as similar interests of the separate provinces through the legally permitted organization of the communities. Only in this way will the life of the members of the municipalities be sustained in its natural stratification and the proper communal spirit be awakened that teaches and accustoms the citizens to subordinate the egotism of the individual, the special interests of the family, the exclusivity of the corporatist spirit, and the particular strivings of a region and to sacrifice them for the sake of the conscious and holy love for national unity.



The Founding of the State in 1918–1920

The problematic nature of the state during the monarchy continues after its collapse in 1918 in the Republic of Austria: A national structure was being established in a period when extreme democratic ideas of legitimation were valued highly, but there was no *demos* with the will to statehood. The founder of the new state was a central governmental power, which was, however, neither permitted nor willing to appear openly as the founder; instead, it had to pretend to be the representative of the will of the people. With the founding of the republic began a period of undemocratic state leadership under the guise of democracy.¹

1. The sources used in this chapter are:

Stenographic minutes of the sessions of the Provisional National Assembly for German Austria [*Provisorische Nationalversammlung für Deutschösterreich*] as well as the supplements to these proceedings.

Stenographic minutes of the sessions of the Constituent National Assembly of the Republic of Austria [*Konstituierenden Nationalversammlung der Republik Österreich*], as well as the supplements to this record.

Stenographic record of hearings [*Verhandlungsschrift*] of the provincial conference [*Länderkonferenz*] in Salzburg on February 15, 16, and 17, 1920.

Stenographic record of hearings of the provincial conference in Linz on April 20, 21, 22, and 23, 1920.

The texts of laws published in the *Staats- und Bundesgesetzblatt*.

Die Verfassungsgesetze der Republik Deutschösterreich: Mit einer historischen Übersicht und kritischen Erläuterungen, ed. Dr. Hans Kelsen, with the supporting collaboration of the Member of the Council of State Dr. Stefan von Licht, with a preface by State Chancellor Dr. Karl Renner, Pt. 1, 1919. Pts. 2–4, edited by Kelsen, 1919–1920.

Die Verfassungsgesetze der Republik Österreich, Pt. 5, *Die Bundesverfassung vom 1. Oktober 1920*. With supplements: I. *Die derzeit geltenden Bundesverfassungsgesetze samt Nebengesetzen*; II. *Materialien zur Bundesverfassung*, ed. together with Georg Froehlich and Adolf Merkl by Hans Kelsen (1922).

Ignaz Seipel, *Der Kampf um die österreichische Verfassung* (1930).

Otto Bauer, *Die österreichische Revolution* (1923).

Reichspost.

Arbeiterzeitung.

Neue Freie Presse.

The first palpable symptom of this situation we can find in the constitutional documents themselves is the phrasing of the Law of November 12, 1918, concerning the form of the state and government of German Austria [*Deutschösterreich*] (StGBI, No. 5). The law is essentially political-declarative and symbolic in its content, and it is considered the "founding act" of the Republic. Its Article 1 states: "German Austria is a democratic republic. All official powers are established by the people." Now, this law, unlike other founding constitutional acts, is not preceded by a preamble in which the power granting the constitution (according to the prevailing idea of legitimation, it would have had to be the people) declares itself founder of the state and originator of its constitutional order. Instead we find here the not very inspiring formula: "By resolution of the Provisional National Assembly, the Council of State decrees as follows. . . ." The founding power itself, the people, does not enter at all into the formative political consciousness; the decisive act is carried out by a representative twice removed. The gesture of this founding act, which was supposed to be democratic, is hardly any different from the gesture of the authoritarian granting of a constitution that occurred in 1934 and which we will discuss in greater detail in Part III.

The Austrian people does not appear as decisive in the founding of its state on November 12, 1918; we are not dealing with a popular movement of a revolutionary nature that urgently demands a new form and ultimately finds it. We must therefore better understand the powers of will that caused an Austrian state to come into being and to adopt this form of a democratic republic.

Politically, the situation began to crystallize around the group of German members of the lower house or chamber of deputies [*Abgeordnetenhaus*] of the Austrian monarchy. This was a subgroup of a more comprehensive political institution, and at first that was how those deputies saw themselves. It was only gradually and in response to the pressure of external events that they found their way to independent action. We know those external events under the name of "the collapse." The peculiar situation in which the German deputies and subsequent state founders found themselves was seen in pretty much the same light by both the left and the right. Chancellor of State Karl Renner wrote at the time: "The catastrophic defeat, coming upon us so turbulently, overnight created the Provisional National Assembly, which then felt compelled to

establish an executive committee whose only function for the time being was to implement the decrees of the National Assembly. The National Assembly and its Executive Committee had the task of gathering up the German people out of the ruins of the Reich and to establish a public authority for it. Thus unexpectedly the full power to legislate fell to the National Assembly, and the full power to govern to the Executive Committee. After a few days the Executive Committee faced the task of governing a people of ten million." This description hardly sounds like a founding initiative on the part of anyone, be it the people or its designated representatives. At about the same time Ignaz Seipel correctly noted that there was something problematic about the new freedom, since—as he remarks—"the people cannot, much as they would like to, imagine that they themselves have brought about these changes. . . . The old state collapsed, and in no time at all, as it were, a new state had to be created. Who else should have filled the breach but the representatives of the people, though their seats [*Mandate*] were already somewhat out of date and therefore open to being contested?" But now, he believed, the people must finally speak in its own voice if it wanted to determine its own fate, and he saw election of the constitutive national assembly as the first step toward such self-determination. Seipel also saw the alarming symptom of the missing preamble, which was absent from the federal constitution of 1920 as well.

The November 12 appeal to the German-Austrian people was somewhat less ambivalent on the subject of the form of the state. It stated that we were now one people—of one origin and one language—united not by force but by the free decision of all. But the commentary on this text once again allowed the situation of a founding without initiative and without founders to show through. We read that now the ideals of 1848 had been "happily achieved" in the midst of the "collapse"; and further, that the representatives of the people, united in the Provisional National Assembly, had decided to organize the state of German Austria as a republic. There seems to have been no awareness that political existence can be founded only out of the sources of a will, not by having a representative "organize" it.

We gain insight into the difficulties, the concrete symptoms of which are palpable in the symbolic act of founding, through the history of the legislative principal organ that leads from the

informal discussions between the clubs of the German deputies in October 1918 through the provisional and constitutive national assembly to the National Council. The terms *national assembly* and *national council*, to be sure, express a will to achieve form; the committees thus designated wanted to be seen as the representative assemblies of the nation; there is an echo of the revolutionary tone of the National Assembly of 1789. But even this beginning of a will is surrounded by a large aureole of elements that are involuntary, imposed. Most especially: Which nation was to see itself represented in the national assembly? Certainly not the Austrian nation—Austria found itself in the peculiar position of a nationally unified state that was not a nation-state. In 1918 the Austrian people consisted of Germans living in the Austrian monarchy; there was a section of the population that was of German nationality on the one hand and on the other the Slavic and Romance nations of the monarchy. When national councils formed in Prague and Agram in 1918 during the days of the collapse, these new political institutions doubtlessly were representatives of nations intent on establishing their own nation-state. They were representatives of powers that were eager to take up an independent political existence and leave the union of the monarchy. The concept of nation of the Austrian people and its representatives, on the other hand, was the expression of the German nationality within the framework of the monarchy. In the history of 1918, the expression *national council* comes from the Slavic revolutionary assemblies; it is taken up by the imperial manifesto of October 16, 1918, which recommends the formation of national councils for all of Austria's nationalities, and it is not until October 21 that the term is adopted by the German delegates, who first convened on that day as the Provisional National Assembly. The nation remains the idea of the German nation on the territory of the old Austria.² In his speech of October

2. The problem of the "nation" is very evident in the wording of the constituent decree of the Provisional National Assembly of October 21, 1918. To speak of the population of the new state, the somewhat awkward designation "the German people in Austria" had to be used, while the other population segments that were leaving the monarchy could clearly and unequivocally be referred to as "nations": "The German people in Austria is determined to decide its future state order for itself, to form an independent German Austrian state, and to regulate its relation with the other nations by free agreements. . . . The German Austrian State will resist any annexation by other nations of territories settled by German farmers, workers, and citizens. . . . Until the constituent national assembly is in session, the Provisional

21 Viktor Adler explained that the Austrian state that was to be newly established wanted to enter into a free league of nations with the neighboring countries. However, if this was possible under conditions that did not accord with the national and economic requirements of the German people, then Austria would join the German Reich as a federal state since the German Austrian state "was not, after all, a structure capable of economic development." At the time of the founding, then, the nation idea vacillated between the idea of the German part of the people in a federation that once again takes up the old Austrian Reich idea, and the idea of absorption into the German national state; an independent existence appears to be entirely out of consideration. On November 12, when the possibility of a federation with the Slavic succession states had already become unlikely, the law declaring Austria to be a democratic republic therefore also provides the following explanation: "German Austria is an element of the German Republic." The designation of the successor to the constituent national assembly as "national council" in the B-VG (Bundes-Verfassungsgesetz) [Federal Constitution] of 1920 does not contain anymore the idea of the imperial manifesto of October 16, 1918. This designation may have mostly been based on an analogy to the Swiss institution of the national council.

The absence of a political people, a *demos*, that might have been able to establish the state as a democracy can be documented in the history of the founding of the republic. For each of the acts by which the constitutional order of the republic was gradually created, we have the commentaries of the responsible party politicians, which give exhaustive information concerning all the nuances of a founding will. In the opening session of the Provisional National Assembly, on October 21, 1918, the representatives of the parties rendered their programmatic declarations. The representative of the Social Democrats, Viktor Adler, elaborated: "We wish to form no party coalitions with you, the enemies of the proletariat. We wish to conclude no alliance or truce, we remain adversaries as we have always been adversaries. We come here to wage our

National Assembly claims the right to represent the German people of Austria at the Peace Conference, to carry on negotiations with the other nations concerning the transfer of the administration to the new national states and concerning the reorganization of relations among the nations, and to establish a legislative and executive authority."

battle for the proletariat, for democracy, for socialism within the framework of this parliament." In the context of these cordial intentions, he declared himself, speaking for his party, prepared to take part in establishing the state as a democratic republic. The speaker for the Christian Social Union (Christlichsoziale Vereinigung) advocated democratization of the state while basically retaining the monarchic form of government; if it were to prove possible, the Austrian monarchy was to form a federal state together with the succession states. The representative of the German Austrian Independent Party (deutschösterreichische Unabhängigkeitspartei) also spoke in favor of a democratic-constitutional monarchy but opposed federation with the succession states; he wished for an independent Austria, though this state was to develop particularly warm relations with the German Reich. The German Liberty Union (deutschfreiheitliche Vereinigung) was in favor of self-determination and democracy; the National Socialist Workers Party (nationalsozialistische Arbeiterpartei) advocated union [*Anschluss*] with Germany; the Union of German National Parties (Verband der deutschnationalen Parteien) argued for an independent constitutional monarchy. According to the wishes of the parties taking part in the opening session of the Provisional National Assembly, Austria was to be organized as a republic and a monarchy, as an independent state, as a member state of a Danube federation, and as a member state of the German Reich. Furthermore, Viktor Adler's speech, with its declaration of class warfare, demonstrates the deep fissure running through the population from the very beginning and robbing from the outset any democratic state institution of its meaning.

The essential development in the following weeks and months consisted of restricting these multifarious aims in response to external events. The second session, held on October 30, decreed the law concerning the fundamental institutions of the state authority, by which the state of German Austria was legally established as a republic and an independent state. The tone of this decree and the pressure under which it was issued are reflected in Chancellor of State Renner's remarks on the founding of the state: "Every people has claimed its right to self-determination, and so there was nothing else left for us to do but to make use of the inalienable and irrevocable right of a people to create its own constitutional institutions." Waber, one of the delegates, made some remarks indicating that the

forced nature of the act, devoid of any independent decision, did not go unnoticed:

We must leave it to the future to determine whether the majority of the people is in favor of a monarchy or a republic, just as the whole permanent elaboration of conditions is left to the future. Originally we established the entire matter as a provisional solution.

With this, we have shown that we cannot transcend the old Austrian concern that we are not immediately ready to undertake an energetic deed; but perhaps this serves to reassure the masses, reassuring them by indicating that in the last resort it is they who will make the ultimate decision.

The third session, held on November 12, 1918, produced the law, cited earlier, concerning the form of the state and the government. Renner accompanied the declaration of German Austria as a democratic republic with the following statement:

After the terrible catastrophe, which uprooted all traditional authority, German Austria can recognize only a public authority that emerges from the people itself and from the representation of the people [*Volksvertretung*].

If, with this decree, we declare German Austria to be a republic, we follow an international necessity, in our relations to the other peoples of Europe and the world, to the friendly powers and those who, at this very hour, are still hostile. There can be no dispute: today democracy has become the basic law of all the world, and we cannot do otherwise, nor do we wish to do otherwise, we too must be governed by the methods of modern civilization.

The apologetic tone of this decision in favor of a republic and the friendly persuasion of pointing to the world supremacy of the democratic idea, however, must not be misunderstood as implying that Renner himself was dissatisfied with this resolution. Rather, his statements were intended to appease the adherents of the monarchy on the part of the representative of the social democracy, for the agreement of the deputies favoring a monarchy was won, as was already revealed in Waber's speech of October 30, under the pressure of a threatened revolt by the socialist sectors of the population.

A different possibility of shaping the state, which had played an important role until that moment—confederation with the succession states—was not also closed off because all discussions toward this end had failed. Article 2 therefore declared: "German Austria is an element of the German Republic." Once again, Renner's remarks reveal that this declaration, too, was not entirely voluntary and

unequivocal but had been adopted for lack of something better. He noted: "It was not easy for us to come to this decision. For weeks, the Council of State negotiated day after day with the neighboring nations, but the negotiations unfortunately came to nought. We are tired of war. The large, the overwhelming majority of the German people would be prepared, and is prepared at this very moment, to conclude the peace, not only with other nations but also internally in the framework of the old state consisting of the provinces that once made up the Reich council." Thus, the choices for the organization of Austria were limited to democracy, republic, and independent state—but all three principles were by their nature not political decisions. No decision in favor of democracy had been taken, because the Social Democratic Party considered the democratic institution as a provisional solution, which was to be replaced as soon as possible by a socialist republic and the dictatorship of the proletariat. No decision in favor of a republic had been taken, for the consent of the parties favoring the monarchy had been forced by the acute pressure of a threatened revolution. And no decision for an independent state of Austria had been taken, for even the moment it was established it was also proclaimed to be an element of the German republic.

The unsettled situation was further complicated by the alternative of establishing the new entity as either a centralized state or a confederation. The decision of October 30, 1918, had set up Austria as a centralized state. At the same time, however, the provinces [*Länder*] were required to declare themselves official members of this state. The receipt of this declaration (not all the provinces submitted it) was confirmed by a decree of the Provisional National Assembly on November 12, 1918, without, however, leading to any changes in the centralized state being constructed. This request for and acceptance of membership declarations, which is difficult to understand in legal terms, is a further symptom of the problems attendant on the founding that we have attempted to outline so far. Austria (with the exception of the Burgenland) was composed of those German territories of the old monarchy that were not claimed by any of the successor states. This remnant never became a constitutional entity, and just as it lacked a national people [*Staatsvolk*], whose political will could have been directed toward the foundation of this state, it also did not have a national organization and political leadership resolved to establish a state.

The only legal and political realities of this remaining conglomerate of territory and populations were the former crownlands. In the years from 1918 to 1920 various historical reasons were cited to justify the independence of the provinces and the necessity of establishing Austria as a federal state. But all these reasons—which were mostly based on a not overly precise knowledge of Austrian constitutional history—are less important than the fact of the monopoly of a tradition of realism [*Wirklichkeitstradition*], something the provinces had but the state of Austria did not have. And this aspect of the situation seems to me fully sufficient to explain this episode of membership declarations, an episode about which many guesses have been advanced. Circumstances forced the government in Vienna to organize the state, but since there was no will to found a state, the subjective feeling of authorship, of authority, was not strong enough, the legitimation perforce had to be supplemented by something of more convincing reality. The events of the following years and especially the proceedings of the provincial conferences of 1920 support the claim that this thesis correctly characterizes the situation. The situation was typified in an exemplary fashion by the declaration of the German Liberty [*deutschfreiheitlich*] Union at the Salzburg conference of the provinces in February 1920:

After the abdication of the dynasty and the collapse of the Danube monarchy, the provinces have achieved independent statehood, and thus have won the right to decide on their union in a confederation and on the federal constitution.

The creation of the federal constitution must result from unanimous resolutions of the constituent provinces.

With a view to the peace treaty of St. Germain, this confederate pact—the legal result of the provinces' unanimous approval of the laws—must also be accepted in the same wording by the Constituent National Assembly.

The provinces' actual predominance is elaborated in the declaration with the same care as the coercive nature of the central state organization. The same conference revealed the provinces' strong sense of autonomy in the declarations of their various representatives. Vorarlberg was wrapped up in its efforts to unite with Switzerland; Carinthia considered itself an independent political structure as the result of the struggles over the German border territories. A representative for Salzburg expressed himself with great vigor:

For centuries the province of Salzburg was an independent state, and it was only through an act of violence that it fell to Austria. . . . When Austria fell apart and the provinces had to be integrated into a new state, back then when the then deputies to the Council of the Reich came together in Vienna to create a new state, though they had no mandate whatsoever but simply laid claim to such a mandate, they felt giddy and uncertain as to the right on the basis of which they were to found the state, and the request went out to the provinces to submit a declaration that they were joining together in one state.

The remarks of the representative from Upper Austria, who spoke about the provinces' autonomy in regard to the question of affiliation with the German Reich, were highly illuminating: "We speak constantly of affiliation, and we have no idea what conditions abroad will be like. We are dependent in many ways, for if the German Reich says that it is prepared to take us in, but only by way of a centralized state of Austria, I say that I will decline such a way with disgust." The representative of Styria declared: "We must consider primarily that today's Austria is a coerced state, this Austria has not come together voluntarily but has come together under the external pressure of the shameful peace, as it is called. In my view, such a state cannot be structured along centralized lines but only as a confederation—and in the interests of its members, who only under coercion come together in this state, which pleases our enemies only if it is constructed as a centralized state." The representatives of other provinces expressed themselves along similar lines. Only the representative of the Burgenland, who wished to join with Austria, was greatly embarrassed by these lively expressions of centrifugal tendencies.

The stronger reality of the provinces was sufficient to establish the state formally as a federal state and to play an increasing role in the symbolism of the state: Austria had transformed itself from a republic to a federal state and its legislative organ from National Council to a Bundestag. But this real supremacy over the democratic substance of the state structure was once again restricted significantly by a different, still stronger reality factor—the party organizations, which play a similar role in the history of the republic as did the nationalities in the monarchy. We find ourselves in the somewhat complicated interpretive position that the strongest political power factor of the new state, the party, does not appear in the symbolic substance of the constitution but is concealed behind

the idea of democracy; at the same time, the strongest symbolic factor of the democracy has no basis in the reality of the state because there is no *demos*. In this balance of powers and symbols it was possible for the state to be organized formally as a federal state and for the federal symbolism to develop more and more until 1934, while at the same time the provinces' sphere of influence vis-à-vis their legal situation in the monarchy became ever more severely restricted and the state was ever more firmly organized as a centralized one.

That the success of the provinces' political power was due to other power factors was already absolutely clear in the period from 1918 to 1920. The provinces were in large measure defined by the parties, insofar as in those years Vienna and the central government stood under the decisive influence of the Social Democratic Party, while in the provinces the other parties either were dominant or could defend their power positions. During the founding period of the state, the Social Democrats advocated centralism, the other parties, federalism. At the conference of the provinces the Christian-Social and National delegates advocated autonomy for the provinces, while the Social Democrats favored the construction of a centralized state. As one of the delegates noted, the conferences of the provinces were in actuality much more conferences of the parties. The constitution that was discussed at the conference was intended to reconcile the federalist and unitary aims.

The negotiations about the constitution of 1920 reflect the total complex of interpretation we have analyzed. The report of the constitutional committee of the Constituent National Assembly formulated the outcome:

The elements of a centralized state and a federal union of states, which underlie the provisional constitution, can be reconciled only in the idea of a federal state. This is the reason why already more than a year ago this state form was recognized to be the one most suited for the community of provinces that united the Germans of the old Austria at the time of the collapse and that almost a year later—to be sure, diminished by large and valuable sections of the people—was welded into a community of fate by the Peace of St. Germain. This is also the reason why, on the common basis of the federal idea, diametrically opposed political tendencies met and out of their shared will to safeguard this body politic against political collapse and material decline have agreed to the present compromise of a federal constitution.

That the constitution was understood as a compromise, a provisional solution of short duration, an action not based on a decision is clear from the speeches of the party representatives. Seipel explained: "We have unanimously determined that our constitution must hold on to the democratic foundation forever and always. To come to this determination was, at the time, necessary much less because of a threat of a so-called reaction as because of the danger that the democratic constitution could be replaced by the rule, the dictatorship, of a single class." The president of the cabinet, Dr. Mayr, expressed himself even more clearly: "The draft law now under discussion . . . in its final form is based—I may surely say 'unfortunately'—on no formal submission of the state government. The law as it is now before us appears rather to be the result of protracted negotiations among the political parties of the Upper House and as such is a compromise of the central requirements of a united state and the federalist rights of the provinces, all of them fighting for recognition." The spokesman for the Social Democrats, Robert Danneberg, declared:

The workers defend this republic, though this democratic republic and this constitution are, as we all know and as the gentlemen surely are fully aware, by no means the last and crucial goal of the Social Democrats. For even in this state, this democratic republic, capitalism continues to live; even in this state the workers produce added value for their exploiters, though they do so as politically free citizens with equal rights; nevertheless, even in this country they are economically exploited. When they defend the republic, however, they defend it as the ground on which they can wage their struggle against capitalism.

The representative of the Pan-Germans expressed his regret about the fact that the wishes for the establishment of an economic parliament were not satisfied: "In our opinion, peaceful labor relations can be promoted only by using legal coercion to get both employers and workers to come to the conference table and realize how the common interests of both can be promoted most effectively." Schönbauer, one of the delegates, stated: "I deny that the present constitution represents, or even can represent, a permanent work, a large, liberating act, the 'great work' that could bring law and order to our unfortunate body politic. I look on it as an emergency constitution, as a transitional constitution, cobbled together because there was no other choice, and I am inclined to entitle it 'The Law By Which the Old Austrian Provinces Have Temporarily Been Established as a Federal State.' "

We may summarize the result of the founding in the following features of the Austrian state:

1. Factually, the extent of the territories and the number of inhabitants was the direct result of the collapse of the monarchy and the exodus of the other nations, which left a "residuum." Legally, it was the outcome of the resolutions of the international treaty of St. Germain.

2. Within the borders thus drawn, a state was "established" (not founded by political decisions), which had neither a *Staatsvolle* in the sense of a political people with a will to the existence of the state nor any state leadership that could claim to be the author or creator of the state.

3. The real powers were the crownlands, freed from the monarchy, and the parties.

4. In this peculiar sphere of political uncertainty, Austria could be organized as a democratic republic, along the lines of the prevailing political ideas, through the B-VG of 1920. This organization was not the result of existential decisions in domestic politics; the text of the constitution did not bring order into the actual power situation, and in essential parts, namely those that required the existence of a political people for the constitution's functioning, it was inapplicable.

The history of the republic after 1920 was prefigured in the founding period: it was fulfilled in the various attempts to realize the decisions suspended at the founding. Concerning the existence of the state, a number of attempts went in the direction of radically eliminating the state through union with the German Reich; other attempts aimed at economic and political integration into a Danube confederation or into the Italian-Hungarian system of treaties. The nonexistence of a national people expressed itself in the Social Democrats' politics of class struggle and in the conflicts between a party organization and the state, which were pushed to the point of civil war. Finally, the beginnings of an Austrian national consciousness showed itself in the militia movement [*Heimwehr*], which had its first, though still weak, success in the constitutional amendment of 1929, and since the German revolution, in the movement for the establishment of an authoritarian and corporative Austrian state.

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Part III
The Authoritarian Constitution
since 1933

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Kelsen's Pure Theory of Law and the Problem of an Austrian Theory of the State

§1. The Guiding Idea of the Presentation: Kelsen's Positivist Metaphysics

In the unique situation of the balance of power and the suspension of any decisions at the founding of 1918–1920 there was an opening for a constitutional theory and construction that is connected with the name of Hans Kelsen. The idea that the definition of the state lies in its identification with a legal system, understood as an embodiment of norms, found its particular opportunities for development in the concurrence of the circumstances we have already touched upon. The formation of a state through an external power—in this case through the conference of the entente powers—and the absence of forces in domestic policy that were capable of arriving at a decision concerning the existence of the state—all this has allowed the norms of the constitutional order to come to the fore as the unifying element of the population in the Austrian territory to such an extent that we could almost say that the Austrian state represents a case to which the theory of the identity of state and law can empirically be applied correctly. Because of the empirical truth content of the theory when it is applied to the Austrian case and because of the influence of its originator, Kelsen, on the structure and interpretation of the constitution of 1920, the pure theory of law gained a significance in Austrian constitutional history that went far beyond its objective content. The theory's idea that the acts of law creation [*Rechtsschöpfung*] can, without exception—even in regard to the constitution—be regulated by norms and its exclusion of the judicial thesis—which, not capable of being regulated by

norms, creates in the emergency situation, by force of a power-borne decision, the national order out of legal phenomena—have prevailed so completely that the theory is advocated not only by the followers of pure theory of law but also by its opponents, and not only by legal scholars but also by politicians. The idea survived the founding situation, taking on crucial importance even for the transition from the parliamentary-democratic to the authoritarian constitution and for the establishment of the authoritarian constitution itself. An objectively adequate analysis of the issues of law in the Austrian authoritarian state is impossible without a precise understanding of this theory, which is representative of the Austrian political complex of problems. When in what follows we make an effort to communicate this understanding and to place the theory into the larger context of the Austrian theories of the state, we do so not because we intend to criticize it (though a certain number of critical remarks must be made), but, most importantly, because we wish to present the inherent metaphysical, ethical, historicist, epistemological, and methodological motives for limiting the legal object [*Rechtssgegenstand*] to a particular norm type.

The most comprehensive intellectual context into which all the various aspects of Kelsen's theory can be placed is a metaphysics we must characterize as positivist. The basic positivist feature of the system gives a uniform cast to the methodological, epistemological, and ontological problems, which historically and theoretically come from a variety of sources and which arise when the questions of state theory are examined; the positivism unites those problems into one whole. We will begin our discussion with those methodical questions in regard to which Kelsen's theory may properly claim the attribute of purity.¹

1. The following discussion of pure theory of law is primarily based on the last systematic summary Kelsen compiled under the title *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* (Leipzig, 1934). The critical literature on pure theory of law is cited in the bibliography to Wilhelm Jöckel's work on Hans Kelsen's theory-of-law method as well as in the fairly exhaustive *Bibliographie der Reinen Rechtslehre*, by Rudolf Aladár Métall (67 pages long), which is appended to Kelsen's *Reine Rechtslehre*. Our discussion relies in essential points on the following works:

Erich Kaufmann, *Kritik der neukantischen Rechtsphilosophie: Eine Betrachtung über die Beziehungen zwischen Philosophie und Rechtswissenschaft* (Tübingen, 1921).

Siegfried Marck, *Substanz- und Funktionsbegriff in der Rechtsphilosophie* (Tübingen, 1925).

§2. The Neo-Kantian Demand for Purity of Method

The demand for purity in jurisprudence—that is, the elimination of all elements that cannot be understood as positive-legal [*positiv-rechtlichinhaltlich*] grows out of the neo-Kantian idea. The epistemological principles that have become crucial for pure theory of law were the following. The attitude of naïve realism takes the statements of science to be reflections of a reality grasped in its essence; according to an epistemology critically cleansed in the Kantian definition, which neo-Kantianism claims to be, reality is ungraspable as a thing in itself. The perceived scientific object is constituted in the context of judgments by virtue of a treatment of the pre-objective material by the a priori categories of the perceiving consciousness; the object is the object of perception in the sense that it is constituted by the act of perception. Specifically, the theory vacillates between the concerns caused by the “point of departure” in the subject matter and the successful overcoming of these concerns by the constitution of the object in the stream of consciousness that permits all material questions to be forgotten to the extent that the system of natural science judgments can also be understood as belonging to the human sciences [*Geisteswissenschaft*] because those judgments also are constituted by the perceiving mind. The unity of a system of judgments is not due to the structure of the being under consideration—this is in

Alexander Hold-Ferneck, *Der Staat als Übermensch* (Jena, 1926).

Gustav Adolf Walz, *Kritik der phänomenologischen reinen Rechtslehre Felix Kaufmanns: Aphorismen zur Rechtstheorie* (Stuttgart, 1928).

Carl Schmitt, *Verfassungslehre* (Munich, 1928).

Rudolf Smend, *Verfassung und Verfassungsrecht* (Munich, 1928).

Wilhelm Jöckel, *Hans Kelsens rechtstheoretische Methode: Darstellung und Kritik ihrer Grundlagen und hauptsächlichsten Ergebnisse* (Tübingen, 1930).

Karl Larenz, *Rechts- und Staatsphilosophie der Gegenwart*, Philosophische Forschungsberichte, fascicle 9 (Berlin, 1931; 2nd ed. 1934).

Our own opinion on the basic questions of pure theory of law was discussed in the following works:

“Reine Rechtslehre und Staatslehre,” *Zeitschrift für öffentliches Recht*, IV (1924).

“Kelsen’s Pure Theory of Law,” *Political Science Quarterly*, XLII (1927).

“Die Souveränitätslehre Dickinsons und die Reine Rechtslehre,” *Zeitschrift für öffentliches Recht*, VIII (1928).

“Die Einheit des Rechts und das soziale Sinngebilde Staat,” *Internationale Zeitschrift für Theorie des Rechts* (1930).

Rasse und Staat (Tübingen, 1933).

It is supplemented here by relating Kelsen’s various theoretical theses to the dogmatism of a positivist metaphysics.

itself ungraspable—but through the unity of a system of categories; whatever cannot be encompassed in the categorical unity within the system does not belong in the system. It taints the system, and if it has crept into the traditional scientific context in the course of the history of science, it must be removed from it.

§3. The Positivist Trait in the Neo-Kantian Critique of Method

The direction of neo-Kantian critique of method that Kelsen pursued takes a decided turn toward positivist metaphysics. Within his system, Kant more or less applied the above-mentioned requirements, which neo-Kantians often simply call the Kantian ones, in his critique of the science of inorganic nature. For human life in society, however, he developed a metaphysics of reason that strongly deviates from these requirements. Neo-Kantianism (and Kelsen in the same spirit), however, transfers the problems belonging to the method of the sciences of the inorganic realm uncritically and essentially unchanged to all other scientific subject matters. While for Kant reason as the essence of the human being was the locus where perception can get hold of a thing in itself, for the neo-Kantian, human beings in society are in essence just as much closed off, transcending the mind of the perceiver, as is the realm of inorganic nature, and therefore their scientific exploration of it is subject to the same methodological principles as mathematical physics. It is not our purpose here to pursue in detail the reasons for turning a Kantian idea into a positivist statement. We need only understand that it was not an *inevitable* consequence of Kant's ideas—speaking of historical facts, many another idea was derived from his, such as the systems of Fichte and Hegel as well as Kleist's existential doubts, and many others can also still follow from them, as is shown by Heidegger's book on Kant and Jasper's interpretation of Kant. Some of Kant's ideas survive in the positivist direction of neo-Kantianism, to be sure; but by the end of the century in Germany they were transformed and incorporated into the totally different context of positivism. Neo-Kantian positivism does not go so far as to doubt the reality of all nonnatural being and to trace all phenomena of the mind to those of nature and to integrate them in principle into a unified science [*Einheitswissenschaft*], though this is what the trend in positivism that is pursued in

Vienna by Ernst Mach's adherents endeavors to do. Transcendental-philosophical positivism, in thrall to the extraordinary progress of the natural sciences, is content to call for related methods for the sciences of mental phenomena in order to make similarly drastic progress possible for them. The enthusiasm for the natural sciences is heightened by the admiration for its success in the area of technology. Kelsen's theoretical insights often turn into corollaries on their social-technical significance, and within the school of pure theory of law, alongside other, very different ideas, the idea of a theory of law as social technology has been elaborated in analogy to the technology based on knowledge about nature. The idea of the social-technological significance of the theory of law can, however, bear fruit only if some contextual goal is set for the social technician. And in Kelsen we do in fact find very precise notions of a desirable, perfect organization of law in the context of a philosophy of the evolution of law. We will discuss it at greater length below when we speak of Kelsen's idea of progress as an element in his system of positivist metaphysics.

§4. The Unity of Object and the Unity of Being

Even without knowing more about the content of the legal object as defined by the pure theory of law, we can state that generalizing the methodology derived from the model of mathematical physics must result in very significant limitations for the object of a theory of the state. The claim that the unity of a scientific object is determined by the unity of a system of categories or by the unity of method contains the ontological precondition that reality is arranged in such a way that it can be perceived by a pure method. Neo-Kantian transcendentalism avoids exploring these preliminary ontological questions by arguing that a knowable being with a perceptible structure does not exist aside from the object of perception as it is constituted precisely in the acts of perception under categorial formation. An ontological question preceding the methodological inquiry into the object, the argument goes, is inadmissible. This argumentation is correct insofar as it proceeds tautologically: the object of perception as perceived is categorially constituted, and until it has entered the judgment form through categorization, it is simply not perceived. There is no perception prior to perception; there is no ontological problem prior to the methodological problem.

Once this is granted, however, then the object of perception is always and in every case a "pure" object, since by definition it cannot be grasped under different categories simultaneously, since it is precisely such categorization that constitutes each object as distinct from all others. This argumentation, in itself thoroughly logical, assumes that in the act of perception the object of perception—out of material that cannot be defined more clearly and that approaches the perceiving subject in a way that cannot be clearly defined—suddenly confronts us as perceived. It does not, however, consider that for human beings the act of perception is always placed in a horizon of being that, though not "perceived" as such, nevertheless is not formless but as our life horizon it is structured more or less distinctly in all the directions in which we—both as species and in our historical existence, that is, as inorganic-physical, as bodily, spiritual, mental, social, religious beings in all degrees of generality all the way down to the concrete moment—are open to the world. That is, the above argument does not consider that the acts of perception, the categorial constitution of the object notwithstanding, are integrated into the context of relevance of human-species and human-historical existence within the horizon of our being, and that decisions about the relevant structuring of the being that is to be perceived are made in the horizon of existence and not through the categories of the perceiving consciousness.

Now it is certainly possible that such a relevant realm of being [*Seinsauschnitt*] that is defined as relevant by the mode of the generic and historical essential openness of the perceiving person can be properly exhausted intelligibly through a single system of categories. However, it is also possible that this requires a greater number of different categorizations to grasp a relevant realm of being, considered a unity, in its totality. The positivist methodology anticipates the discussion of this question by coming to the prejudgment [*Vor-Urteil*] that in principle every relevant sphere of being must be graspable by the constitution of objects of a single categorial type, because the congruence between existentially relevant sphere of being and object of perception appears in fact to be found in the case of the mathematical natural sciences.

We used the word *appears* in the last sentence of the preceding paragraph because it does not seem to be an established fact that the assumption of the congruence between being and object, which positivist methodology is based on, is true even for the mathematical

natural sciences. For the actual data of the natural sciences to which Kant referred in his critique of the categories of the natural sciences, that is, for Newtonian mechanics, this assumption may have been correct. In regard to the complex of the modern mathematical natural sciences, which also includes quantum mechanics, its validity may be doubted. We will not and cannot offer a substantiated opinion on the question. For the realm of being called *state*, which is relevant to our purposes, however, the assumption is definitely wrong. The realm of being called *state* includes such objects as "system of norms," "masses and elites," "power relations," "legitimacy," and "political idea," which quite certainly cannot be included in a single object-constituent system of categories. In this perceptual situation any demand of "purity" can mean only that the several objects must be neatly distinguished from each other and not brought into false relations to each other. If perception, in the sense explicated above, is to remain "relevant," it cannot demand that all objects except one be removed from the system of the science of the state. Thus, without asking which object is to be chosen as the one pure object out of the total complex of objects that together form the perception of the essence called "state," we can say that the positivist requirement leads to a serious impoverishment of the total object. As a result of its basic requirement, pure theory of law finds itself compelled to attack "method syncretism" and the "double-sided theory" ["*Zweiseiten-Theorie*"] of the state, and this struggle limits the phenomenon of "state" to only one of its several objects, namely, to the phenomenon pure theory of law calls *law* and which, precisely because of the limitation, can then be seen as synonymous with the phenomenon "state." The combative attitude in the criticism of method as practiced by pure theory of law, aimed at limiting the object of the science of the state, is the inevitable consequence not of justifying a genuine problem of method but of justifying a metaphysical—more precisely, a positivist—dogma.

§5. The Unity of the Object and the Self-Constitution of Social Reality

Now, once the total phenomenon of the state has been reduced to the object "law," the positivist substance of the dogma makes it impossible to grasp even this single remaining object adequately. When we listed the neo-Kantian methodological principles, we

pointed out that they are in no way Kantian but peculiarly neo-Kantian. Kant (we are willing to admit in order to avoid further extensive discussions, though it does not hold true in detail) applied these principles in his critique of the mathematical natural sciences; regarding the phenomenon of "man in society and state," however, he examined the thing in itself. In the natural sciences, the thing in itself was inaccessible and opened itself to understanding only as a phenomenon in scientific judgments, but in the case of the human being and society, the essence of being was itself accessible and could be made the object of direct observation. While in the case of the natural sciences, the fact of the natural science was the only phenomenon constituted by man and therefore graspable to the mind from inside, in the case of the sciences concerned with human beings in society in general, without limitation to the "state," it is not only the science that is accessible for the immanent analysis but also the object of that science itself, as one constituted prior to all science by human actions. Referring now to the state, there are not only questions of the constitution of the science of the state in the same way that there are questions of the constitution of natural science; there are also questions concerning the constitution of the state itself. If in this situation the neo-Kantian methodological requirement, based on the natural sciences and therefore positivist, is fulfilled with logical consistency (and in his pure theory of law Kelsen at least intends doing so, though he is not successful), then all substantive problems of the theory of the state and all questions of the constitution of reality fall away. In other words, when the object "state" is identified with the "law," not only do all other objects disappear from the total phenomenon of the state, but the law as context of reality constituted prior to science also vanishes from the subject matter of the theory of the state.

§6. Vacillation between Scientific Context and the Structure of Reality

However, when the reality of law is removed from the system of pure theory of law, difficulties arise. Though understanding the context of law as that of the science of law is still in accordance with the fundamental assumption of the neo-Kantian theory of method, the peculiar problematic situation of the dogmatics of law [*Rechtsdogmatik*] requires Kelsen to violate the principle, so

that within his theory we can see a frequent vacillation between the scientific context and the real structure of law as the decisive context of law. The vacillation is due to the fact that in the system of pure theory of law the positivist theory of the object [*Gegenstandstheorie*], according to which a science may deal with only one object, must somehow be brought into harmony with an existentially determined delimitation of a relevant realm of being that includes more than one object realm. Though Kelsen works with the theory of the single object, his premethodological, existential delimitation of the object area that is to be perceived turns out such that certain pieces of the reality constitution are relevant for him as well. And now we must inquire into the grounds of relevance of the pure theory of law for the delimitation of the realm of being.

§7. The Legal Order as a Unit from the Standpoint of the Practitioner of Law [*Rechtsanwender*] and the Dogmatist of Law

For Kelsen, a positive jurist, the extent of the realm of being is determined by the traditional tasks of the dogmatics of law. The dogmatist of law, using the traditional rules of exegesis, must integrate the given norms into a consistent system of norms. Though we may hold to the tradition and not deny this activity its characterization as "scientific," we must be very clear about the fact that the "science" of the dogmatics of law differs crucially from other sciences: it does not transcend the being that it has as its subject matter but is itself part of the being—it is a being-immanent science. The activity of the dogmatist of law differs from that of the practitioner of law in its extent, but not in essence. Just as the practitioner of law—exemplified, perhaps, by the "judge"—can create the basis for a ruling only by force of interpretative, systematic elaboration of the norm material, the dogmatist of law arrives at bases for decisions by using the same material and interpretative means to casuistically study the law. Their activities differ at most in that the work of the practitioner of law is performed occasionally and in regard to a concrete case at hand that must be decided, while the work of the dogmatist of law fundamentally encompasses the total legal material of a system whose limits remain to be further determined and is not only performed on specific occasions. The

activity of the dogmatist of law is preliminary to the application of the law; the work of applying the law subdivides into the more encompassing, fundamental work of the dogmatist of law and the narrower concretizing activity of the state agency applying the law. In modern legal cultures the two are commonly closely linked by the fact that those whose profession is dogmatism of law serve as the teachers of future practitioners of law. The definition of law as a legal order—more specifically, as an order of legal norms or a system of legal norms—is therefore by no means an attempt to delimit the object of law with methodological purity; it is not even an attempt at delimiting the realm of being within which subsequently the constitution of one or more subject matters of science can take place; rather, it is a being-immanent delimitation that is carried out not by the being-transcendent subject of perception but by the dogmatist of law, who must perform preparatory work for the application of law. Surely it requires no further detailed analyses to see that when this principle of relevance is applied consistently to the delimitation of the unities of being and object, when the delimitation of the sections of being comes from the standpoint of the practitioner of law or dogmatist of law, in a modern state there must basically be as many normative orders as there are realms of human action that differ teleologically from each other and are regulated by the norms. In practice this state of affairs is expressed in the traditional organization of the legal material into specific areas of law, such as civil law, criminal law, trial law, administrative law, constitutional law, and the like. The positive law of a state in the sense of dogmatism of law is not a *single* order at all; it consists of a *variety* of orders, each more or less self-enclosed.

§8. The State as Relevant Unit of Order—the “Act” as Second Object beside the “Norm”—the Context of Delegation

Kelsen's pure theory of law applies the neo-Kantian demand for pure method and the constitution of the single object to this being-immanent phenomenon of the multiplicity of norm orders. But by attempting to present the problem of the legal order in the neo-Kantian sense (although by definition of the neo-Kantian requirements, which relate to constitution of science and not constitution of reality, that is not what it is at all), it adds a new factor of

relevance to the one that delimits the normative order from the standpoint of the practitioner and the dogmatist of law. In accordance with the relevance for the practitioner of law, every order within the total positive law of the state would have to appear as a self-enclosed object; however, the pure theory of law wants to understand all legal orders within a state as a single total order because a new delimitation of being is introduced as relevant: the state. The introduction of the state as the realm of being within which are to be found the materials for the constitution of the subject matter of the science of law is in itself not an act of perception but an act of the delimitation of existential relevance that precedes the process of perception. Within this realm of being, however, the phenomenon of law, if it is to be understood as a unity, is by no means a system of norms but is a very complicated interconnected system of norms and acts. While the dogmatist of law could be content to take the norm material as given and work with it while considering the origin of the material to be metadogmatic and excluding it from the scope of his investigation, in defining the "state" as the relevant section of being, the totality of all acts in which the law is posited, applied, and enforced must be included in the phenomenon of law. The context of law that is pre-scientifically delimited by the "state" becomes the context of delegation, extending from a highest, law-establishing [*rechtssetzend*] act through a lesser or greater number of intermediate norms and acts that can be understood as legal acts from the point of view of a higher norm, to the least acts of applying and enforcing the norms. As a result of changing the delimitation of the relevant realm of being from the material of the practitioner of law to the "state," the norm is joined by the "act" as the second object of law. But this raises a crucial set of problems for the system of pure theory of law for according to the neo-Kantian-positivist requirement of purity, the context of science cannot have more than *one* object. That "norm" and "act" are not the same object but two different ones can be assumed without further explanation. The pure theory of law is thus faced with the problem of excluding the "acts," which it nevertheless requires for the context of delegation, because they are objects extraneous to the law [*rechtsfremd*]. As we shall see, the problem is solved masterfully, if not entirely without contradictions, by the introduction of "sociology."

§9. The Breach of the Positivist System Through Recognition of the "Ideology" of the Norm

For a clearer understanding, we must once again return to the positivist metaphysics that provides the framework for Kelsen's theory of law. It would be in keeping with a consistent positivist metaphysics to deny the reality of law as a normative order and instead to "reveal" this phenomenon as a superstructure erected above a "natural" or "material" realm of being that is the only reality. We have not discussed this question before because all the problems considered so far received their positivist cast from the transference of a (perhaps) natural-scientific methodological problem to one of the human sciences. However, if nothing more were involved than such a transference, then we would be considering nothing more than an epistemology and methodology of a positivist hue. Quite aside, however, from questions of the peculiar fusion of positivist metaphysics and transcendental idealism so characteristic for neo-Kantianism as a whole, Kelsen—more than other neo-Kantian thinkers, such as Hermann Cohen, Ernst Cassirer, and Edmund Husserl—is a positivist in the narrower sense of the term that describes a thinker who regards events in nature as the only reality and considers everything mental and psychological only as epiphenomena of nature—a thinker, in other words, who in particular considers all intellectual significations and acts mere ideologies concealing the satisfaction of "natural" needs. That acknowledging the intellectual meanings of "law" is illogical in the system of positivist metaphysics did not escape a mind as acute as Kelsen's, and he admits freely that the "ought," the "normative attribution," the "context of meaning" of law is an "ideology," that it does not refer to anything "real," and that there are no arguments against a logical positivism that epistemologically defines the law as nothing more than a technique for concealing material interests. Nevertheless, he intends to be inconsistent in this point and to acknowledge the normative meaning of the law to keep up a custom of the last several millennia and because the system of positive jurisprudence had been built on this acknowledgment. Thus, the positivist system is suspended by an act of will in favor of the object known as "legal norm"; this act of will is motivated only historically and genetically, refusing a rational justification of the judgment.

§10. The Metaphysical Function of "Sociology"

Thus the positivist system of denial of the being [*Seinsleugnung*] of mind makes an exception for the legal norm—but *only* for the legal norm. This decision—which is both metaphysical and political (metaphysical: against the mind; political: however, for the law)—creates the basis for dealing with the problem of "acts," which according to the principles of pure method have no place in the system of norms. The mind is recognized, but only insofar as it is a norm, and therefore the question of the autonomy of the legal object can be included in a theoretical discussion about the natural sciences and the human sciences. In the process, however, in accordance with the refusal of rational justifications, the concepts of the different sciences are used merely as instruments for the realization of the metaphysical decision and therefore, depending on the situation, their meaning varies. To justify the definition of the science of law as one of the human sciences, Kelsen assumes that there are two types of subject matter for science: nature and society. Society, he argues, differs from nature in that it consists of elements that, in contrast to the space-time essence of nature, must be characterized as meaningful outside space and time. According to this first formulation, therefore, social science is identified as a human science and stands in contrast to natural science. There follows, however, the reduction of mind to the norm, and in Kelsen's *Reine Rechtslehre* we find only a few pages after the classification of sociology as a human science counterpart to natural science the classification of sociology as a natural science in contrast to the science of norms (dogmatics of law, theology). First, the term *sociology* is used as an instrument of positivist metaphysical decisions in order to distinguish methodologically between the science of law as a social science and the natural sciences; then the term is used again, this time to take all those elements of society that are not norms but would be intellectual objects according to the first meaning of "sociology" and remove them from the sphere of mind, so that the "norm" remains as the only mental social reality. As it happens, among the objects that must be removed under the heading of "sociology" as natural science from "sociology" as a human science are also the "acts." In the interplay of these shifting meanings, even attempting an intrasystematic, consistent justification of the methodological questions of the natural sciences, human sciences, sociology, and

sciences of norms is impossible under the circumstances. We content ourselves with presenting the instrumental character of the subdivision of the sciences in the service of metaphysics.

Let us begin by examining in context the result of these numerous and very different motivational chains, all of which come together in the delimitation of the object "law."

1. From the standpoint of the practitioner of law and the dogmatist of law, the "norm order" was delimited as the relevant object of the law.

2. From the viewpoint that the state is a relevant realm of being, the legal object was identified with the entire positive legal order of the state.

3. Since no such total order exists because the entire positive law of the state comprises many different orders instead, the "acts" must be introduced as the connecting link and the context of the legal order must be construed as a "context of delegation."

4. Since according to the neo-Kantian positivist methodological requirement, an object realm as science must be categorially uniformly constituted, and because the introduction of "acts" disrupted that uniformity of the object called "norm," the acts must be removed again.

5. They are removed by the introduction of "sociology" as a natural science and the exclusion of "acts" from the legal object and their classification as belonging to "nature" instead.

§11. The Legal Order as a Context of "Norms" and "Acts"; the "Basic Norm"

All these premises affect the construction of the unity of the legal system. The context of law is a context of acts and norms such that the "norm" arises from the natural act. The first such norm-producing act is followed by a zigzag movement because each time there is a fall from the level of the norm down into nature to another act, this is followed again by the ascent to the level of mind when a new norm is created. The alternation between descent into nature and ascent to the level of mind continues until the advent of the last act, one that no longer creates norms but merely applies, fulfills, and implements them. With this act the system as a whole enters into nature for good. Out of the "nature" of the act rises the first

norm of the system, and after a repeated up and down movement between nature and mind, it ultimately returns to "nature."

To this theory of the context of law is then added another element of the theory, namely, the doctrine of the "basic norm," which has always given the opponents of the pure theory of law the greatest difficulty in understanding. The transcendental-logical demand that the scientific object must be an object that is constituted by the categorial work of the cognizing subject would not be met if the law, as is the case after the introduction of the "act," is a product of "nature" rather than of cognition. It is not enough ontologically to remove the acts, which are needed to produce the context of law, by classifying them as "nature" when, after all, such an act of nature still remains as the origin. Even this original act, which produces the first norm of the context, must therefore be delegated by a norm; but since no such norm exists, it must be posited as hypothetical by the cognizing subject. A fictive norm, posited by the perceiver, delegates the first act arising in the reality of law, and everything else follows from this first act. The "basic norm" shifts the origin of the system of law from the "act," from "nature," to "mind"—not into a "norm" that would be an element of the reality of law but into a norm posited by the cognizing subject. The context of the reality of law is, as it were, transferred to the cognizing subject, and that context no longer appears as a realm of being but now emerges as an emanation of the cognizing subject. The auxiliary construction of the "acts" can be dropped once this elevation of the system has been reached and the demand for "purity" has been realized: the legal object is the norm, the legal order is the norm system, the state is identical with the law, the starting point of the system is the basic norm, the basic norm is produced by the subject of perception, the legal order is constituted as the context of perception.

§12. The System of Metaphysical Battle Concepts [*Kampfbegriffe*]

Before passing on to solving individual questions, we must gain greater clarity on the metaphysical import of some of Kelsen's principles. The legal order as norm order is exempted from the general denial of mind [*Geistvernichtung*] of positivist metaphysics—by a judgment of the will; according to Kelsen, obligation [*Sollen*] is

an "ideology"; but it differs from all other ideologies in that he intends to adopt it. For the rest, the features of his metaphysics are not affected by this decision. Now, since the system of pure theory of law is not rationally elaborated but has the peculiar structure of having a core of relatively high rationalization surrounded by metaphysical and political decisions that are not further systematically elaborated, Kelsen's argumentation follows a typically recurrent basic form: the theory of the "norm order" and the transcendental-logical, neo-Kantian requirement of purity of method is his own firm position from which the positions of his opponents are attacked by way of the above metaphysical decisions. Kelsen developed a complete system of metaphysical battle concepts with which he was able to attack and destroy in principle all theoretical attempts that deviate from pure theory of law. The most important battle concepts and their war functions in the campaign are the following.

1. The theory of the "norm order" as the only permitted legal object requires that all other objects, which anyone else might also include under the heading of the theory of the state, must be excluded from this context by means of a different scientific classification. This is the purpose of the above-mentioned introduction of "sociology." For Kelsen, "sociology" is the great comprehensive category into which is pushed everything that does not fit into the theory of the state understood as a normative theory of law.

2. From the point of view of a purified theory of law, problems arising in the ideas of political science because several objects of perception coexist in the overall area of the theory of the state have to be stigmatized so they can be distinguished from the genuine problems of the order of norms and its interpretation. This purpose is served by the concept of the "pseudoproblem" [*Scheinproblem*]. Kelsen's polemics apply the name of "pseudoproblem" to all problems that result from the fact that the total area of the "state" can be epistemologically exhausted only through several objects.

3. Positivist metaphysics further offers the possibility of devaluing all statements about the reality of mental being—aside from that of the norm of course—by attaching to them the name of "ideology." Wherever statements concerning the reality of substances, either persons or states, appear, Kelsen attacks them as "ideologies."

4. And finally there is the possibility not only of ontologically devaluing any dealing with questions that cannot be integrated into the system of normative theory of law by calling it "ideology" and attacking its authenticity as "pseudoproblems," but also to dismiss it as altogether unscientific. This is done by applying the characterization of "ethical-political postulates." Characterizing a judgment as a postulate not only deprives it of the authenticity of its problems and the reality of being to which it refers but also removes it from the sphere of admissible considerations as completely transcending knowledge.

Surely no extensive explanation is needed to make clear that one can seriously annoy scholars who espouse opinions other than pure theory of law with these weapons. For the battle concepts sidestep a rational discussion of the statements posited as scientific and simply cut away the ground on which alone such a discussion would be possible. The scholar who examines problems of theory of the state that do not fit into the framework delineated by Kelsen has to put up with being told that (1) his concerns have no place in theory of the state and belong to "sociology"; that (2) he is wasting his time on idle pastimes, the "pseudoproblems," rather than performing some kind of valuable scientific work; that (3) his efforts are based on an "ideology" that—for irrelevant motives, such as defending the capitalist social order or to please a political party—he loudly proclaims to be reality; and that finally (4) he has no place in science at all, since everything that comes from his pen must be classified as a scientifically irrelevant construct of "ethical-political postulates." As a perspicacious psychologist, Kelsen noticed the "opposition to pure theory of law, bordering on hate"; but true to his positivist metaphysics, he attributes this hatred to the fact that the pure theory of law interferes with the "ideology" and business interests of its opponents.

§13. Eliminating the Reality of the State from the Object of the Theory of the State

Let us now address the concrete questions of what the substance of jurisprudence is and what it should not be—limiting ourselves in general to the substantive question of theory of the state and leaving aside for the present the corresponding questions of other

areas of law. By limiting the legal object to the legal norm and its interpretation, all presuppositions regarding the content of the norms are placed outside the area of legitimate investigation in political science. For example, the question of what democracy is may be examined as a scientific object only to the extent that the substance "democracy" is given in the norms themselves. However, only prescriptions for what people should or should not do can be given in the norms themselves. Thus "democracy" can be defined with scientific legitimacy only as a specific configuration of human acts—for example, the act of voting for delegates, acts of voting by delegates, and so on. On the other hand, it is impermissible to ask what a "demos" is and what "rule" is. The entire type theory of rule, as Max Weber designed it, would be of no concern to the theorist of the state. The issue of "autocracy and democracy" is reduced to the question of whether one or several persons participate in the formation of the state will [*Staatswillensbildung*]. The question of what constitutes "aristoi" is inadmissible. Raising the question of whether the year 1793 held special significance for the end of the French monarchy because that was the year when Sainte-Ampouille was destroyed would be unthinkable in the system of pure theory of law. Such a question will not only glibly be pushed over to "sociology" but will be further dismissed as "religious ideology." Questions concerning the nature of a "federation," for example, would also be inadmissible and would have to be reduced to the privileged participation in the formation of the state will on the part of a closed circle of persons, and so forth. In short: the entire area of the state phenomenon in its own right [*Eigenbestand*], which alone gives meaning to the act configurations of the norms, is forbidden territory. We will see what consequences this fundamental attitude has for the interpretation of positive constitutional law of Austria.

§14. The Problem of Ordering Being by Establishing Norms of Human Behavior

The attempt to disqualify as scientifically illegitimate the part of the theory of the state that tries to understand the phenomenon of the state even where this phenomenon is not found in the content of the norms is the best-justified element of the pure theory of

law. Happily—from Kelsen's point of view—here genuine theoretical problems converge with Kelsen's positive-metaphysical and political demands. The question of the relationship of the norm content to the reality of the state is a genuine problem of theoretical political science—not in the sense of an "application" of norms to being but in the basic sense of whether it is possible to establish a normative order of being at all. We have said that the substance of the legal norms can only be human behavior, regardless of what the structure of the state is that is being ordered in this way. The being of the state can be ordered only if norms for human acts are established. Whether it is a matter of contracts or crimes, legal verdicts or administrative action, legislation or war, an individual or a corporation, a theatrical enterprise or the state—always and in every case the norm must be about an act or a failure to act on the part of human beings. The great technical problem of the jurist is at heart always the same: How can a realm of being be ordered by establishing norms for human acts—at the same time, there may be realms of being whose legal ordering would be desirable but that cannot be so ordered because no suitable type of human action can be found for which the establishment of norms would achieve the desired ordering of the realm of being in question. Kelsen now combines this theoretical and practical basic problem—to order being legally by establishing norms for human action, which would subsequently, thanks to its typical course in accordance with the norms, guarantee the desirable order of being—with a metaphysical dogma that has nothing to do with the problem of the theory of the state but whose substance touches very closely on it: He claims that man is a natural phenomenon. Certainly there is much that can be put forward to support this metaphysical proposition, and pure theory of law is not the only contemporary theory of the state that advocates it. We find very similar claims in particular movements in race theory, insofar as it is rooted in the same positivist thinking of the end of the nineteenth century as are certain traits in Kelsen's view of the world. But Kelsen never advances any supportive arguments at all; once again we encounter a metaphysical decision. The question of the reality of the mind or spirit [*Geistwirklichkeit*] of the human person is not even mentioned at all and neither is the question of the connection between mind and nature in man's total being. For Kelsen, human action is in no way related to mind; it is a spatial-temporal process in the being of nature. Connecting this

metaphysical proposition with the rational theoretical one that the substance of the norm is human behavior now opens up a whole line of propositions and reflections that would have been impossible without this link.

Above all, to the extent that the reality of being [*Seinswirklichkeit*] is relevant as the object for legal norms, it is reduced to human acts that can be classified as psycho-physical, or biological, but in any case as "natural." The human person is not a unified whole, except as a center of forces for human action; there are also no social units, societies, states, and the like, except as complexes of human actions. All substances become reduced to complexes of acts. Being also disintegrates into configurations of acts that are identical with those that form the content of the norms. Being is thus a repetition of the norm content; Kelsen is therefore justified in refusing to concern himself with the "substances," since such a concern would add nothing new to the problem cluster of the theory of the state but would only unnecessarily duplicate the problems. The "duplication" derived from a metaphysical major premise and therefore the superfluity of the substance problem, however, happily coincide with the neo-Kantian methodological propositions according to which science must proceed from concepts of substance to concepts of function and must eliminate the problem of substance as a metaphysical one from the object the science concerns itself with. We see how the theoretical problems of the jurisprudence and the metaphysical problems of positivism meet so happily—or unhappily—that it is possible to shake up the system only if it is attacked in its fundamentals—and those are metaphysical.

§15. The Disintegration of the Person

Using this combination, Kelsen attacks the traditional problems of jurisprudence and political science. We will now show, with the example of one or two cases, the direction and success of the attack. If all being is reduced to the complex of actions present in the norms, then of necessity all those legal concepts will also disappear whose legitimation is based on the claim of individual or social spiritual or mental substance that is independent of the content of the norm. Thus for example the difference between

the so-called physical and legal person must vanish. For Kelsen, a person is the anthropomorphic personification of a norm order. In reality there would be persons only in the sense of a complex of human actions that is the norm contents. All legal concepts that assume the reality of an individual person, for the sake of whose order a complex of legal norms is created, are inadmissible in Kelsen's view and are maintained only for the sake of an ideology. For Kelsen, the concepts of the physical person and the subjective rights of the person, which create the appearance that such things exist outside their regulation by norms through the objective law, are ideological, because they are intended, for political and capitalist reasons, to present a sphere of liberty and property of the person as real, a sphere in which the legal order—for example, along the lines of a communist legal organization—may not intervene. Now we are by no means denying that legal concepts can also have a political function (we will be encountering some examples of Kelsen's concepts just below), but it does not follow from this possibility, or even fact, that they have no other content. If Kelsen draws from the political function of a concept the conclusion that it is an invention for the purpose of justifying a political system, this is the typical positivist, "ideology"-destroying interpretation of social reality, which believes that the meaning of social intellectual being is exhausted with "ideology." The classical investigations of property and liberty—such as Locke's, Schelling's, and Fichte's—have an ontological core, in the sense of a humanistic anthropology, and endeavor to clarify the structure of human nature, which forms the basis of such fundamental phenomena, recurring in all social orders (even the communist social order), as property. That investigations of this sort very frequently transcend their boundaries and present particular contents of the property rights as inherent in human nature cannot be denied, but their rationale is not to be found in these gaffes. Any conscientious interpretation would of course have to isolate the "ideological" content of such concepts, not for the polemical objective of revealing the political intention of their authors, but for the sake of the relevant goal of liberating its scientific, anthropological content (indispensable for the serious foundation of, say, a theory of civil law) from the political errors of the day.

§16. The Disintegration of the State

The same type of argumentation is applied to every other reality of being, and thus also to the state. "A knowledge of the state that is free of ideology and thus freed of all metaphysics and mysticism cannot grasp its essence in any other way than by understanding this social formation as an order of human behavior." Let us assume—even though we do not really believe it—that this premise, as worded here, could be a correct proposition in every other system of the theory of the state. Nevertheless, it derives its meaning in the system of the pure theory of law from assuming the metaphysical proposition that the behavior in question is "natural" and that the "natural" acts in space-time that make up the state as a social formation are identical with the actions categorized by the system of the constitutional norms. For Kelsen, it therefore follows further that the social order and the legal order are identical, that assuming a difference between them is an inadmissible duplication, and that the state is identical with the legal order. According to Kelsen, differing claims within the field of the theory of the state (for example, claiming that something like spiritual ties exists, that there are such things as, for instance, rule, a people, and elites) are advanced solely for political purposes, and the like. The state, Kelsen insists, is a legal person like any other, differing from them only quantitatively, not qualitatively.

§17. Kelsen's Positive Metaphysical and Political Demands; the Law as Compulsory Order [*Zwangordnung*]; Privatization of the Constitution

Kelsen develops his own positive metaphysical and political program with the same conceptual means he uses to wage war on "substances" and "ideologies." In his polemic, his metaphysical decisions were based on the theoretical problem of ordering being through the normative regulation of human acts, and now that same theoretical problem must serve Kelsen in introducing his own political demands as objectively justified ones. Let us review once again the tools that must justify the political and metaphysical results:

1. The law is a normative order, culminating in a basic norm and excluding "natural" acts.

2. There are no problems of "substance" differing from the problem of the content present in the norms.

3. The only contents of the norms are human acts.

4. A new decision is introduced we have not yet had the opportunity to discuss: namely, that the legal norm is a compulsory norm—let us first make a few remarks to explicate this decision.

At the outset we explained that all the legal norms we find in the realm of being of the state can be subsumed into the unity of the legal order only because of the introduction of acts and the construction of the context of delegation. Without this auxiliary construction, it would be impossible to imagine the unity of an order of norms. Without it, the entire norm material would disintegrate into a large number of orders whose internal unity is ideologically constituted through the relevant facts [*Sachzusammenhang*] of the realm of being each of them is designed to order. In light of this, it may be possible, though not at all probable, that all orders of norms have the same types of contents. We cannot take it as a given that the question about the characteristic of the contents of the legal norms will find a uniform answer. In the system of the pure theory of law, which represents the several orders of norms as *one* order with the help of the auxiliary construction of the context of acts, however, the question of the essential legal [*rechtswesentlich*] content of norms is raised in the expectation that there is indeed such a legal essence, since the legal order is considered materially uniform—and the proffered answer is that the legal norm is a normative compulsory order.

Our objection to the phrasing of the question is that it would be admissible only if there were such a thing as a legal order of the state that is materially uniform rather than combined to a "dynamic" unity through the context of delegation. Our objection to the answer is that the several orders within the total legal order of the state have different types of norms, among them, to be sure, also the normative compulsory order but only as one among many. In order to erect an order as an order of compulsory norms, certain preconditions must be fulfilled in the realm of being that is to be regulated. There must be (1) a realm of human action whose typical courses of action can largely be fixed as to their content without in the process destroying the meaning of the social and life

sphere in question. There must be (2) an agency with the necessary political authority and the corresponding means of enforcing its power, which can intervene for purposes of prevention, reparation, punishment, and so on when the course of action deviates from its type. The first condition is given in those structures of being that are regulated by civil and criminal law and, to a lesser but still to a very high degree, in those matters that are classified as administrative law. Why this is so cannot be explained here—that would be a matter for that anthropology whose beginnings in jurisprudence Kelsen excludes from jurisprudence by calling them natural-law ideology. In the same areas the second condition is also fulfilled, though again to a lesser degree for administrative law.

The compulsory norm can appear only to a slight extent or not at all where (1) according to their contents, actions can be fixed as typical only vaguely or not at all and where therefore no compulsion can be established, since little or nothing is materially mandatory; (2) establishing a compelling authority meets with certain difficulties because the actions that would have to be compelled, if necessary, to comply with the norm are set by the highest political authority. This characterizes the situation of that area of being for which the norms are given by public law in the narrower sense, that is, by constitutional law. While compulsory norms cannot be excluded from the order of constitutional law, they will be comparatively few in number, and in particular, they will not be found in the materially most important parts of constitutional law. When the need arises in a state for the establishment of new general norms or for the ordering of a situation through particular measures, it is in the nature of the matter that the authority that is charged with this task must be given the greatest latitude and discretion. For technical reasons it is almost impossible to prescribe the time frame and the contents of such regulations. And if a constitution contains such prescriptions, they at most assume the form of a promissory note for the enactment of a law with a particular content; however, nonfulfillment of this promise does not lead to a compulsory action against the delinquent authorities. At most, a constitution can set up restrictions regarding the contents of future legislative action in the form of so-called guarantees of basic rights. Such restrictions, however, are fairly insignificant compared to the unlimited discretionary sphere. Since stipulations regarding the content of state action on the highest level and sanctions on

deviations from the norm afford only insignificant control over the highest political authorities, constitutions that consider such control desirable attempt to attain this objective by establishing one or more authorities whose approval of the actions of the first authority is required. That is, to the highest executive authority a second one is added that can act parallel to all the actions of the first, with full freedom of decision. The norm control is thus replaced by a flexible control of situations, and the will of the authority with the right to approve is the norm of the situation for the first authority, which for technical reasons cannot be placed under a norm of a definite content for a variety of situations. This is where we find, typically, the "constitutional" constructions of the exercise of state power. Like norm control, however, this situational control is not a trait characteristic for the essence of the constitutional sphere, and historically it can be realized only where several *auctoritates* that are relatively independent of each other exist in a single polity [*Gemeinwesen*]. Where the political *auctoritas* is centralized, this restriction, intended to be a substitute for the compulsory norm that is typical for civil and criminal law, also falls away.

Thus, when it is claimed that the legal norm is a compulsory norm, we consider this statement false for two reasons: (1) *The* legal norm as such does not exist; there are only the different types of norms that historically can be documented as instrumental in the realization of the political order of being. (2) The statement is materially false for the area of constitutional law under discussion here; in this legal area there are only a small number of compulsory norms, and they appear only under special historical conditions.

But Kelsen claims that this premise is a "theoretical" one (although it could at most be a historical, empirical proposition), and in this claim we see a decision similar to the one that prompted him to go along with the "ideology" of law or of "oughts," although the logic of his metaphysical system would have required him to dismiss them, as he does all other "ideologies." According to Kelsen, there should not only be "law," but it should also have a specific contents, namely, that of a system of compulsory norms. With this proposition—which can be recognized as a postulate because empirically it can easily be shown to be false—Kelsen demands that the structure of civil and criminal law be extended to constitutional law. As a constitutional politician, Kelsen partially fulfilled this demand through his contribution to the establishment of the

Austrian constitutional court [*Verfassungsgerichtshof*]. Moreover, the demand must be characterized as "political" because it aims at restructuring the constitutional sphere through a separation according to civil law of an ordered realm of being from the sanctioning authority—that is, in terms of constitutional law, the depoliticization of the political authorities by subordinating them to a sanctioning authority; the political authorities are to be privatized and deprived of their uncontrolled power to make decisions.

§18. Kelsen's Metaphysics of Progress; the Order of Universal Law [*Weltrechtsordnung*]

The full import of this demand is revealed only in its connection with the other metaphysical propositions of the pure theory of law and in particular in connection with the positivist philosophy of progress. Conclusions for the legally perfect ordering of a realm of being are drawn from the claim that the content of normative regulation can only be individual human behavior and the thesis that the norm must be one that decrees compulsion against behavior deviating from the norm. Realms of being in which the sanctioning power is not organizationally separated from the behavior placed under sanction are imperfectly ordered, as are those realms of being in which the sanction is directed not against the individual who violates the norm but against the collective body to which the individual belongs. Thus, when in a federal state, for example, federal action against a member state is used as sanction in response to behavior by that state's government that deviated from the norm, we have an example of an imperfect legal order. However, if the sanctions consisted in making each member of that government liable for its norm-violating behavior, that would be an example of a perfect legal order.

This thesis is then combined with a notion of progress in human history that, in its general outline, goes back to the nineteenth century and can be summed up as follows: Humanity advances from a phase of primitivism to the present organizational forms, which are better but not yet perfect, and it will progress to a perfect final state. The primitive condition of legal organization exists when the sanctioning power is largely decentralized, in such a way that the person whose rights have been violated himself punishes the violation, and the punishment is directed not at the violator but

at the collective body to which he belongs. A higher degree of perfection is represented by the modern state organization, in which the sanctioning power is independently organized for broad areas of the law (specifically, civil law, criminal law, and administrative law) and in which sanctions are directed against the individual violating the law; however, in regard to other areas of the law—such as constitutional law and the international sanctions against violations through war—the primitive situation still prevails. The legal order will be perfected when it is organized as an order of universal law and when differences of opinion between states are settled through court proceedings by a sanctioning central power.

Those who dare to doubt the theoretical consistency of these propositions and perhaps even go so far as to believe that historically and empirically there is no such linear development of humanity from primitivism to the order of universal law and to think that the demand to order the constitutional sphere through compulsory norms and to settle political conflicts between states through court proceedings under sanctions of a superior power will lead to the destruction of the political substance of the states, all those will be attacked with the weapons already listed above. In other words, those who claim that the state has political substance and refuse to see it as just another order of human behavior, in principle no different from a stamp collectors' club (different only in quantity, not in quality) do so for the sake of "an imperialist ideology directed against the law of nations." This is the same line of argument we encountered in the case of the disintegration of the "physical person," whose logic is based on the metaphysical positivist dogma that demonstrating a potential political function of a proposition or a concept and "exposing" its "ideological" implications is saying anything about its truth content.

§19. Kelsen's Pure Theory of Law in the Tradition of Austrian Theory of the State

In the preceding reflections we have, for the purposes of our presentation, related the problems of pure theory of law to the principles of a positivist metaphysics. In fact, there is no part of the pure theory of law that cannot be meaningfully integrated into the system by virtue of this relationship. If this integration proves

impossible, however, as it does in the case of accepting the "ideology of 'ought,'" Kelsen himself relates even this exception to the metaphysics of positivism by placing its rationale precisely in its exceptional character and not justifying that acceptance in any other rational way. But the theory as a whole and in all its parts can also be placed in entirely different contexts, and we must roughly outline one of them because it is the most pertinent to our work; this is the context of Austrian theory of the state.

We can understand Kelsen's theory of the state as peculiarly Austrian by reflecting on its author's basic theoretical stance toward the phenomenon of the state. Pure theory of law admits only norms and normative orders as legitimate subjects of the theory of the state. Concerning those subjects that have constituted the main body of political science since Aristotle, Kelsen establishes a strict prohibition to study them with theory of the state as such. On the basis of the principle of methodological purity, he formally forbids that science to deal with the object *state* beyond those contents that have entered the norms as human acts if the discipline is to be theory of the state. This basic attitude, which refuses to study the state, reveals, aside from all theoretical and metaphysical justifications, a constitutional trait of Austrian theory of the state that can be traced back to the founding of the Austrian empire and the subsequent educational reforms [*Studienreform*] of 1810. In that year law studies in the universities were reorganized, and as a consequence of the reforms all lectures on legal history and constitutional law [*Staatsrecht*] were suspended. "Because of that and as a result of the changed conditions in constitutional law, the scientific pursuit of constitutional law vanished. Only some parts of public law, generally in the form of mere compilations, were studied as so-called political nomology [*Gesetzeskunde*]."² The decisive year of education reform was followed by half a century during which there was no study of constitutional law of any significance whatsoever in Austria. The situation around the middle of the 1850s was

2. Joseph Ulbrich, *Lehrbuch des österreichischen Staatsrechts: Für den akademischen Gebrauch und die Bedürfnisse der Praxis* (Berlin, 1883), 70.

On the history of legal studies at the University of Vienna and study and examination regulations, see *Die Geschichte der Wiener Universität von 1848 bis 1898: Als Huldigungsfestschrift zum fünfzigjährigen Regierungsjubiläum Seiner k. u. k. apostolischen Majestät des Kaisers Franz Josef I. herausgegeben vom akademischen Senate der Wiener Universität* (Vienna, 1898). The "Allgemeine Teil der rechts- und staatswissenschaftlichen Fakultät" is edited by Karl Brockhausen.

described fully by Robert von Mohl in his *Geschichte und Literatur der Staatswissenschaften*.³ According to him, Austria's literature on public law was characterized by "the extensive treatment of administrative law down to its smallest details and, conversely, the absence of all discussion of constitutional questions, and the like; further, the great amount of detail, calculated to be useful in daily business practice and at the same time in complete avoidance of discussion of fundamentals." Mohl traced this state of affairs to the *ancien régime* and the conditions that prevailed until 1848.

Just as the state power itself was not based on the development of a free, strong middle class and the cultivation of the people's intellectual powers but rested on the power of the army and the omnipresent instructions of officialdom, which touched even upon the most private matters, so in science only the discussion of obligations and forms that could be observed in every life situation was tolerated, but not the investigation of the ultimate grounds on which all these commands rested. And it was not merely negative criticism or theoretical disagreement with the basic positions espoused by the government that incurred displeasure, but the discussion of the issues as such was not wanted. Even historical studies were not free; thus there were hardly even the first beginnings of a history of the Austrian state and jurisprudence to be found. The government itself did not look to science for instruction on matters concerning public law, and as far as its subjects were concerned, it considered such a step precarious and at any rate superfluous. At the same time, through its inexorable censorship the government had the means to guide the literature into only those channels it deemed desirable.

These statements concerning the reasons why a theory of the state failed are not wrong, but they place too much emphasis on the particular ills that vexed Mohl, a liberal. That the organizational intervention of 1810 and Metternich's censorship policy were not the only reasons for the silence is clear from the fact that even after the pressure of censorship had been eliminated and new university reforms had been instituted things have not improved substantially. Mohl, whose reflections date from 1856, also noted that not much had changed in the years since 1848, and he blames that fact on the uncertainty of the transitional situation, the incompleteness of the new constitution, the aftereffects of violent upheavals, and the tradition of old concerns. He expresses the hope that this situation

3. Robert von Mohl, *Die Geschichte und Literatur der Staatswissenschaften: In Monographien dargestellt*, II (Erlangen, 1856), 337.

will change very soon with the "establishment of an entirely new unified life of the people and the state." This remark reveals Mohl's misunderstanding of the Austrian problems, and at the same time it indicates the reason why a theory of the state of any greatness, one that is based on an explanation of the fundamental political powers, has still not developed. Mohl interprets changes in Austria's constitution as analogous to the German transitions from absolutism to the constitutional state; he does not see that Austria, no matter how the state structure was reformed, remained a "Reich," a multinational state in the old style that was unified only by the dynasty. Austria was neither a "unified state" nor did a "unified national life" develop within its borders. The powers that led to constitutional theory of the state in the individual German states, in the North German Confederation, and in Bismarck's Reich were not active in Austria or at most only very ineffectively. In 1872 Herbert Pernice could still note, "Essentially, even the last sixteen years have not detracted from Mohl's presentation [of 1856]." ⁴ The Austrian political situation was not such that problems such as Otto Friedrich von Gierke's theory of the real person of the state could have any relevance.

§20. Joseph Ulbrich

We cannot include here a history of Austrian theory of the state, though this unique phenomenon surely deserves a monograph. Here we will have to be content with sketching the development from the last quarter of the nineteenth century to the collapse, with a few indications concerning major developments relevant to our purpose.

Above all, the development of a descriptive science of administrative law, already noted by Mohl, has continued, and it continues even today in the new Austria. Without a doubt, when it comes to extent and significance, it predominates over the literature on the problems of the fundamentals of constitutional theory.

Closely connected with this preponderance and the tradition of administrative law are attempts to develop the study of public law by limiting it to a description of the content of the legal

4. Herbert Pernice, *Die Verfassungsgeschte der im Reichsrate vertretenen Königreiche und Länder der österreichisch-ungarischen Monarchie* (Halle, 1872).

norms, without any discussions of matters of principle. A characteristic representative of this tendency was Joseph Ulbrich, whose *Lehrbuch* established the following methodological premise: "A scientific presentation of public law must not be a vague mixture of philosophical, historical, statistical notes; rather, it must deal with its material in the juristic fashion with a strict taxonomy."⁵ In Ulbrich we find that the state, defined as "juristic," already so limited as an object of study as to meet the requirements Kelsen raises on the basis of his methodological theses. For "juristic" reasons, Ulbrich decidedly refuses to enter into questions of the history of ideas and institutions or into the interpretation of positive law in the context of its history. "For scientific and didactic reasons, the discipline of universal public law presents a general, historical, and philosophical doctrine of the nature and purposes of the state and the unanimous legal convictions of a modern civilized nation about its limits, organization, and functions. These propositions, derived through abstraction, do not, however, have practical validity."⁶ Had Ulbrich shown a greater interest in questions of methodology, he would probably, like Kelsen, have eliminated from his system all materials outside the normative content in its metaphysical-positivist definition as "sociological." His great affinity to the Austrian tradition of administrative law is evident from his inclusion of administrative law in his discussion of public law—and he offers the following typical justification: "Without administrative law, public law is most often a sorry framework of abstract propositions that are so general that they cannot be applied in political life."⁷ The author himself, however, does not attribute a very high scientific value to such a treatment of the national and provincial law gazettes; the purpose of his work, he claims, is to serve as a textbook and a practical reference book.

The deeper reasons for this reserve do not remain concealed; one statement Ulbrich wrote in his discussion of Article XIX of the Basic Law of 1867 [*Staatsgrundgesetz*] concerning the general rights of citizens illuminates those reasons brightly: "Wherever the state can rely on a linguistic nationality clearly superior in numbers and education, this nationality is the source of the impulses of the

5. Ulbrich, *Lehrbuch*, "Vorwort" (1883).

6. *Ibid.*, 72.

7. *Ibid.*, "Vorwort."

life of state. Without this national and linguistic unity, the state must order its relationship to the nationalities as social groups."⁸ The Austro-Hungarian monarchy has a population, but it has no *Staatsvolk*. The population is divided into "social groups," from which no positive political impulses for the life of the state emanate. Those impulses come from other areas: the dynasty, the army, the bureaucratic apparatus. Men of the liberal-nationalist stamp, who can no longer imagine a state without the impulses emanating from the political people, have no idea of how to deal with the peculiar configuration of the Austro-Hungarian monarchy. The charm of the medieval idea of a Reich and of the ruler over different peoples [*Völker-Herrscher*] pales beside the new glamor of the political power emanating from the people. The limitation to "positive law" and possibly to the reprinting of texts with meager commentary is a sign of political resignation. Even Friedrich Tezner, who had the greatest understanding for the Austrian problem, used a statement that shows the pressure with which the problem of nationalities burdened any study of Austrian public law: "The nationalities united in the monarchy are the schlemiels among the nations; they have been left behind in the great process of state formation on the basis of nationality that has occurred in the past century, and they are unable to alter this their destiny."⁹ Others, it is true, believed that this destiny was about to undergo many a change, and they saw the shadows of the threatening dissolution loom over a constitutional situation that, in retrospect, was summarized pertinently in the following sentence by Rudolf Sieghart: "Beginning in 1867, however, every nation acted under the juristic fiction of having to deal only with the monarch, from whom it had to wrest its rights as a favor, relying on his good will—and then leave it to him to come to terms with the other nations."¹⁰

§21. Ludwig Gumplowicz

Political resignation combined with positivist metaphysics—a combination relevant for our inquiry—entered Austrian theory of

8. *Ibid.*, 110.

9. Friedrich Tezner, *Die Wandlungen der österreichisch-ungarischen Reichsidee: Ihr Inhalt und ihre politische Notwendigkeit* (Vienna, 1905), 126.

10. Rudolf Sieghart, *Die letzten Jahrzehnte einer Grossmacht: Menschen, Völker, Probleme des Habsburgerreiches* (Berlin, 1932), 391.

the state for the first time in the work of Ludwig Gumplowicz. He formulated a basic idea that is already essentially identical to Kelsen's: There is no theory of the state beyond epitomizing the legal norms, except as natural science. Gumplowicz also already employs sociology as the title under which all state problems are subsumed that he cannot incorporate into the normative content, and he too considers sociology a natural science. He too is a positivist metaphysician and scourge of ideology. However, he differs from Kelsen in that he attempts to present the object *state* as such, as the object of the natural science sociology, an object Kelsen always presupposes in his argumentation. In his last major work, published in 1910, Gumplowicz once again formulated the relationship of sociological and juridical theory of the state in splendid images:

A second Sleeping Beauty, she [political science] slept for a hundred years, until Prince Sociologus rode up, penetrated into the juridical castle, and awakened her from her sleep. For it must be said this one time: All those juristic definitions of the state, all the constructions meant to force it into the too tight boots [*in die spanischen Stiefel*] of Roman and Germanic legal concepts of the state, are all useless rubbish, they have no scientific, no informative value at all. Only the sociology of the last two decades of the nineteenth century broke the spell and found the redemptive word that awakened a genuine political science from a sham existence into genuine life. Let the jurists make all the fuss they want! Political science is not a juristic discipline: It is a pure natural science that deals with social phenomena. For the state is a natural process, one belonging to the type of processes that take place in the revolution of the solar systems, in chemical, plant, and biological reactions.¹¹

It seems to me the difference to Kelsen's position lies in the fact that Gumplowicz, in his sociological affect, claims the name of a political science for his natural science of the state, while Kelsen, who goes along with the ideology of the "ought," aims to salvage this name for jurisprudence. Both thinkers agree that the state is a natural phenomenon, and they agree as well that studying it is not the task of a science of public law. However, Gumplowicz is more consistent in that he admits no exceptions to his metaphysical dogmatics. For him, law is not an exceptional sphere of the mind he would acknowledge as such in its autonomy, but it is the manifestation of events in the natural sphere: "The sociological

11. Ludwig Gumplowicz, *Sozialphilosophie im Umriss* (Innsbruck, 1910), 34-35.

idea of the state therefore derives the law neither from the mind of the individual nor from a fictive common will but rather from the conflict of the social elements that make up the state. That is, it considers the boundaries within which each part must confine its exercise of power—boundaries that are established in the conflict between one element and one or more others—as the law of this state.”¹² Thus, the state is by no means the result of an intellectual constitution—unless, that is, one is willing to call “considering” the limits on power as the law an intellectual constitution. For the theory of the social power struggle as the substratum of the law Gumplowicz coins a specific term, distinguishing it from individualism and socialism by calling it a theory of “groupism”: “That is the sociological standpoint, from which the state is seen as the embodiment of social groups, mutually fighting each other, and these groups form its true elements, whose ‘antagonism’ called the state into being and set its evolution in motion.”¹³

Gumplowicz denies his naturalistic theory of struggle through generalizing his theory of race struggle, which he developed based on the problem of the Austrian national conflicts. We see here the problem of nationalities reinterpreted into a theory of the phenomena of history as results of race struggles. In every state, according to this theory, there are caste differences, and these are the symptoms of a past conquest of a less valuable people as defined by its race through a people of a higher race. In the course of time, the two races—the conquerors and the conquered, which appear as the social groups of the nobility and the people—are joined by a third race, which engages in commerce and pursues intellectual careers; this immigrated race takes its position between the two others and becomes the middle class. Thus, Gumplowicz perceives the political situation of his day in terms of the social strata of nobility, political-liberal middle class, and the broad masses of the people and as the result of the racial stratification.

The political tensions between the races become gradually less pronounced as interbreeding and miscegenation occurs, until the people or the nation are fused into a union. With this phase, the theory continues, the high point of the evolution of the state has

12. Ludwig Gumplowicz, *Die soziologische Staatsidee* (2nd ed.; Innsbruck, 1902), 52.

13. Gumplowicz, *Sozialphilosophie*, 36.

been reached, which is followed—as Gobineau describes it—by a gradual stagnation of political life and consequently of cultural life also. For Gumplowicz the struggles between nations in Austria are struggles between races. Though according to his theory, this stage of conflict is a phase on the road to progress, he nevertheless believes Austria is in greater danger from the possibility that the state will perish prematurely because its racial antagonisms cannot be reconciled and so never advances to the stage of forming a nation and carrying out its civilizing tasks. There is a note of resignation in the attempted consolation that “even though we Austrians are not yet a united people of brothers, our racial conflicts nevertheless have historic justification, and surely they contribute to solving a great historical task in future.”¹⁴

For Gumplowicz, the current situation is no different from that described by the resigned positivists. Tasks that are worth solving may—perhaps—emerge in a brighter future; the present is filled with struggle, which runs its course according to natural laws; the individual can only stand by and watch and is powerless to do anything that would be worth doing. Looking at history as subject to natural laws becomes his means for expressing his helplessness in a tone of grim rage and utter contempt for a historiography that believes history to be the work of great men.

It praises the deeds of great men, never suspecting that they are merely puppets pulled hither and yon on the hidden strings of the eternal law of nature; instead of marveling at those hidden mainsprings that from the earliest time in nature's workshop have silently performed their never-changing movements and made humanity run on ever the same tracks on its iron leading strings—always the same cycle of death and life, fall and rise, destruction and rejuvenation, with the same eternal regularity and indifference with which the sun and the moon run their courses, with which day and night and the seasons alternate. For this magnificent display of nature . . . the “science” of history has no understanding.¹⁵

Gumplowicz attributes to the race theory of the natural sciences a destructive effect on the mind similar to that Kelsen later sees in ideological criticism, which is closer to the materialist view of

14. Ludwig Gumplowicz, *Der Rassenkampf: Soziologische Untersuchungen* (2nd ed., 1909; 1st ed., 1883), 401. The quoted passage is taken from the lecture “Über das Naturgesetz der Staatenbildung” (1875), reprinted in the appendix of *Rassenkampf*.

15. *Ibid.*, 160–61.

history. Let us listen to one more voice, one from the German Reich, which interprets Gumplowicz's stance as a typically Austrian phenomenon that necessarily remained alien to the political science of the nation-state Germany—Otto Hintze writes about Gumplowicz:

His deeply pessimistic concept of political and social national life is apparently rooted in the peculiar unfortunate relations among nationalities in the Austro-Hungarian Monarchy. In his work this pessimism is combined with a materialism of a repellent banality. All of history becomes for him a puppet play empty of meaning and spirit. It is no wonder that his theory of the state met with no approval. Already more than a generation ago, it was rejected almost unanimously, especially here in Germany. Though the disciplines of political science, which were nourished mainly from idealistic sources, could tolerate a certain degree of positivism, they could not absorb this blatant materialism, deadening all individuality. National consciousness, still supported by the successes of the era of Bismarck, was unwilling to relinquish the emotional values [*Gemütswerte*] it had brought to the new state and was all the more willing to ignore this pessimistic voice from the camp of the vanquished of 1866 since the new alliance with Austria justified the hope that the old national wound would heal in the near future.¹⁶

§22. Felix Stoerk and Friedrich Tezner

We would be guilty of a serious omission if we did not consider the significant efforts to overcome the resigned stance and to approach the problem of a constitutional theory in general and also in Austria specifically, both methodologically and by way of positive law—even though these efforts have received little attention and had no tangible repercussions. We are speaking here of the work of Felix Stoerk, who lectured only briefly in Vienna, and Friedrich Tezner. Stoerk's treatise on the methods of public law and the supplementary commentaries by Tezner were surely the most significant statements from the Austrian side on the special methodological questions of a theory of constitutional law.¹⁷

16. Otto Hintze, "Soziologische und geschichtliche Staatsauffassung: Zu Franz Oppenheimers System der Soziologie," *Z. f. d. ges. Stw.*, LXXXVI (1929).

17. Felix Stoerk, *Zur Methodik des öffentlichen Rechts* (Vienna, 1885); Friedrich Tezner, *Die wissenschaftliche Bedeutung der allgemeinen Staatslehre und Jellineks Recht des modernen Staates*, *Annalen des Deutschen Reiches* (1902). In order to properly appreciate Stoerk's achievement, we must keep in mind that the essays on the methodology of the historical science by Wilhelm Windelband and Heinrich

The situation of the 1880s, when Stoerk wrote his treatise, was not unlike the present one, insofar as the latter requires a coming to terms with pure theory of law. In Ulbrich's system of public law [*Staatsrecht*] we find the limitation of the object of jurisprudence to the normative content in a metaphysical-positivist interpretation; Gumplowicz, on the other hand, developed the theory that the state is merely the arena for power struggles, interpreted in a naturalistic sense, between social groups, and constitutional law is the "expression" of the power situation at the moment. At the same time Paul Laband and his school prevailed in the theory of public law of the German Reich; they too were intent on a "purification" of the science of public law and believed they could achieve their objective by applying the methods of civil law as the actual juristic methods, just as Kelsen chose the compulsory norm of civil and criminal law as the legal norm underlying both his methodological investigations in general and his interpretation of the norms of constitutional law. The function the positivist-tainted requirement for a neo-Kantian method serves in Kelsen's system is fulfilled in Laband's theory and that of other political scientists of his day by the theory that the legal concepts as universal concepts are to be formed by abstraction in analogy to the inductive process that has been so successful in the natural sciences.

Against this complex of theories Stoerk advances the same arguments we had to apply in presenting pure theory of law, the only difference being the terminology of his day. It is not possible, he argues, to start with the question of method and decree a specific method for a sphere of law, "for existence [*Sein*] is not determined by thought; rather, the reverse is true: thinking must be guided by existence." The nature of the object itself should not be without influence on the method, "which, after all, is merely the adequate procedure for presenting an object to cognition. . . . To begin with the definition of a scientific method before the material itself has been defined scientifically is unthinkable." The material itself, however, is methodologically defined only as it is being worked on.

Rickert were published subsequently. Windelband's address on history and natural science was given in 1894; Rickert's *Naturwissenschaft und Kulturwissenschaft* was published in 1898 as a lecture. Max Weber's methodological studies were published only after 1900. We find similar trains of thought only in Wilhelm Dilthey's *Einleitung in die Geisteswissenschaft*, which was published in 1883; Stoerk quotes from this work repeatedly.

"I cannot imagine intellectual activity detached from the material upon which it works." Pointing to Schuppe and Dilthey, Stoerk argues that "the first perception of the phenomena of a scientific field occurs without entering consciousness—that is, without awareness of a purpose and a method—and it is only after long practice that an idea of what mental work is actually striving for, and thus also an idea of the various means and methods, can be formed." These are the same considerations we went through above when—with less psychology and more humanistic-anthropological thinking—we noted that the object of cognition is not delimited by a method but by reasons of relevance inherent in the existence of the cognitive subject and that after the delimitation, all available methods must be applied that adequately exhaust the object for cognition.¹⁸

In describing the methods appropriate to dealing with constitutional law, Stoerk starts with a criticism of the universal concepts that are to be developed by means of abstraction from the material of experience.¹⁹ He argues against the opinion, rooted in the atmosphere of academic logic in the pejorative sense of the word, that every abstraction must lead to valuable universal concepts. Though in the process of abstracting some characteristics can be left out and such "universal" concepts as "king," "state," and "real union" can be formed, the value of such concepts, according to Stoerk, is questionable. Though there is nothing wrong with the "process of generalization" as such, it must not be interpreted to mean "that leaving out any characteristic of a concept by itself already leads to a different, higher concept without having to consider the relationships among the values of the individual characteristics [*Werthrelation*]. In each concept there inheres a lasting core around which the specific definitions are grouped." The abstraction must not target an "elementary" trait because in that case "the phenomenon is *denatured* in its conceptual image since it is not understood in its essence when an incidental element is emphasized as definitive."²⁰ In these statements Stoerk identifies the problem of "value selection" as crucial in the formation of the concepts of political science, and he does so without falling into the neo-Kantian one-sidedness

18. Stoerk, *Zur Methodik*, 8, 9.

19. In this critique, Stoerk essentially follows the basic remarks of Schuppe, "Die Methoden der Rechtsphilosophie," *Z. f. vergl. Rechtsw.*, V (1884), 230ff.

20. Stoerk, *Zur Methodik*, 42.

of considering the problem as exclusively one of the choice made by the cognizing subject. Instead, for Stoerk the problems of value are part of the question of an existence structured according to value [*werthhaft*], and he thus limits the cognizing subject lest reality become "denatured," perhaps under the methodological pretext that the perceiver must set the relevant values according to his own discretion. While the cognizing subject of cognition, it is true, must select relevant characteristics in the formation of a concept, what is relevant is largely determined by the reality of the state and the state's decisions on relevancy. With his more ontological attitude to the problem of the value structure of reality, Stoerk achieved a level of insight into the question of type formation that in this regard even Max Weber's theory of ideal types did not fully attain even in its final form. The "lasting core" of Stoerk's concept of type corresponds to the "ideality" of Weber's type in its early formation. That this ideality is not exclusively related to value "selection" but is primarily connected with the value "relations" of the reality elements themselves is a problem that in Max Weber led a difficult existence under the title of "sense adequacy," which was never completely explained rationally.

We cannot, however, expect that the public formation of concepts [*publizistische Begriffsbildung*] will result in a system of legal concepts that is as unified and consistent as the concepts of civil law. Stoerk touches on the question of why the formation of juristic concepts of civil law, and especially liability law [*Obligationenrecht*], has never been equaled (just as among all the social sciences, so far only theoretical political economics has succeeded in developing a system of laws); he was not, however, able to solve it entirely with his philosophical-anthropological methods. He traces the simplicity and clarity of the concepts of civil law—and, in our view, rightly so—to the structure of the living conditions they order. In other words, the relationships among individuals the gist of which is the protection of property and the fulfillment of contracts are structured so simply, so consistently (today we would add: because they are peripheral to the person) that the order can be established through relatively simple and consistent configurations of norms that remain unchanged for long stretches of human history. "However, every product of communal existence is subject to such a wealth of concentric forces that nevertheless vary in intensity, and it becomes therefore dependent on historical conditions in so many

different ways that here even approximately similar conditions never recur."²¹ Stoerk's formulations are admittedly inadequate in that the difference between the civil law [*zivilistisch*] and the public law problems is reduced to one between constant, recurring elements and inconstant, changing ones. We would say the difference is more that between ahistorical relationships between individuals that are peripheral to the person and essentially historical, political structures on the other hand. In both realms there are constant, recurrent traits and unique, changeable ones, but the "value relations"—to use Stoerk's expression—in both spheres are such that in structures subject to civil law the constant elements are relevant, while in the historical-political structures lower levels of the concretization of reality, having naturally fewer general and constant traits, become relevant. While a theory of constitutional law that forms concepts on a high level of generality does not necessarily develop concepts that are "wrong" in the sense that these concepts could not be applied anywhere, it does develop concepts that are "irrelevant" in that they do not touch the historically essential elements of state reality.

Stoerk's deep understanding of the historical problems of constitutional law—his inadequate formulations notwithstanding—grows out of a principle for the treatment of constitutional law he establishes by further developing an idea first enunciated by Julius Stahl. Namely, the institutions of constitutional law have come about, according to Stoerk's reasoning, not only in the sense of a *transitory* genesis that while building on the past at each moment in the present nevertheless leaves that past behind, but in the sense of an *immanent* historicity, by dint of which the past is contained in the present. It is the principle of the accumulation of duration, which Bergson formulated in more general contexts at the same time (his *Données immédiates* appeared in 1888). For constitutional law the consequence is the demand for the "historical-genetic reconstruction" of the content of the law.²²

Stoerk's further considerations coincide for the most part with what we have already said and will still have to say below about the demand for "limiting" the object of jurisprudence. He points out that in Austria even private or civil law underwent such a period of

21. *Ibid.*, 34.

22. *Ibid.*, 35.

limitation, from which only Josef Unger liberated it, and he calls it "that epoch of stagnation . . . in which the knowledge [*Erkenntnis*] of law is lowered to a mere knowledge of laws, and the intellectual horizon is closed off by the mechanical aggregate of concurrent regulations 'from the supreme lawgiver [*Gesetzgeber*].'" If applied consistently, the "juristic method threatens the theory of national public law" with a similar situation of "uncritical subjugation to the letter of the legal gazettes."²³ "This would mean forcing the German science of constitutional law into a fateful step backward, one that would doubtlessly lead it into the flat realm of pure paraphrase of the imperial and provincial legal gazettes."²⁴ "If there is an unfortunate theory resulting from a misunderstood limitation of its subject matter, it is the quietist theory, which wants to forbid jurisprudence to penetrate to an understanding of the origin and value of the legal norm and wants to make the production of verbal exactitude [*Wortbestimmtheit*] its only task."²⁵ With the adjective "quietist" Stoerk has touched on an idea he elaborates further when he painstakingly traces, even in all details, the timidity and reserve in the face of the reality of the state to a "national prejudice," the old "non-state [*unstaatlich*] peculiarity." He identifies there the characteristic of the imperial theory of the state that in isolated cases still cling to it in the last quarter of the nineteenth century—for example, Laband. It is still found in Austrian theory today, so that this theory of the state can be seen as a theory of the "state" only *cum grano salis*, since the political reality in which it is rooted is still that of a "Reich."

The only constitutional theorist [*Staatsrechtslehrer*] who, following Stoerk's methodological principles, dealt with Austrian constitutional law was Friedrich Tezner.²⁶ In his critique of Jellinek's theory of the state, he supplements Stoerk's ideas by characterizing in more detail the concept of the type developed by Georg Jellinek. The types distinguished in general theory of the state (republic, federal state, real union, and so forth) according to Tezner, are not concepts that can be developed inductively through generalization

23. *Ibid.*, 79.

24. *Ibid.*, 82.

25. *Ibid.*

26. For an indication that Tezner's importance is beginning to be recognized, see Josef Schenk, "Der österreichische Richter und Gelehrte Friedrich Tezner," *öst. Verw. Bl.*, VI (1935).

from a large body of empirical material (which, in any case, does not even exist in political science); rather, they seek to capture "what is significant for the development of the state idea," something that can serve as a model; they are value-related [*wertbezogen*] types.²⁷ As such, he continues, they are extremely significant for knowledge of the state reality because they capture important developmental tendencies found in reality. They are, however, dubious when constitutional theorists lose sight of the fact that these are historical type concepts and instead interpret them, based on their development, as "doctrinaire" concepts, to which some actually existing state entity must correspond. As Tezner points out, however, in reality every state is the product of its history, in which a great variety of political strivings [*Strebensrichtung*] and organizational tendencies are found side by side, so that a doctrinaire classification of a particular state is impossible.

With this argument Tezner gains the ground for examining the public law of the Austro-Hungarian monarchy—his investigation is the only one, as best we can judge, that touches the problems of this state entity. The basic character of these problems—which, as we know, center on the question of a political people—may be inferred from the fact that such an esteemed element of general political science as the doctrine of elements [*Elementenlehre*] (territory, people, force) can be applied only with great difficulty to the presentation of positive law even for the Austrian half of the empire because there was no such thing as an Austrian national people if the term is to mean something more than all specimens of *homo sapiens* provided with Austrian citizenship. In the face of this situation, all Tezner's efforts can be reduced to one: to understand the formation of the Reich without recourse to the usual type concepts of the prevailing political science but based only on its own historical genesis and contemporary situation. "Even within the very narrow confines in which scholars agree on their definition, the doctrinaire types of the federal state and the confederation, the real and personal union, are really of no significance when it comes to explaining such a complex structure except that they indicate the struggle between the ideas on which they are based, a struggle that has dominated the political life of the

27. *Ibid.*, 148.

monarchy and has led to a development in constitutional law that cannot be gathered from statutory law."²⁸ The Austro-Hungarian monarchy is the exemplary model of a political structure on which run aground all concepts of the theory of constitutional law that relate to the reality of a state carried by the power of a politically active people. Tezner necessarily had to categorize all arguments about whether Austria is a personal union or a real union, a confederation or a federal state, as "irrelevant" because, thanks to its historical evolution, structural elements rooted in the period of the medieval state were still crucial for this political entity. "Thus the Austrian monarchy is a body politic *sui generis*, coinciding neither with the doctrinaire type of the real or personal union nor with that of a truly constitutional monarchic state."²⁹ "The emperor of the corporatist epoch as the highest authority of the monarchy, as its *ultima ratio*, still continues and even in the sense that the parts of the monarchy can do through the emperor what they are unable to do on their own."³⁰ The sovereign authority in this political entity is the emperor from the House of Austria, "whose Reich-procuratorial, unilateral acts stand up as incontestably still in force." The last crucial reason for retaining the forms of the corporatist monarchic time is, once again, the problem of nationalities. None of the national groups in the monarchy could, "based on its national and ethnic composition, develop into a firmly unified body politic capable of autonomous existence and with its own genuine sovereignty."³¹

Stoerk's and Tezner's efforts undoubtedly have their place in the more general context of historicism and the methodology it developed. However, they, and particularly Tezner, also belong to the same intellectual sphere as the intellectual trends represented by Ulbrich and Gumplowicz. The political and theoretical situation, which led in the latter two to pessimism and abandonment of the state as subject matter, leads Tezner to increased efforts to understand a political reality that cannot be grasped with the categories of political science that were developed on the basis of the newly formed German nation-state. The alternative to positivism, which

28. Friedrich Tezner, *Der Kaiser* (Vienna, 1909), "Vorwort," iii.

29. Friedrich Tezner, "Das ständisch-monarchische Staatsrecht und die österreichische Gesamt- oder Länderstaatsidee," *Grünhuts Zt.*, XLI (1916), 135.

30. *Ibid.*, 136.

31. Tezner, *Der Kaiser*, 246.

simply removes from the field of political science a reality that is politically unpleasant and difficult to know and understand, is the attempt to understand the reality of the state in the fullness of its historically sedimented structure.

§23. The Consequences of Pure Theory of Law for the Interpretation of Positive Law

So far in this chapter we have been guided in our analyses by the problems contained in the theories under investigation themselves, and we could only occasionally provide a glimpse of what seems to us the more appropriate organization of the problems. To fully understand the impact of our investigations on positive law, we must now once again briefly summarize Kelsen's basic approach and distinguish our own from his as clearly as possible.

The picture Kelsen has of the problems of theory of the state is that of possible objects of cognition coexisting side by side. The pure method requires that under the categories peculiar to a science only one object be included in a system of judgments, and for jurisprudence this object is the norm system as a system of compulsory norms. Kelsen does not deny that there may be other subject matters, such as the reality of the state as a natural phenomenon, and that these may become the object of another field of scholarship, sociology. However, even when subject matter lays claim to the name "state," it has nothing at all to do with the "state" as the object of jurisprudence and it is not the task of jurists to deal with it. We found essentially the same approach in Ulbrich, who, like Kelsen, focuses on the examined object's relevance for positive law and does not concern himself with questions of principle because they lack practical-juristic significance. The case is somewhat different for Gumpowicz, since he concludes from the dichotomy of law and nature that theory of the state must examine primarily the nature of the state and must consider the norms to be the expression of the outcomes of struggles—the ideology of law, the illogical acceptance of which forms the basis of the system for Kelsen, is dissolved.

We have already criticized Kelsen's view to some extent when we said above that Kelsen limits norm content to human behavior in the sense of a positivist metaphysics. In this limitation, the positivist-metaphysical dogma comes together conveniently with the theoretical problem of jurisprudence that the content of the

norm can always only be human acts and omissions of acts. For a scientific consideration of the problems of constitutional law, we must now undo the metaphysical consequences Kelsen drew from the coming together of the problems and restore the complete content of the norms of constitutional law.

The "purity" of Kelsen's theory is metaphysical in that the content of the norms of constitutional law is restricted in an inadmissible way based on the premise of a metaphysical dogma. Everything that can no longer be understood as the content of constitutional law after this restriction, Kelsen regards as belonging to a different science, not that of the jurisprudence of the state. While above, following Kelsen's formulation of the problem, we had to prove that there could be other subject matters for a theory of the state in addition to jurisprudence in the narrower sense, we now claim that there are no such independently coexisting subject matters and that what Kelsen called "sociological" subject matters in fact belong to the science of positive constitutional law insofar as through them the full content of the norms is grasped. Kelsen's theory of law is incorrectly called "pure" because in fact it does not call for the "purity" of examinations of positive law but for the "limitation" of the norm interpretation in positive law to a particular part of the content of this very norm. The rationale for the limitation, however, is a metaphysical dogma, and we cannot admit its legitimacy in the sphere of the science of positive law.

We will now restore the content of the norm by elaborating what we already considered above, namely, that the human behaviors that appear as contents of the norm are imbued with meaning because they have the function of ordering a particular realm of being. Their full meaning can be understood only when they are integrated into the contexts of meaning pertaining to the realm of being on which they are to impose order. We have pointed out that norms relating to actions of the type "voting," "election," "nomination," and "legislation," or to correspondingly acting subjects, such as "people," "king," "parliament," and "minister," cannot be understood unless we know what they "mean." What they "mean," however, is not inherent in the norm itself; rather, it must be drawn upon as a content-related premise based on the judgments of a political science oriented toward reality when interpreting the norm. Those materials, then, which Kelsen wants to have excluded from a "pure" jurisprudence are not objects "in addition to" jurisprudence

but—if you will—the content of a science of premises for the interpretation of norms. We cannot interpret norms if we do not know what the words in them mean, and we can know this systematically and completely only if the field of the subject matter to which the expressions relate is made the content of a science.

Within Kelsen's system, the metaphysical premises create the appearance that we already know what the content of the norm is. This appearance is created by the fact that the "acts" in Kelsen's theory are not intellectually meaningful phenomena [*Sinnphänomene*] but rather phenomena in a natural sphere that have no "meaning." The concept of the natural act is based on the ontological condition [*Wesensverhalt*]¹—which we do not dispute—that the meaning of the "acts" is in reality grounded in the sphere of the human body. This grounding will be different for different classes of acts: there are acts, such as "mental acts," that are predominantly grounded in processes within the cerebrum and perhaps in rudimentary motions of the vocal organs, while other acts, such as "signatures," have a more extensive grounding in the motor skills of the extremities. But whatever the particular grounding of an act may be, in the legal system—even where the content of the norm, for the purpose of ordering existence, relates explicitly to the bodily foundations of an act—this natural ordering of existence is required only because it expresses an intellectual order of meanings [*Sinnordnung*]. When the norm is understood as essentially and exclusively referring to natural acts and their natural consequences, the norm is emptied of all of its intellectual meaning. If the act of voting consists of putting ink on paper and the transport of the paper through space from the voting booth into a container by a member of the animal species *homo sapiens*, then certainly no problems arise concerning "election," the "representative," the "people," the "voter," the "party," and the like as politically meaningful phenomena, and all phenomena of this sort can be relegated to "sociology." But as soon as we drop the metaphysics of positivism and see these acts as meaningful actions of intellectual persons, the meaningful phenomena must be included in any adequate interpretation of the norm. The question in positive law whether a member of parliament who leaves his party should lose his seat in parliament (if positive law itself does not already contain an explicit norm regarding such a case) can be decided only on the basis of judgments about the meaning of the phenomena "member of parliament," "people," "election," and

"representation" in the concrete political situation. Based on the doctrine of the unrestricted mandate and the position of the member of parliament as a representative of the people, the question must be answered in the negative. On the other hand, according to the doctrine of the compulsory party mandate and the view that the member is an official of a party and must follow its instructions, that in parliament it is not the members but the parties that hold the seats, that it is not the people that "elects" its representatives but that it is the "party" that, in a complicated process combining nomination and election, delegates somebody to the parliament, the above question will be answered in the affirmative. To decide these questions, we must have formed the scientific types of the liberal parliaments of the nineteenth century and the subsequent party parliaments and must have elaborated the differences between the parliament as representation of the people and as a body of party leaders, and these concepts are not found in the legal norms but only in the judgments of a political science that forms historical types. Without a political science that has the contents exemplified here to serve as a prerequisite, it is not just some arbitrary discipline or other that is missing and whose absence may be a matter of indifference to the jurist as a legal dogmatist, but the prerequisites for an interpretation of the norms of constitutional law that can claim to be scientific. Naturally, we do not doubt that the legal dogmatist will arrive at some meaningful interpretations of his norms even without such a prerequisite. For of course in practical legal work even the most loyal adherents of the pure theory of law—and even Kelsen himself—do not pay any attention to the metaphysical proposition that human acts are natural phenomena; instead, they interpret the norms according to their meaning, which is the meaning of an act in the situation upon which order is to be imposed by means of the normative classification of acts. Even though there will certainly be results of the interpretation, they will be scientifically defective because the lack of a rationally developed requisite science of the basic assumptions will render any decision more or less arbitrary. Instead of having a scientific basis and rationale, these decisions will largely be shaped by premises regarding meaning that have been taken over from some academic tradition or other and used as the major premises of the interpretation, by the interpreter's political inclinations that he believes to be ontological features of the state, by his metaphysical convictions that he takes for a

scientifically faithful copy of the order of creation, and so on. Thus, in every case the interpretation is based on presupposed contexts of meaning—it is merely a question whether they are selected naively or critically and scientifically. We cannot recognize a contrast, or even a difference, between “juristic” and “sociological” theory of the state; rather, we see these designations as the manifestation of the contrast between the naïve and the scientific dogmatics of law—or, if we focus specifically on Kelsen’s theory, the contrast between a theory of constitutional law that restricts its presupposed meanings for the sake of the positivist metaphysical dogma and a scientific treatment of public law that ideally takes into consideration *all* the meanings present in a situation as premises of the interpretation without introducing metaphysical restrictions.

In view of this marked contrast between the metaphysically delimited and the scientific dogmatics of law, we must stress again that of course a dogmatics of law that is “pure,” restricted, naïve—or whatever one wants to call it—also arrives at well-founded conclusions; in other words, the defect in its scientific character does not become obvious until, based on a fully developed science of the premises, other possible interpretations are revealed that are overlooked by the “pure” dogmatics of law. In covering up its lack of scientific foundation in concrete cases, a general situation of science works to the great advantage of the “pure” theory of law by giving precisely its restriction the air of a scientific strength. For example, in discussing the question whether the constitution of a particular state is democratic, parliamentary, federal, authoritarian, or so on, pure theory of law answers that the question cannot be answered by declarations issued by the authors of the constitution themselves, but only by examining the positive content of the constitution. This principle of response rejects “subjective” opinions issued by scientifically not authoritative institutions (no matter how politically important such declarations might be) and opens up the possibility of an “objective” impartial judgment. After all, what answer could be more pertinent and objective in terms of positive law than one given on the basis of the legal content relevant to positive law?

Out of the sense of objectivity, secured by this antithesis to subjective opinion, it is easy to overlook that the texts of the norms have no content at all that, as it were, is given in the norm itself and with the help of which statements such as the one under discussion here could be tested. The “content” of the norm is not “given” but

"arises" in the act of interpretation. As a prerequisite for his interpretation, however, the interpreter needs to know those contexts of meaning within which alone the concepts and statements found in the norms only have a "meaning" and become a "content" in the first place. Thus, we cannot tell whether a constitution is, for example, democratic from the content of the legal text. Rather, we first need to know from other sources what "democracy" is, and second, we have to ascertain whether the political situation that is to be ordered by the contents of these norms is fundamentally democratic, and we can examine the acts and behaviors classified in the norms for this quality—not in regard to whether they establish the form of government called democracy—in regard to whether in the concrete situation of this particular state they do in fact make up in the contextual meaning of "democracy." In this examination we will perhaps find, as in the case of the Austrian Federal Constitution of 1920, that the norms that had perhaps been intended by their authors to order the Austrian state as a "democracy" did in fact organize it into something else entirely, namely, into a number of more or less rigidly organized groups of persons—i.e., the parties—that were only to a slight degree unified into a national community and to whom the various applicable sections of the Federal Constitution assigned a relationship of peaceful power compromise, programmatic threat of annihilation, mutual armed intimidation, latent and overt civil war with each other. These problems do not become obvious from the "content" of the norms but only when the norms are related to the concrete intellectual-meaningful political context in which they function as "order."

Nevertheless, the statement that the Federal Constitution of 1920 was a democratic "constitution" is not entirely without meaning. For there are many states and their political structures may have numerous shared basic traits. In the ordering of several political entities with similar basic structures the act configurations, which are the content of the norms, can be repeated with slight variations—i.e., as similar—and when the type of political structure that occurs in the majority of instances under consideration has been defined, the name of the type can be transferred also to a part of its context of meanings, such as to the act configurations forming the content of the norms. Similar political entities typically develop similar forms for their ordering, and these can be detached from the context of meanings of which they are merely an element

and can then be examined separately. Concomitant with a type of political structure there develops a typical formal language for the normatively ordering act configurations. Furthermore, this formal language can be transferred as such and be "introduced" into other political structures. And surely it is also scientifically completely admissible to treat such a formal language as an independent object of knowledge. In this sense, therefore, we can examine the text of a constitution for the formal language in which it is written, to see whether it is, for example, monarchic or democratic or republican. It would be a misunderstanding, however, to take the formal language of a constitutional text for the constitution of a state. The "constitution" itself is the formal language in its concrete political function; the norms of a constitution do not exist in a vacuum by themselves but only in their ordering function in a political situation—that is, a concrete, historically specific situation. In the world of modern states, therefore, the legal dogmatist may have to carry out highly complex acts of interpretation. He must (1) deal with a *formal language* that can be separated from its situation and be transferred to other concrete situations. And (2) he must deal with this formal language as a *functional* language—that is, (a) one that functions as *typical*, i.e., one that is conceived of as functioning in a typical situation, which is not the concrete situation itself, but typical only as one that has been reduced to its general basic traits; and (b) one that functions *concretely* in "ordering" a concrete state at a concrete historical point. *All three classes of meanings* must be considered in interpreting the norms: the formal language, the typical language in all stages of generality, and the concrete language. The evaluation of a constitution according to its "content," as pure theory of law practices it, restricts the interpretation to the premise of the meaning of the formal language and neglects all other contexts of meaning. These others are the contexts of meaning that are considered "sociological" and are therefore not included in the system of premises for the interpretation. In this regard the technique of interpretation of pure theory of law is defective in scientific terms.

The following chapter will discuss the very significant, concrete consequences the limitation of the interpretive premises had for the assessment issues in positive law. For this purpose, the problem of the Austrian constitutional transition of 1934 will serve as an example.



The Constitutional Transition (March 1933 to May 1934)

§I. The Legal Continuum— Legality and Legitimacy

In our discussion of questions of constitutional change and the legal continuum in the case of the Austrian constitutional transition of 1933–1934 we exclude from the outset the issues of identity and continuity of the state as defined by international law (*jus gentium*). We will consider the constitutional change only from the standpoint of the internal legal order of the state. We will take as our point of departure the formulations of pure theory of law because in them the ideas of the applicability of norms in the constitutional sphere were developed systematically and taken to their ultimate logical conclusion. Moreover, precisely these ideas served as the basis for the controversy concerning the Austrian constitutional transition.

According to the theorems of pure theory of law, the continuity of a legal order is preserved even when there is a change in the constitution if those changes of the constitutional law take on the forms stipulated for them by the constitution itself. In other words, even when the form of government is radically changed—from monarchy to republic, from parliamentary democracy to dictatorship—the continuity of the legal order is uninterrupted as long as the transitions proceed in the way stipulated in the norms of the constitution. However, if two government forms of the same content follow upon each other without being connected “legally” through such a procedure, then the continuum is interrupted; a “violation of the law,” a “revolution” in the legal-logical sense, has occurred.

We recognize in these theorems, reduced to their fundamentals, the metaphysical-positivist dogmas we encountered in the preceding chapter as the basis of pure theory of law. The question of the institution of a constitution [*Verfassungsgebung*] is reduced to that of whether the acts of instituting a constitution as such can be understood based on the norms of the constitution itself. Norms and acts classified by norms are the material used to understand the issue, while the problems of "substance," of the will to the institution of a constitution, the subject of the will [*Willensträger*], the political powers, their coming to terms with each other, the elimination of one by the other, the power that renders a situation "normal" to such an extent that it can then be made a "norm," and so forth, all these are consistently excluded.

Let us now look at the import and the limits of this theory of continuity. If we had to formulate the problem strictly in line with a pure theory of legal norms, we would first have to make some corrections in the theorems of pure theory of law. A theory of law that limits its subject area strictly to the unity of the legal order as a context of delegation, which culminates in the basic norm, should in its judgments of legal acts not go beyond the statement of whether these acts are a part of the system or not. From the standpoint of the internal legal order of a state, an act can only either belong to the system or not belong to it. From this standpoint, there is no problem of discontinuity of the legal order: the concept of discontinuity is based on the image of a straight line that has a gap at one point. That is, the line leads to a certain point at which it is interrupted and then continues on the other side of the interruption as the "same" straight line. However, according to its own methodological premises, the pure theory of law cannot allow this image because the determination regarding the "sameness" of the line as it continues after the interruption of necessity can only be based on those questions of substance (such as identity of nation and territory, the cultural context, all the legal norms that are below the level of the constitution, and so on) that as such are not admissible objects of jurisprudence. If we take pure theory of law at its word, then there is no more connection between a "state before the revolution" and the same "state after the revolution" than between one of these states and any other state from another period in history and another continent. According to the pure theory of law, there can be no such thing as a violation of the constitution and

no revolution in the legal-logical sense; rather, two legal systems are juxtaposed as self-contained entities that have nothing to do with each other according to the logic of the law. Expressions such as "violation of the law," "violation of the constitution," "revolution," and "discontinuity of the legal order," etc., establish a substantial connection between the two states that, according to the principles of pure theory of law, they cannot have with each other.

As in some other instances already cited, such as the acceptance of the "ideology of ought" or the "compulsory norm" as the legal norm, the consistency of the theory is broken because of a political decision. Although the "state" is identical with the legal order, and a "violation" in the constitutional sphere can result only in a new legal order and thus a new "state," a substantial concept of the state is nevertheless tacitly introduced as a premise, so that the acts belonging to the new legal order can still be described in light of the old one. And since the legal question is restricted to the question of compliance with the norms, the act must be characterized as an unlawful act [*Unrechtsakt*]. Once again the metaphysical dogma becomes the instrument of a political decision, since the act that institutes a new constitution is characterized as unlawful or revolutionary if it does not comply with the procedures stipulated in the old constitution, and this implies the political decision that this act *should* have conformed with the norms for constitutional amendments. This decision of the pure theory of law, which goes beyond the scope of the theory, offer us the point of departure from which we can make apparent the deeper layers of the problems of "legality." Let us keep in mind that according to the principles of pure theory of law, the explanation of a constitution out of the political situation in which it was instituted must be left out of consideration. Likewise, the fact that a constitution does not fall from the skies but is created by people and takes its legitimation from the ethical function of ordering a human realm of being must be left out of consideration. After all, according to this theory, the constitution is delegated by the "basic norm," the hypothesis of the scholar of jurisprudence. Let us consider this construction, in which the "norm" is completely detached from reality from which it receives its meaning and in which it now stands as a self-enclosed object that has no relationship anymore to anything in the world except to the delegating basic norm, and let us ask ourselves: *Why* should the constitutional norm be complied with? We will soon

see that it is impossible to answer this question. We are confronted with the mystery of why people in full possession of their mental powers should comply with a "norm," a "constitutional norm" that has no other legitimation than the basic norm. For pure theory of law the problem of legal continuity is reduced to the demand that a "norm" should be obeyed; the "norm" becomes a fetish—and we are faced with the task of wresting a meaning from this seemingly incomprehensible fetishism.

We can come closer to understanding the meaning of this demand if we analyze its inherent inconsistency. In the demand for continuity, the norm is no longer understood intrasystematically as a component of the legal order—for from that perspective there would be no problem at all, since the new constitution simply is to be interpreted on the basis of the new basic norm and not on that of the old one—but as an ethical principle of the state order. The political power that institutes itself as *auctoritas*, as the author of a legal order, is not viewed with equanimity, as it would befit a scholar, but with horror as the eruption of something incomprehensible, abnormal, a-rational, and as such something that has the taint of disorder. The requirement that the "norm" must be the source of state order is the manifestation of the fear of the disorder out of which a *nomos*, a law, is born. Only when the new order is established and shows itself as lasting, when everything about existence that cannot be quantified or classified into norms has been pushed out of sight by the jurist with the help of the "basic norm"—that is, when it is no longer the abnormal but the "norm" that is the "ground" of being—only then can the new state of affairs be viewed with some calm. That a *nomos* orders the state and that its violation casts society into chaos and possibly destroys it—that every new *nomos* stands before the background of the chaos from which it emerged—that is the primal knowledge that provides the background of meaning for the juristic discussions of lawfulness and unlawfulness, conformity to the norm and violation of the constitution, and even for the most superficial quarrels of the day concerning the "legality" of an act. That a "norm" in general and a "constitutional norm" in particular should be obeyed cannot be derived from the mere fact that these norms have been instituted but only from the interpretation of the positive norm under consideration as a manifestation of an ordering principle of human society. The requirement of "legality" in the sense of behavior having to conform with the norm establishes

a relationship between act and norm that is based on the tacit understanding that the norm's legitimacy in turn is founded upon the ethical order of life in society. When this tacit understanding is lost sight of and when the legitimacy of the norms is no longer examined, then there develops the formalized faith in legality, empty of any substance, the phenomenon we called fetishism above.

Now, even though the primal phenomenon of the state order can be felt even in the logicalized theses of the pure theory of law, it would nevertheless be wrong to say that an awareness of the phenomenon in the ambiguous fullness of its meaning of order and of the chaos from which the order was wrested, remains alive in those theses. Precisely because there is no such awareness inherent in them could the pure theory of law limit the problems of order in a state to the question of whether the authority's acts conformed to the norm or not. Whatever the "norm" was, it was considered the legitimate norm; that perhaps new norms had to be instituted to restore the legitimacy of the order, that the acts establishing the new order are sufficiently legitimated through this function and that the question of legality is irrelevant for their legitimacy—these considerations are inadmissible in the context of a logicalized theory of jurisprudence that has been emptied of all substance. A "presence" of primal knowledge in this theory can be claimed only to the extent that bringing about a contradictory relationship between the new act, alien to the system, and the old legal system, and condemning the new acts by labeling them "unlawful" or "unconstitutional," are a "flight" from reality: Even such a "flight" still contains an experience of the reality from which one flees. Because the theory is in flight from the origins of legitimate norms, origins that are abnormal in terms of procedure, it cannot openly engage the question of how a legitimate order develops and must instead label it "non-juristic" and push it into "sociology." And for the same reason the theory cannot see any other basis for the legitimation of the new legal ordering of a state than the very system of norms that has been eliminated as illegitimate by this new order. The alternatives of "legal" and "illegal," of "constitutional" and "unconstitutional" must be seen as symptoms of the flight from reality.¹

1. In the preceding chapter we discussed the essential elements of another meaning of this alternative that result from its incorporation into the Austrian thinking

However, this does not exhaust the meaning of the alternative. With its theses of discontinuity and the continuity of the law, pure theory of law has achieved the ultimate formalization of a political idea that appears in Max Weber's sociology of governance power [*Herrschaftssoziologie*] under the title of legitimacy by virtue of legality and occurs in Carl Schmitt's work in its institutionalist formulation as "legislative state [*Gesetzgebungsstaat*]."

In his sociology of governance power, Max Weber developed a typology of legitimacy. Though it does not illuminate the problem of legitimation itself and does not deal with its systematic possibilities, in the wealth of its analysis of characteristics Weber's typology offers the most comprehensive and profound contribution to this question. For Max Weber, "legality" is one among many methods of legitimating the state order—there are in addition also the traditional and the charismatic methods.² Rule based on the law is characterized by a series of notions that are held to a socially relevant extent:

1. that any law can be instituted rationally;
2. that by its nature every system of laws is a cosmos of abstract rules, that the administration of justice is the application of these rules to the individual case, and that the administration of the state is the rational cultivation of interests defined through organization into unions or associations [*Verbandsordnungen*] within the boundaries of legal rules [*Rechtsregeln*];
3. that the ruler obeys the impersonal order, according to which he decrees his rulings;
4. that the person who obeys, obeys only "the law";
5. that the members of an association [*Verbandsgenossen*], by obeying the ruler, do not obey him as a person but only those impersonal orders and are therefore obligated to obey only within the rationally delimited area of responsibility assigned to him by this order.

The first two characteristics are the most salient for our purposes; these are the notions of the members of the association about the nature of the rule they are subject to. While such a compilation of

about the state, which for historical reasons is primarily an "administrative" one, a way of thinking that also treats the constitution on the analogy of the legal stages below the constitution. See the following text for further meanings.

2. Max Weber, *Wirtschaft und Gesellschaft* (Tübingen, 1922), 124ff.

characteristics can provide very valuable material for the description of the type, it does not probe deeply into the meaning of the phenomenon itself. The insight that a "rule" is grounded in the notions the associated members have of it captures an essential element of every phenomenon of rule; however, the content of those notions and its meaning in a particular situation are at least as important in regard to the phenomenon of rule as its grounding in those notions. But simply listing their contents does not yet tell us much about the meaning of the notions in a particular situation. The statement that rule based on the law is typically characterized by members of the state holding the notion that any legal system can be instituted rationally, while perfectly correct, is not very convincing and raises the question of what characteristic features and forces [*Wesenskraft*] of human beings make such a curious notion comprehensible. If we could not interpret Max Weber's silence on this point to mean that the reasons for this notion were so obvious to him that he felt it unnecessary to speak about them but instead had to assume that he considered the content of these notions to be adequately justified in itself, we would also find ourselves compelled to classify his theory of legality as an irrational, fetishistic one. According to this theory, whenever man is confronted by a norm, he must bow to it, since through the mere fact of its having been instituted, the norm is already sufficiently legitimated as compulsory.

Carl Schmitt presented the meaning of the faith in legality for the political situation with exemplary clarity in his treatise on legality and legitimacy.³ The belief that the instituted general norms are compulsory is based on the explicit or tacit understanding that there is a "preestablished and presumed congruence and harmony of right and law, justice and legality, matter and procedure." "Only in this way is it possible to subject oneself to the rule of the law precisely in the name of freedom."⁴ The assumption of such a preestablished harmony, however, must be based on the trust "in the justice and reason of the lawgiver himself and of all the authorities participating in the process of legislation."⁵ And in a democracy this trust must necessarily be based on the premise and belief that the people,

3. Carl Schmitt, *Legalität und Legitimität* (Munich, 1932).

4. *Ibid.*, 22.

5. *Ibid.*, 24.

homogeneous in itself, possesses all the traits "that guarantee the justice and reason of the will it expresses. No democracy can exist without the premise that the people is good and that therefore its will is sufficient."⁶ In the case of a national democracy, the premise is the justified belief in "indivisible national homogeneity."⁷ Once the conviction of the goodness of the homogeneous people loses its force and, as in the modern Central European pluralistic party state, the "people" is divided into separate groups—namely, the parties—the "legislative state" can continue to function only so long as every party has at least a "chance" of becoming the ruling party. When this chance disappears because each party must fear that as soon as the other party comes into power, it will use the state and parliamentary apparatus to remain in power "legally" and permanently and to destroy its opposition, then it is only a matter of time before this event, feared by all, occurs and only a matter of determinedly seizing the opportune moment as to which of the parties "legally" accomplishes the transition to a new nonparliamentary constitutional form. In the pluralistic party state "legality" has lost its meaning of the "preestablished harmony" of justice and law and becomes a mere form devoid of substance, which one party uses to its advantage against the others in order to gain possession of the state apparatus or to defame such possession on the part of others as illegal. "Legality" has thus become separated from "legitimacy" and has become the latter's opposite.

Both Max Weber's typology and Kelsen's pure theory of law are attempts, albeit based on different methods, to rationalize the symptom of the decay of "legality." Max Weber rationalizes it by introducing legality as a type of legitimacy and restricting himself to listing the psychic acts when describing the notions on which it is based without examining the problem's other layers of meaning. Kelsen rationalizes legality by restricting the problems of meaning of norm creation to the conformity of acts to the norm. In the process, the multiplicity of meanings of ordering function, legitimation of the ordering act according to person and content normalization of a situation, and classifying it as a norm through an act of decision, and so on, is lost sight of. In both theories it becomes

6. *Ibid.*, 27–28.

7. *Ibid.*, 31.

incomprehensible why the "notions" or the "norms" should have the peculiar effect of legitimation that is attributed to them.⁸

Carl Schmitt's discussion has restored to the problem of "legality" its institutional background and to that extent achieves more than the sociology of chances of Max Weber and Kelsen's metaphysical positivism. For our present investigation, which aims at clarifying the particular Austrian problems, we must take a further step in analyzing the meaning of "legality." Carl Schmitt did not elaborate the problems of legitimacy and legality in their principal content but treated them only in connection with the transition from the legislative state to the formalization of this system of legitimation in the concept of legality. His discussions are too closely tied to the transition from the legislative state via the pluralistic party state to an authoritarian rule legitimated by plebiscite. We will therefore supplement Carl Schmitt's analysis with some of Maurice Hauriou's ideas, which we mentioned already in Part I of this volume.

We will start with a sentence by Hauriou that exposes the heart of the problem: "Les lois constitutionnelles ne signifient rien en tant que règles; elles n'ont de signification qu'en tant que statuts organiques d'institutions" [Constitutional laws mean nothing in terms of rules; they have no meaning except as the organic status of institutions].⁹ The constitutional norm in itself means nothing; it is significant only as the basic law of an institution. Here we have our criticism of Kelsen's pure theory of law, as we expressed it in the preceding chapter, reduced to the most succinct formulation possible. The norm in itself signifies nothing at all; we even went so far as to say that it has no "content" except a formal-linguistic one, and even that can be interpreted only based on the tacit premise that forms of the same type have had a specific meaning in another situation. The meaning is revealed only in the interpretive acts of integrating the norm into a far-reaching context of meanings that Hauriou called "institution." An institution is a complex social formation that contains primarily the following constitutive

8. We can deal with the theoretical questions here only in passing. A fundamental discussion of the newer theories of legality and of the loss of substance they contain would have to begin with the questions that Jaspers treats in his *Psychologie der Weltanschauungen* (2nd ed., 1922) under the names of authenticity and inauthenticity and formalization.

9. Maurice Hauriou, *Précis de Droit Constitutionnel* (1929), 5.

elements: (1) a "power"—that is, a free energy of will that takes upon itself the endeavor of ruling over a group of people by creating an order and laws; (2) the characterization of such a freely arising political will already contains the "idea" of such an order; (3) the idea unfolds its appeal and agencies of power develop that—if the endeavor is successful—lead to a separation of the ruling organization from the bearers of power; that is, the institution of rulership is depersonalized and the person holding the rulership is subordinated to the institution; (4) the ruling organization becomes an institution when the continuing organization meets largely with the habitual consent—the *consentement coutumier*—of those subjected to the rulership. Hauriou sums up these elements in the definition: "Une organisation sociale devient durable, c'est-à-dire conserve sa forme spécifique, malgré le renouvellement continu de la matière humaine qu'elle contient, lorsqu'elle est instituée, c'est-à-dire lorsque, d'une part, l'idée directrice, qui est en elle dès le moment de sa fondation, a pu se subordonner le pouvoir du gouvernement, grâce à des équilibres d'organes et de pouvoirs, et lorsque, d'autre part, ce système d'idées et d'équilibres de pouvoirs a été consacré, dans sa forme, par le consentement des membres de l'institution aussi bien que du milieu social" [A social organization becomes enduring, i.e., it preserves its specific form, in spite of the continuous renewal of the human material it contains at the time of becoming instituted, which means when on the one hand, the guiding idea that inheres in it from the moments of its foundation has been able to bring under its control the power of government, thanks to the balance of organs and powers, and then on the other hand, this system of ideas and balances of powers has been sanctioned in its form by the consent of the members of the institution as well as by that of the social climate].¹⁰

Once a social organization has been instituted in this way, problems of legitimation arise for the rulers. The rulership is legitimated by its "idea" of the enterprise of the state and its successful realization. The constitutional norms are legitimated as the ruling order of the institution; the norms concerning the transmission of rulership are legitimated by the lasting character of the institution, which continues beyond the life span of both ruler and ruled. Over time,

10. Ibid., 73.

after a long period of peaceful transmission of rulership, the fact that rulership and constitutional norms are legitimated through the institution and their function of founding and maintaining it may be lost sight of, and the constitutional norms may take on the role of an autonomous source of legitimation in the public eye. The meaning of "legitimation" is thus reversed: the ruler, who was legitimated as the representative of the institution by dint of his work on its behalf, is not legitimated by the norms, which are compulsory because he normalizes the situation and thus has prepared it to be regulated by norms. By thus calling attention to the original meaning of rulership as creation, extension, and preservation of an institution and the reversal of this meaning in the establishment of the rule of law as the source of legitimation, Hauriou is saying everything there is to say on this point. Rulership is legitimate when its relationship to an institution is one of representation; the ruler himself as representative of the institution gives it its ruling order; his position cannot be legitimated through a rule of law. The demand for "legality" is a misunderstanding—surely understandable from a psychological point of view—of the processes of legitimation. The claim that acts of constitutional amendment that do comply with the rules for such amendments are unlawful is not a conclusion of a "juristic" theory, which might be juxtaposed to a "sociological" one, but it is a wrong description—wrong in both empirical and scientific terms—of the phenomenon of a constitution.¹¹

§2. The Practice of the Wartime Economic Decrees from March 1933 to the Enactment of the Constitution of 1934

The juristic problems of the constitutional transition in the strict sense begin with the emergence of a new legislative agency in place of the National Council. When the National Council ceased to function in March 1933, the federal government carried out the legislative responsibility in the form of legal rules [*Rechtssatzform*]¹¹—only rarely applied before this time—as delineated in the

11. Among the older literature on the problem of legitimacy and authority, the reader is referred to the excellent discussion by Robert Piloty, *Autorität und Staatsgewalt* (1905).

government decree based on the wartime Enabling Act of July 24, 1917 (*RGBl* [*Reichgesetzblatt*, or Reich Legal Gazette], No. 307). When the federal government (and the federal ministers) became the actual legislative agencies and the so-called wartime economic decrees became the standard legislative form, the disputes, waged more or less passionately, began concerning the question of whether those legislative acts were in conformity with the law and the constitution. The juristic problems of the controversy can be summed up according to the following issues:

1. the possibility of, based on the parliamentary constitution in effect at the time, using a law to entrust legislation to an executive agency that would carry out legislation through acts of issuing statutory regulations;

2. the content of delegation.

1. According to prevailing constitutional theory, the responsibilities assigned to an agency by the constitution cannot be delegated by this agency to another one unless the constitution specifically permits such delegation. According to Article 24 of the B-VG of 1920 (amended in 1929), the legislative authority was the National Council, elected by the entire federal citizenry [*Bundesvolk*], together with the Bundesrat (Upper House of Parliament), elected by the diets of the provinces. To a limited extent, article 18, section 2, provided for the possibility of delegating the legislating function in the substantive sense. According to that article, every administrative authority could issue, based on the laws, statutory regulations for its sphere of responsibility. Any enabling law going beyond the provision in article 18.2 required passing a constitutional law. The wartime Enabling Act, on which the statutory laws of the federal government and federal ministers were based, had taken on the role of such a constitutional law through its adoption in §7.2 of the Constitutional Transition Act (*Verfassungs-Übergangs-Gesetz*) of 1920; formally, therefore, its provisions allowed the legislative organ to transfer all the responsibilities assigned to it. Among these transferable powers were ordinary legislation and constitutional legislation, except for the power of totally revising the constitution. According to article 44.2, only the legislative agency together with the people could exercise that latter power. However, one has to consider the question whether—aside from the substantive content of the Enabling Act—the wartime Enabling Act did not also formally and in principle provide for the transfer even of the authority

for a complete revision of the constitution. After all, the role of a constitutional law, which the Enabling Act took on through its adoption, was not given to it by the issuer of the constitutional law to whom the B-VG of 1920–1929 had granted this power, but by the national assembly that issued the constitution, and this body had the right to assign the authority for a total revision of the constitution as it saw fit. This detail is significant because in fact a total revision of the constitution took place on the basis of the Enabling Act.

2. The content of the enablement was delimited by the text of §1 of the wartime Enabling Act, which reads as follows: “The government is enabled, for the duration of the extraordinary conditions brought about by the war, to make the necessary arrangements through statutory regulations for promoting and rebuilding the economy, for warding off economic damages, and for providing the population with food and other vital commodities.”

It is difficult to determine the limits of the subjects that according to this enablement can be regulated by statutory regulations. The time period of those subjects is limited to the continued existence of the exceptional conditions resulting from the war—that is, for all practical purposes, there are no limits that can be foreseen today. Further, §17.2 of the Constitutional Transition Act of 1920 provides that the point in time when the cited exceptional conditions are to be considered remedied must be determined by federal law. Since thus the end of the exceptional conditions was delimited by a formal act of federal legislation, but no such act ever occurred, there could be no doubt that the Enabling Act was still in force. The subject matter covered is in part strictly limited through the formulation of “providing the population with food and other vital commodities,” and in part it is only broadly defined, as in the formulations “promoting and rebuilding the economy” and “warding off economic damages”—there will hardly be any subject matter that cannot be more or less closely causally connected with these facts. Though arguments against the various regulations pointed out that they had gone beyond the objective framework in this sense of the Enabling Act, the arguments *against* the existence of a causal connection were just as good or bad as the ones that could be marshaled *for* its existence. This is not to deny, of course, that a constitutional court could have adequately justified the repeal of one or another of these statutory regulations.

Arguments of this sort were, as a rule, connected with interpretations based on the lawgiver's intent and the definition of the limits that can be deduced from this intent. While this premise of the interpretation is without any doubt pertinent and legitimate, but those who made use of it may not always have seen clearly that the intention of the lawgiver was not absolutely binding on the subsequent application of the norm he established. The meaning of norms can change, such that the norm at a later time has an accepted meaning that could not have been intended by the lawgiver, for example, because he could not have foreseen this meaning at the time he instituted the norm. The objections against certain regulations based on the Enabling Act that they did not conform to the intentions of the 1917 legislature must be accepted wholesale, for it was certainly not the intention of the legislature of the Austrian monarchy that the Enabling Act should be used to regulate any living conditions at all in the Austrian republic. In 1933 the Enabling Act could be placed meaningfully only into the context of the republican constitutional law. This may well have led to some matters being settled by means of statutory regulation in 1933 while the same matters could not have been dealt with in the same way during the monarchy. And vice versa, certain matters likely could not be dealt with through statutory regulation in 1933 even though there would have been no objections to this in 1917.¹²

In terms of jurisprudence, attempts to determine the content of the enablement through integration of the Enabling Act into the constitutional law of the republic are more interesting. The first relevant question in this context was whether the Enabling Act confers authority merely for regulations *praeter legem* or also for regulation *contra legem*. The right to issue regulations *praeter legem* was not in doubt; the question whether regulations *contra legem* could also be issued had to be resolved by interpreting the context of the constitution, since the Enabling Act itself was silent on the matter. Arguments for both views were put forth. The argument in favor was that in another case of enablement—article II, §4.2, of the Constitutional Transition Act of 1920—the enablement

12. On these questions, see the extensive note in Merkl, *Die ständisch-autoritäre Verfassung Österreichs* (Vienna, 1935), 10–11; further, see Merkl, "Die Verfassungskrise im Lichte der Verfassung," *österreich. Volkswirt*, XXV, no. 25 (Vienna, March 18, 1938), 585.

was explicitly limited to regulations not violating existing laws. The enablement concerned allowed the authorities responsible for the general security police to issue any regulations necessary to protect the personal safety of persons or of property as long as such regulations did not contravene against existing legal provisions. Since the Enabling Act did not have such a proviso, many concluded that regulations *contra legem* were implicitly permitted. On the other hand, one could argue that article 18.3, which specifically authorized the federal president to issue regulations under certain circumstances, expressly stated that these regulations could also change existing law; the absence of such a specific proviso from the Enabling Act could thus indicate that only regulations *praeter legem* were admissible. There was no consistent constitutional custom regarding the formulation of enabling provisions.

In our opinion, the question of authorization to issue regulations *praeter legem* and *contra legem* is not as important as a large part of the literature takes it to be, because the glow of this significance is a reflection of an inadequate theory of law. A regulation *contra legem* is taken to mean a regulation that alters legal provisions. The criterion of "change" is a linguistic one; that is, a change is considered to have occurred if and only if the linguistic substance of the law has been altered. This criterion is meaningful only on the basis of a theory of law that considers a law to be not an actually functioning ordering of a specific realm of being but rather merely a linguistic expression. Following Merkl's theory of levels, we must say that the "law" is not limited to just one level but can be understood in its unified, total meaning [*Sinneinheit*] only when we consider all the levels of its concretization.¹³ The question of how a law orders a realm of being cannot be answered by pointing to the words contained in it; the answer must be based on an analysis of its concretization in individual acts, whether these are private legal transactions, individual administrative acts, or judicial rulings. Therefore the question of whether a statutory regulation has changed a law can be decided only by interposing another question, namely, whether, for example, a court would have to decide a case based on the law in question differently after the regulation has been issued than it did prior to the regulation. If the

13. On the question of independent regulations and regulations that change the law, see Merkl, *Allgemeines Verwaltungsrecht* (Vienna, 1927), 182ff.

decision does not change because of the regulation, then the law has not been altered. However, if the decision is different after the regulation from what it would have been if it had been based only on the law, then the law has been altered. Now it is of course clear that there will hardly be regulations that do not change any laws, for if a statutory regulation does not cause any change at all on the level of the ultimate acts of concretization, there would be no rationale for issuing it. If a regulation *praeter legem* is defined as one that regulates matters previously not covered by law, this does not mean that previously those matters were "unregulated" but rather that according to the past legal conditions they were regulated in a "different" way, and this "different" way appeared from certain legal-political standpoints to be the same as "no" regulation at all. Thus, the meaning of the concept of "regulation *praeter legem*" in part reflects a historical structural problem of the law: the law is understood as the ordering function of a realm of being when the historical situation has changed to such an extent that the existing norms no longer order the situation in keeping with the prevailing social ethic; we speak of a "nonregulated" situation or "nonregulated" matters. This partial meaning of the concept certainly makes sense because it relates to a genuine historical problem of the legal structure. However, if we hold on to this meaning and think it through to its logical consequences, we will arrive at the conclusion that the order of the "nonregulated" situation in the sense of an ethical demand may very well require the alteration of legal provisions previously in effect under procedural law. That is, precisely because the regulation *praeter legem* regulates new "matters," it must do so *contra legem*. The "novelty" of the "matter" by itself has nothing to do with the question of whether the text of a law in force at the time must be changed or not.

In summing up, we have to say that the attempt to distinguish between regulations *praeter legem* and those *contra legem* in accordance with the prevailing formation of concepts is impossible because these concepts comprise a highly complex and inherently contradictory constellation of meaning:

a. A statutory regulation is defined as *praeter legem* when it does not affect the linguistic substance of a law; the rationale of this interpretation is the constitutional theory of law according to which the formal law, which comes into being under participation of the parliament, is sacrosanct even where its punctuation marks

are concerned. This is a political theory that succumbs to a kind of word fetishism by assuming that the legal order of existence is not changed as long as the language of the law remains intact, that is, by interpreting *lex* as a linguistic expression, a historical monument, and not a legal norm in the context of meaning of its ordering function. In fact, however, a great deal can be changed in the meaning of the order without touching its language. How much a regulation that does not touch the language of the law can actually change the law becomes clear in examining the concretization acts. If we understand the word *change* not as referring to the wording of the legal norm but as relating to the function of the legal norms for the order of being, then every norm that would be *praeter legem* in its first meaning is at the same time also a regulation *contra legem* in its second meaning in the theory of levels.

b. Concerning the definition that the regulation *praeter legem* regulates matters that were not previously regulated by law, we have to say that from the standpoint of the legal order in force at any particular time there are no such matters. The legal order in force provides an ordering of being that may be more or less satisfactory to us, but from its point of view, there is no being that is not ordered. From the standpoint of the legal order in force, there is no realm of being *praeter legem*.

c. On the other hand, there are realms of being *praeter legem* from the standpoint of a theory of the historical structure of law and the function of the laws in ordering a situation in keeping with a social ethic. When such a realm of being is to be ordered by a regulation in accordance with an ethical or political requirement, it is impossible to predict whether this order necessarily will affect the language of the laws or not.

For all these reasons we believe that the concepts of regulations *praeter* and *contra legem* as they are used in the prevailing theory have no great juristic value and merely give rise to controversies springing from the contradictions inherent in the concepts.¹⁴

14. We therefore also agree with the interpretation given by Adamovich, Froehlich, and Merkl of the authority to issue regulations [*Verordnungsvollmacht*] granted in article 9.2 of the 1934 constitution (Merkl, *Die ständisch-autoritäre Verfassung*, 22; Adamovich and Froehlich, *Die neue österreichische Verfassung* [Vienna, 1934]). The provision of this article, that each administrative agency could issue regulations to the extent that a statute specifically authorized it to do so, is interpreted to mean that the administrative offices can issue regulations that change

We have investigated this complex of arguments concerning the wartime statutory regulations in somewhat greater detail because of their theoretical interest. They are a typical example showing how, under the guise of a scientific controversy, a legal practice is opposed or backed for various reasons with great determination and the pathos of the search for truth. In fact, of course, such arguments are nothing more than the possible results of contradictions inherent in poorly formed theoretical concepts; while these contradictions may surface *in connection* with a legal case, they have nothing to do with it as far as its *legal content* is concerned.

In terms of jurisprudence, the most important point was the discussion of whether limits to the enablement were implicit in the context of meaning, which has to be preserved, to another exceptional authorization in the constitution for the issuing of regulations, namely, the authorization based on article 18.3 of the B-VG. This article granted the federal president to issue interim statutory regulations that changed the laws as long as the regulations had been proposed and countersigned by the federal government. This right could be made use of only when the immediate issuance of measures that, according to the constitution, require a resolution of the National Council become necessary for the prevention of obvious and irreparable damage to the general public and become necessary at a time when the National Council is not in session, cannot be convened in time, or is prevented from carrying out its function through an act of God. The federal government's proposal for a regulation had to be approved by a parliamentary committee. The regulation itself had to be submitted to the National Council without delay. In addition to these special procedural provisos, the enabling law was also limited in its scope because the regulations issues could not alter provisions of the federal constitutional law, nor incur financial liabilities for the federal government, the provinces, districts, or communities, nor undertake financial obligations for the citizens or the sale of public assets. Moreover those regulations could not affect the labor laws, protection of workers and salaried employees, social and contractual insurance, the chambers for workers and employees, the right of association, or the protection of tenants. Based on the argument a

the law and those that are autonomous on the basis of ordinary legal authorization [*einfachgesetzliche Ermächtigungen*].

majori ad minus, Merkl interprets the authority of the Enabling Act as subject, at the very least, to the same limits of scope that had been established for the presidential right to issue regulations in article 18.3.¹⁵ In practice, the wartime regulations extended to a great many matters exempted from the presidential regulation, especially—though with great restraint concerning the last crucial act of total revision of the constitution—to the formal constitution. Therefore scholarly studies concluded that a large number of those regulations were in whole or in part either unlawful or unconstitutional or both.

All the discussions of the wartime statutory regulations, the major arguments of which we have presented above, are in their point of view based on the theory of legal dogmatics. In analyzing Kelsen's "pure theory of law," we found that his first delimitation of the law as subject matter is based on the standpoint of the dogmatist and practitioner of law. From this point of view, "law" is the embodiment of the norms that must be adopted as premises by the practitioner of law in deciding a concrete legal case. The elaboration of these norms by legal dogmatics, we noted, prepares them for the practitioner of law. To assess the scientific significance of the analysis presented here, we must therefore first answer the question: which practitioners of law did the legal dogmatists identify with, who examined whether the wartime regulations were in accordance with the law and the constitution? The answer is clear: they identify with the constitutional court in its capacity as the court that reviews the regulations. In other words, the legal dogmatists work on the norms in all those ways the constitutional court would have had to work on them if it had been called upon to review whether those regulations conformed to the laws and the constitution. These efforts were meaningful, since article 139 of the B-VG had entrusted the constitutional court with the authority to review the regulations, so that every regulation issued by a federal or provincial agency was in force only conditionally, since the regulation could be repealed wholly or in part by a decision of the constitutional court. The judgment of legal dogmatics that a regulation was unlawful or unconsti-

15. Merkl, "Die Verfassungskrise im Lichte der Verfassung," *Öst. Vw.*, March 18, 1933, and "Der Verfassungskampf," *Öst. Vw.*, March 25, 1933, 609ff., esp. 611, col. 2.

tutional was—aside from its objective correctness—generally legitimated as the anticipation of a decision by the constitutional court.

This situation changed radically when the federal government, by a decree based on the Enabling Act of May 23, 1933 (BGBl [*Bundesgesetzblatt*, or Federal Law Gazette], no. 191), made it impossible for the constitutional court to function as a court of review concerning these regulations. Though the decree did not formally rescind the constitutional court's authority to review regulations but merely through a technical stipulation made it impossible for the court to carry out its function, from the overall political situation it was quite clear that for the foreseeable future there was no intention of enabling the constitutional court again to review the wartime statutory regulations, which proved to be the case. From the day this decree was issued in the given political situation, the unlawfulness or unconstitutionality of the wartime regulations could no longer be determined. Quite aside from the political dubiousness of such a ruling, it was also wrong from a scientific point of view, because the basis in reality for such a determination had been removed, namely, the possibility of identifying the constitutional court as the forum for reviewing regulations.¹⁶ From that day on,

16. This and the following remarks in the text can lead to misunderstandings if they are not seen as restricted to the Austrian situation and are turned into generalizations. We will permit ourselves a few sentences pointing out the principal problem. The B-VG of 1920 had established a constitutional court, and we noted that the judgments of jurisprudence were legitimated as anticipating the judgments of this court. This is not to claim that in states in which the institution of a constitutional court is absent, judgments concerning the constitutionality of acts by agencies directly answerable to the constitution [*verfassungsunmittelbar*], especially executive agencies, are not allowed. The admissibility of such judgments is not scientifically contingent on the institution of the constitutional court but on the existence of a "normal situation." By the term "normal situation" we understand a situation that is ordered by the outcome of a political power struggle and in which the representatives of the ruling order intend to adhere to the rules of the exercise of power—an intention that in the modern state is typically proclaimed by the declaration of the mandatory norms, of the constitutional charter, and the like. As long as this intention is in force, it is possible to render juridical judgments concerning deviations from the declared norm. The judgments of legal dogmatism identify with the intention of whoever is in power.

This existential situation in which jurisprudence finds itself gives rise to a number of difficulties since in a concrete case it may be questionable whether the "normal situation" and the intention of those in power to remain within the legal forms of the normal situation is still present. This question is not decided by a declaration of the ruler that he harbors such an intention but by evaluating *all* the acts that are politically relevant in the situation, among which such a declaration may also occur. There may be unclear situations that prevent an unequivocal judgment. In the

the following possibilities of a scientific evaluation of the wartime statutory regulations existed:

1. It was possible to determine that the acts of issuing regulations could not be reconciled with the constitution that was in effect before the regulation dated May 23, 1933 (BGBl, No. 191)—or, to put it more stringently, that some of the stipulations in the regulations as such could not be interpreted on the basis of the norms of the constitution prior to May 23, 1933. From this fact that they could not be interpreted as such, however, it does not follow that they were unlawful or unconstitutional, but only that the constitution had been changed. From this critical date on, the regulations in question that altered the law or the constitution were no longer regulations based on the Enabling Act even though they called themselves that. Instead, they were the product of the federal government's original legislative power. From that day on, the Republic of Austria had an authoritarian constitution. These regulations could no longer be unlawful or unconstitutional.

2. This interpretation, however, applies only to part of the total constitutional situation, for regulations continued to be issued as regulations based on the Enabling Act, and according to the constitutional theory of the federal government the republican-democratic constitution continued to be in force. Scientific considerations based on this theory had to arrive at something like the following conclusion regarding the regulations: Whether the regulations under discussion were in force or not was no longer contingent upon a potentially repealing decision of the constitutional court as the court of regulatory review. Ultimately, the "legal practitioner" applying the norm concerning the authority to issue regulations was no longer the constitutional court but the federal government itself. The judgments based on legal dogmatics could be pronounced

concrete case of Austria, we believe that a very crucial indication of the existence of an exceptional situation is given by the regulation of May 23, 1933, cited in the text. Assessment of the wartime economic regulations after this date seems to us impossible, not because the constitutional court was prevented from reviewing the regulations, but because we regard the act that made review impossible the decisive symptom for the abolition of the "normal situation." A constitutional situation can definitely be "normal" without a constitutional court, admitting judgments by legal dogmatics concerning the constitutionality of governmental acts, but it seems abnormal to us when the functions of an existing constitutional court are suspended by the agency whose acts it is meant to review. However, we freely admit that an opposite opinion on this question can also cite various reasons in its favor.

only as anticipations of the new ultimate "practitioner." Given this new point of view, there were only two possible judgments:

a. Legal dogmatics could use as the "correct" premise the same treatment of the norms that it had applied earlier when it identified with the constitutional court as the legal practitioner. From this point of view, the conclusion would have been that the federal government in its regulatory acts, which were acts of applying the constitution without further appeal, had made a "misjudgment." In legal terms, however, such a conclusion would have been irrelevant; whether there was a "misjudgment" or not had no influence on whether or not the regulations were in force; the fact that they were "misjudgments" did not make them either unlawful or unconstitutional. Insisting on their character as "misjudgments" makes sense only when assuming the situation of the appeal *a rege male informato ad regem melius informandum* [from an ill-informed king to a king better informed]. However, that situation did not exist: the "rex" was fully informed and knew exactly what he was doing; further "information" was superfluous and politically inopportune. In view of this situation, the second possibility had to be considered:

b. If legal dogmatics did not want to degenerate into political conjurations but wanted to limit itself to scientific judgments, it could no longer use as the "correct" premise the same treatment of norms it had applied when it still identified itself with the constitutional court as the court of regulatory review. Instead, it had to supplement and alter this premise with the federal government's understanding of the law; it had to identify with the federal government as practitioner of law and to treat its understanding of the law no differently than a court judgment that serves as binding precedent for future cases until a decision to the contrary makes it no longer binding. In other words, legal dogmatics had to accept the changes in constitutional provisions through the wartime statutory regulations as the expression of the federal government's conviction that it had been authorized by the Enabling Act to change constitutional provisions. The federal government's understanding of the law was to be the new applicable Austrian constitutional law and to serve as the basis of judgment. Thus, there could be no such thing as a "misjudgment." On this view, the Enabling Act authorized the federal government to make legal and constitutional revisions to the extent to which the government did so. The regulations

were legal and constitutional, and there was no “error” in their interpretation. The federal government’s understanding of the law was the applicable constitutional law; science simply had to register this historical fact.¹⁷

§3. The Federal Regulation of April 24, 1934, Concerning the Constitution of the Federal State of Austria, BGBl I, No. 239

It is extraordinarily difficult to give a clear presentation of the juristic content of the other acts that led step by step to the “1934 constitution” because the various interpretations we discussed at the end of the preceding section coexist side by side in them and overlap in many ways. According to the first of the two interpretations the elimination of the constitutional court as the court of review for regulations completed the transition from a democratic-parliamentary constitution to a governmental-dictatorial. Though the wartime statutory regulations were still designated by that name, they were in actuality the products of an original legislative power and—if the federal government was willing and politically able to do so, to extend them to this point—of an original constitution-instituting power. The federal government had become the supreme legislator and author of the constitution for Austria, and it held this position legitimately because it had prevailed as such and was sufficiently supported by its practical means of power and the *consentement coutumier* of the population. According to this view, there were no longer any problems of legality. The regulations served as a means for creating provisions of ordinary law and constitutional law. And even extending their scope to a complete revision of the constitution—whose legality, aside from the questions of the content of the Enabling Act, could be questionable in a formal sense because the National Council itself was not authorized to do this—presented no problems, for the new legislative authority was after all no longer delegated by the federal constitution of 1920–1929. The regulation dated April 24, 1934, BGBl I, No. 239, concerning

17. For the analysis of viewpoints here applied, compare the basic work by Alfred Schütz, *Der sinnhafte Aufbau der sozialen Welt: Eine Einleitung in die verstehende Soziologie* (Vienna, 1932). This work provides a fundamental analysis of the problems of interpretation as they are contingent on person and position.

the constitution of the federal state of Austria, drew the necessary conclusions from the situation and issued a new constitution for Austria. Reference to the Enabling Act was just as superfluous for this regulation as it was for all the others that were issued after May 23, 1933.

§4. The Enabling Act of April 30, 1934, BGBl I, No. 255

This clear and unambiguous legal situation was then complicated by the fact that the federal government wanted to establish "legal continuity" between the new constitution and the B-VG of 1920–1929. We do not need to examine in detail the reasons for this. There were basically two main reasons: (1) to take into consideration politically the opinion, widespread in the population, that the "legality" of a constitutional transition was the only possible "legitimation" of the new constitution and its agencies, especially of the federal government; (2) the fact that this opinion was shared by at least some members of the federal government. We presented our own opinion at the beginning of this chapter—let us now try, as far as possible, to unravel the existing complication along juristic lines.

Since March 1933, after the resignation of its three presidents, the National Council had not met again in regular session, but through a change in the law about rules of procedure (effected through the federal government's regulation of April 24, 1934, *BGBl I*, No. 238) it was technically enabled again to reconvene, and it was then convened for April 30, 1934. In that session the B-VG of April 30, 1934, *BGBl I*, No. 255, was adopted. The "legality" of this session of the National Council and the adoption of the constitution of this date, which authorized the federal government to proclaim the charter of the constitution as the "1934 Constitution," has been hotly debated. The question of the "legality" as such holds no interest for us, since from the juristic aspect nothing depends on it. Only the problems of interpretation are important that emerged in this context as well as the arguments for and against, which were far from equal to the problems.

Concerning the adopting of the constitution, we must distinguish between two separate questions: (1) the question of whether the National Council that convened on April 30, 1934, was a national council in the sense intended by the B-VG of 1920–1929; (2) the

question of whether the adoption of the constitution had come about in accordance with the constitution. Before we address these questions, we must first emphatically note that, quite aside from the insignificance of the "legality" problem, there is also no juristic problem here in terms of procedural law. For the dogmatist discussion of the question presumes that the dogmatist identifies with a potential practitioner of the law. Such a potential legal practitioner would once again be the new federal court in its function as the court of legal review. It is true that according to article 170 of the 1934 constitution the federal court has this authority; but the *Verf.-übg.-Ges.* of 1934 declares in §53: "The terms of article 170 of the 1934 Constitution do not apply to laws issued before July 1, 1934." Since the law in question was adopted on April 30, 1934, the federal court does not have the authority to review its constitutionality. Thus the dogmatist cannot identify with the federal court and formulate its judgment in anticipation. The court and administrative authorities, however, do not possess any material right of legal review, so that, given this situation, identification with them is impossible as well. Review of the proper proclamation, which is up to the courts, is of no interest, since it is not in question. We have here the same situation as in regard to the wartime statutory regulations after May 23, 1933. The discussion of the question is therefore of a purely theoretical nature; it simulates the possibility of juristic review in order to present, with the help of this fiction, an interesting issue from Austria's constitutional problematic.

The efforts to establish a legal continuity were based on the metaphysical-positivist premise of interpretation—that is, the efforts aimed at establishing a legal situation that could be interpreted as continuity on the basis of the metaphysical-positivist interpretive premise. Criticism of those efforts was essentially limited to showing that they had been unsuccessful and continuity based on that premise had not been established. No further meaningful premises were applied either in constructing the continuity or in criticizing those constructions. It is our task now to clarify the legal situation in all its implications. We will begin by isolating the first problem: Was the National Council that met on April 30, 1934, a national council as defined in the B-VG of 1920–1929?

There was no doubt that the members of the National Council had been elected in accordance with the constitution. There could

only be doubts concerning whether the National Council, as a collective executive organ as a whole still met the stipulations of the constitution, for the session on April 30, 1934, had been preceded by the abolition of the Social Democratic seats. The regulation dated February 12, 1934, *BGBI I*, No. 78, had declared in its §1 that the Social Democratic Party was prohibited from political activity, and §2 had decreed that occupying a seat for the Social Democratic Party was considered political activity for the Social Democratic Party and therefore subject to the prohibition in §1. In the implementation this very general and vague norm was replaced by the more detailed provisions of the regulation dated February 16, 1934, *BGBI I*, No. 100. That regulation decreed all those members (alternates) of representative bodies who had won their seats through election on the slates of the Social Democratic Workers' Party of Austria were denied their seats. In order to prevent a possible circumvention of this provision through resignations from the Social Democratic Party, a further regulation of February 27, 1934, *BGBI I*, No. 118, declared the immediate expiration of the terms of office of all members (alternates) of any representative body who had resigned from or would be resigning from the party on whose slates they had been elected.

Now it was possible to question whether such a representative body as a whole, and in particular the National Council, was still an organ of universal representation as defined in the constitution if the members of the strongest party no longer had a seat and a vote in it because they had to vacate their seats. The regulations *BGBI I*, No. 100 and No. 118, therefore contained the following clause: The expiration of the terms does not affect the legal status of the representative body to which those affected by the expiration belonged. Furthermore, §80.1 of the election regulations for the National Council, dated July 11, 1923, *BGBI*, No. 297, decreed: "If in an election district half the seats are vacated by the resignation of the elected representatives and their alternates, all other delegates and alternates also lose their seats, and a new election for the district is to be carried out within three months." Therefore the regulation dated March 23, 1934, *BGBI I*, No. 182, arranged for §80.1, cited above, of the election regulations for the National Council to be repealed effective on February 13, 1934. This regulation, therefore, legally provided that

1. all Social Democratic seats in the National Council were vacated and that the members could not avoid losing their seats by resigning from the party; that
2. in no case could the vacating of the Social Democratic seats result in the other seats in an election district also being vacated and thus in the necessity of new elections; that
3. the vacating of the seats had no influence on the legal status of the National Council.

If we consider the interpretive premises on which these rulings are based, we notice that they go beyond the framework of the metaphysical-positivist contexts of meaning in one point. If the construction had included in its calculation only human conduct, the denial of the seats would have sufficed, and there would have been no doubts about the legal status of the National Council even when its membership was reduced by the number of the Social Democrats. The regulations, however, had to touch on this question because the norms applicable until that time had themselves gone beyond regulating individual human behaviors and had included the context of meaning of the representative body as a whole. According to the provisions of the election regulations for the National Council, the important point in implementing the federal constitutional law was not that any number of members of the National Council were present; rather, it was important that those members present together constituted an entity that fulfilled the typical definition of a parliament. According to the political idea on which the election regulations for the National Council were based, a rump parliament could not be considered a parliament, and it became important to determine and establish a norm for when the National Council turned into a rump parliament. In the strictest sense, the National Council would not have been complete if even only one of its members was prevented from exercising his mandate (for example, because he had given up his seat, or because it had been denied him, or because he had died). The concepts of parliament and rump parliament were not interpreted in this, the most narrow, sense. However, according to the definition of §80.1 of the election regulations for the National Council, a rump parliament existed if half the seats of an election district had become vacant. In this case the character of representation seemed to have been destroyed to such an extent that the remaining representatives

could no longer be recognized as constituting a representation; they also had to vacate their seats, and the electorate had to elect new representatives. The election regulations for the National Council had apparently considered only the possibility that seats would be vacated one at a time and that by chance several such individual acts could accumulate in an election district and lead to half the seats becoming vacant at the same time. That a global denial of seats might take place was apparently far from its intent. Nevertheless, one can conclude from the context of meaning of the norms that the status of the whole representative body had to become questionable once the biggest party was excluded from it, for, after all, the legal status of representation no longer obtained in even a single election district once half the seats had been vacated due to accidental accumulation of resignations. The regulations were therefore quite right in taking into consideration the meaning of the election regulations for the National Council when they decreed the legal status and existence of the National Council despite the cancellation of the Social Democratic seats.

Thus, the question of the constitutionality of the National Council's adoption of a constitution on April 30, 1934, can, on the whole, not be subjected to a relevant discussion in terms of legal dogmatics, since §53 of the *Verf.-übg.-Ges.* of 1934 removes review of laws issued before July 1, 1934, from the responsibilities of the Federal Supreme Court. By the same token, it is impossible to carry on a dogmatically relevant discussion concerning the special question of whether the National Council that convened on April 30, 1934, was composed in accordance with the constitution, since the regulations that decreed its legal existence and status were removed from review by the Federal Supreme Court through §51 of *Verf.-übg.-Ges.* of 1934. We can therefore discuss this special question only by employing the fiction that such review would have been meaningful, and we simulate the significance and possibility of review in order to present the problems of constitutional theory. From this standpoint, we must now ask whether the great effort expended on establishing legal continuity in convening the National Council had really been necessary. The regulations No. 100 and No. 118 of February 16 and 22, 1934, respectively, were based on the assumption that if the Social Democratic seats had not become vacant, the National Council would definitely have been a national council according to the definition of the constitution. But this

assumption is open to question. We must distinguish the levels of the interpretive premises presented above in order to understand the problem's full context of meaning. If we base our interpretation strictly on metaphysical-positivist grounds, then all that matters are individual human acts; in the light of this premise the National Council would have been competent to adopt ordinary laws as long as one-third of its members were present and voting; it would have been competent to pass constitutional laws as long as one-half the members were present and voting. Thus, from this standpoint, the problem of a rump parliament does not arise. Such a purely positivist-metaphysical interpretation could by no means be adequate, however, since, as we have shown, election regulations for the National Council themselves had included other contexts of meaning, most specifically the context of "representation of the people." The election regulations for the National Council assumed that those entitled to vote in an election district formed an electoral body and that those who were elected by this electoral body formed a unified entity. This assumption was not entirely obvious, and it contradicted to some extent the institution of proportional representation, according to which those persons who voted for a list formed an electoral body. If taken to its logical conclusion, proportional representation, with its system of fixed lists, contradicts the principle of democracy if the word *demos* has any meaning at all. Democracy presumes a *demos*, while election by the list system is based on parties. Historically, it is not impossible that a representative body created by proportional representation functions as both a party representation and representation of the people at the same time, but this simultaneity is not inevitable, and in any case, strict proportional representation offers the starting point from which a representation of the people can turn into party representation.¹⁸ The adoption of the election regulations for the National Council was based on the B-VG of 1920-1929; its articles 24 and 26 stipulated that the National Council was to be elected by the entire federal population according to the principles of proportional representation. This puts the issue into a great

18. According to our understanding of it, the principle of "democracy" is basically compatible with the existence of parties. In Rousseau's view, the existence of parties is incompatible with the existence of a *volonté générale*; therefore it is also incompatible with representational democracy, since this requires parties for its operation.

many contexts of meaning whose legal implications are not easy to unravel.

If we define the term *federal population* in the metaphysical-positivist way as referring to the totality of individuals entitled to vote, then we have to say that the National Council was elected by these, and taking away the seats of a great many of National Council members made no difference as long as a sufficient number remained for the National Council to be competent to pass a resolution.

If we consider the context of proportional representation and the party system, then we would also have to say that the National Council had been elected in accordance with the constitution. However, taking away the seats of one party left that part of the population that had elected this party without representation. Thus the rump parliament was no longer a national council elected by the entire population but merely one elected by a part of the population. This interpretation, however, requires the premise of the party state as its foundation. If our interpretation is based on the classical idea of democratic representation, our above conclusion would be inadmissible, for according to the definition of the classical idea, the "representative" is not the representative of a particular segment of the population but the representative of the "people." Assigning a representative to a segment of the population, which loses its representation when he resigns, is impossible. In the context of modern democracy it is impossible to neatly separate these two possibilities and consequently also to decide unambiguously for one or the other. For even elections in districts with only one representative for election and elections by absolute majority result in a subdivision of the population into electoral bodies, which reasonably allow the argument that when a representative drops out, *his* electoral district loses its representative. The type of representative democracy with elections organized by electoral districts is inherently contradictory. In the Austrian case the contradictions become more numerous because we have to consider not only those entitled to vote within an electoral district as an electoral body but must also take into account the context of the division of the population into party organizations.

Finally, when we define the "entire federal population" not materialistically as the totality of all those entitled to vote and not particularistically as the totality of territorial or personal electoral

bodies (electoral districts and parties), but as the totality of the politically united population imbued with the will to the state and its existence, then it becomes very questionable indeed whether the Republic of Austria ever had a constitutional National Council at all. For the lack of a politically united people imbued with the will to existence—that is, of a *demos*—is precisely *the* problem of the Austrian constitution. Understanding the history of Austrian parliamentarism since 1918 as the history of a latent revolution gradually becoming more overt makes it impossible to draw the line at a particular point in time prior to which the parliament was a representation of the people and after which it ceased to be such. It is our opinion that it never was a representation of the people (no more so than in the old Austria). Therefore, in our opinion, there also never was a problem of a possibly unconstitutional National Council. The National Council of April 30, 1934, is the final phase of a revolutionary process in which there was no one phase that could have been incontestably interpreted on the basis of the B-VG of 1920–1929. In our opinion, a provision like that of article 24, according to which the National Council was to be elected by the federal population, was never in effect nor could it have been, since at no time during the existence of the Republic of Austria did the context in which alone it could have functioned, namely, the “federal population” [*Bundesvolk*], exist to a socially relevant degree.

We have thus used all contexts of meaning we considered relevant as premises for interpretation: the configuration of individual human acts, the separate elements of party and election district, and the totality of the people in the political sense. The arguments for and against the competence of the National Council of April 30, 1934, to adopt a constitution are to be judged depending on whether the legal status of the National Council is determined on the basis of one or another of these premises or of all of them simultaneously. According to article 44.1 of the Federal Constitution of 1920–1929, half the members of the National Council had to be present and a majority of two-thirds of the votes cast was required for passing a constitutional law. There could be differences of opinion about whether these conditions had been met because the norms did not take into account the case of a rump parliament that had been reduced by the members from the biggest party, and the norms were formulated so vaguely that, while it could not lead to difficulties of interpretation under normal conditions—as far as is humanly

possible to predict—now in the critical situation of April 30, 1934, they became the source of practical and relevant misgivings in their interpretation. At the time it was elected, the National Council had consisted of 165 representatives; on April 30, 1934, 75 of those seats had been vacated; that is, 90 representatives were authorized to take part in the session. Seventy-seven representatives actually participated, and seventy-four in favor of the Enabling Act. The question of the validity of the vote depends on the way the number of those present and the voting majority are calculated. It goes without saying that in the political struggle the opponents of the government claimed with the greatest firmness that the only proper and possible calculation had to come up with 165 as the number of members, which meant that the House did not have a quorum. The adherents of the government, on the other hand, based their argument on ninety as the number of members, which meant that the House had a quorum and, in view of the number of yes-votes, the resolution was valid. In support of the first opinion it could be claimed, and was claimed, that §1 of the election regulations for the National Council set the number of members of the National Council at 165 and that this provision had not been explicitly repeated by other regulations of the federal government. In support of the second opinion it could be argued that this provision was repealed when the Social Democratic seats were annulled and that the National Council thus consisted only of the smaller number of members. In our opinion, the question cannot be decided in legal dogmatist terms on the basis of the norms of the constitution and the election regulations for the National Council; it can be decided only in the application. It could not have been decided dogmatically even if the Austrian constitution—like article 76 of the Weimar constitution—had defined the number of members on the basis of which to calculate the constitutional quorum more narrowly as the “legal” number of members, for in that case the same difference of opinion would have arisen concerning the meaning of the word “legal.”

All the arguments for and against the presence of a quorum, however, follow exclusively metaphysical-positivist lines and do not consider other contexts of meaning. When we regard the National Council and the presence of a quorum not purely quantitatively as a problem of the sum of persons and acts, but as a meaningful phenomenon and take into account that as a rump parliament—regardless of its legal status and its legitimacy, which was derived

from other sources—it was no longer a national council as defined in the B-VG of 1920–1929 but a new legislative organ, then the question of a quorum becomes irrelevant altogether. For in that case there can be no doubt that on April 30, 1934, the National Council consisted only of the members who had not vacated their seats, and if we apply the old provisions concerning constitutional resolutions (though we are not obligated to do so), the adoption of the constitution was valid. Taking this context of meaning as our interpretive premise and including the further consideration that even the earlier National Council, generally acknowledged as constitutional, had only questionable standing, we have to conclude that the National Council of April 30, 1934, was the final phase in a process of change of the Austrian constitution. This final phase could be interpreted on the basis of the federal constitution to the extent it was expedient for the political authority that had gained control. Whatever happened was the valid constitutional law—the attempts at interpretation based on the B-VG of 1920–1929 were increasingly inadequate because the function of that law in ordering a realm of being also became ever weaker.

We could apply the same considerations to the question of whether there are any objections to the Enabling Act of April 30, 1934, because it includes a total revision of the constitution, which, according to article 44.2 of the B-VG of 1920–1929, requires a plebiscite before it can become effective. Though article I of the Enabling Act had repealed this provision, it would have been legally more proper to separate this repeal, as an act all by itself, from the total revision, which could then be passed without a plebiscite. We will not go into the details of the arguments pro and con, since they are essentially a repetition of those cited concerning the question of the quorum.

Juristically speaking, from the standpoint of the present day, all these questions are of no interest, since whether the new constitution is in force or not does not depend on them. In our opinion, they were without interest even at the time of the constitutional transition; after all, considering *all* interpretive premises—and we must consider all of them if we want to proceed scientifically—we find that the constitutional transition was the end phase of a constitutional change. In this change minor blemishes did not matter any more, in view of the fact that the text of the constitution could not be applied to such fundamental complexes of meaning

as the people in the political sense. The efforts to establish legal continuity in the so-called formal sense—in what we would call the materialist or metaphysical-positivist sense—are relevant not in regard to *whether* they were clearly successful in every detail but because of the fact *that* they were undertaken at all. This fact is the manifestation of a certain misgiving about letting the new source of the constitution-issuing power appear openly and of the desire to legitimate it as much as possible through the forms of parliamentary democracy.¹⁹

§5. The Complete Act of Constitutional Legislation

In the preceding paragraphs we have examined the various acts relevant to the institution of the new constitution separately so that we could very clearly see the individual connections of significance. Now we must integrate these separate acts and interpret their combined contribution to the making of the constitution. The complete act of instituting the new constitution can be divided into three acts:

- a. the federal government's regulation of April 24, 1934, concerning the constitution of the federal state of Austria, *BGBI I*, No. 239;
- b. articles II and III of the federal constitution of April 30, 1934, concerning extraordinary measures in the area of the constitution, *BGBI I*, No. 255.
- c. the federal government's proclamation of May 1, 1934, issuing the 1934 constitution, *BGBI II*, No. 1.

The federal regulation of April 24, 1934, was the first act of constitutional legislation relating to the "1934 Constitution." This regulation not only made public the text of the constitution with its preamble (but without the title of "1934 Constitution") but also instituted it as a constitution. This regulation does more than declare the content of the constitution, which would exist through

19. A deeper scrutiny of this phenomenon, which is so important for current concrete constitutional theory, would have to take into consideration the very similar events in Italy and in the German Reich and to distinguish the case of Austria more precisely from the phenomenon of the "legal revolution" as it extends beyond Austria's borders.

another act; it is itself the constitution-instituting act. The regulation clearly states that the constitutional document attached to it and thus made public forms the constitution of the federal state of Austria. The content of the constitution is made known through the appendix; the regulation itself is the constitution-instituting act, in which the constitution is not only instituted but is specifically instituted for the "federal state" of Austria. The regulation of April 24, 1934, is therefore the act that establishes the "federal state" of Austria as the successor to the "republic" of Austria.

The constituting act of April 24, 1934, is supplemented by the one contained in the federal constitutional law of April 20, 1934. In the act of April 24 the federal government appeared as the authority issuing the constitution, in keeping with Austria's fascist-authoritarian political direction, but on April 30, 1934, the National Council is the issuing authority, in keeping with the 1920-1929 constitution. This second act places the constitution of the federal state in a legal relationship to the democratic constitution of the Republic of Austria. But this second act does not stand independently beside the first one—which would mean that the constitution was issued twice in two completely independent acts. Rather, the second act is presented as a legal supplement to the first one. Article II of the law of April 30, 1934, recognizes the "legal validity" of the constitutional document of the federal state of Austria as instituted through the regulation of April 24, 1934; it supplements this legal status with the declaration that the constitutional document, which already exists legally, is the federal constitutional law in accordance with the constitution of 1920-1929.²⁰

Article II further authorized the federal government to proclaim the constitutional document as the preliminary announcement in Part II, beginning on May 1, 1934, of the federal law gazette of 1934. This proclamation was combined with a third constituent act—

20. While we consider the regulation of April 24 as a sufficient constituent act, not requiring any supplementation, and while we rate the Enabling Act as a symptom of the belief in legality that was legally unnecessary, Merkl, in *Die ständisch-autoritäre Verfassung*, laid the greatest stress on the Enabling Act, seeing it as the ratification of the act of April 24 by an empowered authority. This interpretation is quite possible—except that we tend to believe that its emphasis makes too strong a concession to the faith in legality, which is so questionable in the light of scholarship.

The note in Adamovich and Froehlich, *Die neue österreichische Verfassung*, 1, merely lists the acts without interpreting them.

designating the constitutional document as the "constitution of 1934."

The federal government's proclamation of May 1 was legally based on article II of the April 30, 1934, law and supplements, in a constitution-constituting sense, the acts of April 24 and April 30 by designating the constitutional charter as "Constitution 1934." It is only with this proclamation that the work of the constitution is completed. When the constitutional charter is cited as "Constitution 1934," it must be dated correctly as Constitution 1934 of May 1, 1934.



The Core of the Authoritarian State

§I. The Anonymity of Power; The Systematics of the Constitution

We have presented the details of the constitutional transition in greater breadth because—quite aside from the problems of constitutional theory, which became obvious in the process—their context of meaning is a prerequisite for understanding certain basic features of Austria's current constitution.

Austria has an authoritarian constitution. On the level of meaning of the formal language of the constitution and its act configurations, this means that no "representation of the people" participates in the formation of the state will in general and the creation of the general norms in particular (though we do not wish to address once more the dubiousness inherent in the term "representation of the people"). Such formal language, however, can serve as the basis for various levels of meaning of a higher order—for example, for an absolute monarchy, for a plebiscitary monarchy or dictatorship, for Italy's unique state form, and the like. In Austria the level of meaning of a higher order may be characterized as: legitimation of power by the work of maintaining and developing the Austrian state. In Part I of this book we examined Maurice Hauriou's theory of authoritarianism [*Autoritätstheorie*] and the surprisingly parallel formulations used by Dollfuss. Retrospectively we can say that Austria is the almost pure case of authoritarian rule in the sense of legitimating sovereignty by the authorial [*urheberschaftlich*] work for the institution of the state. Aside from it, there is no other significant source of legitimation—neither a dynastic one nor one that is democratic or plebiscitary. It is the uniquely Austrian problem

that the historical development has still not produced the nation, the people in the political sense, as the existential basis of the state.

Our presentation of the constitutional transition has shown that the completely clear meaning, which was also expressed in the completely clear legal position of the governmental authority as the source of the constitution, was complicated by the inclusion of other contexts of meaning to interpret the Austrian constitution. The authoritarian-democratic ambiguity of the constitutional transition also marks the new constitution. Though the 1934 constitution is authoritarian, this trait is not unequivocally expressed either in the symbols it creates or in the arrangement of the legal material; even this cautious statement is saying too much, since it is precisely the authoritarian factor that was conspicuously taking second place compared to the other self-interpretations and symbols created. It would require a special study to pursue all the ramifications of the entire set of problems concerning legitimation and interpretation of the new constitutional charter. We will have to make do with a brief presentation of the principal features of this complicated phenomenon.

1. One reason for the ambiguity of the new system of legitimacy is the cyclical nature of the Austrian constitution. In Part II we have shown that the question of what kind of constitution is in force in Austria is not easily answered because since 1848 the promulgation of constitutions occurs in cycles that begin with a move in the democratic direction and end with a return to authoritarianism. If we regard not only the cross section at a point in mathematical time but the development of the power situation over a larger period of history as essential in characterizing a state's constitution, we will have to take into consideration this cyclical situation with all its phases. In this light it is not surprising that after almost a century of repetition of such cycles, the authoritarian end phase no longer legitimates itself as merely authoritarian but also contains the sediment of the preceding phases of the cycle in the form of efforts for additional democratic legitimation. Aside from all questions of legality—the insignificance of which we cannot stress strongly enough again and again—there was good reason why after May 23, 1933, the decrees of the federal government did not declare themselves emanations from an original legislative power and that the adoption of the constitution on April 24, 1934, was supplemented by the act of the National Council of April 30, 1934. The reason is

that the full significance of the democratic source of legitimation, which always comes more vividly to the fore in the first stage of the cycle, was not to be simply abandoned without a struggle. This conservative attitude concerning the possibilities of legitimation was all the more advisable as the last two cycles—that of 1867 and that of 1918—had still not achieved the creation of the political people but had nevertheless activated the population to such an extent that the bare establishment of the government authority at the end of the cycle would have formed too harsh a contrast to the extremely democratic experiment of 1920.

2. A further obstacle to deploying the personal authority of the government and its head lay in the nature of the purely authoritarian power, based entirely on efforts on behalf of the institution. Such ruling power of necessity has a trait of impersonality, anonymity. When the person in power sets himself up as the source of the law and the constitution, he does so, admittedly, by force of his legitimacy as the representative of an institution, but historically to this has been added a special legitimation of his person—whether in the sacral nature of the medieval kings or as the embodiment of the national spirit, which applies to modern leaders of the people [*Volksführer*], who also share in the sacral nature. Where no sacral legitimation of one or the other sort is given beyond the institutional legitimation, the situation urges anonymity for the rulers.

3. For a better understanding we should also consider the Christian character of the Austrian authoritarian regime. The sacral legitimation of the European monarch—prefigured in part in antiquity, in part in the Teutonic kingdoms—has been integrated into the Christian idea of the state—but it is not an option for the secular head of government. The sacral legitimation of the ruler as the embodiment of the deified people, however, would burst the bounds of the Christian idea of the state—at least, it has not yet adopted this form of legitimation. From this context of meaning, too, a personal legitimation would be difficult or quite impossible; once again, the situation urges anonymous exercise of power.

4. Finally, we must consider the weight of the Austrian tradition of administration. The impossibility of creating clear domestic power relations shifted the emphasis of the problem of the Austrian Reich from the field of politics to that of administration. Since the Enlightenment, Austria has developed a style of administration

peculiar to it; in the vacillating political power situations, this supported and maintained the Reich. The neutrality of the administrative style toward the political problems could already be seen in the new Austria in connection with the constitution of 1920—there it is expressed in the efforts to suppress the creation of political symbols in the realm of constitutional law and to treat the constitution as though it were a legal order of a lower level. Now there is an attempt at symbolic expressions in a preamble, but the administrative style prevails to such an extent that the issuer of the constitution remains anonymous and becomes secondary to the constitution he intends to administer as a given.

We believe this last context of meaning of the Austrian administrative style to be the foremost and most important—but in any case it combines with the others to produce the unique phenomenon of anonymous exercise of power. The institutions of the authoritarian state are erected, as it were, behind a veil consisting of the forms of the administrative state. We have already mentioned the preamble. It reads: "In the name of God the Almighty, from Whom flows all justice and law, the Austrian people [*Volk*] receive this constitution for its Christian, German federal state on a corporative basis." In European constitutions the preamble serves as an opportunity for the power decreeing the constitution to solemnly avow its loyalty to the principles on which the state is founded, which are realized for a political union in the constitution following upon the preamble. Thus, a preamble as a rule consists of three elements: the designation of the power granting the constitution, the principles of the constitution, and the object for whose benefit the constitution is issued. The preamble of the constitution of 1934 contains only two of these three elements. It lists the principles of the constitution, it names the object benefiting from the constitution—but it says nothing about the power issuing the constitution. The Austrian people *receives* a constitution—the source of power remains anonymous. But moreover—not only does the government as the issuer of the constitution step into the background—in listing the principles of the constitution, the Christian, the German, the federalist, and the corporative are named, but not the most important structural principle of the new constitution, namely, the authoritarian. Even the declarative articles of the constitution never mention it. Article 1 states that Austria is a federal state, article 2 that it is organized corporatively.

Even the systematics of the constitution of 1934 do not allow the authoritarian principle to emerge. The principal organization is federal and very strictly so according to the definition of Kelsen's theory of the threefold organization of the federal constitution into a total constitution, a federal constitution, and provincial constitutions. The first main piece concerning the fundamental provisions (state territory, state symbols, state language, principle of legitimacy [*Gesetz-mässigkeit*] of the administration, and the like) and the third concerning the federal separation of power are contained in the main part of the total constitution. The fourth and fifth, concerning legislation and execution of the federal organs, the sixth, seventh, and ninth, concerning legislation and administration in the provinces and the city of Vienna, which is directly accountable to federal authorities, are contained in the federal and provincial constitutions. Worked into the federal system is another ordering principle—that of the rule of law. The second main piece enumerates civil rights [*allgemeinen Rechte der Staatsbürger*], the eleventh and thirteenth, auditing controls [*Rechnungskontrolle*] and provisions for the federal court [*Bundesgerichtshof*], which combines the powers of a constitutional court and an administrative court. These main pieces can be summarized as being specifically constitutional [*rechtsstaatlich*] and can be juxtaposed to the federal organization, but they can just as easily be incorporated into the federal system as elements of the total constitution. The federal organization of the legal material is supplemented by the eighth main piece concerning administrative districts, local communities [*Ortsgemeinden*], and local associations [*Ortsgemeindenverbände*]. The principle of organizing constitutional law according to the legal system [*Rechtsordnungen*] of the territorial corporations is further extended to the communities and the administrative districts [*Verwaltungssprengel*] (though these do not possess the character of corporations). Only the tenth main piece, concerning the emergency powers of the administration, falls outside this system and indicates by its title that, beyond its regular powers, the administration is granted extraordinary ones. But it is precisely the title of "emergency powers" that seems designed to indicate that normally the constitution does not recognize such a preponderance of the administration. This appearance is further enhanced by the arrangement of the main pieces within the federal and provincial constitutional law. In each instance the main piece concerning legislation takes first

place, second place being assigned to the executive powers—as if the constitution were structured according to the principle of the separation of powers. On the whole, the system is dominated by federalist and rule-of-law-constitutional structural principles. The authoritarian principle is placed far in the background, and the “emergency powers” tend more to suppress than to emphasize it.

§2. The Enabling Act of April 30, 1934, and the Constitutional Transition Act of 1934

The constitution of 1934 and the constitutional acts indirectly or directly dependent on it are not the only sources of Austrian constitutional law. A number of provisions contained in the constitution of 1934 have not yet taken effect, and for the time being they are supplanted by provisions of the Constitutional Transition Act of 1934, issued on June 19, 1934, BGBl II, No. 75. We will consider the details, to the extent that they are relevant to our discussion, when we discuss the arrangements of the constitution of 1934.

The validity of the total constitution of 1934, however, is contingent on the Enabling Act of April 20, 1934, BGBl I, No. 255. Article III.2 of this act transfers to the federal government all the powers assigned to the National Council or the Upper House of Parliament [*Bundesrat*] or any of its committees or agencies by the B-VG of 1920–1929 or any other act, especially the authority to legislate, including constitutional legislation, as well as the authority, provided for in the B-VG of 1920–1929, for acts of cooperation of the National Council and the Upper House in executing the federal agenda. In addition to the legislative power established by the constitution of 1934, the federal government has thus also federal legislative power and unrestricted constitutional authority, and this power is granted by §56.3 of the Constitutional Transition Act of 1934 until the date when the Federal Cultural Council and the Federal Economic Council, both of which are established by the constitution of 1934, are created according to the procedure provided by article 47 and article 48 of the 1934 constitution and the federal acts there promised but not yet enacted. The federal legislative power is concentrated in the hands of the federal government, and it is within the federal government's discretion to decide whether a bill is to be subjected to the procedure provided by the 1934 constitution or whether it will be enforced as a governmental act. Unlimited constitutional

power also is in its hands. Austria's current constitution is thus extraordinarily flexible, since each of its provisions can be abolished by a simple governmental resolution, issued under the title of a federal constitutional act.

In fact, the constitutional situation is far more complicated than can be summed up by characterizing it as "flexible." We have already dealt with all applicable meanings, and we will here simply list again the most important features. The ambiguity of the contexts of meaning that emerged in the transition period of 1933–1934 continues. As a consequence of the cyclical nature of Austrian constitutional history, any constitutional situation contains the meanings of the other phases together with the dominant meaning of its phase. Before May 1, 1934, the authoritarian constitution, which was already in place, was colored by the preceding democratic phases; and the preceding democratic phases, as they replaced the democratic constitution with the party state, already contained the seed of the future authoritarian constitution. In the same way, the current constitution contains, side by side, the extremely authoritarian meanings of the Enabling Act of April 30, 1934, with its *pouvoir constituant* of the government, and the partially fulfilled promissory provisions of the 1934 constitution, with its relative loosening of the radical governmental authority in favor of sharing power with other authorities, the corporations, and possibly, in instituting the referendum, of sharing power with the people. We find ourselves in the peculiar situation, which for Austria has been a constantly recurring one since 1848, of having to understand the norms of the constitution not as the regulation of a power situation normalized by a decision, but as provisional regulations, which also include in their meaning future situations regulated differently. We will have to forego closer scrutiny of the theoretical problems of the accumulation of meanings of the past and future here contained and be content with pointing out that Austrian constitutional law—current as well as past—is a treasure trove of materials for analyzing levels of meaning contingent on the historical period.

§3. The Core of the Authoritarian State of the 1934 Constitution

The best way to understand the authoritarian aspect of the 1934 constitution is to begin with the promissory provision that the

extremely authoritarian state will be relaxed. The concentration of power is not to be dispersed to such an extent that an authoritarian core of the state, completely self-enclosed, does not remain extant; wherever the central authority grants greater or lesser influence to other authorities, it does so with so many provisos that the real power of the core is hardly affected. In this connection the authoritarian core is a beautifully elaborated counterpart to the parliamentary-democratic core of the B-VG of 1920, before the addition of the 1929 amendments.

The B-VG of 1920 structured the state so that all its agencies could directly or indirectly be traced back to the "people" as the creative organ. The National Council was elected by the people; the Upper House [*Bundesrat*] consisted of members elected by the provincial diets; and the provincial diets for their part were based on popular election. The federal president was elected by the federal assembly, which consisted of the members of the National Council and the federal council; the federal government was elected by the National Council. All federal employees were to be appointed by the federal president. The provincial diets, which were elected by the people, for their part elected the provincial governments. The entire institutional hierarchy could, in the final instance, be traced back to the people as the creating institution.

Now a similar construction was chosen; but in the last instance it was not of a democratic but of an authoritarian nature. The highest executive authority is the federal president. The federal president has absolute discretion to appoint and dismiss the federal government. He has the right to appoint officials. The federal president further appoints the heads of the provincial government, requiring only the federal chancellor's countersignature, on the basis of a list of three candidates proposed by the provincial diets. The deputy of the head of a provincial government [*Landeshauptmann*], the provincial governor, may be appointed by the head of the provincial government only with the approval of the federal chancellor. The municipal director [*Amtsdirktor*] of the provincial government [*Landeshauptmannschaft*], who holds the title of government director [*Regierungsdirektor*], also can be appointed only with approval of the federal chancellor. Further, approval of the federal chancellor is required for the appointment of the district commissioners [*Bezirkshauptmänner*], the security directors, as well as in conferring positions in the two highest service classes on

national civil servants [*Staatsbedienstete*] employed by the provinces. Mayors are elected by town diets [*Gemeindetag*] but require confirmation by the head of the provincial government in the case of mayors of independent [*landesunmittelbar*] cities, or confirmation by the district commissioner for the other cities. The heads of municipal offices for cities with populations over ten thousand must be confirmed by the provincial government.

The federal president, chosen from a slate of three candidates proposed by the federal assembly, is elected by this lowest rung of the leading executive organs, from the mayors of all local communities of the territory of the state. The hierarchy of the executive forms a circle in which the lowest rung in the hierarchy creates the highest executive authority, from which all others directly or indirectly flow. In the following, we will explore the individual levels of hierarchy of the executive bodies in more detail.

§4. The Federal President and the Federal Government

The position of the federal president has undergone a significant increase in power from the previous legal situation. His term of office was extended from six to seven years. Compared to the powers enumerated in article 66 of the B-VG, article 78 adds the right to bestow general amnesties in cases of legally punishable actions. His authoritative position is further strengthened by the stipulation that he is not accountable for his acts. However, this institution of immunity is not fully worked through: according to article 80.2 all acts of the federal president, unless otherwise provided by the constitution, require the countersignature of the federal chancellor or the appropriate federal minister, and the countersignature confers accountability. Whether accountability remains in force for acts that do not require a countersignature is questionable, especially as other passages in the constitution, articles 147 and 148, mention the accountability of the federal president. Absence of accountability for all acts can be concluded most clearly from the absence of provisions concerning any procedure that could enforce such accountability. The provision of article 80.2 would hardly be adequate to this conclusion, most especially not if our interpretation takes into account analogous provisions in other constitutions—for example, in the Weimar constitution. According to article 50 of

the Weimar constitution, a ministerial countersignature would also assume accountability for presidential acts. This arrangement was understood to mean that by countersigning the ministers assumed political accountability. The legal accountability of the Reich president, provided in article 59 of the Weimar constitution, was not affected by this provision. Now, according to the provisions of the 1934 constitution, the ministers cannot assume political accountability, since the authoritarian constitution does not provide for such accountability to a parliament in the traditional sense. In the construction of article 80.2 we may well be dealing with a manifestation of a kind of constitutional thinking that has not yet become acclimated to the peculiar problems of legal form of the authoritarian state and therefore still thinks in terms of categories that do not fit the total structure of the constitution.¹

Further, the federal president gains significant influence over the composition of the legislative organs by the power to appoint the members of the Council of State. The exercise of this authority, granted by the 1934 constitution, however, is modified by §21 of the transition act of 1934. While article 46 provides that the federal president is to have full discretion in appointing members of the Council of State and that the appointment merely requires the federal chancellor's countersignature, §21 of the Constitutional Transition Act provides that, until the federal cultural council and the federal economic council have been formed and organized in accordance with federal law as defined by articles 47 and 48, the members of the Council of State are to be appointed by the federal president, acting on recommendations of the federal chancellor. On the other hand, §21 of the transition act of 1934 increases the influence of the federal president on the composition of the legislative organs even beyond the provision of the 1934 constitution, since during the transitional period he is also to appoint and dismiss the members of the federal cultural council and the federal economic council (acting on proposals and with the countersignature of the federal chancellor).

The cited provisions indicate that to get a correct picture of the position of the federal president we must also consider the position

1. The framers of the constitution intended to free the federal president from accountability for *all* acts performed while in office. (Verbal communication from the former constitutional minister, president of the federal audit office, Dr. Otto Ender.)

of the federal government. The most significant extension of the federal president's power results from the fact that the federal government finds itself absolutely dependent on him, although, compared to the constitutional amendment of 1929, hardly anything has changed in the form of the relationship between federal president and federal government. The federal government, which, according to the B-VG of 1920-1929, was dependent on both the federal president and the National Council, now depends exclusively on the federal president. While previously the federal president was limited in his power to appoint the federal government by the fact that the government he appointed had to have the confidence of the parliament, this restriction is now abolished. Article 82.1 of the 1934 constitution, which is essentially identical with article 70.1 of the B-VG of 1920-1929, has therefore taken on an entirely new meaning. The institution of political accountability, which characterizes the parliamentary state, is removed, and it can be said that it has been replaced by a new form of accountability—accountability to the federal president, since the federal president can dismiss any federal chancellor and federal government that have lost his confidence. The complete separation of the government from the legislature is accomplished by article 82.2, which provides that when members of a consultative agency for federal legislation of a provincial diet, of a provincial government, or of a municipal diet are appointed to the posts of federal ministers, their other activities will be suspended. A legal situation is thus created that can best be compared with that of the Reich chancellor and the state secretaries of the German Reich as established in the Bismarck constitution. Article 21.2 of the Reich constitution of April 16, 1871, provided that a member of the Reichstag would no longer have a seat and a vote in the Reichstag once he assumed a salaried Reich post. The legal situation was different, however, in that by the definitions of the Bismarck constitution, the Reich chancellor and the state secretaries were in the legal category of civil servants and the particulars of their legal position were regulated by the civil-service law. The position of the civil service was characterized by the fact that the cited agencies were subject to the Kaiser's directives, and in this point their position had a certain resemblance to the relationship of the head of a department to the president in the American constitution. The 1934 constitution, however, does not recognize such an obligation of the federal chancellor and the

federal government to follow the directives of the federal president. The position of the federal government vis-à-vis the federal president is quite similar to that of a government to parliament in the parliamentary state. The federal president influences the acts of the federal government only because the federal government depends on his will for its existence. However, as Merkl stresses very strongly, this dependence is weakened by the circumstance that the federal government's control over the entire executive apparatus of the federation gives it so much power "that [it] in fact can hinder the federal president in the complete performance of his powers—even in dismissing a dissenting government."²

In view of the high degree of independence the federal government enjoys because of its many powers—although, as far as its position is concerned, it is dependent on the federal president—Merkl compared authoritarian rule at its highest stage with the institution of a duumvirate.³ The comparison seems to us to be apt, especially since the internal structure of the federal government—which will be discussed below—raises the federal chancellor above his ministerial colleagues, so that the head of the government, as one duumvir, is a direct counterpart to the federal president. However, we believe that the category of duumvirate belongs to a level of generality that is too high to allow an adequate characterization of the meaning of the relationship between the federal president and the federal government. If the relationship is to be placed into the contexts of modern European constitutional history, it would have to be compared to the situation of the government (1) in an absolute monarchy, (2) in a constitutional state, and (3) in a parliamentary state. A certain similarity to the position of the government in an absolute state is evident in the fact that the federal government is accountable only to the federal president; however, the president is not a monarch and therefore in principle does not enjoy superior legitimation over the government, as does the monarch. The Austrian constitution shares with the constitutional construction that, according to the 1934 constitution, the federal government is not the only legislative organ but must submit its draft laws to the Bundestag for passage. Although the Bundestag is far from being comparable in significance to a parliament in a constitutional state,

2. Merkl, *Die ständisch-autoritäre Verfassung*, 85.

3. *Ibid.*, 83, 85

its existence alone nevertheless suffices to affect the relationship between the federal president and the federal government in a similar way as a parliament does the corresponding relationship in the constitutional state. For if the federal government wants to carry out its legislative program, it must cultivate a minimum of good will from the Bundestag. In this way its position is weakened on the one hand, since it depends to a certain degree on the good will of the Bundestag, but its position vis-à-vis the federal president is strengthened, since a government that enjoys the consent of the Bundestag to its policies as expressed in acts of legislation has little need to fear being dismissed by the federal president. And finally, strange as this may sound at first, there exists a very close similarity to the position of the government in the parliamentary state, since the position of the federal government has lost any trace of the civil service that clings to the government in an absolute monarchy and in part also in a constitutional monarchy.⁴ The relationship of the federal president to the federal government could be described as one resembling that in a constitutional monarchy but differing from it in that the president lacks the preponderance of legitimation granted the monarch, while the government has accumulated the weight of legitimation of the parliamentary period. The construction of the authoritarian state with the executive on the highest level is a new legal configuration, the meaning of which can be fully understood only as an authoritarian construction established on the historical foundation of a preceding republican and parliamentary constitutional period.

The internal organization of the federal government has undergone a number of changes since the birth of the republic. They all tend toward an ever stronger monocratic type. The B-VG of 1920 changed the appointment of the federal government by election through the National Council and established the norm of a total proposal [*Gesamtvorschlag*] to be submitted by the central committee. In legal and formal terms, the federal chancellor had no

4. As a perfect example of this trait, see the previously mentioned position of the Reich chancellor and the state secretaries in the German Reich constitution of 1871. There §1 of the Reich civil service act of May 17, 1907, reads, "A Reich civil servant is any civil servant who is employed either by the Kaiser or is sworn to obey the Kaiser's directives according to the provision of the Reich constitution." Civil servants employed by the Kaiser, with the special provisions concerning promotion to eventual retirement by Imperial disposition according to §25, included the Reich chancellor, the state secretaries, the undersecretaries, and so forth.

part in appointing his ministerial colleagues; he was not superior to them in authority but raised above them merely by his function as "chairman." Every minister was independently in charge of his department; he was not obligated to take directives from any of his colleagues or from the federal chancellor or be guided by a majority decision of his fellow ministers. The federal government functions as a collegial executive body only where the constitution specifically provides so, as, for example, in the right to introduce a bill. Just as in the creation of the federal government each member individually depended on the agency that appointed him—the central committee, which had to submit the election proposal—so not only the federal government but also each one of its members could be removed from office by a no-confidence resolution of the National Council.

The constitutional amendment of 1929 changed this situation by rearranging the appointment procedures. According to article 70 of the B-VG of 1920–1929, the federal president was to appoint the federal chancellor and, upon the chancellor's recommendation, the other members of the federal government. Thus the federal chancellor became part of the agency appointing his fellow ministers and therefore he was superior to them; the federal government was a more strongly unified and organized entity by virtue of the fact that one of its members, the federal chancellor, had participated in putting it together. This clear internal structure was complicated by the parliamentary system. The federal president was not free to appoint the federal chancellor, nor were the federal president and the federal chancellor together free to appoint the other federal ministers, since no minister could remain in office without the confidence of the parliament. Furthermore, the forms of terminating someone's term in office were construed in sharply differing ways. While the federal president could not dismiss a federal minister over the head of the federal chancellor, for the National Council the federal government was a group of individuals, each of whom could individually be refused confidence (whereupon dismissal by the federal president had to occur). For the rest, as far as the administration of an office was concerned, the relationship of the ministers to each other, to the federal chancellor, and to the federal government as a whole remained unchanged.

The 1934 constitution has significantly firmed up the internal unity of the federal government. The mode of appointment remains

unchanged: the federal president appoints the federal chancellor and, upon his suggestions, the federal ministers; but the dependence on the legislature is abolished. The federal government as a whole depends only on the federal president for its position. Except for the head of the government himself, none of the ministers has individual accountability to the federal president. The federal president cannot dismiss any individual federal minister on his own discretion but only on the proposal of the federal chancellor. Just as the appointing agency for the individual federal minister consists of the federal president and the federal chancellor, so does the authority that can dismiss him. The monocratic trait is further significantly enhanced by a reorganization of the departments on the analogy to the Weimar constitution. For the management of the federal government and the various federal ministers, the following four principles are now in force:

1. According to article 81.1, the federal chancellor is no longer the presiding officer but the "leader" ("*Führer*") of the federal government. The substance of this leadership is more closely defined by article 93, according to which the federal chancellor sets policy guidelines.

2. Within these guidelines, according to articles 93 and 90.1, each federal minister independently runs the department entrusted to him.

3. The federal government functions as a collegial agency in cases provided for by the constitution and by law. These cases are exceedingly numerous (the 1934 constitution alone includes close to thirty of them). In the context of the provisions concerning the federal government in article 94.1, the passing of a resolution concerning bills and differences of opinion in questions that affect the jurisdiction of several federal ministers are particularly emphasized.

4. When the federal government becomes responsible for an executive function on the basis of an ordinary statute, it can, according to article 94.2, entrust the federal minister responsible for the main issue with this function. In such cases the federal minister acts as an organ of the federal government.

The 1934 constitution does not go into greater detail about procedures in government resolutions, any more than did the earlier B-VG. The prevailing opinion assumes that resolutions must be unanimous. In cases where differences of opinion among ministers must be reconciled as noted in article 94.1, it must be assumed

that majority resolutions are also admissible, since otherwise the function of the federal government as a conciliation agency would be made very difficult.

The 1934 constitution brought about an innovation toward authoritarianism in regard to the right to determine the number of federal ministries and their sphere of activity. According to article 77.2 of the B-VG of 1920-1929, the matter was settled by way of legislation. According to article 90.2 of the 1934 constitution, the matter is determined by regulation of the federal president. As Merkl points out,⁵ the innovation results in certain difficulties, since the sphere of activity of the ministers is in the main determined by the executive clauses of the statutes. Now the question is whether the executive clauses of the statutes can be repealed and altered through regulations of the federal president, whether future statutes should perhaps contain no executive clauses at all and assignment to a ministry be done by a decree from the federal president, and whether therefore the federal president is the only authority to determine the sphere of activity of the ministries and their heads, the ministers. On a technical level, the 1934 constitution doubtlessly deals with the matter incompletely, and Merkl leaves open the answer to the questions here raised. We believe that a solution can be found similar to the one found for the same legal situation by the Weimar constitution. The Weimar constitution recognizes the conflict between the legislature and the president regarding the number, the sphere of activity, and the organization of the Reich's ministries. In constitutional practice, the powers of the two agencies were separated in such a way that by its executive clauses the legislature assigned the various legal matters to the ministers to be implemented, while the Reich president was charged with the general establishment of the central authorities of the Reich [*Reichszentralstellen*]. The common rules of procedure of the Reich ministries were set down in §65: "Regulations by which Reich authorities are established or abolished are issued by the Reich president." And §18 of the rules of procedure of the Reich government of May 3, 1924, stipulated: "The portfolio of the individual Reich ministers will, *insofar as is necessary*, be regulated *in basic outlines* by the Reich president." By limiting the authority

5. Merkl, *Die ständisch-autoritäre Verfassung*, 88.

of the federal president to regulating "in basic outline," and this only insofar as such regulation is "necessary," this stipulation can be reconciled with the assignment of responsibilities through the executive clauses of the statutes.

A question concerning the rights of the federal government that was already not fully settled in the B-VG of 1920–1929 still remains unresolved: namely, that of the "provisional federal government." Article 71 of the B-VG provided that in case the federal government resigns its office, the federal president has the right to entrust members of the departing government or higher-level officials of the federal departments with continuing the administration and to charge one of them with heading a provisional federal government until a new federal government has been formed. The "provisional" nature of this government is evident in the way it comes about: it is appointed by the federal president, but the definitive government had to be elected by the National Council. The question now arose of whether the provisional government has the same rights as the definitive one, in particular, whether it was authorized to undertake acts of greater political scope or had to limit itself to attending to routine business. The constitutional court decided that since more specific provisions are lacking, the provisional federal government had the same rights as the definitive one. One can doubt whether this decision fits into the form system of the extremely parliamentary constitution.

The institution of a provisional federal government also appears in the 1934 constitution. Article 83 almost word for word adopted the provisions of article 71 of the B-VG. But it was precisely this literal adoption—quite aside from the still open question of whether a provisional government was to be limited to taking care of "routine" business—that raised a new legal problem. While the definitive government is organized in such a way that the federal chancellor is entitled to "lead" the federal government, according to article 83 there is only a "chairman" in the provisional federal government. It is not entirely clear whether this chairman is empowered to exercise the rights of the federal chancellor in determining the policy guidelines as defined in article 93, especially since he—as, incidentally, also according to the 1929 amendment—does not hold the same position as a definitive federal chancellor in relation to the other members of the government because according to article 83 the federal president directly appoints the

other members of the provisional government instead of acting on the advice of the provisional federal chancellor. It might even be questioned whether the provisional chairman has any claim to the title of federal chancellor. It might further be considered whether according to the 1934 constitution the "affairs of administration" also include the far-reaching powers of the federal government in the process of legislation.⁶

§5. The Provincial Governor and the Provincial Government

The authoritarian construction of the provincial executive branch was faced with the difficult problems of (1) shaping the executive branch along authoritarian lines within the province—that is, to divest it of its democratic-parliamentarian legitimation and conferring authoritarian legitimation on its position—and (2) to preserve the federalist nature of the provincial executive branch, although the sole authority that was able to legitimate it was the highest agency of the federal executive. The efforts to bring about authoritarian legitimation and the corresponding procedure of creating the provincial executive branch therefore had the effect of strengthening the unitarian traits of the entire state construction. By contrast, the efforts to preserve remnants of federalist legitimation brought about a slight democratic moderation of the authoritarian construction.

According to article 114.3, the provincial government is made up of the provincial governor, his deputy—the *Landesstatthalter*—and at most five other members. This organization of the provincial government alone is an authoritarian innovation compared to the previous legal situation. According to article 101.3 of the B-VG of 1920–1929, the provincial government was made up of the provincial governor, the requisite number of deputies, and further members. The looser regulation, which allowed the provincial legislature a greater scope of decision making, was prompted by the requirements of the parliamentary appointment of the provincial government and by the necessity of having available a sufficient

6. The framers of the constitution did not intend making a distinction between the powers of the definitive federal government and the provisional federal government [verbal communication from Dr. Otto Ender].

number of government offices to distribute to the parties according to their proportionate strength. Since it is no longer necessary to take these conditions into account, the provincial government can be organized not only along authoritarian lines but also more closely in accordance with the requirements of the situation. A single deputy for the provincial governor suffices, and the number of additional members is limited to a maximum of five.

The creation of the provincial government takes place in several differently regulated subordinate actions. It begins with the appointment of the provincial governor. The provincial governor is appointed (article 114.4) by the federal president from a list of three names submitted by the provincial diet; the countersignature of the federal chancellor is required. The procedure resembles that of appointing a federal minister, except that instead of the federal chancellor the provincial diet is the agency authorized to submit proposals. A certain loosening of the strictly authoritarian procedure was inevitable if the office of the provincial governor was not to turn into simply a federal agency; organizing the executive branch along the lines of the authoritarian state tends to centralize the state. The procedures for recall correspond to the appointment procedures: the federal president *may* recall the provincial governor on the advice and with the countersignature of the federal chancellor, with the same procedure that applies to the dismissal of a federal minister. The federal president *must* recall the provincial governor if the provincial diet demands it. This rather strong intrusion of the provincial diet into the authoritarian system is, however, weakened again by the fact that a resolution of recall requires the presence of half the members and a two-thirds vote in favor.

The provincial deputy governor and the provincial councillors [*Landesräte*] are appointed and recalled by the provincial governor. The appointment of the provincial deputy governor additionally requires the federal chancellor's revocable consent. The strongly unitarian nature of this procedure is moderated somewhat in the direction of federalism by the fact that the provincial deputy governor and the provincial councillors must be recalled by the provincial governor if the provincial diet demands this in a resolution taken with half the members present and a two-thirds vote. Since the provincial deputy governor and the provincial councillors are thus completely dependent on the provincial governor for their positions, the latter, as an official who has the highest federal

authorities' trust, has a paramount influence on the management of the administration of the provinces even though he does not have the authority to issue directives to the other members of the provincial government. This influence is further increased by the circumstance that the affairs of the provincial government are not carried out collegially, which would have given more weight to the other members of the provincial government when acting collectively, but that the deputy governor and the provincial councillors are individually entrusted with heading a particular department by the provincial governor (article 114.7).

The authoritarian reorganization of the judicial system of the provincial government has obviated the institution of the legal accountability of the members of the provincial government to the federal government. According to the B-VG of 1920–1929, the provincial government was elected by the provincial diet; the highest agencies of the federal administration participated only through the federal president, who swore the provincial governor to fidelity to the constitution. Since the provincial governor thus was indirectly an organ of the federal government, and since various affairs of the indirect federal administration could be managed in the name of the provincial governor by members of the provincial government because these affairs were connected with matters of the province's sphere of activity, an arrangement had to be created that guaranteed compliance with the federal government's directives. This guarantee was provided by article 142.2d of the B-VG, according to which the federal government could file a complaint with the constitutional court against provincial governor, his deputy governor, or a member of his government for violating the law as well as for noncompliance with the regulations and other instructions (directives) of the federal government in matters of indirect federal administration. If a member of the provincial government was involved, the complaint could also be based on noncompliance with the provincial governor's directives in these matters. Now this arrangement is replaced for the provincial governor and his deputy by the federal president's and the federal chancellor's right of recall. As far as the provincial councillors are concerned, their compliance with the directives of the federal government is indirectly guaranteed by the right of the provincial governor to relieve the provincial councillors of their posts and directly by the right of the federal chancellor to demand of the provincial governor that he relieve of

his duties any member of the provincial government who does not conform to the directives of the federal government as conveyed by the head of the provincial government—in particular relieving the member in question of the management of matters of the indirect federal administration—and that he assign no further authority in future without the consent of the federal chancellor (article 117.3).

That the authoritarian structure of the executive branch must simultaneously be a strengthening of the construction of the centralized state and a weakening of the construction of federalism is clearly evident in the reorganization of the administrative machinery. The office of the provincial governor is charged with supporting the provincial governor in his total sphere of activity as well as with supporting the provincial government. Previously the office was designated as an office of the provincial government to express the federalist nature of the administration, since the provincial government was the highest authority of the administration belonging to the province, while the provincial governor was also an agent of the indirect federal administration. To head the internal service of the office, the provincial governor now appoints a director of operations [*Regierungsdirektor*], and according to article 115.2—in contrast to the previous arrangement—his appointment requires the federal chancellor's consent; this consent can be revoked. Subordinated to the provincial governor, who presides over the office of the provincial government, the district governor and the other officers and agencies of the provinces as well as the municipal communities and other self-administrating bodies, according to the provisions of the law, carry out such affairs of administration in the province that are not taken care of by specific federal agencies. The consequences of this provision are not entirely clear, but since they deprive the provincial councillors of any influence on the provincial agencies independent of the provincial governor (the kind of influence given to the federal ministers, who independently run their ministries and the subordinate agencies), and since furthermore the provincial governor may appoint and recall the provincial councillors at will, it will hardly be possible in future to see in the provincial councillors the highest executive authorities, on a level with the provincial governor. Their position has been reduced to such an extent that it is hard to justify the fact that articles 114.9 and 173.2b make them legally accountable to the provincial diet for the management of their office and leave them liable to federal indictments.

To appoint the district commissioners, finally, and to entrust an official of the provincial government with administering the affairs of the public security agency, the consent of the federal chancellor, which can always be rescinded, is required. In the same way, assigning the positions that correspond to the former positions of the two highest service classes to civil servants in the provincial system requires the federal chancellor's consent.

Not all of the provisions of the 1934 constitution we have just listed have already been put into effect. For the transition period their authoritarian and unitarian aspects are further intensified through the provisions of the Constitutional Transition Act of 1934. The transition period will end with the convening of the provincial diets according to the provisions of the provincial law projected in article 108.4, and this law can be issued only when the corporative organization is completed, thus creating the basis for delegating to the provincial diet representatives of legally recognized church and religious societies, of the school, education, and adult-education systems, of art and science as well as representatives of the professions in the province. Until this law is promulgated, the previous provincial governor remains in office according to §32.2 of the Constitutional Transition Act of 1934, unless he is recalled by the federal chancellor. In such a case the federal chancellor has the right to appoint a successor. The federal president and the provincial diet do not participate in this appointment. According to §32.3, the other members of the provincial government remain in office—unless recalled by the federal chancellor—until new ones, appointed by the provincial governor, take their place in accordance with article 114.5. Members recalled by the federal chancellor are replaced by others appointed by the governor of the province. "Members of the provincial governments appointed after November 1, 1934, on the basis of this paragraph remain in office until the provincial governor appointed after the convening of the provincial diets, whose members are chosen on the basis of the provincial law projected in article 108, section 4, of the 1934 constitution, has appointed other persons to be members of the provincial government on the basis of article 114, section 5, of the 1934 constitution." Technically, these provisions are not very felicitously phrased and can give rise to differences of opinion when it comes to interpreting them. It seems to me to follow quite clearly from §32.3 that the reorganization of the provincial government

(with the exception of the provincial governor) is intended as a one-time action, for the transition period. The members appointed after November 1, 1934, cannot be recalled but remain in office until a governor is appointed according to article 114.4. But §32.2, concerning the governor, is not worded with equal clarity; it does not say anything about whether the federal chancellor's right of appointment and recall is exhausted with recalling the provincial governor appointed on the basis of previous provisions and the appointment of a successor, or whether this successor, appointed by the federal chancellor, can also be recalled and replaced with a different one. Adamovich and Froehlich⁷ believe that during the transition period the federal chancellor's right to recall and appoint is unlimited; as far as §32.3 is concerned, they even believe that the provincial governor is entitled to unlimited recall and appointment of the members of the provincial government in accordance with article 114.5.

§6. The Mayors and the Election of the Federal President

In the area of municipal law, the authoritarian reorganization had a particularly strong dissolving effect on the previous form of democratic self-government, even though certain remnants had to be retained if the nature of a self-governing territorial authority was to be preserved at all. The institutions of municipalities [*Ortsgemeinde*] are the mayor, the municipal diet [*Gemeindetag*], and an optional municipal council [*Gemeinderat*] of no more than five members. The municipal diet elects the mayor and the municipal council. The municipal councils consist of members of the municipal diet. In choosing a mayor, the municipal diet is not limited to its members, but his election automatically makes the mayor a member of the municipal diet. This construction, according to which all the main officers of the municipality are members of the municipal diet, is essential to the legal consequence of dissolving the municipal diet. The position of the mayor is closely tied to the will of the provincial executive. The election of the mayor of the cities directly under the jurisdiction of the provinces [*landesunmittelbar*] requires the consent of the provincial governor,

7. Adamovich and Froehlich, *Die neue österreichische Verfassung* (Vienna, 1934).

the election of the other mayors that of the district commissioner. These confirmations can be rescinded. Furthermore, the position of the mayor can be affected by the exercise of government control [*Staatsaufsicht*], according to article 132.3. Concerning the sphere of activity assigned to the mayor, he is bound by the directives of the federal and provincial authorities, and he is obligated to carry them out by using the means he commands in his capacity as an agency of the municipality's jurisdiction. If the directives are not carried out, the superior authority may arrange to have the affairs of this sphere of activity administered in whole or in part by its own agencies. If the fault lies with the mayor, he must bear the costs, and if the fault lies with the municipality, it must bear the costs. Further, the mayor's position is imperiled by his membership in the municipal diet, since the latter can be dissolved by the exercise of the right of government control according to article 132.4 and 5. Thus even the mayors are incorporated into the authoritarian state core, being accountable to the federal and provincial executive agencies. In spite of the arrangement of the state into provinces and the retention of autonomy for municipalities, a continuous chain of command runs from the federal president to the municipal mayors; this chain provides that every executive agency is accountable to the next higher one and can be removed either by the latter alone or in connection with another agency.

According to §39 of the Constitutional Transition Act of 1934, all current mayors (municipal heads, government commissioners) remain in office, unless recalled by the governor of the province, until the new mayor has taken office.

Now the mayors, who are thus incorporated in the structure of the authoritarian government core, must, according to article 73, elect the federal president on the basis of a slate of three submitted by the federal assembly. The election proceeds by a single ballot, and the winner is the candidate who has received the majority of valid votes. Thus the election of the federal president is structured much like the appointment of other executive agencies on other levels of the state structure. For the general structure of the executive branch the result is a somewhat complicated but well-thought-out system, which has a parallel construction at all levels. The principal features of the construction are the following:

1. At every level of territorial bodies (federation, province, municipality) there is a principal executive agency, the head of which

is appointed by a superordinate executive agency, with the participation of a corporatively organized representative board [*Vertretungskollegium*].

2. The other leading executive agencies of a particular level are created by the principal agency of that level, possibly with the cooperation of the executive agencies of the next higher level.

3. On the lower levels of the hierarchy, the legal configurations decrease in size and time.

4. The highest level joins with the lowest level of the executive agencies to form a circle.

In the context of these features, the following picture emerges:

1. *Collaboration of the corporatively organized boards in creating the principal agencies.* On the federal level, an independent collective agency participates in the appointment of the federal president. This agency is made up of members of the four advisory [*vorberatend*] chambers to the federal legislature, the federal assembly. It issues a list of three names. On the level of the province, the provincial diet participates in the investiture of the provincial governor by submitting three names. On the municipal level the municipal diet participates in installing a mayor by submitting the name of one person; this proposal is called *election*.

2. *Filling of positions in the principal agency by a superordinated executive agency.* The federal level joins into a circle with the lowest level of the executive; the federal president is elected by the mayoral assembly. On the provincial level, the head of the provincial government is appointed by the federal president in conjunction with the federal chancellor. On the municipal level, the mayor is appointed by the head of the provincial government or by the district commissioner.

3. *Filling positions in other executive agencies.* On the federal level, the federal chancellor is appointed by the federal president. The other federal ministers are named by the federal president in concert with the federal chancellor. On the provincial level, the deputy provincial governor and the provincial councillors, the director of operations, and the district commissioners are appointed by the provincial governors, a process in which the federal chancellor may collaborate directly or, as in the case of the provincial councillors, he may have ultimate authority over part of their conduct of affairs. On the municipal level, the appointment of further agencies is optional. It is carried out by the municipal diet, but the institution

of government control places the diet's conduct of business under the control of the superordinated executive agencies. Article 126 specifies that the appointment of the heads of municipal offices in cities of more than ten thousand inhabitants requires the revocable consent of the provincial government.



The Authoritarian Chambers

§I. Corporative Society and the Corporative State; Seipel's Ideas; the Encyclicals

With the term *corporatively organized society* we mean a society whose members are organized into professional corporations with lesser or greater rights to autonomy. In this context a corporative state is a state whose society is arranged along corporate lines and in which representatives of the corporative organizations participate on the highest level of the governmental formation of will, especially in legislation.

The definition of both concepts is necessary in order to distinguish the different lines of meaning [*Sinnlinie*] that converge in the problems associated with corporative states. The efforts at reorganizing the state along corporative lines, first expressed in constitutional form in the 1929 amendment, were intended to solve a double problem in Austria. First, the corporative social order was to overcome a demoralization of the people as a result of the idea of class struggle. Second, the parliament, which had become unable to function as a result of the splintering into classes, was to be restored to a condition where it could fulfill its tasks through the participation of corporative representatives. Ignaz Seipel has analyzed the major trends implicit in the social as well as the political-organizational problems, the possibilities, and the limits of a corporative solution.

To the extent that the Austrian problem is a general Central European problem, Seipel characterizes it in terms not unlike those used by Carl Schmitt. "I do not expect any essential improvement from a so-called corporative parliament—at least not from it alone. I see the root of the evil in the party rule that has developed during

the periods of constitutional monarchy that has continued in rank, unchecked growth after it was no longer held in check by the monarchy. In my view, democracy will be saved by the man who rids it of party rule and only in this way restores it."¹ These few sentences contain all the principal themes of the critical situation and their possible solutions as Seipel understood them: the conviction that the current constitutional situation (as discussed in detail previously) is not a democracy but a "pseudo-democracy," an intention to realize a democracy, and that as such it represents an early stage that may, with increasing maturity, be attained *in capite et membris*; his mistrust of the possibility of solving the national problem by parliamentary reform, even a corporative one; the open indication that the current situation of party pluralism had become so critical because of the loss of monarchic authority and that this was the core of the problem. These reflections clearly contrast the problem of parliamentary reform by removing the party regime and the problem of restoring a state authority, even though Seipel never quite dares to fully formulate this latter problem for Austria, veiling it always in phrases about establishing a "true democracy." His principal discussion of the basic types of state construction through dynastic authority [*Familiengewalt*], through official authority on the basis of a mandate (monarchy, aristocracy, or representative democracy), and through dictatorship show that in this regard he did not have the biases into which the lay political scientists of our day easily fall and that he saw the problem in its full scope of classical Christian political philosophy. The basis on which these three forms of rule rest are piety, political power, and authority.

From the moral standpoint, we have no reason to issue value judgments about the various forms of the state. Each of them can be good if two preconditions are met: first, when and as long as the basis of each—piety, political power, or authority—is truly present rather than a deceptive sham; and second, if there is no violation of the truth that the common concerns belong to all and must be administered for the good of all; when, that is, the common concerns are not taken away from the public and turned into the private concern of an individual or of several individuals, if the *res publica* is not transformed into a

1. Ignaz Seipel, *Der Kampf um die österreichische Verfassung* (Vienna, 1930), 181–82. Lecture of July 16, 1929, "Tübinger Kritik der Demokratie."

res privata contrary to nature and thus contrary to all justice. That is what is essential; everything else is less important."²

With this clear view that what is essential in sovereignty is service to the *res publica*, Seipel very clearly saw the limits of a corporative parliament as well as its strengths. Most particularly he tries to forestall misunderstandings that could arise if the term *corporative state* is interpreted as though the modern corporative state has any relation whatsoever to the medieval corporative state. "The corporations of the preconstitutional period were not the professional groups but the lords of the manor. Nowhere was the clergy represented as a profession; only those clerics who had landholdings had a seat and a vote among the estates, just as the cities participated in the corporative assemblies not as representatives of the merchants and tradespeople but once again as landholders. The peasants fared no differently elsewhere, for example, in Tyrol. Those peasants who were not in the service of any landholder but lived as free peasants on their own land were themselves small landholders. What the old estates and the corporative representation for which we strive today have in common is merely, and confusingly, the name. It should already give us pause that precisely old liberal parties, who believe in individualism, today are the most enthusiastic about using the corporative name to win adherents."³ His intention in juxtaposing the medieval corporative state and the modern corporative representation becomes even clearer perhaps if we recall that the "landed gentry" which Seipel mentions was not an economic category, or at least not chiefly or predominantly so, but a political and military one. The associations of lords, cities, and peasants were political societies and military organizations, and as such they were empowered to take political action, while the modern "corporations" typically are the result of a leveling of the entire population into a "society" as opposed to the association that alone is capable of political and military action, the "state." Organizing the population by professions in the modern state is a form of organization that becomes possible only with the establishment of a domestic peace order and the resulting transformation of the local military associations into a society that can be organized along

2. Seipel, *Der Kampf*, 179.

3. *Ibid.*, 183-84.

superterritorial lines, while the medieval estates, faithful to their place in time, are characterized by the fact that the phenomena of "state" and "society" did not yet exist then. This is also the reason for what Seipel very correctly describes as the "liberal" aspect of efforts toward a corporative state—the corporative idea includes a traditional of liberal thought that arises from the antithesis of state and society. The "estates" confront the state; they themselves are not the state. The establishment of the state as a corporative state in the sense of a corporative reorganization of the legislative authority can solve certain problems of parliamentarianism—but it does not affect the basic problem of the state, the construction of the political core that preserves the state.

Seipel's basic thesis, that a corporative organization of the legislature cannot solve the problem of the political structure of the state and the creation of a ruling authority, must be kept firmly in mind if we are to understand what Seipel and, surely influenced by him in part, the encyclical *Quadragesimo anno*, considered the positive achievement of a corporative organization of society. Above all: though society is organized in various ways into professional interests, today it is not yet corporative; the corporative order is still to be created. Seipel lists a number of social groups that, he believes, are already entitled to the designation of an estate: the clerical estate, the military estate, the academic estate. The persons who belong to these professional groups form, in Seipel's view, estates because they are not torn by class divisions. Beyond these three groups, however, the existence of estates seems questionable to him. "Do we still or again have estates in commercial life? I doubt it."⁴ Seipel is even convinced that in the professional group of the so-called peasant "estate" the social strata have a class character and that therefore the corporative nature of the peasantry becomes questionable. For society as a whole (with the exception of the three cited estates), therefore, a corporative order must still be created, thus eliminating class divisions. A decision would have to be made whether society is to continue as a class society, with all its rifts, or whether it is to be transformed into a corporative society. The decision must be made: "for either a vertical or a horizontal organization of society; vertical in that all that are united by the same area

4. *Ibid.*, 203.

of work form one 'estate' from the bottom to the top, in which being able to rise, without having to transfer to another class, is the hope and ideal of each individual; or horizontal, in that those who live under the same or similar conditions, no matter what their sphere of activity, form an entity—the class that everyone who grows beyond it must leave in order to join another class."⁵

With this, Seipel has arrived at the point at which the reflections of the encyclical begin. It views the current state of society as one of total individualist decay, in which "the once flourishing and richly structured human social life, unfolding in a wealth of various communalities [*Vergemeinschaftungen*], was so shattered and nearly killed, until finally only individuals and the state remained."⁶ The individuals, however, form groups according to shared or antagonistic material interests, according to classes, which render impossible any harmonious unity of the social structure. "To this very hour the unnatural condition of society continues, and is therefore lacking in permanence and steadiness since today's society is built, as it were, on the antagonism of class interests and thus on the antagonism of the classes themselves, an antagonism that all too easily degenerates into hostile conflict."⁷ This condition is to be overcome through a corporative structure—that is, through a structure into organizations "to which one belongs not according to membership in one or another labor-market party but according to the various social functions of the individual."⁸ Society is presented as an organism within which people organize themselves in groups; the internal unity of the groups is brought about by "the goods and services it is the duty of the members of the same professional group, regardless whether as employers or employees, to produce or perform." What binds the estates into a unified society is "the common weal, to which all professional groups, each on its part, must collaborate and contribute."⁹ The idea of estates enunciated

5. *Ibid.*, 204.

6. *Die sozialen Rundschreiben Leos' XIII und Pius' XI: Text und deutsche Übersetzung samt systematischen Inhaltsübersichten und einheitlichem Sachregister im Auftrage der Sektion für Sozial- und Wirtschaftswissenschaft der Görres-Gesellschaft*, ed. Gustav Gundlach, S.J. (2nd ed., Paderborn, 1933), marginal no. 78.

7. *Ibid.*, no. 82.

8. *Ibid.*, no. 83.

9. *Ibid.*, no. 84.

The basic questions of the problem of estates, insofar as they are related to Christian social doctrine, have by no means been thoroughly explored. We will raise

in the encyclical is incomparably more conservative than Seipel's. The encyclical goes no further than to demand an organizational structure that, for the purposes of production, binds employers and employees into one entity called estate, within which, further, the interests of the employers and employees were to be separately represented and administered. For his part, Seipel calls for a social situation in which the individual can rise from the lowest level in such a context of production to the highest without "transferring" from one class to the other—that is, without any change in his social and material interests. It is likely that this demand can be realized

one of them here. The encyclical *Quadragesimo anno*, in the section "Ordinum mutua conspiratio" refers to a statement by St. Thomas Aquinas for the principles of the doctrine of estates: "Cum vero ordo, ut egregie disserit S. Thomas, unum sit ex plurium accomodata dispositione oriens, verus ac genuinus socialis ordo postulat, ut varia societatis membra firmo aliquo vinculo in unum copulerentur" [That true order as St. Thomas excellently argues, should arise as one from the many by (their) suitable disposition, the true and genuine social order demands that the various members of society be fused by some firm bond]. The note (in the Gundlach edition) cites as the source for Thomas' sentence: "Summa contra Gentiles III, 71; Summa Theologica I, q. 65, a. 2, i. c." But the cited passages do not contain the formulation of the encyclical, "unum ex plurium accomodata dispositione oriens" [should arise as one from the many by (their) suitable disposition]. The formulation can be taken only as the result of an interpretation that is not absolutely compelling. For in the cited passages of the *Summa Theologica*, Thomas deals with the position of the *creatura corporalis* in the universe and with the question of what purpose its creation serves in the total structure. The question is resolved by referring to the construction of the world in its orientation toward God as the *summum bonum*. The passage in *Contra Gentiles* deals with the Manichaean problem of why evil was not eliminated from the overall structure of the world. Now admittedly there must be a path from the questions of the complex structure of the world and its orientation toward the *summum bonum* to the formulation of the encyclical; we must nevertheless note that the discussion in the encyclical, with its assumption of the complexity of the services and their cooperation for the good of the whole isolates a segment in Thomas' set of problems that, in its meaning, is congruent with the modern organologic interpretation of the social structure. And we can specify quite precisely which part was isolated. The quoted passage of the *Summa Theologica* names three laws of relation of the whole to its parts: 1. *quod singulae partes sunt propter suos actus*; 2. *quod pars ignobilior est propter nobiliorem*; 3. *omnes partes sunt propter perfectionem totius, sicut et materia propter formam* [1. That single parts exist for the sake of their acts; 2. That the lowlier part exists on account of the nobler; 3. All parts exist for the sake of the perfection of the whole the same as matter exists for the sake of form]. Of these three laws of relation, the second, concerning gradations, is completely put in the background in the encyclical, so that the remaining two come very close to the concept of the organism. The same is true for the application of the passage from Epistle to the Ephesians in the section "Directivum oeconomiae principium instaurandum" of the encyclical (marginal no. 90 in the Gundlach edition). There, too, the metaphor of the body is isolated in such a way that only the image of the organism remains and its function in St. Paul as the illustration of an authoritarian hierarchy disappears. The formulations in the encyclical are dominated by the concept of the cooperation of all professions, on an

only in the context of a communist social order with far-reaching equalization of income and education.

One subsidiary problem of the corporative organization—concerning the division of society into professional categories—is thus thoroughly elaborated. In Seipel's mind the idea of the corporative social order was insolubly bound up with the questions of state organization, which concerned him directly. The problems he noted may be most clearly seen in a speech he gave at the 1929 budget debate and in the note he added when the speech was published in book form.¹⁰ The opposition speaker had attacked the government for discussing important economic questions in "conventicles." The accusation referred to the fact that the government, before submitting legislation or proposals for economic measures to the parliament, entered into agreements with economic interests [*Wirtschaftsvertretungen*] and considered their advice and wishes. Seipel's remarks on this occasion, made in his capacity as head of government, may be more or less summarized along with other remarks and discussions as follows: Democracy in Austria has been destroyed by the party system; the parliament is not a representation of the people but a party committee; it is completely inadmissible if in this situation a party functionary who is also a representative reproaches the government for communicating "without mediation of the parliament with the people, with the separate economic groups."¹¹

The head of government had to reserve the right for himself to maintain contact with representatives of various economic interests, if only to procure for himself the factual bases for exercising the government's right to introduce a bill. Furthermore, Seipel's

equal standing, in the totality of society. In St. Thomas, on the other hand, the problem of the *ordo* is essentially raised only in connection with the hierarchy [*Summa Theologica* I, q. 108, a. 2, i.c.]. With his own concrete doctrine of the *ordines*, which takes its direction from the internal structure of the Italian city-state, Thomas touches directly on the problems of political organization that the encyclical *Quadragesimo anno*, continuing the tradition of Leo XIII, punctiliously avoids. The idea of the corporative order of society as the encyclical develops it works with the modern concept of society as a self-enclosed entity opposed to the political leadership, which can be characterized by the analogy of the organism; this concept of society was totally foreign to St. Thomas.

It seems to me important to point out these differences, since they allow us to recognize with special clarity the extraordinary adaptation of Catholic social philosophy to modern ideas and social realities.

10. Seipel, *Der Kampf*, 135ff., note on page 142.

11. *Ibid.*, 141.

formulation contains an attack on parliament, or at least on the opposition, since one can easily read into it the reproach that the parliament and the parties are intent on preventing the government from making contact with the "people." The representatives of economic groups are here introduced as representatives of the people, in competition with the "representatives"—now suspect—who hold seats in parliament as a party functionaries. The formulation points to a theory of representation of the people that differs greatly from the one that holds that only persons elected by the masses can be representatives of the people. This change in his concept of the essence of a "true democracy" led Seipel to the conviction "that in spite of all theoretical and principal difficulties, the way to a true corporative parliament must be sought and found."¹²

Thus we again come close to the theories of authority of Renan and Hauriou, which we examined in Part I of this book. Authority was understood to be the authorial [*urheberschaftlich*] work in founding and maintaining the state. This work can be done at every level of the organization of society—on the level of the highest political leadership as well as at the levels of the leadership of local territorial authorities within the state, of commercial enterprises and professional categories, the leadership of the army and the administration, individual efforts in intellectual areas. The result is what we called a hierarchy of authorities, within which the highest political leadership occupies merely one level; the participation of representatives of the professional categories in shaping the will of the state is merely a special problem within the general problem: how to incorporate the hierarchy of authorities as a politically active power appropriately into the organization of the state. This problem, however, has undergone numerous modifications in European constitutional history and theory, one of which we have already studied in Renan's reform projects.

Now in the attempt to regulate the hierarchy of the authorities along political-organizational and constitutional lines, the modern reform ideas, grown out of parliamentarianism and imbued with a Christian basic principle of social structure on which the encyclical calls in its demand for corporative organizations, come together with the principle of subsidiarity. The encyclical (Marginal Nos.79

12. *Ibid.*, 142, note.

and 80) demands that one highest sociophilosophical principle be adhered to firmly and unshakably—a principle that was to be neither shaken nor interpreted:

Just as what the individual can achieve out of his own initiative and with his own powers may not be taken from him and assigned to the activity of society, so it is a violation of justice to claim for the larger and overriding society that which the smaller and subordinate polities [*Gemeinwesen*] can achieve and achieve successfully. This would be exceedingly detrimental and confuse the entire social order. All activities of society are, after all, subsidiary by nature and concept; they should support the members of the social body but may never shatter or absorb them. Therefore the state rulers may rest assured: the more the hierarchical order of the various communalities is kept up through strict observation of the principle of subsidiariness, the stronger social authority and social effectiveness [*Wirkkraft*] will be and the better and happier does the state fare.

What the encyclical calls subsidiariness is the same thing the parliamentary reformers call the authoritarian state—except that the battle front is different. The political situation to be reformed is seen by the encyclical as defined by the antagonism between the omnipotent state and the mass of individuals. Depending on the direction of the political struggle, a change of the situation can be brought about by abolishing the state's omnipotence and allowing subordinate organizations to participate in political organization (this is the demand made by the encyclical after assigning self-governing functions to the estates) or by overcoming the "individualist" situation of the masses by establishing organizations capable of functioning politically—that is, the estates. The authoritarian state organization appears to be authoritarian from the standpoint of extreme mass-election democracy; it appears to be "liberal" from the standpoint of a total state program.¹³

§2. Hegel's Critique of the English Reform Bill of 1831

The questions of the corporative social order are questions of modern constitutional history because they presume the equalization

13. This ambiguity inherent in any corporative program, based on the respective fighting positions, explains the hostility expressed toward Spann's political theory by a number of National Socialist writers. From the totalitarian standpoint of National Socialism, Spann's political program must appear to be a national-liberal idea.

of the European power hierarchy through a state monopoly on legitimate political exercise of power and the corresponding depolitization of all other powers, whether of individuals or of communities. The questions of the corporative state are questions of modern constitutional history because the organization of the legislative collective body by professional categories presents itself as a problem of restructuring precisely that sort of representation of the people that derives its meaning only from the tension between the state's political monopoly and a society that has been leveled and deprived of its political power.

The concomitant problems became evident fairly early on in England, and they found a masterful description in Hegel's treatise on the Reform Bill of 1831.¹⁴ With a few concise lines he sketches the peculiarities of the English political situation and its difference from the Continental constitutional issues. While in drafting the French constitution the point at issue was the assertion of the political power of the people and of the parliament against the absolute monarch, according to Hegel, this problem was of no importance in England. There it was never doubted that political power was located in parliament and not with the king. Only a restructuring of the organization of parliament itself could therefore be at issue. The political problem thus isolated is then treated by Hegel in light of how an efficient legislative assembly can be brought about. His vantage point can be concretely formulated: "that in Parliament the various large interests of the nation are to be represented, and the changes this representation would undergo as a result of the bill at hand." With an excellent sense for the realities of political life, Hegel admits that the proposals for parliamentary reform had sufficient grounds in the corruption of the prevailing system, but that the corrupt system did produce what was necessary: a legislative authority in which the main interests of the nation are represented. He cites a declaration by London bankers and merchants opposing the Reform Bill "because this measure, while it intends to base the representation of the Kingdom on the wide basis of property and to extend this basis, would in its practical effects close off the principal sources of access, by means of which the financial, commercial, shipping, and colonial interests together with all other

14. Georg Wilhelm Friedrich Hegel, *Schriften zur Politik und Rechtsphilosophie*, ed. Lasson, 2nd ed., *Phil. Bibl.*, CXLIV (1923).

interests—throughout the country and in all foreign possessions, to the farthest points—were previously represented in parliament.” The “principal sources of access” cited were the boroughs, where seats in parliament could be bought. Hegel sees that the “modern principle,” “according to which only the abstract will of the individual as such is to be represented” is not compatible with the previously prevailing English principle of representation of the interests of the nation. He admits that the previous representation is not adequate to the current situation, but he does not therefore conclude that the parliament must be reformed by expanding the individual franchise. At most he advocates ordering and adjusting the representation of interests to the needs of the present.

There is no doubt that Hegel’s sympathies lie with the representation of interests. But his expression of sympathy is not formulated with absolute clarity because precisely in the case of England the problems posed by the remnants of the medieval estates, the modern parliament, and the indication of a future corporative arrangement are not yet strongly enough differentiated from each other. He sees that the old English type of representation of interests is no longer adequate because the process of nomination for the House of Commons has become morally untenable and because the newly emerging interests of the commercial and industrial middle class are not adequately represented. But at the same time he holds the representation of interests to be the crucial principle in structuring the legislature. He points to the representation of estates in the Swedish national diet as an older way to establish a norm for the representation of interests, which could serve as a model for a future arrangement by taking into consideration the newly included interests. He also points to Napoleon’s constitution for the Kingdom of Italy, with its representation of *possidenti*, *dotti*, and *mercanti*. As still happens frequently today, Hegel works the modern problem concerning the representation of all professional interests found in society into the medieval problems concerning estates when he speaks of the “earlier basis of the internal constitutional law,” which “would have to be understood again and again” in order to abolish all contemporary ills.

But his projection of the new corporative questions back into the time of the estates of the Empire and the country nevertheless does not blind Hegel to the crucially new aspect the contemporary “interests” pushing their claims for representation bring into the

traditional system of representation, in particular the English system. He understands very clearly that extending the representation of interests to previously unrepresented classes and estates does not mean simply a numerical increase in the representational system but may potentially lead to its destruction. The "representation of interests" of the old English system, which was to be altered by the Reform Bill, is more than the mere representation of specific property and commercial interests in political power—it is the political power itself. The advance of new classes to the political arena does not signify a sort of diplomatic representation of previously unrepresented interests in the central political authority; rather, it attacks the ruling system of the English governing class. The Reform Bill does not undertake a correction in the "representation of the people," which would have no impact on the basic skeleton of the state structure. Rather, it puts the form of the state itself in question. Hegel begins his principal considerations with a remark by the Duke of Wellington; he once asked with concern whether the "shopkeepers"—who, as a result of the bill, would make up the larger mass of voters—"are the people who will elect the members of the great assembly of the nation, which must decide the domestic and foreign affairs, the interests of farming, the colonies, and factories?" The concerns of this question are not opposed to a representation of the "interests" of the "shopkeepers" but to a breakdown of the state—a condition to be feared if elements untrained in statesmanship should intrude into the area of politically responsible action. Hegel reduces Wellington's fear to the formula of the antithesis of *homme d'état* and *homme à principes*, which could now become dangerous. The *hommes à principes* could get a foothold all the more easily

as the principles as such are of a simple kind, therefore quickly grasped even by the ignorant, and with some flexibility of talent—since for the sake of their generality they already have the pretension of being sufficient for everything—and with some energy of character and the ambition for the requisite eloquence, touching everything, will suffice and will exert a brilliant effect on the reason of the masses who are just as inexperienced in these matters; whereas the knowledge, experience, and business routine of the *hommes d'état*, which are equally essential to the application and introduction of the principles of reason into real life, are not so easily acquired.

By this, however, it was not only that the interests chiefly represented by the governing class were placed in jeopardy; simultaneously the authority of the governing power as such was put in jeopardy. This upheaval, Hegel argues, was to be feared for England all the more because the political authority that might gradually have had a mediating effect on the social interests while preserving the state authority—namely, the monarchy—was incapable of fulfilling this function. The Reform Bill would not only expand the representation of interests but also fundamentally change the nature of the opposition. Though the political life of the governing class was structured into parties, it was not factional; now it would turn into a hostile confrontation between ruling powers and “the people,” a development that could lead to revolutions, and such revolutions would not be countered by any socially neutral political authority acting as a moderating influence. Hegel saw that the situation of the Reform Bill of 1831 already contained all the problems that one hundred years later were to be clarified in the types of pluralistic party states and the absorption of the state by the social forces. If English constitutional history still has not taken the revolutionary course Hegel feared, the reason does not lie in a fundamental error in his analysis but mainly in his underestimation of the shaping influence of the governing class on the *homines novi*—an influence that persists to this day, though it grows visibly weaker and could lead to the collapse of the English political system with each parliamentary election. Hegel may also have made a wrong estimate in regard to monarchic authority—the unsatisfactory Hanoverian royal types could hardly portend the new prestige the crown gained through Victoria and the Coburg connection.

§3. Grey's Reform Proposals

Hegel illuminated the organizational questions of parliament at the moment when the English parliamentary system was about to take its first step toward democratization. In the course of the next generation, after this step had been taken, these questions became clearer and produced a rich descriptive and critical literature. The best analysis of the problem and the most significant reform project may

well be Earl Grey's.¹⁵ Grey begins his examination at precisely the same point where Hegel started. England is not a constitutional but a parliamentary state. That is to say, the executive and legislative branches are not separate; both powers are combined in Parliament. The state does not exercise its executive power independent of Parliament, but it is also not dependent on the will of Parliament as an autonomous political power. Instead, executive power works, thanks to the peculiar ruling structure of the English state, from the ministries through Parliament. What Grey means by the concept of a parliamentary state is not what is frequently thought of today, especially in Central Europe under the influence of the postwar constitutions—a state whose government depends on parliament. According to Grey's understanding of a parliamentary state, the government acts in an authoritarian way to impose its management of the state on the parliament, while parliament basically functions as an indicator of public opinion and the voice for the various interests of the nation that are affected by the government's management. The authoritarian nature of the government is institutionally and legally ensured by the fact that party formations within parliament fluctuate within a governing class (so that program-bound party organizations, hostile to each other on principle, do not confront each other) and that through the system of borough representation a not insignificant number of seats are occupied by nomination on the part of groupings within the governing class. The changeable members of parliament, who can back any government out of their insight into the necessity of some government, together with the bought and nominated members, ensure a sufficient working majority for any government. The authority of the government and its majority in parliament is further strengthened by the influence the king can throw into the scales in favor of a particular government—an influence that at times, under George III, when it was exploited unscrupulously, was considerable indeed. The limits on authority and parliamentary dominance are set by the falling away of the changeable members as a result of a change in public opinion, which runs its course essentially within the governing class, and by the "lack of confidence" among the people, the sentiment of the broad masses.

15. Earl Grey, *Parliamentary Government, considered with Reference to Reform: A New Edition* . . . (London, 1864).

The reform of 1832 is basically determined by a "lack of confidence," which can no longer be pacified by a change of government but only by altering the system of representation itself. The reform was a so-called democratic one, in the sense that the ideas of representation of "the people" were at work and that the franchise was extended to wider circles of the population. The reforms did not, however, abolish the old system; they merely adapted it to the extent that the "lack of confidence" was to be removed by redistributing parliamentary seats in favor of the populous industrial districts and through extending the franchise in the individual districts. But seats were not fundamentally parceled out in accordance with the population density of the representational districts.

It was in this situation that Grey began his examination. For him, the great advantage of the English House of Commons over all comparable Continental congresses is the irregularity of its composition. Delegates of populous voting districts sit next to delegates of very small ones and others that for all practical purposes are still nominated according to the borough system. The consequences, he notes, is that the parliament is made up of three types of men: 1. able men holding unpopular opinions; 2. members expressing conflicting views of the various classes of society; 3. and those representing the different interests which exist in the Nation.

This composition combines the advantages of the old representation of interests and the possibility of expressing independent opinions with a stronger participation of the people through the representatives of the numerically stronger voting districts. But Grey already sees in this situation dangers that could grow acute if parliamentary reform were to progress in the so-called democratic direction indicated in the bills of 1859 and 1861.

Even as it is, I fear that Members are far too much disposed to vote against their own opinions and their own knowledge of what is right, in deference to popular clamour excited by ignorance or passion, and that their tendency to do so is increasing. It is an alarming system of deterioration in the character of public men and of the House of Commons, that it has more than once happened of late years, that motions have been carried, so decidedly against the opinion of a large proportion of those who have voted for them, that they have not scrupled in private to express their regret at finding themselves in a majority.¹⁶

16. *Ibid.*, 78.

With further democratization, these phenomena would intensify in unpredictable ways. The government's authoritarian influence on parliament would be weakened if the majority of members were to be representatives of the "people," and thus would become corrupt because it would be vulnerable to blackmail on the part of the supporting members of parliament and would be unable to do anything that would lie in the interest of the country. A government dependent on Parliament, Grey wrote, can no longer manage its affairs responsibly; the responsibility would be shifted to the will of the Parliament and that would be the will of the numerical majority of the population. According to Grey, nothing indicates that the will of the numerical majority of the people would ensure a "good government"; many elements spoke against it, since the will of the masses was of necessity emotional, ill-informed, and incapable of rational reflection. But since the Reform of 1832 clearly had not been sufficient to bring about "the confidence of the People," forms would have to be found in which the old arrangements of English parliamentarianism would combine with the new demands for stronger representation of the people. To this end Grey made the following proposals for a future parliamentary reform:

1. The constituencies were not to be one-man voting districts as before; instead, each constituency was to send at least three delegates, according to proportional representation. The system of majority election, Grey noted, had the effect, especially in the more densely populated constituencies, of ensuring that the numerically largest class of the population was the only one represented, while the numerically smallest classes—and these were precisely those with property and education—were left without representation at all. In this way, the former value of the Parliament as a representative body for the various interests of the population had for the most part been lost. Additionally, uniformity had been increased by the fact that improved means of transportation had led to an increasingly rapid spread of opinions throughout the country, so that the variety of interests, which had previously been contingent upon localities, was reduced. For these reasons it became necessary, by introducing proportional representation, to assure appropriate minority representation, which would restore the old diversity at

least to some extent.¹⁷

2. But even proportional representation is not sufficient, in Grey's opinion, to stop the ills connected with general elections of the masses. Only certain types of men are suited to campaign for seats that depend on a general vote; it is not certain that they are always the most satisfactory ones, and quite surely a large number of people whose membership in parliament would be thoroughly desirable are unsuited to an election campaign. Therefore, along with district constituencies there would also have to be personal electoral bodies, whose knowledge and character traits could send outstanding figures to parliament. The graduates of the large universities should form electoral bodies that would send their representatives to parliament. Grey formulated the principle on which this demand was based as follows: "Indeed, it seems self-evident that if we desire to see the Nation well and wisely governed, the representation ought to be so arranged that while no class is excluded from making its voice heard in Parliament, the preponderating power should be given to those who have acquired the knowledge necessary to enable them to form a sound judgment as to the true interest of the country in the various questions that arise."¹⁸

3. Grey wanted this principle of personal electoral bodies to be extended from the universities—for which it already existed, even though in an inadequate form—to professional groups. He was thinking in particular of the representation of workers. Workers in particular professional groups (trades) were to be joined in corporations, and these corporations were to send representatives to Parliament. This arrangement would make it possible for the interests of the working class to be represented in Parliament and at the same time avoid the danger that far-reaching extension of the franchise would make workers the only class represented in parliament.

17. This intention in introducing proportional representation, espoused not only by Grey but also by Hare, Marshall, and others, can be understood correctly only if we remember that the number of those entitled to vote was relatively small and that none of the proponents of proportional representation intended to combine this with universal suffrage. Of course proportional representation would lose its intended purpose if it were so combined, since given the size of the modern urban industrial population, even proportional representation, in combination with universal suffrage, would give no chance of representation to the small minorities Grey has in mind. The problem of the workers' representation is solved in Point 3 of the proposal.

18. Grey, *Parliamentary Government*, 211-12.

4. There is, Grey continued, a general interest in seeing that outstanding figures can represent in Parliament a policy that makes its representatives unpopular. When the delegates are dependent on their electorate, they have to give too much consideration to their chances for reelection and thus become hesitant to represent an unpopular opinion even if they believe it to be right. Under the old system the nomination boroughs made provisions for such cases: when an outstanding man, such as Edmund Burke, lost his seat in the reelection because he had made himself unpopular with his voters, he could be sent to Parliament through the nomination of one of his influential friends by a borough. Grey points out that a number of the most important English statesmen—such as Walpole, Burke, Pitt, and Fox—practically had lifetime seats in Parliament, and he considers it advisable to consider a similar arrangement in some future parliamentary reform by conferring on the House of Commons the right to elect a certain number of members for life. Such an arrangement would keep the House from losing its most important members to election mishaps.

5. Before the reform, the government could maintain an authoritarian stance toward Parliament because the system of treasury boroughs and the sale of borough seats by their patrons to the government allowed it to appoint a not-insignificant segment of Parliament—perhaps forty to fifty members. The reformed parliament, as well as the colonial and Continental parliaments, tended to splinter into parties of which no single one commanded a secure majority, so that the parliament slips out of the government's leadership grasp.

Parliamentary Government, in such a state of things, becomes one of the very worst systems of Government to which a country can be subject. Indeed, it can scarcely be called a Government at all, for under such conditions it is inconsistent with the existence of any authority capable of ruling a nation (and mankind require to be ruled), or of steadily directing the measures either of the Executive Government or of the Legislature, to any clearly defined and well-considered objects of public good. Instead of being so directed, these measures will vary with every change in the game of party politics, and will generally have for their aim to gain a fleeting popularity by flattering the passions and prejudices of the people, or of some particular section of it.¹⁹

19. *Ibid.*, 224.

In order to restore the situation that prevailed before Reform but without the concomitant corruption, it would therefore be expedient if at the beginning of every new Parliament the House of Commons had the right to coopt a limited number of members, perhaps forty. This number was to be elected as a "list," so that the strongest party could elect the full number. "This arrangement would do much towards preventing that equal division of parties which has of late years been so great an obstacle to good Government." It would restore the authority and sovereignty of the government as against the Parliament. It would have the further advantage that young people could be elected to these seats; these would thus be given an opportunity to become familiar with political affairs and to distinguish themselves—a sort of school for the next generation of politicians.

§4. Principles and Methods for a Solution

Grey's proposals for reform coincided in many points with Renan's, but they go further in substantiating the arguments with theory of the state and including problems that are left out of Renan's arguments. Renan places the principal emphasis of his theoretical reasoning on clarifying the authoritarian nature of a legislative organ thus constituted: it is authoritarian because the representatives, or at least a considerable number of them, are not produced by general election but—however the process is arranged—hold their seats by force of their connection to a military, economic, cultural, or occupational elite in the total structure of the nation. Grey is more concerned with clarifying the other problem—that even an authoritarian legislative authority as such is unable to govern but must be an instrument wielded by the government, acting as a political agency. The hierarchic element of layered authorities is therefore more clearly emphasized. The legislature is to be composed along authoritarian lines, and the head of the executive branch must in turn have the necessary authority to conduct the affairs of state. The composition and the sphere of activity of the legislature is therefore to be qualified as authoritarian from two directions—one, from below, insofar as the members of the council have the character of authoritarian representatives, and two, from above, insofar as the position of the legislature and its function are determined by the authoritarian character of the executive and the relationship

between them bears traits that may be classified as belonging to the authoritarian state.

Since we are arranging our description according to the constitutional institutions and in this chapter deal with the problems of how the legislature is brought into being (while the following chapter is concerned with the cooperation between the authoritarian state leadership and the authoritarian legislative chamber), we cannot entirely separate the two elements as far as description goes. The authoritarian influences of state leadership on the legislative council is simply expressed not only in the cooperation between the agencies but also in the influence of the executive on the composition of the council. If therefore in what follows we turn to the problems of the design of the legislature, it is true that in the main these are identical with the problems of authoritarian representation, but we must also consider the relationship to the higher authority level of political leadership insofar as it influences the design.

The political situation for which a solution must be found by an appropriate arrangement of the legislature, according to Renan's and Grey's understanding, is characterized by the following traits:

1. The political activation of the individual citizen has advanced to such a degree that the old form of state leadership by a governing class is no longer adequate and new forms must be found that enable the broad masses of the people to participate in the formation of the state will in the form of elections and so on.

2. Further, the old system of popular representation is no longer adequate because new social types appear as mass phenomena—especially the working classes, which increased with the Industrial Revolution—that were not taken into consideration at all in the older system.

3. In this situation, extending parliamentary suffrage to the total population does not result in better representation of the people but in a monopoly of representation for the numerically largest social classes within the population, depriving all numerically small classes within the nation of the representation that reflects their actual significance.

4. The reorganization of popular representation must solve the new problems raised by the political activation of the masses and must at the same time prevent the creation of a representation monopoly for numerically large social groups.

The proposals for solutions may be classified as follows:

A. *Multicameral System.* Calhoun proposed a system of genuine multiple chambers. He proposed forming personal-interest electoral bodies, each of which would elect one chamber. Within the specialized electoral bodies, elections occur by universal suffrage. Risks are minimized by the provision that in passing legislation, each chamber's voice is equal to that of every other.²⁰ Looking back at the Parliamentary Reform of 1832, Disraeli thought that it would have been better to place a third chamber, representing the interests of the numerically large social classes, alongside the Lords and Commons, instead of destroying the unique character of the House of Commons by extending the suffrage.²¹

B. *Bicameral System.* The pure case of such a solution was given by Renan. An authoritarian chamber was to be set next to one based on indirect nationwide election. Grey's proposal is more closely bound to tradition and therefore lacks an equal measure of rational clarity. The House of Lords is paralleled by a second chamber; its composition is determined by a combination of democratic and authoritarian procedures.

While Renan strictly separates the democratic and authoritarian chambers, Grey sticks with the authoritarian Upper House and completes it through a mixed chamber.

C. *The Mixed Chamber.* The idea of a mixed chamber functioning as a single chamber has not, to my knowledge, been proposed.

The following typical procedures for forming an authoritarian or an authoritarian-democratic mixed chamber can be gleaned from the various proposals.

1. Election according to proportional representation—Hare's proposal. This would be practical only if a comparatively restricted suffrage continued to exist.

2. Filling only some of the seats with representatives that have come from general elections based on district electoral bodies; possibly further weakened by cumulative votes and representational election; this is Grey's proposal.

3. Electing only some of the members in universal personal elections—Grey's solution for labor suffrage. This procedure is of

20. Calhoun, *A Disquisition on Government and a Discourse on the Constitution of the United States* (Charleston, 1851).

21. Disraeli, *Coningsby*.

particular interest for the more recent political problems because it combines the concession to universal elections with an authoritarian reinterpretation of the democratic character, insofar as the electorate is limited to occupational classes and in no case can attain a monopoly of representation if this procedure is supplemented by some of the following:

4. election through personal minority electoral bodies—Grey's university suffrage;
5. dispatching delegates from military, administrative, cultural, and economic institutions—Renan's delegates of the army and navy, the judiciary, the clergy, the educational establishment, the academies, the industrial and commercial chambers;
6. dispatching delegates from territorial authorities—Renan postulates cities with populations over 100,000;
7. coopting members on the part of the legislature—Renan, Grey;
8. appointment of members—in Grey, by the government; by the democratic chamber in Renan (which gives Renan's chamber a slightly democratic cast);
9. nomination or election of lifetime members—Renan, Grey;
10. establishing hereditary seats—Renan; Grey does not include this proposal, since the hereditary seats are organized in the House of Lords as a separate chamber.

§5. The Austrian Solution: Advisory Chambers²² and the Bundestag

The comparison with the English and French reform proposals allow us to correctly classify the arrangements contained in the 1934 constitution. In Part I of this work we have shown that the formation of concepts in political science is always faced by the problem of relating the symbolic expressions of the political sphere to the conceptual system of science. In this process it can and will frequently happen that the meanings of the symbols must be dissolved. This is the situation in which we find ourselves in the scholarly treatment of the Austrian solution to the problem of bringing about a legislative council.

22. For reasons of the historical context of problems, we use the term *chambers* for the legislative agencies of the 1934 constitution. But we realize that this concept can also very justifiably be so limited that the Austrian legislative councils fall outside it.

The organization of the legislature is characterized by the political symbol of the corporative state. According to the preamble, the federal state stands on a corporative foundation. Article 2 declares: "The federal state is structured corporatively." That the idea of the corporative state became a symbol can be understood from the potential for conflict of the political situation; the idea was juxtaposed to that of class struggle. In other words, one of the most dangerous ideas, destructive to the state, was to be fought and overcome by the idea of the corporative state. Further, the organization of the estates and delegating representatives of the estates to the legislature presented itself as the appropriate means to fight the dangers of mass democracy and to limit the power of representation (which for Vienna was a monopoly of representation) of a numerically strong social class. And finally the corporative idea could come to embody the efforts to avoid a totalitarian constitution. At the beginning of the chapter we referred to the liberal dimension of the corporative idea. The idea of the corporative state thus serves in the political struggle on three fronts: 1. in overcoming the idea of class struggle; 2. in combating the dangers of mass democracy and the monopoly of representation; 3. in combating the idea of the totalitarian state.

The significant effectiveness of the idea of the corporative state in this struggle, its resulting symbolic value, and the incorporation of the symbol into the new constitution should not delude us, however, into believing that the 1934 constitution can be defined as one for a corporative state in anything but a very limited sense. At the outset we defined the corporative state as a political form or organization in which the representatives of professional groups participate in the formation of the state will on the highest level, most especially in originating legislation. This characteristic applies to the 1934 constitution, and in this sense it serves the corporative state. This feature, however, is significantly compromised by the fact that the council participating in legislation does not consist only—or even predominantly—of representatives of the estates. Rather, a significant number of persons in this council have acquired their seats through some of the other procedures listed above. The agency involved in federal legislation must be classified as an authoritarian chamber in the meaning of the word exemplified above. If we follow the outline of characteristics of authoritarian legislative agencies cited above, we find the following essential features:

A. *The Cameral System.* The constitution arrived at a compromise between a multicameral and a unicameral system. Five chambers function as agencies of the federal legislative process: the four advisory chambers (Council of State, Federal Cultural Council, Federal Economic Council, Provincial Council) and the decision-making chamber (Bundestag).

The four advisory or consultative chambers represent four sets of interests relevant to the state as a whole. These interests are more closely defined by article 61.6, according to which the deliberations of the chambers are to lead to opinions, rendered from various aspects, on draft legislation. Specifically,

1. the opinions of the Council of State should deal with the question of whether the draft meets the requirements of the sovereignty of the state and the public welfare as well as of practical enforcement of the legislation;

2. the opinions of the Federal Cultural Council should deal with cultural interests;

3. the opinions of the Federal Economic Council should deal with economic interests;

4. the opinions of the Provincial Council should deal with the interests of the provinces.

Each of the four chambers may, independent of all the others, represent its special position in written opinions. The arrangement by special interests goes even further; in cases of mandatory opinions the main professional groupings within the Federal Economic Council have the right to present a separate opinion [*Sondergutachten*] if not all members of the main corporative group in question agree with the determination of the Federal Economic Council (§17.2, Rules of Order). Any multicameral system faces the problem of achieving agreement among the decisions of the various chambers; this problem is solved by the provision establishing that the consultative chambers merely have the right to express a positive or negative opinion of submitted bills, but these opinions do not have the legal effect of approval or rejection. These opinions are merely taken into consideration by the government at its discretion in the further elaboration of draft legislation. Only the Bundestag, which consists of delegates from the consultative chambers, is in a position to make ultimate decisions.

B. *Establishment Procedures.*

1. *The Federal Economic Council.* In the structure provided by

the 1934 constitution, the Federal Economic Council occupies the third position, immediately after the Council of State and the Federal Cultural Council. We will discuss it first because it is a manifestation of the corporative aspect of the overall authoritarian structure of the legislature, which holds such great political-symbolic significance.

The 1934 constitution sets the Federal Economic Council in the place assigned by Renan's proposal to the chamber created by indirect nationwide election and in Grey's reform proposal by election through territorial and personal universal electoral bodies. It makes a concession to the mass-democratic element that is unavoidable in the situation of political mass activation and at the same time robs it of its main threats by organizing the masses according to occupational groupings. This construction has not yet been worked out in all its details. To date the following outlines are evident:

The members of the Federal Economic Council, seventy to eighty in number,²³ are chosen from among the so-called principal professional groups. Article 48.4 lists these as follows: (1) farming and forestry; (2) industry and mining; (3) trades; (4) commerce and transportation; (5) the financial, credit, and insurance industries; (6) the liberal professions; (7) the civil service. Because the legal language has not yet been cleansed of all ambiguities, it remains unclear for the present whether the listed "principal professional groups" are identical with the "professions" which, according to article 48.5, have to send their delegates to the Federal Economic Council, and furthermore, whether these are identical with the "professional bodies according to public law" mentioned in article 32.2. So far, only the arrangement of the "profession of civil servants" has been more closely worked out by the federal law of October 19, 1934 (BGBl II, No. 294), supplemented by the regulation of November 30, 1934 (BGBl II, No. 377). The profession that is established by this law and the cited regulation is identical with the "principal professional group" listed as seventh in article 48.4. The "profession," however, is not a corporate body; it is a group of persons more closely defined in §1 of the law. To assert the interests of this class of persons that holds the title "profession of civil servants," various "professional bodies" are formed according to §3,

23. For the transition period, Federal Law no. 45 ex 1935 increased this number to eighty-two.

these being a principal corporate body designated as "civil service association" and various specialists' associations for the various branches of the civil service, called "squads" [*Kameradschaften*]; these are established by the supplementary regulation. According to §§4 and 7 of the cited federal law, the principal corporate body is charged with sending representatives of the civil service to public representative bodies.

The details of how the representatives of this corporate body are to be "delegated" are still unspecified. The numerical element is taken into consideration to a certain degree by article 48.5, which prescribes that the allocation of corporative representatives to the principal professional groups should be arranged with regard to the number of their self-employed and employed professional members. The provision that in view of total membership in the Federal Economic Council numbering seventy to eighty, no fewer than three representatives must come from each of the principal groups weakens the principle in favor of protecting minorities. Article 48.3 reserves details about the process of delegation for a federal law that has not yet been issued. However, we can draw inferences about the process from the formulation of article 48, according to which the representatives are to be delegated "from the professions"; thus it appears that at least one agency of the profession must be decisively involved in the delegation. Again, we can infer something about the nature of the agency involved on the basis of the law organizing the profession of civil service. According to §14.1 of this law, the tasks of the principal corporate body, which include the delegation of the corporative representatives, are carried out by the federal civil-service chamber unless a law assigns them to a different agency. According to the organizational law, the agencies of the principal corporate body do not consist of the totality of those competent in the profession. If, therefore, the law that is to be issued in accordance with article 48.3 does not stipulate otherwise, the delegation at any rate cannot come about through general election on the part of the corporative members. At the present time general elections are included in the system of corporative organization and corporative representation only on the lowest level (in the case of the estate of civil servants, election to the district technical leadership and the service unions [*Dienstgemeinschaft*]). Beyond this level, provisions are made for an upward gradation [*Aufstaffelung*] of further agencies

of the professional corporations in several stages through election and delegation from the lower levels.

To the extent the outlines of the professional structure can be discerned at this time, the institution of general elections is handled with the utmost caution. Only the lowest level agencies are staffed by general elections, the higher ones by election and delegation on the part of the agencies constituted by the general elections. A special condition for control for the executive is created by the provision of article 48.3, according to which the federal law to be issued must ensure that the Federal Economic Council will be made up of patriotic members [*vaterlandstreu*]. A minimal guarantee might be provided if the members also belong to the Patriotic Front [Vaterländische Front]. This provision, however, activates the control mechanism stipulated in §7 of the Federal Law of May 1, 1934, concerning the Vaterländische Front (BGBl II, No. 4). According to this provision, members of the Vaterländische Front may take seats in the consultative agencies of the legislature, in the provincial diets, and in the municipal diets, and in the representative bodies of other self-governing bodies only with the consent of the head of the federation or of the agency he has fully authorized to give such consent. Refusal of consent can exercise a very considerable influence on the selection of members of the representative bodies in question.

According to §21.1 of the Constitutional Transition Act of 1934, during the transition period members of the Federal Economic Council are appointed by the federal president on the advice and with the countersignature of the federal chancellor. The proposal of the federal chancellor is given after obtaining recommendations from professional organizations. The federal president may recall members and replace them with others at the suggestion of the federal chancellor and with his countersignature.

2. *The Federal Cultural Council.* While the Federal Economic Council, representing the professions, must represent broad strata of the population, the Federal Cultural Council is a pool of representatives from cultural institutions. Article 47.1 sets its membership at thirty to forty representatives of legally recognized churches and religious associations; the school, education, and adult education systems; the science; and the arts. Article 47.3 stipulates that parents must be included in representation of the educational system.

According to article 47.4, nomination is to be regulated by a federal law (not yet issued). The provisions of the 1934 constitution allow us to deduce only some slight details concerning the nomination process. Since, unlike article 48, which mentions the "delegation" of representatives to the Federal Economic Council, article 47 uses the term *appointment* [*Berufung*], we can assume that in the composition of the Federal Cultural Council the executive is entitled to a stronger influence than is the case for the Federal Economic Council. With the exception of the legally recognized churches and religious associations, which are already legally organized as such, the organizational foundations for representation must still be created. An organization that would correspond to one of the principal professional groups is not mentioned in article 47. We can infer something about the future organization of cultural interests from the federal law of October 9, 1934 (BGBl II, No. 284). In this piece of legislation the Federal Cultural Council is constituted for the transition period as follows:

- a. Eight representatives of the Roman Catholic Church;
- b. one representative of the Protestant church;
- c. one representative of the Israelite religious community;
- d. twenty-two representatives of the school, education, and adult education system;
- e. four representatives from the sciences;
- f. four representatives from the arts.

As is the case with the Federal Economic Council, the federal law to be issued according to article 47.4 is to guarantee that the Federal Cultural Council is composed of patriotic members.

For the transition period, §21.1 of the Transition Law of 1934 regulates the composition of the Federal Cultural Council in analogy to that of the Federal Economic Council.

3. *The Council of State.* The Council of State consists of forty to fifty members. They are nominated by the executive—specifically, by the federal president with the countersignature of the federal chancellor but without his input. In general they are appointed for ten years, and reappointment at the end of the ten-year term is possible. In the case of civil servants on active duty, however, the duration of membership in the Council of State can be limited to the term of their employment at the time of their nomination to the Council of State. According to article 46.1, the members of this council must be meritorious citizens of good character who can be

expected, on the basis of their past conduct and achievements, to have complete understanding of the needs and tasks of the nation. Article 72.2 stipulates that persons serving in the armed forces or rendering professional services to them as well as state employees active in the public security service may be appointed only to the Council of State.

During the transition period, appointments to the Council of State are made by the federal president on the advice and with the countersignature of the federal chancellor.

4. *The Provincial Council.* The Provincial Council represents the largest territorial authorities within the state, the provinces, and the independent city-province of Vienna [*bundesunmittelbare Stadt Wien*]. Each province, in accordance with article 49.1, dispatches to the Provincial Council the governor of the province and the member of the provincial government in charge of the provincial financial affairs; Vienna sends its mayor and one other representative, selected by the mayor, who should be familiar with the city's financial affairs. If the provincial governor himself presides over financial affairs, he decides who is to take the second place in the delegation to the Provincial Council. If a member of the Provincial Council is temporarily prevented from participation in the Provincial Council, he may charge the other representative in the Provincial Council to vote in his name in the Provincial Council. If a member is permanently unable to represent his province, the governor of the province delegates another member of the provincial government. The corresponding provisions apply to representatives from the city of Vienna.

Since provincial governors are nominated by the federal executive and the members of the provincial government are nominated by the governor of the province, the procedures for forming the Provincial Council, as well as those used to make up the Council of State, are equivalent to the nomination of members of the authoritarian chamber by the state leadership in Grey's and Renan's proposals. Beyond this, however, the members of the Provincial Council function as representatives of the large territorial authorities. Additional representation of territorial authorities—as, for example, in Renan's suggestion for cities with more than 100,000 inhabitants—is not provided for. This omission might well prove to be a flaw, especially as the representatives of small communities are granted a significant influence in the state because the federal

president is elected by mayors; in this mayoral council the rural communities predominate to such an extent that the influence of the few large cities is completely meaningless. It is probably the perception of this flaw that gives rise to the efforts at forming a municipal association to represent the interests of the cities.

5. *The Bundestag*. The policy-making agency consists of a portion of the members of the consultative chambers. The procedures according to which the members of the Bundestag are selected supplement the procedures used in selecting members to the consultative chambers; as a result, the executive exerts a stronger influence. According to article 50.1, the Bundestag consists of twenty delegates from the Council of State, ten delegates from the Federal Cultural Council, twenty delegates from the Federal Economic Council, and nine members from the Provincial Council. Thus the consultative chambers are not represented in the Bundestag in proportion to their numerical strength. The Provincial Council contributes half its membership, the Council of State two-fifths to one-half of its members, the Federal Cultural Council and the Federal Economic Council each about one-quarter of its members. The membership numbers for the consultative chambers are chosen in such a way that even with proportional representation in the Bundestag, the delegates from the Federal Economic Council alone would not form a majority but at most make up a very considerable bloc: the ratio is 80 out of 188 in case of the maximum numbers, 80 of 158 in case of the minimum numbers. If we combine the Federal Cultural Council and Federal Economic Council as chambers delegated by a greater or lesser contribution from self-governing bodies and cultural institutions, the result would be a ratio of 120 to 188 in case of maximum numbers and 100 to 158 in case of minimum numbers. The composition stipulated by the 1934 constitution reduces the Federal Economic Council from fifty-nine to twenty members, the Federal Economic Council and Federal Cultural Council together from fifty-nine to only thirty members. The number of members nominated directly or indirectly by the federal executive almost balances with that appointed by other methods.

The practical consequences of this composition for the constitution cannot at present be foreseen. The one purpose of Renan's and Grey's proposals—to send to the legislature a larger number of persons who, in representing their views, are relieved of the necessity of taking an enfranchised populace into account—was surely

achieved. How far the other purpose of those proposals—to bring about a majority in the service of the executive—has been achieved is difficult to judge at the present time. It is also highly questionable whether, in the case of the 1934 constitution, this purpose was intended, since the relationship between the legislature and the executive is not like that in a parliamentary government—certainly not in the sense in which we in Central Europe have in recent years become accustomed to speak of a parliamentary government, namely, one in which the government depends on the will of the parliament, but also not in the sense of classical English parliamentarianism, which corresponds much more closely to what is called an “authoritarian” government in Central Europe—namely, a far-reaching actual control by the government over the parliament, even though it is loosely formed and subject to veto. As we will see in the following chapter, government control of the legislature is secured by other methods besides influencing what persons compose the legislature. The internal power structure of the Austrian legislature will run into problems for which one can hardly find precedents and which are visible now only in very indistinct outlines. The internal organization of the chambers is to a large extent prescribed by law. The Council of State is not subdivided into groups at all—each member functions as an individual. By virtue of its composition, the Provincial Council is subdivided into the nine times two provincial votes. According to §19 of the rules of order, the Federal Cultural Council and the Federal Economic Council are subdivided into groups, each of which elects its delegates to the Bundestag separately. The Federal Cultural Council is subdivided into four groups: (1) the representatives of legally recognized churches and religious associations; (2) representatives of the school, education, and adult education systems; (3) representatives of the sciences; and (4) representatives of the arts. The Federal Economic Council is subdivided into the seven representative groups of the principal professional groups. Further, according to §42 of the rules of order, committees are formed in the consultative chambers and in the Bundestag. In the Federal Economic Council, the formation of committees must proceed separately for each principal professional group. In the Federal Cultural Council, this stipulation can be applied correspondingly (§18). According to §42.7 of the rules of order, other groupings of members, in particular, the forming of clubs and parties, are not permitted.

Since party and club formations are forbidden and none of the permissible groupings alone represents a majority, the methods of integration for the formation of a will in the legislative councils are restricted to deliberations in committee, to hearings of reports and counterreports, to opinions and resolutions. Occasionally integration of the will occurs when government bills are dealt with. An integration for the longer term, such as is represented by a party, which can maintain the same fundamental position toward issues over a longer period of time, is illegal. Groupings that can be called in any traditional sense a "majority" of the government are just as inadmissible as the formation of an "opposition." Even where such a representative body arrives at "resolutions" that have the legal consequences of a veto, they are not, according to the existing provisions, expressions of a political will. Rather, though they are invested with the consequences of such a will, they are the summation of isolated wishes, and because these wishes are isolated, they are powerless. Now, in spite of the structure of the legislature into a number of councils that are prevented from forming a political will and that may only occasionally and in very restrained form summarize the wishes of individuals and small groups, through the means of the members named by the executive the construction of the 1934 constitution is apparently intended to control a reliable bloc of delegates, whose preponderance is favorable to the government's policies. Overall, this calculation is likely to be correct—but in the individual case, surprises might crop up. It is quite possible, on the one hand, for the members of the Council of State—who serve for ten years and as a rule are likely to find themselves in a social and material position that allows them a relatively independent representation of their personal views—to develop unexpected oppositional strengths; on the other hand, it might happen that particularly the members of the Federal Economic Council—since they are entirely dependent on the government to assert their preferences concerning legislation—develop a very high degree of submissiveness, at least in cases that do not touch on the special interests they represent.

§6. The Provincial Diets and the Municipal Diets

The structure of the legislative agencies of the provinces and communities follows principles similar to those used in establishing

the institutions responsible for federal legislation. But just as in the organization of the executive agencies, the forms are made shorter and simpler. In the provinces, the city of Vienna, and the municipalities, there are no multicameral systems; the unicameral system prevails throughout. Moreover, the provincial diets (article 108) and the Vienna city parliament (article 140) do not include all the types of representatives found in the federal legislature. It is in the nature of things that the type of provincial representative is lacking, but there is also the absence of representatives whose position would be analogously structured to that of the members of the Council of State. The provincial diets and the Vienna city parliament include only the types of representatives that correspond to the Federal Cultural Council and the Federal Economic Council. They consist of representatives of legally recognized churches and religious associations; the school, education, and adult education system; the sciences; and the arts as well as representatives of the professions within the province (in Vienna, of the city of Vienna). Because of their composition, in which appointed members are lacking, the provincial diets come very much closer to the type of a corporative representation than does the Bundestag.

Since the type of the members of the Council of State is not present in the provincial diets, persons serving in the armed forces or performing professional services for them as well as civil servants active in the public security service may not become members of the provincial diets according to article 108.3. But according to article 72.2, they can become members of the Bundestag by way of the Council of State.

For the transition period, §29 of the Transition Act of 1934 provides that, in accordance with the principles of article 108, the members of the provincial diets are to be named by the governor of the province after he has obtained opinions from cultural communities and advice from the Vaterländische Front, which are to be rendered after the province's professional organizations have been contacted and after consultation with the other members of the provincial government. The number of members is set at a maximum of thirty-six. The determination of the total number and the numerical distribution to the cultural communities and the principal professional groups requires the consent of the federal chancellor. The provincial governor can recall the members he has named and name new ones to take their place.

For the Vienna municipal parliament, the transition is regulated by §43 of the Transition Act of 1934. The Vienna municipal parliament is put together by the mayor on the basis of the municipal order of the federal capital of Vienna of May 31, 1934, *LGBI* for Vienna, No. 20. This council is responsible for all the duties assigned to the Vienna municipal parliament by the 1934 constitution.

Article 127.1 provides that the municipal diets must be composed in the same way as the provincial diets where the composition of the population permits this procedure. Where the stratification of the population does not allow this, article 147.2 stipulates that the provincial legislation must regulate the delegation of the municipal diet as closely as possible in accordance with the provisions of paragraph 1.

The transition is regulated by §39 of the Transition Act of 1934. The current municipal diets become municipal diets according to the definition given in the 1934 constitution. They retain their current composition unless the provincial governor responsible for them names other members to replace those whose terms have expired or dissolves the municipal council and appoints other persons as members of the municipal council. If replacement is partial or total, the principles of article 197 must be observed. The provincial governor's appointments must be based on the same opinions, contacts, proposals, and the like that obtain in the case of nominating members to the provincial diets. The provincial governor may recall members he has named and name others to take their place. In case of a total changeover, the number of members of the municipal diet may be no fewer than six and no more than thirty-six.



The Relationship of the Executive to the Agencies of the Federal and Provincial Legislatures

§I. The Term of Office of the Federal Legislature

The characteristic trait of English parliamentarianism, which was retained in Grey's reform proposals, was the combination of authoritarian leadership of the state with a parliament that, in spite of the authoritarian structure, remained a source of the formation of the political will. The 1934 constitution shapes the relationship between the executive and the legislature in such a way that the latter can no longer be a source for formation of the political will. The means of formation of the political will in a council, the formation of groups, factions, parties, clubs is even explicitly prohibited. The types of government are broadly defined in political science; nevertheless, if we stretch the concept of parliament to that extent and, rather than understanding it, as has become common, as a legislative council whose members are selected by general elections, instead let the term apply to an authoritarian chamber—it seems to me that a limit to any meaningful stretching of the concept is set by its definition as expressing the political will. If the council is no longer a political power, it will no longer be appropriate to call it a parliament, even if it fulfills a parliamentary function in the structure of the constitution and in the manner by which it participates in legislating.

In spite of the peculiar construction of the Austrian authoritarian chambers as a nonparliamentarian legislative agency, the shaping power [*Formkraft*] of the parliamentary constitutional law was so

lively and influential that as a result the relationship of the executive to the agency of federal legislation represents a mixture of old legally parliamentary [*parlamentsrechtlich*] forms and new forms adapted to the problems of authoritarianism.

By force of its structure, the Council of State is a permanent institution. Its members are named individually. Overall recall or overall renewal of this agency is not possible; only partial replacement is allowed. The same is true for the Provincial Council.

The terms of office in the Federal Cultural Council and the Federal Economic Council, on the other hand, are constructed much like those of a parliament. According to article 55.1, they are calculated as six years from the day of the opening session and in any case at least until the day the new representative body meets. The construction is not self-evident—it would certainly have been well within the definition of the principle of an authoritarian chamber, and might even have suited it better, if these chambers too had been established as permanent ones and if the replacement had proceeded by the principal cultural and professional groups, or even by appointing delegates individually within these groups. The construction would have greater meaning if the implementing regulations that are yet to be issued would provide for membership decided by general elections; the integrational value of the mass action would justify total renewal, even if the agencies created by election are not a political power vis-à-vis the government.

Article 55.1, which grants the federal president the right to dismiss the Federal Cultural Council and the Federal Economic Council, provides for an even more crucial replacement of parliamentary legal bodies. The term of office ends with dismissal; replacements are to be arranged by the federal government in such a way that the newly appointed representative body can meet no later than one hundred days after dissolution. The advantage of this provision for the national order cannot yet be foreseen. It would exist only if both councils could serve as political forces, but, aside from the explicit prohibition, they have hardly any opportunity to act in this capacity. That the editors of the constitution nevertheless took something of the kind into consideration is shown by the provision of article 147.3, according to which the federal government may use emergency decrees to adopt a proposed law that has been rejected by the Bundestag if the federal president has ordered the dissolution of the Federal Cultural Council and the Federal Economic Council.

cil.¹ This stipulation makes sense only if it is assumed that the Federal Cultural Council and the Federal Economic Council can be centers of resistance to legislation intended by the government. This assumption can hardly be reconciled with the construction as a whole. Furthermore, we have already pointed out in the previous chapter that it is not the Federal Cultural Council and the Federal Economic Council, both of which are dependent on the government to see their wishes realized, that might develop forces of resistance to the executive but much more likely the relatively independent Council of State. We must rest content with this analysis, since the essence of the institution will be revealed only in its function.

In any case, the power to dissolve the Federal Cultural Council and the Federal Economic Council raises a juristic problem concerning the permanence of the Bundestag. If the possibility of dissolving the two consultative chambers did not exist, these agencies could still be replaced entirely and then there would be no break in their activities, since the terms of the first would not end until that of the newly appointed agency begins. The possibility of dissolution raises the question of whether the Bundestag is a legally functioning agency of the constitution when the Federal Cultural Council and the Federal Economic Council are dissolved and the representatives to these chambers have lost their seats in the Bundestag. Since the constitution is silent on this question, various interpretations are possible:

1. Despite the absence of delegates from the Federal Cultural Council and the Federal Economic Council, the Bundestag must be considered a Bundestag as defined by the constitution. The presence of one-third of its members and an absolute majority of votes is required to pass resolutions. The Bundestag consists of fifty-nine members. Without the delegates from the dissolved chambers, it consists of twenty-nine. A sufficient quorum for resolutions can therefore exist, since the presence of twenty members constitutes a quorum. However, resolutions concerning constitutional acts cannot be enacted, since these require the presence of half the members, and the membership is one member short. If, however, the interpretation were to postulate that at the time of dissolution the Bundestag constitutionally consists not of fifty-nine but

1. In the next chapter, dealing with the emergency powers of the administration, we will deal further with the additional problems associated with this provision.

of twenty-nine members, such a rump Bundestag would also be competent to pass resolutions on constitutional acts.

2. The rump Bundestag is not a Bundestag as defined in the constitution, since article 50.1 states unequivocally that it is made up of the prescribed number of delegates from the four chambers. If the delegates of even one chamber are absent from its membership, it is no longer a Bundestag as defined by the constitution. This interpretation is also supported by article 147.3, which provides that in case the Bundestag is dissolved, emergency legislation may enact the rejected bill. Such a provision would not be necessary if the bill could be passed by the rump Bundestag. And finally, one can point to the provisions of article 61.1, according to which bills concerning laws must in the material sense be transmitted from the federal government to the consultative agencies of the federal legislature. Such transmission is impossible if the agencies are dissolved. At the very least, the process of legislating in the material sense is eliminated for the period of the dissolution.

We would prefer the second interpretation (1) because it seems to us to be more firmly supported by the norms of the constitution and (2) because it incorporates the full context of meaning of the constitution. The interpretation by which the Bundestag is a Bundestag as defined by the constitution even if the representatives of the estates are absent seems to us the typical case of a positivist-metaphysical interpretation, which incorporates as its premise merely the meaning of individual acts. An interpretation that considers all the facts, however, must also incorporate the social meanings that are presupposed in individual acts in the constitution—and according to the symbolic and declaratory elements of the constitution these are primarily the estates. The assumption of a constitutional Bundestag without corporative representatives contradicts the symbolic content of the constitution.²

§2. The Organization of the Federal Legislature

The organizational norms largely place the agencies of the federal legislature under the authority of the executive. There is practically

2. According to a communication of President Otto Ender, it was the understanding of the framers of the constitution that if the Federal Cultural Council and the Federal Economic Council were dissolved, the Bundestag would not be able to function.

no opportunity for the agencies to act as an autonomous political force. The consultative chambers are convened by their chairmen, the Bundestag by its president (article 57.1). When the Federal Cultural Council and the Federal Economic Council are newly constituted, the federal president convenes the first session (article 55.3). The councils must be convened without delay whenever the federal government so orders. The members of the councils have legal recourse to call a session, such as was granted to the members of the National Assembly by article 28.2 of the B-VG of 1920–1929. Some of the councils are allowed to have a say in appointing a chairman to only a very limited degree, some none at all. The chairman of the Council of State and two deputies are named from its membership by the federal president on the advice and with the countersignature of the federal chancellor (article 56.1). Though the Federal Cultural Council and the Federal Economic Council elect their own chairmen, the election requires the federal president's consent, which is given on the advice and with the countersignature of the federal chancellor (article 56.2). The provinces rotate the chairmanship of the Provincial Council every six months, in alphabetical order. The chair is occupied by a provincial governor or by a member of the provincial government he has designated to represent him (article 56.3). The executive committee of the Bundestag is made up of the chairmen of the consultative chambers. The first, second, and third vice presidents are the chairmen of the Federal Economic Council, the Federal Cultural Council, and the Provincial Council, in that order (article 56.4). The staff of the consultative agencies and the Bundestag is not nominated by the chairmen, as the president of the National Assembly was empowered to appoint the officials of his office according to article 30.3 of the B-VG of 1929. Instead, article 58.1 of the 1934 constitution assigns this right to the federal chancellor; the staff is employed by the office of the federal chancellor.

The rules of order in connection with this and the other procedural provisions were not set by the agencies of federal legislation for themselves; they were issued by federal statute on the basis of the Enabling Act of April 30, 1934, as Federal Statute of November 24, 1934, BGBl II, No. 365. Only within the very extensively detailed provisions of the rules of order are the agencies of the federal legislature allowed to issue autonomous rules of procedure, as article 57.3 stipulates. For our purposes, the provision concerning

the formation of committees and the establishment of the agenda are important as symptoms.

The number of committees, their sphere of activity, as well as the number of members to be delegated to each committee are determined by the chairman of each agency of the federal legislature, in agreement with his deputies. The skeleton organization of the committees is thus in the hands of those agencies that are established with the approval of the executive branch or by the latter alone. Though the members of each committee are chosen by each council from among its members, the selection proposal is issued by the chairman in agreement with his deputies. The members merely have the right in the election to make alterations to the proposal. The committee itself elects its presiding officer, the presiding officer's deputies, and the keepers of the minutes; the rapporteur for the committee and for the respective agency of the federal legislature, however, is appointed by the chairman. The rapporteur summarizes the results of the deliberations in a report, which must substantiate the resolutions of the committee majority. A minority gets the chance to be heard by the provision that if one-fifth of the committee members so demand, they may appoint a counter-rapporteur.

The agenda is set by the chairman of the legislative agency. At the beginning of a session the chairman can alter the proclaimed agenda at his discretion by shifting or omitting any item. Additions, however, can be made only with the consent of a majority of the agency. Aside from this right of consent concerning additions to the agenda, the members of the council are granted no influence over its structure. Any resistance to the chairman appointed or confirmed by the executive through motions to remove an item from the agenda, and the like, is impossible.

§3. The Position of the Members of Agencies of the Federal Legislature

The norms concerning the position of the members of the legislative agencies are not clearly defined in a way that could be characterized as peculiar to the authoritarian state. In part they are adopted from the inventory of the parliamentary area, in part they were created in sharp distinction to these in order to make

certain particularly flagrant abuses of Austrian parliamentarianism impossible in the future.

The provision of article 70, according to which the members of the legislative councils are not charged with specific orders in exercising their mandate is taken from the inventory of parliamentary constitutional law. We consider this provision, which formulates the idea of the unencumbered seat, antiquated in the modern parliamentary system; it was seldom applied in Central European postwar parliamentary systems. In the system of the 1934 constitution it can be applied only to a very limited degree. The idea of the free mandate originally developed out of the demand to free the delegate from direct orders by those who have elected him and to make his activity in the legislative assembly subject only to the norm of the "general welfare," the "good of the state," and "reason." The demand echoes something of the spirit of Rousseau, since each delegate was envisioned as an individual outside specific, personally binding social contexts, and the joint work of such minds was to result in the *volonté générale*. The demand is utopian, and in the concrete case it is unrealizable, since it is obvious that every delegate is woven into some contexts that obligate him personally in some way and that the only possible variations are those of intensity of the obligation and the degree to which his obligations can be sanctioned. The intensity of obligation of the norm for the delegate and the degree of elimination of the obligation, including orders for behavior in the individual case, depend on the degree of organization of the social group to which the delegate stands in a relationship of obligation. Since 1918 in Austria the more or less well-organized group was the party, and the delegate who was exercising his mandate as a so-called representative of the people was bound to the imperative party mandate; the orders of the party were sanctioned by the fact that the delegate depended on the party organization for his political existence.

According to the 1934 constitution, the degrees of freedom and obligations to orders are differently structured for members of the legislative agencies. It is difficult to get a clear view of the situation for the members of the Council of State, which lacks any uniformity. Depending on age, temperament, financial independence, expectations of future career advancement in the case of active civil servants, integration into other contexts of interest, and so forth, each member will find himself in a personally unique position.

In the Federal Cultural Council, dependence will be a function of the degree of organization of the delegating community—it is, for example, hard to imagine that a representative of a church will carry out his activity without consulting his church organization. The corporative representatives will be strongly dependent; a representative of the banking system or of labor is not likely to act in opposition to the wishes of the financial association or the trade union; in crucial questions he may even be bound by specific orders. In the Provincial Council the position of the second member is dependent on the will of the provincial governor; one can hardly expect divergent opinions when the votes are cast.

The new regulation of the right to immunity and of disciplinary force [*Ordnungsgewalt*] (article 71) represents a crucial contrast to previous parliamentary law. The delegates' personal immunity is abolished. If the behavior of a member of a legislative agency violates the law in a way that leaves him open to prosecution through official channels, governmental prosecution is not out of the question. Private accusations concerning the behavior of a member are also admissible. The only exception is when the private accuser is himself a member of an agency of the federal legislature. In such a case the accusation must be filed with the disciplinary panel [*Ordnungssenat*].

Disciplinary power over the members of the legislative agencies is exercised by the agencies' chairmen or by the disciplinary panel just mentioned, which has jurisdiction over all agencies of the federal legislature. The disciplinary panel consists of two members of each of the consultative councils, elected from among their members. The chair is held by the first member elected from the Council of State; the second member from the Council of State is his deputy. The disciplinary panel has very far-reaching punitive powers. If a member accused privately by another member is found guilty, the disciplinary panel can compel him to apologize; if it is a matter of repeated or gross offenses against order, good manners, or propriety in one of the agencies of the federal legislature or in the federal assembly, the panel can further administer a caution, inflict the penalties of loss of attendance fees for the duration of up to a month or a half-month's remuneration, or it can order loss of membership in the consultative agencies. Loss of membership is indicated if the member does not acquiesce to the highest punitive sanction of the chairman of an agency, the exclusion from a session; if he has been

repeatedly excluded from sessions or repeatedly missed sessions within a month without an excuse; if he has repeatedly been called to order by members of the federal government or the chairman because of affronts to the federal president; for gross insult of the federal president, a member of the federal government, an agency of the federal legislature, or the federal assembly; and finally, if he does not meet his obligation to render an apology, previously mentioned, as stipulated by a guilty verdict. Decisions of the disciplinary panel cannot be appealed. The harshness of these verdicts is understandable as a reaction against the deplorable manners of the old National Council.

§4. The Participation of the Agencies of the Federal Legislature in Federal Legislation: Procedure Concerning Laws in the Material Sense

The cooperation between the agencies of federal legislative branch and the agencies of the federal executive essentially cannot be described unambiguously. Once again there is a mixture of parliamentary elements with those of the authoritarian state. In structuring the constitution, the agencies and the procedures of the federal legislature occupy the place that the B-VG of 1920–1929 assigned to the National Council and its activities. In the sequence of articles, the establishment of the agencies of the federal legislature precedes that of executive agencies. We have already pointed out that the system only incompletely reflects the substance. In reality the procedure of the federal legislature, and in particular the procedure concerning statutes in the material sense (article 51, line 1), to which we will turn first, is structured in such a way that the role of the so-called legislative agencies is merely subordinate compared to the control the executive agencies exert over legislation. The right to introduce a bill lies exclusively with the federal government; as their name implies, the consultative agencies exercise merely a *votum consultativum*. Though the Bundestag has a *votum decisivum*, it is not entitled to any decisive influence on the content of the submitted bills but can only accept or reject them as they are presented. The function of the federal legislative agencies can be characterized by two principal traits: (1) by their nature as authoritarian auxiliary

organizations of the legislature; (2) by rudimentary traits of a parliamentary control of legislation.

Ad. 1. The nature of authoritarian auxiliary organization is evident in the authoritarian composition of the consultative chambers and in the compulsory nature [*Pflichtcharakter*] of their activity, which is in part stipulated directly by the constitution and in part by governmental regulation. The result of the consultations, in which members of the government may participate, gives the government a picture of the position of the consultative chambers on its proposed bills. It may alter the proposal to reflect suggestions, or it can withdraw it. The resolution of the Bundestag will not, as a rule, be surprising.

Ad. 2. Acting as an authoritarian auxiliary organization of necessity involves a degree of suppression and control of the government's legislative activity, which may go as far as a veto in the Bundestag. In this characteristic the legislative agency resembles a parliament—all the more so as in constitutional practice during the parliamentary era the National Council limited its legislative activity largely to debate and resolution on government bills. The process of legislation, however, is construed in such a way that activating these suppressions cannot affect the expeditious nature of the government's legislative actions too much.

The federal legislative process, as regulated by the 1934 constitution itself, begins when the responsible federal minister submits a draft bill to the federal government for debate and the passing of a resolution. The constitutional system, however, does not connect the next phase directly to this initial step, which is regulated by article 94.1, but shifts it to the section that regulates the establishment of the agencies of the federal legislature. Article 61 regulates the participation of the consultative agencies in the legislative procedure. The federal government must transmit the bills approved in accordance with article 94.1 to the consultative agencies through the federal chancellor. The consultative councils' function is limited to rendering expert opinions. The opinions may be obligatory or voluntary. Unless the government stipulates otherwise, the obligation of rendering an opinion falls to the Council of State, according to article 61.2. If, however, the federal government designates the bills under discussion to be exclusively or predominantly of cultural or economic significance, the obligation devolves on the

Federal Cultural Council or the Federal Economic Council.³ The federal government may also transmit the drafts to both agencies for obligatory opinions. The obligation to render an opinion is set by the federal government for the Federal Cultural Council and the Federal Economic Council; the consultative councils do not have the right to refuse an opinion. Those agencies that are not obligated to render opinions have the right to render voluntary opinions. The federal government must set a deadline for both obligatory and voluntary opinions. The constitution permits an extension of the deadline. Keeping the deadline is sanctioned by the fact that the federal government has the right to continue the process of legislation through the federal chancellor, even if the opinions are not submitted by the deadline. After the opinions are delivered, or after the deadline has expired (article 62.1), the federal government may submit its draft bills to the Bundestag through the federal chancellor. The federal government must set a deadline for passing a resolution. Observing the deadline is sanctioned by article 148.6, according to which the federal president, if the Bundestag has not met the deadline, may arrive at a resolution on the bill on the request and countersignature of the federal government, both of them taking responsibility. The bill is explained and justified by a rapporteur. A counterreport is admissible. No further debate takes place. After listening to the reports, the Bundestag immediately decides to accept the bill without changes or to reject it (article 62.3; Rules of Order §29).

The question of when and to what extent the federal government can make changes in its bill in the course of the proceedings is not entirely clear. The rules of order of the National Council provided in §6.4 that the government could change or withdraw its bills *at any time*. The new rules of order contain no provision on this question. Instead, we find in the constitution of 1934 itself—in paragraph

3. Article 61.2 is formulated in such a way that it is not possible to infer an obligation on the part of the Council of State to render an opinion on every bill concerning a statute in the material sense. The wording of the norm suggests that in drafts of cultural or economic significance the federal government could obligate the Federal Cultural Council or the Federal Economic Council to render an opinion *in place of* the Council of State. According to a communication from President Otto Ender, it was the intention of the framers of the constitution that the Council of State was to render an obligatory opinion *in every case*. In constitutional practice, every bill concerning a statute in the material sense is assigned to the Council of State for an obligatory opinion (communication by Professor. L. Adamovich, councillor of state).

4 of article 62, which regulates procedures in the Bundestag—the provision that the federal government can withdraw a bill, or make such changes as in its opinion do not affect the essence of the bill, at any time before a vote is taken. Compared to the rules of order of the National Council, this stipulation, which is limited to changes that do not affect the essence of the bill (granted, according to the government's judgment), apparently reflects the consideration that the Bundestag should not vote on a bill that materially deviates from the bill that was sent to the consultative chambers. No regulation is provided, however, for what is to happen after the consultative chambers have rendered their opinion: the extent to which the federal government may change a bill in accordance with their advice before sending it to the Bundestag, and how nevertheless the bill submitted to the consultative chambers and the bill sent to the Bundestag can still be identical.

For a resolution of the Bundestag to become law requires certification [*Beurkundung*] by the federal president that it has been achieved in accordance with the constitution, countersigning of the certification by the federal chancellor and the responsible federal minister, publication in the Federal Law Gazette, and the expiration of the *vacatio legis*.

§5. The Participation of the Federal Legislative Agencies in the Federal Executive

Except for participating in drawing up the budget, the federal legislative agencies' participation in the executive is structured in such a way that the councils act as authoritarian auxiliary agencies and are thus provided with certain means for exercising restraint and control. They do not, however, have any initiative in administrative control. Just as they have no right to legislative initiative, so they also are not entitled to initiatives in controlling the executive. The federal legislative agencies have no rights of interpellation, investigation, and resolution with regard to the federal government.

The right to participate in concluding state treaties has also undergone significant limitation compared to the B-VG of 1920–1929. According to article 50 of the B-VG of 1920–1929, all political state treaties require ratification by the National Council to become valid; other treaties required ratification only if their substance

changed existing laws. In this way the government's foreign policy was subject to a very considerable control, even though it was up to the government to decide when a treaty was "political" and therefore required ratification by the National Council.

The 1934 Constitution introduces additional differences of procedure for the various categories of state treaties. Basically, according to article 78.1, the federal president continues to be responsible for concluding state treaties. But if the treaty changes existing laws or obligates the federation to issue new laws, it must be submitted to the Bundestag for passage. This provision supplements the right of the Bundestag to pass laws in the material sense. The procedure, however, deviates from that concerning laws in the material sense: state treaties are not sent first to the consultative chambers but directly to the Bundestag. The Bundestag has no right of debate or alteration; it merely has the right to decide to accept or reject the treaty. The constitution does not set a deadline for the Bundestag's resolution, nor does it empower the federal government to set such a deadline. Strong pressure is exerted on the Bundestag, however, by the government's right to temporarily activate the material provisions of such state treaties, if they deal with regulations of trade and international relations, for a period of no more than twelve months as soon as the drafts of such state treaties are completed by the treaty states. On the basis of this authorization, the federal government can invalidate passed resolutions as long as the Bundestag has not arrived at a decision on the government draft. If the Bundestag refuses consent, the regulation must be repealed within an appropriate period of time. What period of time is "appropriate" is determined by the federal government at its own discretion. Thus the Bundestag's right of participation is weakened as far as the significance of its inhibitory function goes by the broad authorization granted the federal government.

Political state treaties that do not affect any existing laws are not subject to passage by the Bundestag; they become valid once they receive the approval of the Council of State or of a committee appointed by it—that is, they must be accepted by that federal legislative agency whose members are named by the executive and which in its internal organization is also most strongly under the influence of the executive.

The legislative agencies' participation in controlling finance and accounting was structured in a way that is surprising from the

standpoint of the authoritarian state. The draft of the federal bill must be submitted to the Bundestag for passage. Some of the provisions for dealing with this bill again make the Bundestag appear as a merely auxiliary agency. The proposed federal budget for the coming fiscal year must be submitted to the Bundestag ten weeks before the end of the current fiscal year. The decision of the Bundestag must be rendered within six weeks. If the Bundestag does not come to a resolution within this time, the draft is considered accepted by the Bundestag and can be moved on to verification and promulgation as federal law. A delay in passing the bill that would force the federal government to operate with a provisional budget is thus impossible. No special provision is made for the case of rejection of the federal draft budget. In such a case the executive would be forced to dissolve the Federal Cultural Council and the Federal Economic Council and to validate the budget by emergency decree according to article 147.3.

Another section of the rules of procedure, however, grants the Bundestag the position of a parliament. According to article 63, the Bundestag has the right of unrestricted debate and alteration of the proposed budget. This provision gives the Bundestag the right to exercise an unrestricted influence on all matters connected with the state's income and expenditures. Though the Bundestag's changes to the budget cannot alter existing laws, its cutting and adding of income and expenditure items can have far-reaching effects on how the laws are carried out. In terms of construction, this presents a serious disharmony between the lack of any right of initiative for the legislative in the material sense and the unrestricted right of interference in its execution. A development of the institutions of the 1934 constitution is conceivable in which the Bundestag, possessing the means of bringing pressure to bear through its influence on the budget, might also gain a considerable influence on the construction of the legal substance that is not granted to it from a procedural point of view.⁴

4. The contradiction in the authoritarian construction was completely intentional on the part of the framers of the constitution. The broad budget powers of the Bundestag—especially the budget debate—was intended in the authoritarian constitution to echo the discontent and criticism of the federal government in the public. The arrangement is thought of as a kind of safety valve. In realizing this intention, however, the framers of the constitution went too far on one point: the Bundestag

The budget authorization of the Bundestag is supplemented and secured by a number of other provisions. Thus, federal expenditures not designated in the federal revenue act or in a special law require consent by the Bundestag before they can be implemented. When there is a risk in delay, such a federal expenditure, if it does not exceed the amount of 1 million schillings, may be implemented without such consent; however, the consent must be procured after the fact. No time limit is set for the consent of the Bundestag.

Furthermore, bills of the federal government concerning raising or converting federal loans and concerning the disposition of federal property are subject to unlimited debate, possible alterations, and ratification on the part of the Bundestag. No deadlines are set for ratification.

Direct financial control is supplemented by participation in accounting control. The Audit Office must make up the federal statement of account and present it to the Bundestag for discussion no later than eight weeks before the end of the following fiscal year. The Bundestag has the right of unlimited discussion concerning the statement of account and its ratification. No deadline by which the negotiations and the resolution accepting or rejecting the statement of account must be concluded is set, nor can it be set. And finally, the Audit Office may report to the Bundestag concerning its activities or concerning individual items. Such reports, however, must be given to the federal chancellor before they are submitted to the Bundestag. The federal government can comment on such a report within three weeks, and upon its request the Audit Office must submit these comments along with the report to the Bundestag. The Bundestag has the right of unlimited discussion and ratification of such reports from the Audit Office. A deadline of six weeks is provided for ratification.

§6. Concluding Considerations Concerning the Relationship between the Authoritarian Chamber and the Executive

Jurisprudence as an art [*ars*] would have the crucial mission of

should not have been granted the right to *raise* expenditure items (President Otto Ender, in conversation).

answering the question of whether the construction chosen by the editors of the 1934 constitution of the relationship between the authoritarian chamber and the executive is the proper practical arrangement for the political power relations it was designed to regulate. An opinion on this question meets with one general and several specific practical difficulties. In principle, an opinion is complicated, and made almost impossible, by the fact that the text of a constitution is not yet a constitution but merely the program for a constitution. A constitution in the full meaning of the term is only the functioning norm program—the “constitution in the working,” as Anglo-Saxon terminology has it. Now, first, the time in which the 1934 constitution has served as the order of the Austrian state reality is still much too short to enable us to get a clear picture of the kind of order that has been realized. And, second, a significant part of the constitution—precisely the part that would be crucial to answer the question before us: the setting up of the Federal Cultural Council and the Federal Economic Council—is suspended and replaced by a transitional order. An opinion can therefore apply only to the constitutional program and its value is thus much diminished. Practical problems of evaluation in the individual case result from the fact that, first, great sections of the program itself—that is, the executive federal statutes concerning the institution of the estates and the cultural communities and procedures for delegating representatives—are still unknown. Second, the construction of the authoritarian chamber, to the extent that its program can be seen, does not have a uniform nature and therefore various problems of order, whose mutual interdependence is hard to estimate, run parallel to each other. After clearly pointing out these difficulties and the corresponding questionability of our opinion, the following reflections may be appropriate.

The principal symbol of the legislature is the chambers of the corporative representatives and the group of its delegates in the Bundestag. The basic question whether it was advisable to replace representation of the people with corporative representation must be answered unreservedly in the affirmative: the professional interest groups here being organized into groups have one indisputable advantage over the Austrian political people: they actually exist. Whatever consequences a corporative organization may have, it serves to organize a genuine collective power, while the political people—the precondition for the functioning of a democratic

constitution—was not a collective power. For an opinion on the question of what power position should be granted a corporative body within the state organization, and whether in the instance of the 1934 constitution the right balance has been found, we must refer to the experiences and the judgment based on these experiences of leading scholars. We have an overwhelming amount of experiences, although the idea of the organization of professional interests into estates and the representation of the estates are of very recent date. Nevertheless, representation of professional interests, even though not organized into estates, played a significant part in the national structure even before 1934. What Carl Schmitt has called the pluralistic party state, in which the parliament is composed of representatives of societal interests that are not counterbalanced by any state authority, is also the typical case of the state in which the representation of professional interests is given a political function. One of the reasons for the so-called failure of democracy in Central Europe and in Austria in particular is found not in the nature of democracy—whose existence in Austria we dispute—but precisely in the fact that instead of representation of the people, political power was held by a council of representatives of professional interests—the interests of labor, employees, farmers, industry, the commercial middle class, and the like. We are by no means ignoring the fact that the conflicts among these groups attained their special severity through political ideas of cultural and class struggle, but even taking this factor into account, given our experience, serious concerns remain whether the welfare of the state is in good hands when placed with the representatives of the professional interests. Seipel even believed that interest groups that are also ideological parties present a lesser danger to the nation, since they have comprehensive notions of how the public welfare can best be served, while the dispatching of delegates from the estates would introduce a purely materialistic principle into politics. These fears on Seipel's part seem only too well justified if we summarize the principal points of the demands typically raised by representatives of producers:

1. Monopolization of acquisition opportunities for the respective owners; if the social structure permits, for the sons and sons-in-law of the owners; the most stringent possible impediments to keep outsiders from entering the profession.

2. For this purpose, the establishment of a national work prohibition [*Arbeitsverbot*], which was called for and which is already in place for a large number of occupational fields. It was attained first by labor when employers were forbidden from paying less than a determined minimum wage (not the only but a crucially contributing factor to the extent of unemployment). For the trades, the aim was achieved through the system of concessions and the limitation on admission to membership in the trades [*Gewerbesperren*]. For the liberal professions, quotas in admissions to universities [*numerus clausus*] fulfilled the purpose.

3. Individual retirements with pensions [*Verrentnerung der Einzelexistenz*]*—*in part achieved by monopolizing opportunities for earning and work prohibitions, in part demanded and attained by health and old-age insurance, by government supports, price regulation, protective tariffs for nonviable lines of production and individual enterprises, restrictions on imports, government support of insolvent enterprises, and the like.

4. The large number of further demands that are most seriously damaging to the national welfare, of which we will cite only two: the demand for currency devaluation and the one-sided propaganda for the purchase of domestically manufactured products.

The consequences of such a policy are more or less widespread progressive decrease in the national prosperity, increasing unemployment, and therefore the growth of a stratum of young people who are forced by the government regulations against exercising a profession into a revolutionary position against the existing governmental and social order. It requires no further explanation to prove that the domestic situation of the state and the society here described is not a desirable one.

Within his system of political science Maurice Hauriou addressed in greater detail the question of reshaping parliament into a body representative of occupational interests, and for the same reasons we have just cited, he argued very strongly against such a plan. Because his discussion relates to the details of the French situation, they seem somewhat doctrinaire when phrased as generalities. Nevertheless, they raise several points pertinent to our examination as well. Hauriou's basic thesis concerning the development of the European state notes that it essentially took place in the transition from the political personal associations of the Middle Ages to the territorial administrative organization of the state. The

organization of the people according to territorial districts and their representation through representatives sent from geographic election districts, according to Hauriou, is the foundation of political freedom in the modern state, since only representation structured in this manner can represent the interests genuinely common to all the people of the territory in question. Any personal organization, especially a structure along the lines of occupational interests, however, promotes the interests of the manufacturing sector at the expense of the community as a whole. In Hauriou's view, the result of a personalized representation of interests would inevitably be an increase in the cost of living and thus constitute a threat to political democracy, since this can be realized only if the lowest possible cost of living adds a strong trait of egalitarian democracy to the life of the people. "Il existe un lien entre la protection des consommateurs et la liberté politique, dont la vie chère est l'ennemi" [There exists a link between the protection of consumers and the political liberty whose enemy is expensive life].⁵ The transformation of the parliament into a chamber of representatives of the manufacturing sector would be the end of a regime of political freedom; "une véritable tyrannie politico-économique, la plus redoutable de toutes" [a genuine politico-economic tyranny, the most formidable of all] would be established.

Hauriou's comments, which oppose a syndicalistic chamber, are tied to the French situation in that the danger of which he warns as a future threat was for us a present danger while B-VG of 1920-1929 was in force. Quite aside from the problem of the political people, we no longer had geographic representation of the populace, such as is still a reality in France today; instead, we have lived with precisely that sort of personal group representation that seems so dangerous to Hauriou. The problem of transforming the structure of the chamber in Austria was not—as it is still generally seen by the public in Austria as well as abroad—one of transforming a parliament based on the geographic principle into a body representing occupational interests. Rather, it was that of transforming a representation of occupational interests, equipped with political power and therefore dangerous to the state, into a new representation workable under the conditions prevailing in Austria. *Under the constitution*

5. Hauriou, *Précis*, 558.

of 1920, the Austrian parliament was not a parliament in the Western European, especially the French, sense but precisely an instance of that type of representative council that Hauriou describes as the utmost contrast to representation of the people based on the principle of political freedom. It was what he called "la tyrannie, la plus redoutable de toutes." No one who does not keep in mind this phrase can understand the problem of the Austrian parliament.

The question of how to arrange the relationship of a chamber representing economic interests to the executive, then, is a political problem that must be distinguished very clearly from the question of the composition of the chamber. At the time Grey and Renan made their proposals for reform, these problems were not yet as clearly distinguishable; it still seemed possible to retain the political function of a parliament, even if it took on strong elements of interest representation because, for other reasons, government control of the parliament was still quite strong. In the postwar situation pertaining in Central Europe, when the political organization of the people has completely slipped out of government control, new forms to restore it must be found. The following technical means, in part also considered by Hauriou, are principally involved.

1. One way to limit the danger of interest representation is the organization of the estates themselves. Hauriou's reservations about a parliament of representatives of special interests are based on experience with the freely developed organizations of occupational interests—in France, with the workers' and civil servants' syndicates. The estates, in the sense used in the encyclical, for the most part unite various occupational groups, especially those of employers and workers, who in a system of freely formed interest organizations find themselves in hostile opposition; even if, following the intention stated in the encyclical, the two interest groups are separately represented within the estates, the numerical distribution has shifted nevertheless in such a way that a monopoly of representation on the basis of numerical superiority becomes impossible and excesses in the representation of particular interests are for the most part avoided.

2. Hauriou bases a further reservation on the fact that there is not sufficient contact between the government administrative organization and the syndicates. He points out that the geographic districts whose population forms an electoral body are also administrative districts, and that the local head of the central

administration, the prefect of the department, has a not inconsiderable influence on the course of the election. He believes that it would be impossible to penetrate the syndicates in a similar way with national administrative institutions. "Les deux organisations, n'étant plus en contact continu, en arriveraient très vite à l'antagonisme et à la lutte, ce qui est inadmissible" [The two organizations, no longer in constant contact, would very quickly move toward antagonism and battle, which is inadmissible]. It will be important for the Austrian corporative legislation to bring about a corresponding control of the national administration over the estates. Article 32.2 of the 1934 constitution places the estates under state control. The delegation of representatives to the Federal Economic Council can probably be controlled by the executive through an appropriate implementation of the provisions of article 48.3, according to which only patriotic members are eligible.

3. Hauriou further suggests that in any body representing interests must have a consulting function only and not a decision-making one. This requirement is met by the 1934 constitution, since it organizes the corporative representatives into a consultative chamber and limits the number of corporative representatives in the Bundestag to one-third of the entire membership.⁶

This brings us to the last decisive point for evaluating the construction of chambers in the 1934 constitution. The chamber that has a *votum decisivum* is not a corporative representation but an authoritarian chamber, put together in the manner we have discussed in great detail. In view of its nature, it can seem admissible that a more than merely consultative role is assigned to it when it comes to legislation, and on that basis one can also justify the budget right, which is not entirely without risk. The greatest danger—that because of the budget resolution, the representatives of special interests will enter into compromises by which they grant

6. The opinions of the former constitutional minister [*Verfassungsminister*], President Otto Ender, are fundamentally very close to Hauriou's ideas. He, too, believes that geographic representation is the desirable basic form of representation. In the Austrian case, he notes, the realization of this principle is of special importance, since the provinces are the strongest political force in the state. Therefore corporative representation should be organized in such a way that each province's estates are combined in a provincial chamber and the provincial chamber dispatches representatives to the Federal Economic Council. Since this construction would create difficulties in the provinces for the proportional representation provided by the constitution for the corporative representatives, an adjustment would have to be created for the entire federal territory (President Otto Ender in a verbal communication).

each other excessive special advantages—is in any case averted by limiting the representatives of special interests to one-third of the membership in the decision-making authoritarian chamber. Considering its experimental nature, and in light of the experiences and considerations cited above, the overall construction is at least very prudent and politic.⁷

§7. The Relationship between the Executive and the Provincial Legislative Institutions

The participation of the provincial diets in the provinces' legislative and executive branches presents nothing that differs markedly from the material we have discussed so far in relation to the problem of the authoritarian state. The cooperation of the provincial executive branch and the provincial diets is regulated analogously to the corresponding process in the federal legislation, modified by the necessary reduction and contraction of the legal forms and by inclusion of control through the federal executive. The principal traits of norm formation are the following.

The exclusive right to introduce bills resides with the provincial government. The procedure concerning statutes in the material sense differs, as it does in federal legislation, from the procedure concerning other bills. Since the legislative institution is not subdivided into consultative and decision-making chambers, statutes in the material sense are dealt with by the provincial diet, first in a session where opinions are rendered and then in a decision-making session. The provincial government prescribes time limits for both the gathering of opinions and the arrival at a decision. If the time set for debate is not observed, the head of the provincial government can enforce the provisions contained in the bill by decree. The further proceedings are provided by certification, countersigning, and publication in the provincial law gazette. The bills of the provincial government that do not concern laws in the material sense are dealt with in consultative and decision-making sessions.

The procedure allows for control on the part of the federal executive after the act of decision-making by the provincial diet. As soon as the provincial diet has passed a law, the provincial governor must

7. For this section, see the relevant discussion in Merkl, *Die ständisch-autoritäre Verfassung österreichs*, 79–80, which also relies on Hauriou.

immediately communicate it to the office of the federal chancellor and to the federal ministry whose area of responsibility is affected by the resolution in question. A resolution may be promulgated only when the federal chancellor has given his approval. If the federal chancellor does not refuse his consent within six weeks, he is considered to have approved the law. A procedure of control by the federal executive that is vested with special provisos was created by the federal statute of October 9, 1934, BGBl II, No. 286, for legal resolutions of the provincial diets that concern taxes and loans.

The dangers resulting from placing the provincial budget into the hands of a chamber that, in the case of the provincial diets, must be mainly made up of representatives of economic interests are somewhat mitigated by the veto power vested in the federal chancellor. Deciding control of the provincial budget by the federal executive is further created by the provisions of article 148.7: When in a province the preconditions for maintaining order in the provincial budget are no longer met, and when the provincial diet takes no effective measures to reverse the situation, then the federal president, at the suggestion of the federal government and with its countersignature, will issue emergency legislation in order to bring about the measures that will restore order in the provincial budget. These measures can affect both cuts in expenditures for personnel and supplies in the provincial administration and in the province's system of taxation. The provincial diet may not abolish such a regulation until it has been in effect for a year, and the federal government may assign special commissioners to supervise compliance with such regulations.

Safeguards against the misuse of the budget right by the representatives of economic interests, which are present in the authoritarian chamber in the case of the federal budget due to the minority nature of the corporative representatives, are here presented by the control granted the federal executive concerning provincial budgets.

For the city of Vienna, article 145 stipulates that the corresponding provisions concerning the legislative procedures in the provinces are to be applied accordingly. A significant deviation is found in article 141.2, according to which every law passed by the Vienna city parliament requires the consent of the mayor.



Emergency Powers Granted the Administration and Their Control

§1. Ordinary and Extraordinary Constitution

In its tenth section, entitled "Emergency Powers of the Administration," the 1934 constitution included a kind of extraordinary constitution in the system of the ordinary one. In this arrangement the democratic-authoritarian ambiguity of the constitutional system has found its clearest expression.

The establishment of an emergency constitution alongside the one we have analyzed above and which we will call the ordinary constitution is the expression of political experiences made since the founding of the republic. It seemed advisable to place a second legislative organ alongside the legislative chambers; this additional agency would function whenever for any reason the chamber might fail or operate under such great difficulties that the activity of the government was seriously hindered. As a result of this arrangement, the institutions of the ordinary authoritarian constitution now become open to an interpretation that is hard to reconcile with the authoritarian meaning and that reintroduces the second democratic line of reasoning that we found from the beginning of the constitutional transition in March 1933 running parallel to the authoritarian meaning. By granting the executive special rights of legislation under the title "Emergency Powers of the Administration," the framers of the constitution erect their work on the basis of the parliamentary-democratic idea that the politically normal form of legislation is the form that exists with participation of the quasi-parliamentary, authoritarian council, and that the extraordinary condition of legislation by the executive must be changed back to the ordinary form as soon as possible. According to this

construction, it would be a matter of nothing more than provisions, common in modern constitutions provided with a parliamentary legislative agency, of an executive right to issue decrees in transitional periods when the normal legislative branch is incapable of functioning. In this way, from the standpoint of political ideas, (1) a wealth of power and authentication of a parliamentary nature is attributed to the authoritarian organ of the federal legislature that can hardly be reconciled with its actual nature as an auxiliary organ of legislation; at the same time, (2) by designating the executive as the "administration," it is made subordinate to the legislature—an ideological subordination that agrees neither with the character of the government as the organ entitled to legislative initiative nor with the authentication system of an authoritarian constitution and the work of the executive as state leadership. The position of the executive as the state authority *par excellence* in the authorial [*urheberschaftlich*] sense is once again made anonymous in the administrative style, recognized as typically Austrian, by calling it "administration," an implementing organ of the "laws," which claims a higher function for itself only in an emergency.

In the context of the development of the constitution from March 1933 on, the emergency powers of section 10 represent, however, the remnants of the executive-dictatorial constitution built into the system of the 1934 constitution. The first phase of the dictatorial constitution was the period in which the wartime Enabling Act was in force after the constitutional court's right to review regulations had been abolished: the enabling substance of the law was interpreted so loosely that all state powers, including the power to issue the constitution, were concentrated in the hands of the government. The second phase is the one in which we find ourselves currently, in which the Enabling Act of April 30, 1934, is in force. This act also concentrates all power—including the *pouvoir constituant*—in the hands of the federal government. The validity of the 1934 constitution is determined by this act, and the federal government's right to legislate is parallel to that of the Bundestag. According to §56.3 of the Constitutional Transition Act of 1934, the Enabling Act remains in force until the expiration of the term of office of the Federal Cultural Council and the Federal Economic Council established by §21.1. Though the section concerning the emergency powers of the administration is already in force as well, it has little practical significance as long as the government controls

the broader authorizations. The emergency powers could become relevant in constitutional practice only when the Enabling Act has expired; at that point a third phase would set in, in which the dictatorial powers of the executive would be limited to the authorizations of the tenth section. Today, when not even the ordinary constitution is actualized in full, we cannot yet foresee what significance those authorizations will have in constitutional practice. Furthermore, their function in critical situations is hard to evaluate beforehand because in addition to the authorizations of the tenth section, the Economic Enabling Act may also remain in force, and as we have seen, the possibilities of its interpretation are limitless.¹

§2. The Elements of the Tenth Section Alien to the System

The principal item of the tenth section is the "extraordinary" constitution. But this item is hedged about with a number of provisions whose systematic substance actually should have placed them in the ordinary constitution. We have discussed them already in part; here we will summarize them once more in order to clearly differentiate them from the substance of the principal item.

1. Article 148.6 provides that the Bundestag's right of legislation reverts to the federal president and the federal government if the Bundestag does not meet a deadline. In terms of the system, this stipulation belongs in the context of article 62, which regulates the procedure of legislation in the Bundestag. Other similar rights of reversion are found at the systematically proper place in the context of the ordinary constitution—especially the corresponding rights of the head of provincial government in the case that the provincial diet fails to meet the deadline for passing legislation; these are regulated by article 109.3.

2. The same holds true for the provision of article 148.7, which enables the federal president to take the place of the provincial diet and arrange for measures to restore order to the provincial budget.

1. The framers of the constitution intended to invalidate the wartime Enabling Act, and they believed that they had realized their intention by not having explicitly adopted that act (President Otto Ender, in a personal communication). On this point, see also Adamovich and Fröhlich, note 2 on article 9 of the 1934 constitution, and the note to §17 of the *Verf.-Üb.-Ges.* of 1934.

This provision belongs in the context of the section concerning the provinces' legislatures, specifically in the procedure for "bills of the provincial government that do not pertain to laws in the material sense" according to article 109.6.

3. It is more difficult to determine the systematic position of article 148.5. It authorizes the federal president, on the advice of the federal government, "to issue regulations to delay the new formation of the consultative agencies of the federal legislature as well as the new formation of provincial diets, of municipal diets, and of representative bodies of other autonomous entities, and to extend the term of membership in these organs, if the conditions connected with a new formation would bring about a breakdown of law and order threatening economic life." If the extraordinary conditions continue, the measure may be invoked again, but the term of office of the designated organs may under no circumstances be extended by more than half. The principles of these provisions do not deviate very far from the norms of the "ordinary" constitution. Most particularly—in the area of the federal constitution in the narrower sense—the continuity principle of article 55.1 is not breached. The consultative organs of the federal legislature that can be suspended—the Federal Cultural Council and the Federal Economic Council—continue to function in any case until the day the new representative councils meet. In fact, however, given their position, the possibility of lengthening their term by half represents a far from insignificant deviation from the democratic substance inherent in these institutions. The term of the two consultative chambers is six years; this in itself is already a fairly long time for a representative body intended to be democratic and therefore to be reshaped periodically according to the will of those there represented. An extension of the period to nine years, perhaps against the wishes of those estates and organizations that sent the members to the chambers, deviates considerably from the principle these chambers embody. The extraordinary nature of the measure is further made clear by the fact that a time period of three years is calculated for the extraordinary conditions that activate it. A national situation in which for three years the new formation of the two representative councils can lead to a "breakdown of law and order threatening the economic life of the nation" must surely be called extraordinary. The provision of article 148.5 stands at the borderline; if the intention was to incorporate it in the "ordinary"

constitutional system, it belongs in the context of the provision of article 55.1 concerning the term of office of the Federal Cultural Council and the Federal Economic Council and the corresponding provisions concerning the term of the other named representative bodies. If the intention was to consider it "extraordinary," it would seem to belong in the context of an extraordinary constitution, such as the principal items of the tenth section, to which we now turn.

§3. The Substance of the Emergency Powers

The principal item of the "extraordinary" constitution is made up of articles 147 and 148.1-4. Certain difficulties arise in interpreting them because ambiguity in the objectives has affected the formulation and the relationship of these articles to the rest of the constitution. The essential substance of the provisions aims at transferring—given some, more specifically detailed, situations—lesser or greater legislative powers under the designation of authority to issue emergency regulations from the normal legislative agency, the Bundestag in combination with the government, to other agencies—more specifically, the authorization to legislate according to article 147 to the federal government and supplementary authorization in article 148 to the federal president, who may, on the advice of the federal government, issue regulations.

Activating the authorization to issue regulations stated in article 147, the so-called Emergency Powers of the Federal Government, is tied to the emergence of a particular situation. The situation consists of the following:

1. The immediate passage of measures must be necessary;
2. the constitution provides that these measures must be passed by the Bundestag;
3. in the existing situation immediate passage by the Bundestag cannot be expected;
4. the measures must be necessary "to maintain public safety and order, to preserve important economic interests of the population or the state finances of the federation, most particularly to safeguard the federal budget."

When this situation appears, the federal government is empowered to take the necessary measures through regulations designated (article 147.4) as "emergency regulations of the federal government."

The authority to issue regulations is more closely defined by the following details:

1. The measures must be "necessary" to relieve the state of emergency;
2. such a regulation may also entrust special federal agencies with implementing federal matters that under other circumstances are assigned to other agencies; that is, extraordinary administrative agencies may also appear alongside the extraordinary legislative agencies;
3. the regulations must not contain any amendments to constitutional provisions;
4. the regulation must not implement a bill rejected by the Bundestag, unless the federal president orders the Federal Cultural Council and the Federal Economic Council dissolved.

The authorization to issue resolutions according to article 148, the so-called Emergency Powers of the Federal President, includes the federal president's right to issue regulations on the advice of the federal government. This authorization is activated when the following situation exists:

1. the immediate passage of measures must be necessary;
2. the measures must, according to the constitution, require passage by the Bundestag;
3. in the existing situation immediate passage by the Bundestag cannot be expected;
4. an emergency must exist that is an immediate threat to the state or one of its parts.

When such a situation arises, the federal president is empowered, on the advice of the federal government, to take the necessary measures by provisional regulations altering the laws; these must be called "Emergency Regulations of the Federal President" (article 148.3). The authority to issue regulations is delimited more specifically by the following provisions:

1. The measures must be "necessary" to relieve the state of emergency;
2. the measures must not fall into the area of the federal government's authority to issue regulations according to article 147;
3. the regulations may also amend individual constitutional provisions, but they cannot make alterations that represent a total revision of the constitution. Further, these regulations must not affect the form of the state nor contain provisions that touch on

the existence of the federal court and its authority to review laws and regulations or hinder it in this oversight, nor issue regulations that aim at a revision of legal judgments;

4. the regulation must not implement a bill rejected by the Bundestag, unless the federal president orders the Federal Cultural Council and the Federal Economic Council dissolved.

§4. Checks on the Emergency Regulations

The measures taken by the federal government and the federal president through emergency regulations are basically subject to three supervisory procedures: (1) a check by the Bundestag, to which the emergency regulations must be reported, according to articles 147.5 and 148.4; (2) a check by the federal court acting as a supervisory court for regulations, according to article 169; and (3) a check by activating the responsibility of the federal government and the federal president before the federal court acting as a national court, according to article 173.

The establishment of supervisory procedures raises a fundamental problem of the constitutional theory of the authoritarian state. By *authoritarian state* we mean an institution whose highest organ, state leadership, is legitimated by its authorial endeavors in establishing, preserving, and developing the state. The institution of the authoritarian state could, true to type, be supplemented through the participation of authorities on lower levels of the social structure in the formation of the national will. In this sense the 1934 constitution must be classified as an authoritarian constitution, since it establishes the state as an institution headed by the authorially legitimated executive organs, while authoritarian chambers participate in the formation of the national will as auxiliary legislative and executive organs. In the systematics of the constitution, the entire authoritarian system and many of its separate institutions were steeped in elements related to democracy and the rule of law. These elements were so prominent that the authorial power was rendered anonymous. But camouflaging the intent in this way—the reasons for which we have discussed in detail—was nothing more than camouflage pure and simple, complicating the legitimation system but capable of affecting the real power relations between the organs of the state institution only slightly or not at all. With the establishment of checks, however, the camouflaging formulaic

language takes on a questionable life of its own, threatening the fundamental features of the authoritarian state institution. For the state leadership's highest normating acts are thus subjected to legal and also political control by other authorities—the authoritarian chamber and the federal court. It would have been more in keeping with an authoritarian constitution to establish a specific authoritarian legal rule [*Rechtssatzform*] for acts of state leadership in emergency situations as listed in articles 147 and 148—a rule that would be distinguished clearly from the laws and from regulations issued on the basis of laws already in its name, and which might perhaps be called a patent or decree. Such a patent or decree would have to be a legal form in which—in an emergency situation—the executive could establish general or specific norms (laws in the material sense or measures) without the participation or subsequent control by other agencies. Such acts would also be legitimated by the authority of the executive in the authorial sense. A legal formulation of this kind was not created; instead, the emergency regulation, in analogy to the regulations in a constitutional and parliamentary state, was instituted. The result, especially because of the control given to the federal court, is a not inconsiderable interference with the authoritarian system.

§5. Checks by the Bundestag

The obligation of a government to submit emergency regulations for approval to the ordinary legislature is an old institution of constitutional documents. With these emergency regulations the administrative agency that issues them has encroached on an authority reserved for the regular legislature. And the legal act created by this encroachment must be introduced into the system of the legislative acts that are seen as "regular" from the standpoint of constitutional policy by obtaining retroactive approval from the statutory legislature. Should that legislature refuse its approval, the emergency regulation must be repealed. The typical structure is exemplified in §14 of the Basic Law of December 21, 1867, concerning the Reich representative body. The statutory constitutional legislative organ was the Reich Council, in conjunction with the emperor. Only when the necessity arose to issue regulations that according to the constitution required the consent of the Reich Council at a time when that body was not in session was legislative

power transferred to a limited extent to the monarch in conjunction with the full body of ministers. The regulations based on this right had provisional force of law, which expired if the government did not submit the regulation to the Reich Council next to convene after the proclamation; the regulation had to be submitted for approval within four weeks after the council began convening. The regulation also no longer had force of law if it was not approved by one of the two houses of the Reich Council.

The constitution of the 1920 republic does not deal with problems of this sort because the constitutional substance of the national structure is strongly suppressed. If we were to characterize the form of the republic, which is not easily defined, in terms of the aspect essential to our study, it might perhaps be called a parliamentary dictatorship, softened by party pluralism.

Only the constitutional amendment of 1929 again took a step in the direction of the constitutional state, by providing the president with greater powers, in particular granting him the right—albeit a limited one—to issue emergency regulations in case urgent measures that would, according to the constitution, fall within the sphere of the National Council had to be decreed at a time when the Council was not in session (article 18.3–5 of the amended constitution). The federal government was obligated to submit the emergency measures to the National Council without delay; the Council had to be convened within a week and was obliged to pass a law equivalent to the regulation or to demand that the government invalidate the regulation at once. The extraordinary legislature then had far less scope than it had in the constitutional monarchy.

From the point of view of political dynamics, the 1920 constitution is furthest removed from the absolutism of the executive; the parliament as a political power was on the attack and on the rise. After 1929 the direction of the power struggle between executive and representation of people has been turning around, so that the position of the president of 1929—although his power cannot even remotely be compared with that of the constitutional monarch—is nevertheless symptomatically to be evaluated quite differently because in the constitutional monarchy the power of the emperor and the government is put on the defensive by the democratic idea, while now the legislature must be on the defensive and the power of the executive is growing. The authoritarian constitution of 1934 goes far beyond the restoration of the classical constitutional

distribution of power, and the political significance of the obligation to submit bills and, correspondingly, the legal form is significantly altered.

Most importantly, the right to issue emergency regulations prescribed in articles 147 and 148 is not intended as provisional legislation for times when the Bundestag is not in session. Even if the Bundestag is convened, the federal government and the federal president can issue emergency regulations if immediate passage is not to be expected under the given conditions. It is difficult to get a clear idea of these "given conditions." The process of legislating in the consultative chambers and in the Bundestag is extraordinarily simple; furthermore, it is limited to a particular deadline, which the government is empowered to set as short as it pleases. Therefore only two cases are imaginable that could prevent immediate passage of a resolution: if severe disturbances of law and order make it technically impossible for the Bundestag to convene, or if in spite of the safeguards built into the constitution an obstructive Bundestag systematically votes down bills submitted by the federal government. Articles 147 and 148 do not mention the kinds of obstacles, so that the criteria for deciding that an emergency situation exists are first of all the expectations of the federal government and the federal president.

According to this enormously far-reaching expectation, control by the Bundestag is also different from that in the constitutional state. Though the federal government's as well as the federal president's emergency regulations must be communicated to the Bundestag without delay, the changed position of the executive in the authoritarian state is evident in the fact that the Bundestag does not have the right to approve the regulations but merely the right to call for their repeal. Thus the act of regulation is not, as it is in the typically constitutional process, reintegrated as an act "encroaching" on the regular form of legislation by virtue of consent according to §14 of the Basic Law of 1867 or the resolution of a substitute law [*Ersatzgesetz*] according to article 18.4 of 1929. Rather, it appears as a politically and legally autonomous act. The independent position of the act is further emphasized by the fact that the Bundestag can demand repeal of the regulation only if half the members are present and with a two-thirds vote—that is, only under the unfavorable conditions provided for the amendment of constitutional provisions. In case the federal government does

not communicate the regulation without delay, no deadline is set at which the regulation would lose force of law, like §14, which set a time limit of four weeks after the convening of the Reich Council.²

A general limitation for time during which emergency regulations remain in force is contained in article 147.6. According to this provision, the regulations become null and void within three years at the latest. They may, however, be reissued if the legal preconditions for promulgating them exist. This provision may be the clearest indication that the right to issue emergency regulations represents a second constitution running parallel to the ordinary one. If "conditions" "exist" by which the passing of a resolution by the Bundestag cannot be expected to occur for three years and for some arbitrary period beyond that, the social and political situation on which the ordinary constitution is based surely has suffered such an alteration that there is ample justification to speak of the existence of a new constitution. The constitution provides a special procedure, beyond the general procedure of constitutional changes through constitutional statutes, a special procedure by which the authoritarian state can be transformed into a dictatorship of the federal president and the federal government.

The extent of constitutional amendments is determined by the narrower or wider interpretation of article 148.2. Though, according to this paragraph, the federal president's emergency regulations may alter some specific constitutional provisions, they may not bring about a total revision of the constitution; specifically, they may neither alter the form of the state nor affect the existence of the federal court and its authority to rule on the validity of laws and regulations. The extent of the authorization to change constitutional provisions depends on the question of what constitutes a total revision of the constitution and what form of state Austria possesses. Up to this time, Austrian jurisprudence interpreted the term *total revision* when it refers to the constitution of the republic

2. Similarly, there is no legal guarantee that in case the Bundestag votes to terminate, the government will invalidate the emergency regulation. In §14 the responsibility of the entire body of ministers was explicitly established for immediately invalidating any regulations promulgated on its basis as soon as they have lost their provisional legality. However, the absence of an explicitly formulated sanction does not mean that it is impossible to bring an indictment pursuant to article 173 because this constitutional provision has been violated.

as a change in the constitution that affected one of its basic political principles, regardless of the amount of constitutional text that is altered. The constitution itself names the corporatist and the federal as structural political principles. Although it is not mentioned in the text of the 1934 constitution, we must surely add the republican principle. Beyond these, opinions concerning the substance of the concept of total revision will differ. As a fourth structural principle of the constitution that of the constitutional state would deserve primary consideration, as it is expressed in the establishment of fundamental rights and the right to liberty, the legitimacy of the administration, the independence of the courts, the establishment of administrative jurisdiction, and the power to rule on the validity of laws and regulations by the federal court.

Concerning this principle of the constitutional state, the emergency powers detailed in article 147.7 explicitly allow the administration to intervene. According to this provision, a federal law has yet to determine the details of preconditions under which the federal government can limit—temporarily and locally, altogether, or in part—the applicability of articles 19 (freedom of the person), 22 (domestic rights), 23 (privacy of correspondence), 24 (right of association and assembly), 26 (freedom of speech), and the extent to which under such conditions restrictive police instructions, even those containing elements that alter the law, may be given in specific areas of the law. Furthermore, article 148.2 specifies that the federal president's emergency regulations may not affect the existence of the federal court and its authorization to rule on the validity of laws and regulations.

Whatever the case, however, the substance of the injunction against changing a constitutional provision becomes questionable wherever the amendment of a constitutional provision would represent a total revision if it were permanent but where the judgment on duration or irrevocability cannot be rendered, especially if the altering act appears as provisional and perhaps limits its own applicability. Thus—to isolate a case pertinent to the question of control under examination—article 148.2 in all probability allows that article 55.2 is amended by the federal president's emergency regulation. This paragraph provides that after the Federal Cultural Council and the Federal Economic Council are dissolved, new appointments are to be made in such a way that the newly appointed representative body can convene no later than one hundred days

after the dissolution. It seems to me absolutely admissible to delay new appointments by an emergency regulation promulgated by the federal president, and possibly to postpone the deadline to an even later date by new acts, although in fact this measure gives the state the form of an administrative dictatorship for an indefinite term. The controlling function of the Bundestag is rendered inoperative for an indefinite period by this simple measure.

§6. Review of Regulations by the Federal Court

Legal control is also in part power control, since every norm of accountability also defines a sphere of influence of the accountable agency; the controlling agency ascertains that the controlled agency does not overstep the sphere of influence that has been defined for its authority. And if it prevails in its acts of control, then it simultaneously keeps the controlled agency within its prescribed bounds, and as an agency of legal control it is also a power factor that places limits on the expansionary drives of the controlled power. Legal control acquires its special political significance as a power control in the area of the highest state agencies, where legal thesis and power thesis merge. The legal control of one agency over another also means, if it is effective, a power shift in favor of the controlling organ, or it at least presumes an authority that can compete with the authority of the controlled agency. The control relations in the constitutional sphere must be seen as power relations, and the legal formulations, in the sense that they are expressions of power relations, must be examined for their appropriateness in expressing the intended power relations. The federal government's obligation to submit the emergency regulations to the Bundestag alone resulted in a vacillation in style among constitutional, authoritarian, and dictatorial forms. What was constitutional was the obligation to submit the regulations without further differentiation; the provision that the Bundestag had only a right of refusal, under aggravated circumstances, rather than a right of approval, is authoritarian; the dictatorial elements are the provisions concerning the term for which the emergency regulations have force of law and the possibility of eliminating the Bundestag as the controlling organ for an indefinite period of time.

An analysis of the review of regulations by the federal court may provide a key to this peculiar mixture of styles. The constitution

of the monarchy recognized the court's right to rule on regulations in article 7.2 of the Basic Law of December 21, 1867. However, according to the dominant interpretation of §14 of the Basic Law concerning Reich representation, this right does not extend to regulations issued on the basis of this paragraph that have force of law only for a limited time. In §10 of the Basic Law, which deals with judicial power, of November 22, 1918, the republic first expanded the right to review regulations to regulations of *every* kind. The federal constitution of 1920 concentrated the right to review regulations in the newly established constitutional court and required the courts to apply to the constitutional court for rulings on the legality of a regulation if the court was hesitant to apply the regulation on the grounds that it might be illegal (article 89). A corresponding provision was incorporated into the constitution of 1934 in article 104.3.

The right to review regulations in this form is a constitutional provision in the sense that the legality of the regulatory acts is placed under the control of independent courts. Constitutionalism, which is expressed on the legal level by linking the laws with the consent of the parliament, continues on the regulatory level through judicial control and is completed on the level of separate administrative acts by the fact that they are subject to control by an independent administrative court. A judicial review of the laws for their constitutionality would not be in keeping with the political principle of constitutionalism because the political powers—the Kaiser and the people—would thus be placed under the control of a third power. The case for the imperial regulation on the basis of §14 was dubious. In the political system of the constitutional monarchy it was neither a law that came about through the cooperation of *both* powers active in establishing a state, nor was it a regulation in the sense of a general norm, issued by an administrative agency as an agency of a politically subordinate rank. The name "Regulation with provisional force of law [*Gesetzkraft*]" expresses the intermediate position of this legal formulation. In technical legal terms, a specific expression to designate this unique legal formation was lacking, and the lack of such an expression and its replacement with a compromise designation resulted in attempts to interpret this legal formulation either as a law or as a regulation and led to a lack of attempts to elaborate the necessary form for this unique type of act in all its consequences.

The constitution of the republic of 1920 simplified the situation by treating everything called a regulation the same way, whether the regulation was issued by the highest administrative agency or by a subordinate administrative organ. The political problems were largely neglected, and the interpretation of the legal formulation as the manifestation of a power position was deliberately ideologically repressed in constitutional theory. Kelsen's commentary on the right to review regulations notes "that the demand that the regulations be legal represents primarily a constitutional interest." The "constitutional interest" takes the place of construction in the sense of political principles of constitutional structure. The legal formulation and its elaboration is made anonymous and depoliticized in favor of treating the problems in a judicial form, but here again the judiciary is not incorporated as a political power, as for example in the constitution of the United States, but it is thought of as a nonpolitical authority that has no other job than to coordinate the various levels of norms. The 1920 constitution even went so far as to submit the constitutionality of the laws to the adjudication of the constitutional court—that is, to place the highest political authority of the state under control, without seeing a political problem in this procedure.

The condition of a juristic system of concepts that can use only the expressions *law* and *regulation* to designate the general norm on the one hand and the "constitutional ideology" that was elaborated during the first years of the republic on the other may serve essentially to explain also those traits in the construction of the 1934 constitution that distort the importance of the political significance [*Ausdruckswerte*] of the legal formulation and make it seem inconsequential.

The emergency regulations of the federal president and the federal government are not regulations in the sense of those general norms that are established by administrative agencies as state agencies of subordinate political standing. In the authoritarian state they are general norms that emanate from the dominant political power of the state. And it seems to us, as we have already indicated above, that calling section 10 "Emergency Powers of the Administration" contradicts the style of the authoritarian state, since, from a political point of view, the federal president and the federal government are not agencies of the administration but are the

state leadership. This is a category that cannot be grasped by the antithesis of legislature-executive, and the term *regulation*, which today derives its meaning from the antithesis of law-regulation, is not appropriate to its acts.

It would have been more consistent for an authoritarian state construction to exclude the emergency regulations from review by the courts and to give them at least equal status with the laws. It might even be worth considering whether these regulations, which are equivalent to constitutional laws as far as the Bundestag is concerned, should not also have this standing in relation to the federal court, so that logically the emergency regulations would also remain unaffected by the provisions concerning the review of laws for their constitutionality.

In fact, however, concerning the question of court review, the constitution equates the emergency regulations with the ordinary regulations. The provision in article 148.2 to the effect that the federal president's emergency regulations do not affect the federal court's authority to review laws and regulations and may not hinder it in this review can only be interpreted to mean that these regulations themselves are to remain subject to review by the federal court. Thus the emergency regulation is a legal formulation *sui generis* in relation to the Bundestag, as expressed in the fact that it is not subject to its approval and that a demand for its repeal may be made only under the same conditions as those prescribed for a constitutional amendment. In regard to the federal court, however, the emergency regulation is not different than a regulation issued by a subordinate administrative office.

It may seem doubtful whether the writers of the constitution were aware of the scope of the construction they chose. Above we analyzed the factual conditions for activating the right to issue emergency regulations and the substance of the authorization and looked at their elements. Without exception, all are subject to the unrestricted right of review of the federal court. We can divide the elements into two groups of unequal political relevance. The first group, of lesser political relevance, includes those provisions that negatively circumscribe the substance of the regulation, such as the provision that an emergency regulation of the federal government or the federal president may not have for its content a bill rejected by the Bundestag (unless, that is, the Federal Cultural Council and

the Federal Economic Council have been dissolved by the federal president), or that the federal government's emergency regulation may not alter any constitutional provisions, or that the federal president's emergency regulation must observe certain restrictions even though they may alter constitutional provisions. Given these provisions, the federal court has relatively small scope for its interpretation, since the conditions in question are relatively clearly and exactly circumscribed. When the question of a total revision of the constitution arises, however, this relatively narrow scope does expand into a considerable breadth of potentially divergent opinions. But no matter how limited the scope of interpretation, here, too, the factor of political control is inherent in judicial control.

The other group of elements includes the extremely vague indications on the state of emergency itself and the means to remedy it. Here there is a boundless variety of opinions on the questions of when an immediate resolution by the Bundestag cannot be expected; when public safety and order, the economic interests of the population, the state or one of its elements is imperiled; and finally, whether the measures taken are "necessary" to remedy the state of emergency. These questions, too, are subject to review by the federal court. Article 147.6 even specifically provides that after three years the regulation may be newly issued "if the legal preconditions for its issuance exist"; thus, potentially the federal court must also review whether the "legal preconditions"—that is, emergency conditions as mentioned in articles 147.1 and 148.1—do in fact exist. But this means that the eminently political decision concerning the existence of a state of emergency is granted to the state leadership only provisionally and submitted to the federal court for a definitive ruling. The federal court is made the politically decisive authority in the question of a national state of emergency. There may be some question whether the framers of the constitution did in fact intend to empower the federal court—which, by its composition, is little suited to such a task—to arrive at decisions concerning a national state of emergency and the establishment of a provisional dictatorship of state leadership. A difference of opinion between the federal court and the state leadership in this question can only, as occurred in previous instances of this kind, end in compromising the authority of the highest court in the land. The stylistic incongruity of the construction must most probably be

explained by the continuation of the constitutional ideology of 1920 and the legal terminology constructed adequately in that sense.³

§7. Control Through Accountability of the Federal President and the Federal Government as Provided in Article 173

The emergency regulations are subject to a third control by the provisions concerning the accountability of the federal government and the federal president. According to article 147.1, the federal government can, "on its own responsibility," take the necessary measures through provisional regulations that alter the law. According to article 148.1, the federal president can issue his emergency regulations on the advice of the federal government on his and its responsibility. The constitutional accountability, according to article 173, is enforced by bringing a charge before the federal court. An indictment of members of the federal government and the agencies placed on an equal footing with it in the matter of accountability can occur when the law has been violated and is brought before the court upon a resolution of the Bundestag (article 173.2a). The federal court in its sentencing must find for loss of office, and under particularly aggravating circumstances for temporary loss of political rights. In the case of minor violations of the law, the federal court can also limit its action to finding that the law has been violated.

In technical legal terms, the provisions concerning the institution of ministerial accountability and the authority of the federal court as a national court are not elaborated very clearly in the 1934 constitution. Clarity is lacking in regard to the accountability of the federal president. The constitution of the republic explicitly established the accountability of the federal president in article 68, even naming the authority to whom the federal president was accountable: the Federal Assembly [*Bundesversammlung*]. This construction of accountability fitted well with the system of the constitution, since according to the 1920 constitution,

3. It would be a solution of the worst difficulties if the federal court were to treat the question of a state of emergency as a question of executive discretion, which is outside the scope of the court's review.

the federal assembly elected the federal president, and he was accountable for his actions to it as the authorial agency. The parallel construction was applied to other relationships of accountability: the federal government was accountable to the National Council, which had elected it; the provincial government was accountable to the provincial diet, which had elected it. Article 142 encompassed the three constructions by establishing the constitutional court as the authority with which the federal assembly could lodge a complaint against the federal president for violation of the constitution, where the national council could bring indictments against the members of the federal government and other agencies of equal accountability for violation of the law, the provincial diet could file claims against the members of the provincial government and other agencies of equal accountability for violation of the law.

The clarity of the parallel construction was already not as transparent anymore in the constitutional amendment of 1929. Article 142, which established the jurisdiction of the constitutional court, did not change any of the items here in question. But the legal responsibilities, of which the 1920 constitution considered the court the crowning culmination, were changed by the amendment. The federal president was no longer elected by the federal assembly but, according to article 60.1, by the federal citizenry. Nevertheless, accountability to the federal assembly was preserved in article 68. The government was no longer elected by the National Council but, as provided in article 70, appointed by the federal president; nevertheless, even in this case accountability to the National Council was preserved. Thus the election of the provincial government by the provincial diets and the corresponding accountability to the provincial diet was all that remained of the earlier construction.

The 1934 constitution gave even vaguer shape to the construction—so vague that we must ask whether the present construction was actually intended by the framers of the constitution or whether its form is the result of a mistake. First, as far as the federal president is concerned, his position is defined along the lines of that of a constitutional monarch. According to article 80.2, validity of the federal president's acts, unless otherwise stipulated by the constitution, depend on the countersignature of the federal chancellor or the responsible federal minister who accepts accountability by countersigning. In line with this relief of the federal president by the members of the federal government, article 173 also does not

contain any provisions concerning accountability of the federal president that could be enforced by filing a complaint with the federal court. Instead, it contains merely the stipulations concerning charges against members of the federal government and the provincial governments. The provisions of article 148, according to which the federal president's emergency regulations are issued on the advice of the federal government, with accountability shared between the former and latter, represent a clear contradiction to this constitutional construction. We may perhaps assume that this formulation, which appears in paragraphs 1, 5, and 6 of article 148, was adopted from article 18.3 of the constitution in the amended form of 1929 and was not reconciled with the remaining construction of the federal president's position. It would therefore follow that the federal president is not accountable according to the provisions of the constitution. And even if we were inclined to assume that the wording of article 148 established accountability on the part of the federal president, this could not be enforced because the constitution contains no provisions concerning the procedure that would put it in force.⁴

The question of the federal government's responsibility for the emergency measures issued by it alone or in conjunction with the federal president cannot be easily solved in the authoritarian state by technical legal means. Once again, the difficulties must be sought in the fact that both the institution and the conceptual apparatus that serves the establishment of the institution arise from the

4. It is conceivable that one could attempt an interpretation arguing that article 173 is intended to include the federal president's accountability when paragraph 2a provides that an accusation can be lodged against members of the federal government and other agencies on the same level in the matter of accountability for violation of the law. Such an interpretation seems to me untenable, since the constitution does not leave the question of what other state agencies are on an equal level with members of the federal government in the matter of accountability open to interpretation based on the overall structure of the constitution, but instead specifies these agencies. Those placed on a par are: the representative of a federal minister, according to article 85.1; the president of the Audit Office, according to article 151.1; his deputy, according to article 152.2. The same construction was chosen for parity of accountability of state agencies with the members of the provincial governments, according to article 173.2b. Those placed on a par are: the president of the Audit Office, according to article 151.1, and his deputy, according to article 152.2. In view of these specifications, consistently fixed, it must seem inadmissible to read the wording of article 148 as giving the highest agency of the federation accountability in contradiction to article 80.2.

To supplement this discussion on the federal president's accountability, see above, Chapter 8, §4.

constitutional and parliamentary constitutional situation. Article 173.2a holds the members of the federal government responsible for violations of the law. The provision was taken from article 142 of the 1920 and 1929 constitutions, where it had been included as a development and variation of the institution of the responsibility of ministers for the kingdoms and territories represented in the Reich Council, as it was formulated in the law of July 25, 1867. This transformation is most evident in the legal formulations in which the law was expressed. According to the 1867 law, the members of the ministerial council could be held responsible by the Reich Council for all actions and omissions occurring within their area of competence that intentionally or because of grave negligence violate the constitution of the kingdoms and territories represented in the Reich Council, the provincial regulations of any one of them, or any other law. Most especially, all actions of the highest governing power occurring during the time in office came under this responsibility. This applied particularly to imperial orders issued at the request of the ministers, or countersigned by them, or enacted without any ministerial countersignature. It further applied to directives and instructions issued within their own ministries. Thus the accountability of the ministers also allowed legislative control over the emperor, since the ministers were held accountable for all imperial acts, even those issued without countersignature. Speaking in terms of political dynamics, that was a period of aggressive and expanding legislative power. Though the legitimacy of the governing authority represented by the emperor is stressed by various institutions to be equivalent to that of the Reich Council, the decisive establishment of accountability nevertheless subordinates the governing authority to the parliamentary legislative agencies. In particular, the legislature is not only the guardian of executive legitimacy, as the agency that enforces the laws, but it also watches over the constitutionality of the acts of the government. The emphasis on the *pouvoir constituant* is thus shifted to the side of the parliamentary agencies in the political idea, even if in the legal reality of the monarchy it was exercised by the monarch in the emergency situation.

The constitution of 1920 brings about a significant change in this political situation and its legal expression. The terminology of the 1867 constitution still distinguished very clearly between

constitutional and legislative authority and the forms of the rule of law assigned to each. The ministers were explicitly held accountable for violations of the Reich constitution, the provincial regulations, and other laws. Article 8 of the basic law of December 21, 1867, concerning the exercise of governing and executive power differentiates even more stringently between the “basic laws” and the “general laws.” Thus, even though in the law concerning ministerial accountability the general laws are listed simply as the “other” laws of the Reich and provincial constitutions—so that the legal concept is a generic term, also including the constitution—this legislative language nevertheless resonates with a certain sense for the material difference between constitution and law. The shared generic term is a material legal concept that in itself is further materially differentiated, though its clear materiality is dimmed by the fact that the regulations, which are also laws in the material sense, do not fall under the shared legal concept, so that in this respect the concept of the law becomes formal as the concept of a general norm issued with the participation of parliament.

The constitution of 1920 takes a decisive step toward formalizing the legal concept and thus toward reinterpreting the institution of ministerial accountability. Though article 142.2a also still speaks of a violation of the federal constitution by the federal president, it would not be impossible to understand this to refer to the constitution in the material sense—that is, not to some constitutional act that does not contain material constitutional law. Paragraph 2b, on the other hand, speaks of the ministers’ accountability for violations of the law, and according to the prevailing interpretation, this was to be understood to mean a violation of the formal law, a concept under which constitutional acts as well as ordinary laws were subsumed. The technical legal work on this article, then, was not entirely transparent, since the concept of “federal constitution” under the letter *a* could be interpreted as constitution in the material sense but was probably meant to be read as constitutional act in the formal sense, while “law” under the letter *b* was to be understood as law in the formal sense. Kelsen’s commentary does not clarify this point either, since Kelsen does not analyze the question but limits himself to quoting the text verbatim.

Conversely, the commentary allows a very clear picture of the political intention of article 142. “The institution was transformed

from ministerial accountability to accountability of leading executive agencies." The shift of legitimacy to the parliament, only begun in the 1867 constitution, is now completed in a radical way: the entire executive, even the head of state, is controlled, the only agency of the constitution that is not accountable to another authority is the parliament. The parallel nonaccountability of the emperor in the 1867 constitution and the question of who possesses the *pouvoir constituant*, which was basically left pending in the constitutional monarchy, necessitated a material distinction between basic law and general law as well as one between the "highest governing power" (§3 of the law on ministerial accountability) and actual "enforcement power." With the crucial shift of legitimacy to the parliament, this necessity is obviated. The law becomes formal law, without separation into constitution and general law, and governing power and enforcement power merge in the "executive," which as a whole is placed under the control of the democratically legitimated representative councils.

The writers of the 1934 constitution took over the institution of accountability in the form left over from the 1920 constitution and adapted it to some extent to the authoritarian structural principle of the constitution. In particular, the accountability of the federal president was abolished again. Article 80 gives the federal president a position that closely resembles that of a constitutional monarch in the matter of accountability. Thus, though the terminology does not necessarily reflect it, the distinction was again made between a governing power, removed from the executive, and the other agencies that are charged with implementing the law and that, in one or another form, are accountable for their official acts. For the rest, however, the institution was retained in the form given it by the 1920 constitution, so that, according to article 173.2a, the members of the federal government are accountable for violations of the law—and here, as in the 1920 constitution, "violation of the law" surely means the formal law, including constitutional law and ordinary law. With this, however, the institution of accountability comes into certain difficulties in regard to the meaningful connection to the authoritarian constitutional construction as a whole. Because:

The federal president appoints and dismisses the government, and in connection with the federal president's nonaccountability

according to article 80, a situation is created that resembles the relationship of a ministry to the emperor in the constitutional monarchy. But the position of the federal president itself is by no means endowed with the authority that the hereditary monarch has because of his right to his position. The federal president is elected by the mayors of all municipalities in a secret ballot and from a proposed list of three names submitted by the federal assembly. On the basis of the stipulations of the constitution, however, the federal government can exert such a significant influence in appointing the members of both the consultative and the establishing agencies that the federal president can hardly have any authority independent of the federal government.

The location of authority becomes even clearer if we include in our considerations the history of the constitution since March 7, 1933. While according to the B-VG of 1920 the parliament was, if not the source, nevertheless the embodiment of the *pouvoir constituant*, by which all other powers were legitimated and constitutionally established and controlled, now the federal government possesses the power of constitutional legislation, and the total reorganization of the power system is evident in the concession of power on the part of the federal government to other agencies. These concessions are even construed expressly as revocable, for until the federal cultural council and the federal economic council are assembled as stipulated in the constitution, the federal government has full authority of constitutional and other legislation according to §56.3 of the Constitutional Transition Act of 1934. Until that moment it is up to the government's discretion whether or not to use the Bundestag as a legislative agency; on the basis of article II.2 of the Enabling Act of April 30, 1934, the government can perform the legislative functions by itself.

In this political and constitutional situation, it is perhaps not quite consistent to construe ministerial accountability on the model of the parliamentary state and to charge the Bundestag with enforcement of the accountability. Given the history of how the constitution came about and was structured, the Bundestag cannot have the authority that would make it seem appropriate to subordinate the legislative power to it. In this way the Bundestag would become—at least in the political idea—the fellow representative of this power, which agrees neither with the political situation nor

with the idea of the authoritarian state. In regard to our special inquiry, such a construction is particularly incongruous because the emergency regulations will be issued precisely when the state finds itself in an emergency situation and because the emergency powers themselves allow that an emergency constitution can replace the normal one for an indefinite period of time.



The Directly Democratic and Constitutional Mechanisms

§1. The Plebiscite or Referendum

In conclusion we must examine the mechanisms of the constitution of 1934 that are not direct elements of the authoritarian state construction and therefore do not in themselves fall into the substantive area of this study, though they do touch on the authoritarian system of legitimation in certain essential points. To complete the picture, we must therefore at least briefly indicate those points, even if we do not discuss these mechanisms themselves in detail. One of these mechanisms is the plebiscite, or referendum.

A direct democratic mechanism, such as the plebiscite, is capable of disrupting the system of the authoritarian state. Participation by the people in the formation of the national will goes beyond the *consentement coutumier* to the control of state leadership; it could form the point of departure for legitimizing political power through the legally expressed will of the people. The constitution of 1934 guards against this danger and arranges the institution of the plebiscite in such a way that it is meaningfully incorporated into the system of the authoritarian state while still allowing the government the possibility under certain circumstances to make visible its foundation on the *consentement coutumier* and to make it legally concrete by the action of a mass vote. Most important, there is only a plebiscite but no provisions for a petition for a plebiscite. The enfranchised voters cannot unite and petition on their own initiative. Further, the instrument of the plebiscite is not made available to the authoritarian chamber (as it was made available to the National Council by the B-VG); it is reserved exclusively for use by the federal government. The people as an agency called

upon to participate in the formation of the national will finds itself in a situation similar to that of the authoritarian chamber itself; it can act only as an auxiliary organ; the government retains the initiative.

A plebiscite takes place when the federal government decides to submit to the federal electorate's decision specific proposals and questions, and when the federal president has ordered a plebiscite. The 1934 constitution (article 65) leaves further details to a federal statute, so that for the present it is still undetermined whether the federal president is also empowered to refuse to order a plebiscite.

There are three cases in which the people can be called upon to render a referendum:

1. The federal government may submit to a plebiscite a draft of a law in the material sense that has been rejected by the Bundestag. If a government bill is rejected, therefore, the right of legislation devolves upon the federal electorate if the federal government so chooses. The federal government may appeal to the people over the will of the authoritarian chamber. This arrangement considerably lowers the significance of the chamber since its situation here is completely different from that of a parliament. While for a parliament ordering a plebiscite opens up the possibility for the parties to influence public opinion by agitation, the authoritarian chamber as such is deprived of such a possibility by the ban on party formation; its only way to influence public opinion is by the delegates' individual effectiveness and the effectiveness of the economic and cultural organizations. The federal government is the only political authority allowed to campaign directly.

2. The position of the citizenry enfranchised to vote as a second auxiliary organ of the federal government, in addition to the authoritarian chamber, is emphasized by the right granted the federal government to present a bill to a popular plebiscite instead of submitting it to the usual procedures in the consultative chambers and in the Bundestag. Thus the federal government is given a third method of federal legislation in addition to the legal formulation of the government law on the basis of the Enabling Act of April 30, 1934, and to the statutes enacted by the Bundestag.

In both the cited situations—a plebiscite on a draft law rejected by the Bundestag and on a bill presented to the people directly—if the voters approve, the bill or the draft must be brought to certification and proclamation at once, without any further procedures.

3. Finally, the federal government may submit a specific question of federal legislation to the voters for a fundamental determination. If the voters approve, the federal government must submit draft laws corresponding to the result of the vote to the normal legislative procedures. If the Bundestag rejects a draft law corresponding to the result of the referendum, the federal government may settle this issue by a regulation reflecting the outcome of the plebiscite.

The overall construction is intended to be in line with the authoritarian state, since the plebiscite is made available to the government and may be invoked independently and possibly against the authoritarian chamber. On the level of the type "authoritarian state," it is set up correctly. In the concrete Austrian constitutional situation, however, similar concerns may be voiced as can be raised against the mechanism of a democratic-parliamentary constitution in general. The party-pluralist period of the Austrian state is still so recent that one can hardly claim that since that time a "people" has emerged as a political power. Though in the authoritarian constitution the greatest evil—the active destruction of the community of the people through the parties—is legally stopped, groupings along party lines seem still so strong that no experiment with a plebiscite is required to prove their existence and thus precisely the nonexistence of a people in the political sense. For the present and the immediate future the mechanism of the plebiscite appears to us difficult to apply because of the nonexistence of the political people that is called upon to render its plebiscite—unless, that is, the positivist concept of people is used as the basis of the interpretation; according to this concept, the people in the political sense is identical with the sum of those citizens enfranchised in accordance with the constitution and the administrative law to be issued.

§2. The Elements of the 1934 Constitution That Embody the Rule of Law

In the construction of the constitutional state, three mechanisms must primarily be seen as conforming to the rule of law: participation of a parliament in legislating, the independence of the courts, and the administration's legality, buttressed by guarantees of judicial control. All three arrangements were based on the idea of the confrontation between the monarch and the people. The constitutional arrangements were to place the power of the monarch

and his administration under the supervision of another political authority, which was legitimated democratically. This aim was technically achieved by allowing the parliament to take part in creating the general norms and by making these norms binding for the executive, the courts, and the administrative agencies.

Politically, these so-called institutions of the rule of law had constitutional significance and of necessity had to change when the constitutional-nationalist power dualism disappeared. In a constitutional state the above-mentioned elements signify an advance of sovereignty of the people over the sovereignty of the monarch; control of the executive ensures that the pact between the principal political powers, which is entered into on the level of the constitution and the laws, is preserved in every legislative act. In a complaint filed against an illegal administrative act, the political disputants standing in the background are the "people," which participates in the legislature through its representatives, and the "monarch" as the head of the administration; each proceeding of this sort is a political one.

The meaning of the situation is radically altered when one of the two parties to the proceedings withdraws. In a republican and extremely parliamentary constitution, such as the Austrian constitution of 1920, the arrangements have a fundamentally different significance. The people is the sovereign, and the parliament is the only legislature. Administrative control no longer means a process involving principal political powers that are legitimated through different sources. Instead, in this constitutional situation, a technical control factor emerges. It becomes evident as the means by which an agency that issues the laws but does not itself implement them may supervise the executive agencies. Accordingly, the distinction, so essential to a constitutional monarchy, between governing power and executive power vanishes; the "government" is politically reduced to an "administration"; it becomes the executive organ of the general norms emanating from the sovereign. The judicial procedure concerning an administrative action is no longer a proceeding between sovereign political parties but a legal procedure against one of the sovereign's hirelings.

In the authoritarian state, finally, the only politically legitimated authority is the "executive," representing the instituted state. The government issues the constitution and the laws, or initiates the legislative process, utilizing for the purpose an auxiliary agency,

the authoritarian chamber; the highest political agency is also the head of the administration. Administrative control cannot be exerted politically over the state leadership, nor can a representative of the sovereign, placed outside the administration, exert it by technical means. True to form, in the authoritarian state even the constitutional mechanisms become instruments of the state leadership as it asserts its will, which is realized on the highest level in the form of laws.

If we consider the functional change of the constitutional arrangements—a change we have just characterized in its most general political outlines—we have no difficulty drawing conclusions regarding the assessment of their integration into the authoritarian system. The constitutional mechanisms are compatible with the structure of the authoritarian state to the extent that they are aimed at the control of the implementation of constitution and laws below the acts of state leadership originating in its *pouvoir constituant*. They are not compatible with the authoritarian system when they go beyond this function and subject the executive, in its character as state leadership, to control of any kind.

The solution to this problem in the 1934 constitution was not entirely felicitous. We have already said all that is necessary about certain essential structural inconsistencies in the previous chapter when we discussed control of the emergency powers. It became apparent that the parliamentary-democratic terminology of the 1934 constitution resulted in mechanisms that were not compatible with the construction of the authoritarian state. Measures of the authoritarian executive in the emergency situation of articles 147 and 148 are not administrative acts but by their very nature acts of the state leadership. They represent a temporary suspension of the ordinary constitution and its replacement with an emergency constitution. We are dealing here with acts of the power that issues constitutional legislation, and these acts cannot be subjected to legal supervision without either gravely undermining the legitimation system of the authoritarian constitution or causing a loss of prestige for the court that decided against the state leadership. Acts of the authoritarian executive in the emergency situation cannot reasonably be subjected to substantive control, any more than can federal constitutional legislation that comes about in ordinary procedures.

The judicial control of the other legislative forms—that is, reviewing the constitutionality of the laws, checking regulations

(with the exception of emergency regulations) for their constitutionality and legality, checking administrative acts for their lawfulness—is politically neutral and offers no contradiction to the authoritarian construction.

Our analysis of constitutional mechanisms was made from the viewpoint of the order of the principal political powers. In doing so, we have omitted one essential element of these arrangements—the liberal element. By “liberal” we mean a metaphysics of the human being and the state according to which the individual, as a metaphysical substance, must also be a power in the state structure, a power that sets absolute limits to the authority of the state. The problems that are raised by the metaphysics of the person and are reflected in the political area in the ideas of liberty and fundamental rights affect the organization of the authoritarian state just as they affect every organization. Their discussion, however, would open up basic questions of philosophy of the state that we do not want to address in a study of the particular problems of the Austrian state.

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Appendix



The Change in the Ideas on Government and Constitution in Austria since 1918*

by
Professor Eric Voegelin

I

Under the aspect of Peaceful Change, Austria offers a curious problem. While other countries are centers of unrest because they have got what they wanted and are trying to keep it against other claimants, or because they have not got what they wanted and are now trying to get it, Austria has been during the greater part of the last two decades a danger-spot of Europe because of its strong inclination towards non-existence.

This curious state of things expressed itself in the Austrian ideas on government and constitution. And the rather remarkable change which has occurred regarding these ideas since the Great War is an excellent indicator of the change of the internal political structure of Austria and the growth of a will to independent political existence.

The Austrian constitutional problem can be put in one sentence: Austria is a nationally uniform state without being a national State.

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The population of the present territory of Austria has never formed in history a political unit. Austria has a long and glorious history, but it is not the history of the present Austria as an independent body politic; it is the history of Austria as part of the medieval Empire or as an integral and dominating part of the old Austrian monarchy. The Germans of Austria have been during their history an Empire-building and colonizing people; Vienna has been, up to the rise of the present Reich, the seat of the only German Great Power. And, when in 1918 the break-up of the old Monarchy ensued, the population on the Austrian territory was "left" as a "residuum." While the other succession States are products of an evolution towards national independence of the population on their territory, the Austrian population was never inspired by a will to independent national existence. Austria, when it was created after the War, had a population, but it did not have a people in the political sense of the word.

By the word *nation* or *people* we mean a social group possessed by the will to common and independent political existence; the two most important criteria for the existence of such a will are (1) a readiness to rank party interests and programs second, leaving the first place for the interests of common national importance; (2) a readiness to defend the common political existence against aggression. Of course, there will always be individuals and groups who do not fall in with this order of values; and the criteria mentioned have, therefore, to be interpreted reasonably as meaning that, at any critical point of time, a sufficiently large part of the community is inspired by such a political will to make the weight of dissenting groups and individuals negligible.

II

When we apply these criteria to the Austrian situation in 1918 and subsequent years, we find that our thesis of the Austrian population not being a people at that time, is correct. In the last weeks of October and the first half of November 1918, the leaders of the parties informed the public frequently in a programmatic manner of their view of the situation and of the steps they had taken in order to create a satisfactory political status for Austria. A first page of these weeks is filled by the endeavors to create a Danubian Federation between the succession States including Austria. This attempt

failing, the idea of the union with Germany, the "Anschluss," came to the foreground. It would, however, be a mistake to interpret this idea, at the time, as the ardent wish of the Austrian people. The pronouncements of the party leaders accompanying the Law of November 12th, which proclaimed the union with the Reich, made it quite clear that this measure had been taken because the more desirable alternative of a Danubian Federation could not be realized. But the policy of joining the German Republic seemed inevitable because all parties agreed in the belief that, for economic reasons, an independent Austria could not exist. The will to non-existence as a political unit was expressed with clearness beyond doubt.

A similar lack of decision characterized the formation of the inner structure of the new State. The conservative parties were much in favor of a monarchy, but they were hampered in pursuing this aim by the resistance of the Socialist party as well as by external force. The Socialist party, itself, had a right wing, represented by the Chancellor, Dr. Renner, who believed that the ideals of 1848 were now realized; and it had a left wing who believed in the dictatorship of the proletariat as the ultimate goal and considered the democratic republic as an interlude and first phase of evolution towards this aim. The democratic, parliamentary, republican constitutional instrument agreed upon by the parties in 1920 was the outcome rather of external necessities than of any positive will of the fathers of the new Austrian constitution.

III

From the beginning, therefore, a discrepancy developed between the idea of government envisaged by the constitutional instrument of 1920 and the constitutional reality of the Austrian republic. The constitutional instrument was intended to create a democratic republic, meaning thereby a republic with a parliament as the representation of the people; the *people* was to be, according to the constitutional instrument, the last source of political power in the republic. Now, as there existed no such thing as an Austrian political people or nation, the parliament soon developed into an assembly of parties, opposed to one another on the cardinal point that the left wing party asserted the ideal of class war, while the several other parties were held together by the firm resolve not to become the victims of the class war waged by the Socialists.

The Austrian population was divided along the party lines in a rather rigid way. The series of general elections proved that the party adherence of the individuals would not be shaken. Austrian politics lacked absolutely the elasticity of Western democracies, which arises from the fact that a sufficient number of citizens are capable of changing the party of their choice, so that the power of the parties can change, and a change of the parties representing the government is possible. The stability of party adherence and the discipline within the parties reached such a stage that a brilliant teacher of public law was of the opinion that the election of single members of parliament was superfluous and that the system would work much more simply when the vote was given for a party only and it was left to the party leaders to compromise on the legislation and other State affairs, every party having in council the weight of the votes received at the last election; the members of parliament, the supposed representatives of the people, being practically of no importance. This real constitution, of course, was incompatible with the ideas of the constitutional instrument, that is: the ideas of a free formation of political opinion, of an election of deputies according to the issues, of a formation of fractions within the parliament, of the free mandate, etc. The constitution in the working proved to be the permanent cleavage of the population into antagonistic stabilized parties, the absolute power of the parties over the members of parliament, the imperative party mandate, etc.

This period of discrepancy between the written and the real constitution of the country was characterized by a peculiar idea of government and constitution. The written constitution was considered as a formal instrument being at the disposition of the parties for the attainment of their private purposes. As the political force envisaged by the constitution, the people did not exist, only a formal adherence to the constitution seemed necessary to the real forces, the parties, and the letter of the constitution was quite unscrupulously abused in open contradiction to its spirit. Especially the anti-democratic parties, in the beginning the Socialist, later on also the National Socialist, considered the rights granted to political activity exclusively as instruments put at their disposition in order to destroy any rudiments of democracy which might exist. The anti-democratic parties created strong organizations with a numerous bureaucracy; they tried to organize their members in a "totalitarian" way by transforming their mental attitude and disposition on

strict party lines and according to their *Weltanschauungen*; they created for that purpose very efficient educational systems; and, last but not least, they organized private armies, which in the case of the Socialist army was bigger and in some respects technically better equipped than the state army. The Socialist army, the so-called "Schutzbund," would have been an even more serious instrument than it actually proved to be in February 1934, but for the questionable qualities of some of its leaders. There had been developing a "state within the State," or, rather, Austria was split up into several state-like personal organizations on the same territory, held together by external pressure under a common "constitution." In 1933 the split-up had gone so far, that as a matter of fact there existed besides the state army a number of party armies who participated in the short civil war of February 1934 and in the years of anti-Austrian warfare of the National Socialist party: on the one side, the socialist Schutzbund and the S.A., on the other side, Heimatschutz (Staremburg-Fey), Ostmärkische Sturmscharen (Dollfuss-Schuschnigg), and others.

This evolution has been favored by a widespread attitude towards the constitution which, to a certain extent, had been a heritage of the old Monarchy. The old Austrian Empire had not been a national State either; and the role of the parties after 1918 was played before the War by the different nationalities within the Empire. A political attitude has been growing since the constitutional era of 1848, which might aptly be called "the administrative style." This is to say, that the living forces of the old Monarchy, the nationalities, were using the constitution in a similar way to the parties in post-war Austria. The constitution was not a living force in itself, but a legal instrument applied by the neutral administration (the Emperor, the Government, Bureaucracy, and Army) and used by the collective forces of the nationalities only for ends which were not intended by the constitution itself. The constitution of the "administrative" style is not the heart of the political life of the people; it is not the symbol of its will to national existence, but rather a colorless set of legal rules used by the political forces living under them. In this situation, a curious idea of "legality" evolves; the groups cherishing it do not intend to live up to the constitution but rather to use the constitution as a technical legal instrument for the realization of their political aims. This idea of "legality" was of considerable importance in the crisis of 1933-34, when the

anti-democratic parties resented bitterly the measures taken by the government to preserve the existence of the State as "illegal," because acute examination of these measures could show that some of them did not comply with every letter of the written constitution. The decisive point of these reproaches, however, was the fact that they were made by the parties whose outspoken programme was the destruction of the constitution by any means suitable for that end. The "idea of legality" of that period may be put in the phrase, that in the opinion of the anti-democratic movements the democrats were under an obligation to cling to the letter of the constitution until the anti-democratic forces were strong enough to do away with it. The rules of the constitution had to be observed, according to this opinion, although the social reality to which they should be applied was lacking. The "democratic" contents of the constitution should be the guiding rule for the government, in spite of the fact that there existed no Austrian *demos*.

IV

The events of 1933-34, and especially the German Revolution, brought about a fundamental change in the Austrian political situation. The problem of the existence of the Republic as a whole as well as that of its organization had been left in suspense up to that date, now events urged a decision. The existence of the State had to be preserved against the National Socialist propaganda for a union with Germany; the inner structure had to be stabilized against the class-war ideology. The two exigencies were met by the authoritarian and the corporative reorganization of the State.

A few weeks after the *Machtergreifung* in the Reich, an incident of parliamentary procedure, which probably would have passed without consequences at any other time, made it possible for the Government to replace parliamentary legislation by delegated legislation of the Government itself. The Constitutional Court was prevented by a technicality from passing judgment on the constitutionality of governmental Orders. By these measures the real constitution of the Republic was transformed from government by parties to the authoritarian government of a single group, whose nucleus consisted of the former Christian Socialist party and the so-called "*Wehrverbände*." The evolution of the constitution was marked by the following dates:

A. Legislative Power

1. March 1933 to April 30th, 1934: legislation of the government by Orders based on a Law of 1917, control by the Constitutional Court made impossible.
2. Since May 1st, 1934: Legislative and Constitutional Power conferred on the Government by the Law of April 30th, 1934, passed by the old Parliament; this Law is still in force and will remain so until the corporative organization of the State is completed.
3. Since November 1934, a supplementary legislative power is given to the new legislative assembly (the Bundestag) organized by the Constitution of May 1st, 1934; this legislative power is to become exclusive when the corporative organization is completed.
4. Power of legislation by governmental orders (*Notverordnungen*) conferred by the new constitution; will become practical only when the legislative power under (2) has come to an end.

B. Authoritarian Political Organization

1. The Patriotic Front as founded by Chancellor Dollfuss in 1933; free political organization to attract the forces in favor of the policy.
2. The First Law on the Patriotic Front, creating a "Corporation of Public Law" with the executive right "to form the political will of the people"; May 1st, 1934.
3. The Second Law on the Patriotic Front making the Federal Chancellor *ex officio* Leader of the Front; May 20th, 1936.

C. The Parties

1. Activities of the Communist Party prohibited by Order of May 26, 1933.
2. Activities of the National Socialist Party prohibited by Order of June 19, 1933.
3. Activities of the Social Democrat Party prohibited by the Orders of February 12 and 16, 1934.
4. Disarmament of members of parties whose activities were prohibited, and of their military organizations. Law of August 31, 1934.

D. The "Wehrverbände"

1. Period of independent organization (Heimatschutz, Ostmärkische Sturmsharen, etc.).
2. Volunteer Guard (Freiwilliges Schutzkorps) organized by the Government in 1933, reorganized in June 1935.
3. Designation of the "Wehrverbände" whose members had the exclusive right to join the Volunteer Guard; June 1935.
4. Creation of a Front Militia, being a military organization of the Patriotic Front; Second Law on the Patriotic Front; June 1936.
5. The Front Militia becomes an auxiliary force of the state executive; June 1936.
6. The members of the Volunteer Guard are taken over to the Front Militia; July 1936.
7. The "Wehrverbände" are dissolved. The Front Militia receives the monopoly of volunteer military organization; the Front Militia has "to continue the tradition" of the Wehrverbände; October 15th, 1936.

E. General Compulsory Service

The Law of April 1st, 1936, and a number of subsequent Orders created the Compulsory Service for all Austrian male citizens from 18-42 years of age.

F. Youth Organization

Creation of the Oesterreichische Jungvolk. Youth-Law of January 1937 on the patriotic education of the youth. Youth meaning boys and girls up to the age of 18. Separate organization of the Catholic Youth.

V

These measures show the reverse development of those of 1918 and the following years. While in the former period a constitution was constructed which lacked in a fundamental respect a basis in political reality, now the political reality develops first, partly in contradiction to the former written constitution, and then the laws are given which fit the new development. A decisive political will

to exist, and to exist in a definite way, is the primary fact which creates the adequate legal instrument to stabilize the new order. The political forces envisaged by the new legislation on matters of constitution are the forces which can be discerned in reality as the decisive forces of the Austrian government, while under the constitution of 1920 the principal political force envisaged by that instrument, the "people," did not exist in any relevant way, and the real political forces, the parties, had no place in the system of the written constitution.

The new infiltration of reality was brought about by events which have already been hinted at. In 1918 there was no good reason for an independent Austrian existence. As an economic unit, the country was cruelly maimed by the dismemberment of the old Monarchy, and the solution of all difficulties seemed to lie in the union with some bigger economic area. The national feeling was equally in favor of a union with the Reich; and the Socialist and Catholic parties did not object to union with a country where the parallel parties exerted such considerable influence as the Social Democrats and the Zentrum in the Reich. After the German Revolution of 1933 the situation had radically changed: only the National Socialist minority was in favor of the *Anschluss*; the Socialist and Catholic parties could not any longer approve this policy after the experience of their sister-parties in the Reich. The two largest parties who commanded together, in the parliament of 1933, 80 percent of the votes had a new and very real interest in the independent existence of Austria. The smooth development of this favorable situation, however, was hampered by the difficulty that the Socialist party was prevented by its class-war ideology, its tradition, its anti-religious cultural ideals, and the accumulation of bitter feeling between the big parties during the years since 1918 from cooperating in the reconstruction of Austria in a satisfactory way—the short civil war of February 1934 exterminated the Socialist party and left the field to the Catholic forces alone.

An entirely new type of political responsibility and morale was growing fast. The inclination towards non-existence was replaced by an Austrian "mission." While up to 1933 the independence was more or less forced upon Austria by the Treaty of St. Germain and the later agreements "obliging" Austria to stay "independent," the independence now had become a necessity in order to pursue the realization of certain political ideals. The National

Socialist *Weltanschauung* with its totalitarian claim proved to be incompatible with the Catholic ideas of personality, society, and humanity. The Austrian tradition of peaceful and tolerant administration acquired a new value when the neighboring Great Power professed adherence to a form of government which demanded the restriction of personal rights in favor of the omnipotence of the community, the *Volk*, and the State. The Chancellor Dollfuss attached particular importance to the "authoritarian" quality of the new government as opposed to the totalitarian ideals. A movement made itself perceptible which endeavored to clarify the particular qualities of the true Austrian (the "Oesterreichische Mensch") as the bearer of the new Austrian mission founded in a century-old tradition. The Austrian German was discovered to belong to that region of Europe which had developed under the influence of Mediterranean culture, while the Reich was said to be dominated by the German type which had not been imbued by the Latin spirit;—Austria was said to be the representative of the German *Romanitas*. And, last but not least, the monarchist movement which had no real meaning during the period when the idea of *Anschluss* was dominating the scene, gained in force, because it offered a reasonable solution for the problem of an Austrian independent political organization and a safeguard against all projects of a "union."

VI

The peculiar meaning of the Austrian idea of authoritarianism cannot be grasped adequately unless it is considered in relation to the idea of corporative organization. The idea of organizing the people on professional lines is an old one in the history of parliamentarism. Since the fifties of the last century programmes have sprung up in the United States (Calhoun), England (Grey), and France (Renan) with the intention of reforming parliament in order to make it technically a working instrument of government under the new conditions of mass-democracy. To avoid domination over groups of important social function, but small in number, by the large masses of petty-bourgeois and industrial workers, parliament should be organized—in the general sense of such reformers—according to professional and other functional groups giving proper weight to each group irrespective of its size; this measure should preserve

the influence of small groups, who, otherwise, would have been annihilated politically by the masses. The "corporative state" is, in this respect, a technical measure to paralyze certain disadvantages of mass-democracy.

Another incentive to corporative ideas comes from the social field. The Marxist ideology of class-war furthered by way of reaction the project of associations comprising industrialists and workers in one social unit. This idea goes back to the end of the last century, and has been fostered in Austria particularly by the Vogelsang group.

A third element may be found in the idea that the "economic interests" should participate in the government of a nation and perhaps replace the "political" representation. This idea has its foundation in an exaggerated opinion of the brain-qualities of economic "leaders" as compared with those of politicians, and more generally in a trend to consider the "specialist" as the proper type of man to handle difficult social problems. The idea expressed itself in the movement of "Economic Councils" which should form part of the governmental organization of a State (German Reich, France). In Austria this movement can be recognized since the constitutional era of 1918 and 1920.

And ultimately, and for Austria very important, the organization of professional corporations corresponds to the Catholic social ideas on the subsidiary function of larger communities. The larger community, the State, should intervene only when the means of smaller social units did not suffice for their ends. The organization of smaller social units with a certain autonomy is one of the postulates of the Encyclical *Quadragesimo Anno* (1931)—which, for the rest, expresses the idea of social pacification and extermination of class-war ideology as well.

All these factual and ideological motives together have been causes of the Austrian corporative organization. A corporative organization of the people, and a representation of the people on the lines of professional and other functional interests has a technical consequence which had not been taken into account by the reformers of the nineteenth century, which, however, has been seen already quite clearly by a statesman like Seipel (and also by French teachers of public law like Hauriou and the Institutional school). A representation of economic and other functional interests can never be a political representation of a people. It is a system of

private interests and not an organization of the *res publica* as a political unit. A representation of interests can work without destroying the State only when a political authority is organized which will paralyze and counterbalance the centrifugal tendencies of private interests and works as the representation of the will of the people as a whole. A corporative representation requires a political authority as its technical counterpart in the governmental organization of a country.

This technical necessity of an authoritarian government seems to develop into the essential contents of Austrian authoritarianism. The problem is perhaps not yet seen quite clearly; at least, the Second Law on the Patriotic Front (May 1936) has still created a Leader's Council, consisting of 40 members, whereof 14 are representatives of the corporations. But it has already been realized in certain governmental circles that the organization of this Council gives rise to misgivings. The Patriotic Front is destined to be the political organization of all citizens and it should, therefore, be organized on the lines of the general political interests of the people and not incorporate representatives of particular economic interests. It will probably, sooner or later, become necessary to clarify the situation and to separate technically the lines of representation necessitated by the corporative organization of the State.

VII

I have given a very general outline, in a wood-cut fashion, of the technical problems of Austrian reorganization. But I hope that the decisive changes in the ideas of government and constitution have become clear, and also their practical import for the problem of Peaceful Change, as far as Austria is concerned. While up to 1933 Austria was "forced" to be "independent," while no political people did exist in a relevant way on the Austrian territory, and, therefore, Austria was a danger-spot in the sense that changes in the map of Europe of tremendous consequences have been imminent because of Austria's will to non-existence, since 1933 the situation has changed considerably. It would be an exaggeration to say that now an Austrian people exist in a most satisfactory way—but certainly it is now in the making. The unpolitical, administrative attitude, and the atmosphere of exploitation by the parties has been dissolved; a consciousness of the political necessities is developing rapidly.

With the parties the private armies have disappeared, and a Front Militia and the General Compulsory Service have taken their place. A youth-organization is developing. And insight into the peculiar political problems of a corporative State is growing. From the point of view of domestic politics a not entirely peaceful but certainly a change has taken place, which is now rapidly making for the consolidation of a political unit. From the point of view of foreign politics, this consolidation removes the danger of the inclination of a State in Central Europe to disappear from the map, with all the consequences which might ensue.

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