Preface to the Second Edition (1934)

The second edition of *Political Theology* remains unchanged. After twelve years, one can judge to what extent this short publication, which appeared in March 1922, has withstood the test of time. The disputes with liberal normativism and its kind of "constitutional state" are repeated verbatim. The few cuts that have been made involve passages that dealt with nonessentials.[1]

What has become clear in recent years are the numerous additional instances to which the idea of political theology is applicable. "Representation" from the fifteenth to the nineteenth century, the seveteenth-century monarchy, which is regarded as the god of baroque philosophy, the "neutral" power of the nineteenth century, "which reigned but did not rule," up to the conceptions of the pure measure and administrative state, "which

1. [Tr.] While it is true that the omissions in no way affect Schmitt's argument, they are interesting from another perspective, namely, the light they cast on Schmitt's relationship with Erich Kaufmann. Why, for example, did Schmitt omit the favorable references to this former friend, who was Jewish, while retaining positive references to the work of other Jews, notably Hans Kelsen?

administers but does not rule," are examples of the fruitfulness of the thought processes of political theology. The major problem concerning the individual stages of the process of secularization—from the theological stage by way of the metaphysical to the ethical and economic stages—was treated in my address "The Age of Neutralization and Depoliticization," delivered in Barcelona in October 1929.[2] Among Protestant theologians, Heinrich Forsthoff and Friedrich Gogarten, in particular, have shown that without a concept of secularization we cannot understand our history of the last centuries. To be sure, Protestant theology presents a different, supposedly unpolitical doctrine, conceiving of God as the "wholly other," just as in political liberalism the state and politics are conceived of as the "wholly other." We have come to recognize that the political is the total, and as a result we know that any decision about whether something is *unpolitical* is always a *political* decision, irrespective of who decides and what reasons are advanced. This also holds for the question whether a particular theology is a political or an unpolitical theology.

I would like to supplement my remarks on Hobbes concerning the two types of juristic thinking found at the end of the second chapter. This is vital because it concerns me professionally as a professor of law. I now distinguish not two but *three* types of legal thinking; in addition to the normativist and the decisionist types there is the institutional one. I have come to this conclusion as a result of discussions of my notion of "institutional guarantees" in German jurisprudence and my own studies of the profound

2. [Tr.] See Carl Schmitt, "Das Zeitalter der Neutralisierung und Entpolitisierung" (1929), in *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles, 1929–1939* (Hamburg, 1940), pp. 120–132.

and meaningful theory of institutions formulated by Maurice Hauriou.

Whereas the pure normativist thinks in terms of impersonal rules, and the decisionist implements the good law of the correctly recognized political situation by means of a personal decision, institutional legal thinking unfolds in institutions and organizations that transcend the personal sphere. And whereas the normativist in his distortion makes of law a mere mode of operation of a state bureaucracy, and the decisionist, focusing on the moment, always runs the risk of missing the stable content inherent in every great political movement, an isolated institutional thinking leads to the pluralism characteristic of a feudal-corporate growth that is devoid of sovereignty. The three spheres and elements of the political unity—state, movement, people[3]—thus may be joined to the three juristic types of thinking in their healthy as well as in their distorted forms. Not resting on natural right or the law of reason, merely attached to factually "valid" norms, the German theory of public law of the Wilhelmine and Weimar periods, with its so-called positivism and normativism, was only a deteriorated and therefore self-contradictory normativism. Blended with a specific kind of positivism, it was merely a degenerate decisionism, blind to the law, clinging to the "normative power of the factual" and not to a genuine decision. This formless mixture, unsuitable for any structure, was no match for any serious problem concerning state and constitution. This last epoch of German public law is characterized by the fact that the answer

3. [Tr.] *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* was Schmitt's first major treatise on the new order. Published in the fall of 1933, it offered an analysis of emerging constitutional realities in which Schmitt attempted to institutionalize a one-party state. See George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936* (Berlin, 1970), pp. 108–118.

to one decisive case has remained outstanding, namely, the Prussian constitutional conflict with Bismarck; as a result we lack answers to all other decisive cases. To evade the necessary decision, German public law coined for such cases a saying that backfired and that it still carries as its motto: "Here is where public law stops."

Carl Schmitt
Berlin
November 1933

1

Definition of Sovereignty

Sovereign is he who decides on the exception.[1]

Only this definition can do justice to a borderline concept. Contrary to the imprecise terminology that is found in popular literature, a borderline concept is not a vague concept, but one pertaining to the outermost sphere. This definition of sovereignty must therefore be associated with a borderline case and not with routine. It will soon become clear that the exception is to be understood to refer to a general concept in the theory of the state, and not merely to a construct applied to any emergency decree or state of siege.

The assertion that the exception is truly appropriate for the juristic definition of sovereignty has a systematic, legal-logical

1. [Tr.] In the context of Schmitt's work, a state of exception includes any kind of severe economic or political disturbance that requires the application of extraordinary measures. Whereas an exception presupposes a constitutional order that provides guidelines on how to confront crises in order to reestablish order and stability, a state of emergency need not have an existing order as a reference point because *necessitas non habet legem*. See George Schwab, *The Challenge of the Exception* (Berlin, 1970), pp. 7, 42.

foundation. The decision on the exception is a decision in the true sense of the word. Because a general norm, as represented by an ordinary legal prescription, can never encompass a total exception, the decision that a real exception exists cannot therefore be entirely derived from this norm. When Robert von Mohl[2] said that the test of whether an emergency exists cannot be a juristic one, he assumed that a decision in the legal sense must be derived entirely from the content of a norm. But this is the question. In the general sense in which Mohl articulated his argument, his notion is only an expression of constitutional liberalism and fails to apprehend the independent meaning of the decision.

From a practical or a theoretical perspective, it really does not matter whether an abstract scheme advanced to define sovereignty (namely, that sovereignty is the highest power, not a derived power) is acceptable. About an abstract concept there will in general be no argument, least of all in the history of sovereignty. What is argued about is the concrete application, and that means who decides in a situation of conflict what constitutes the public interest or interest of the state, public safety and order, *le salut public*, and so on. The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law.

It is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty. The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when

2. [Tr.] *Staatsrecht, Völkerrecht und Politik: Monographien*, vol. 2 (Tübingen, 1862), p. 626.

it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. From the liberal constitutional point of view, there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case. If such action is not subject to controls, if it is not hampered in some way by checks and balances, as is the case in a liberal constitution, then it is clear who the sovereign is. He decides whether there is an extreme emergency as well as what must be done to eliminate it. Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety.[3] All tendencies of modern constitutional development point toward eliminating the sovereign in this sense. The ideas of Hugo Krabbe and Hans Kelsen, which will be treated in the following chapter, are in line with this development. But whether the extreme exception can be banished from the world is not a juristic question. Whether one has confidence and hope that it can be eliminated depends on philosophical, especially on philosophical-historical or metaphysical, convictions.

There exist a number of historical presentations that deal with the development of the concept of sovereignty, but they are like textbook compilations of abstract formulas from which definitions of sovereignty can be extracted. Nobody seems to have taken the trouble to scrutinize the often-repeated but completely empty

3. [Tr.] As already noted in the introduction, Schmitt, in his study of dictatorship (*Die Diktatur*), considered the powers of the president to be commissarial in nature, that is, to be understood in the context of article 48. In the case of an exception the president could thus suspend the constitution but not abrogate it—an act characteristic of a sovereign form of dictatorship.

phraseology used to denote the highest power by the famous authors of the concept of sovereignty. That this concept relates to the critical case, the exception, was long ago recognized by Jean Bodin. He stands at the beginning of the modern theory of the state because of his work "Of the True Marks of Sovereignty" (chapter 10 of the first book of the *Republic*) rather than because of his often-cited definition ("sovereignty is the absolute and perpetual power of a republic"). He discussed his concept in the context of many practical examples, and he always returned to the question: To what extent is the sovereign bound to laws, and to what extent is he responsible to the estates? To this last, all-important question he replied that commitments are binding because they rest on natural law; but in emergencies the tie to general natural principles ceases. In general, according to him, the prince is duty bound toward the estates or the people only to the extent of fulfilling his promise in the interest of the people; he is not so bound under conditions of urgent necessity. These are by no means new theses. The decisive point about Bodin's concept is that by referring to the emergency, he reduced his analysis of the relationships between prince and estates to a simple either/or.

This is what is truly impressive in his definition of sovereignty; by considering sovereignty to be indivisible, he finally settled the question of power in the state. His scholarly accomplishment and the basis for his success thus reside in his having incorporated the decision into the concept of sovereignty. Today there is hardly any mention of the concept of sovereignty that does not contain the usual quotation from Bodin. But nowhere does one find cited the core quote from that chapter of the *Republic*. Bodin asked if the commitments of the prince to the estates or the people dissolve

his sovereignty. He answered by referring to the case in which it becomes necessary to violate such commitments, to change laws or to suspend them entirely according to the requirements of a situation, a time, and a people. If in such cases the prince had to consult a senate or the people before he could act, he would have to be prepared to let his subjects dispense with him. Bodin considered this an absurdity because, according to him, the estates were not masters over the laws; they in turn would have to permit their prince to dispense with them. Sovereignty would thus become a play between two parties: Sometimes the people and sometimes the prince would rule, and that would be contrary to all reason and all law. Because the authority to suspend valid law—be it in general or in a specific case—is so much the actual mark of sovereignty, Bodin wanted to derive from this authority all other characteristics (declaring war and making peace, appointing civil servants, right of pardon, final appeal, and so on).

In contrast to traditional presentations, I have shown in my study of dictatorship that even the seventeenth-century authors of natural law understood the question of sovereignty to mean the question of the decision on the exception.[4] This is particularly true of Samuel von Pufendorf. Everyone agrees that whenever antagonisms appear within a state, every party wants the general good—therein resides after all the *bellum omnium contra omnes*. But sovereignty (and thus the state itself) resides in deciding this controversy, that is, in determining definitively what constitutes public order and security, in determining when they are disturbed, and so on. Public order and security manifest themselves very differently in reality, depending on whether a militaristic bu-

4. [Tr.] *Die Diktatur*.

reaucracy, a self-governing body controlled by the spirit of commercialism, or a radical party organization decides when there is order and security and when it is threatened or disturbed. After all, every legal order is based on a decision, and also the concept of the legal order, which is applied as something self-evident, contains within it the contrast of the two distinct elements of the juristic—norm and decision. Like every other order, the legal order rests on a decision and not on a norm.

Whether God alone is sovereign, that is, the one who acts as his acknowledged representative on earth, or the emperor, or prince, or the people, meaning those who identify themselves directly with the people, the question is always aimed at the subject of sovereignty, at the application of the concept to a concrete situation. Ever since the sixteenth century, jurists who discuss the question of sovereignty have derived their ideas from a catalogue of determining, decisive features of sovereignty that can in essence be traced to the points made by Bodin. To possess those powers meant to be sovereign. In the murky legal conditions of the old German Reich the argument on public law ran as follows: Because one of the many indications of sovereignty was undoubtedly present, the other dubious indications also had to be present. The controversy always centered on the question, Who assumes authority concerning those matters for which there are no positive stipulations, for example, a capitulation? In other words, Who is responsible for that for which competence has not been anticipated?

In a more familiar vein it was asked, Who is supposed to have unlimited power? Hence the discussion about the exception, the *extremus necessitatis casus*. This is repeated with the same legal-logical structure in the discussions on the so-called monarchical

principle. Here, too, it is always asked who is entitled to decide those actions for which the constitution makes no provision; that is, who is competent to act when the legal system fails to answer the question of competence. The controversy concerning whether the individual German states were sovereign according to the constitution of 1871 was a matter of minor political significance. Nevertheless, the thrust of that argument can easily be recognized once more. The pivotal point of Max Seydel's attempt to prove that the individual states were sovereign had less to do with the question whether the remaining rights of the individual states were or were not subsumable than with the assertion that the competence of the Reich was circumscribed by the constitution, which in principle meant limited, whereas the competence of the individual states was in principle unlimited.

According to article 48 of the German constitution of 1919, the exception is declared by the president of the Reich but is under the control of parliament, the Reichstag, which can at any time demand its suspension. This provision corresponds to the development and practice of the liberal constitutional state, which attempts to repress the question of sovereignty by a division and mutual control of competences. But only the arrangement of the precondition that governs the invocation of exceptional powers corresponds to the liberal constitutional tendency, not the content of article 48. Article 48 grants unlimited power. If applied without check, it would grant exceptional powers in the same way as article 14 of the [French] Charter of 1815, which made the monarch sovereign. If the individual states no longer have the power to declare the exception, as the prevailing opinion on article 48 contends, then they no longer enjoy the status of states. Article

48 is the actual reference point for answering the question whether the individual German states are states.

If measures undertaken in an exception could be circumscribed by mutual control, by imposing a time limit, or finally, as in the liberal constitutional procedure governing a state of siege, by enumerating extraordinary powers, the question of sovereignty would then be considered less significant but would certainly not be eliminated. A jurisprudence concerned with ordinary day-to-day questions has practically no interest in the concept of sovereignty. Only the recognizable is its normal concern; everything else is a "disturbance." Such a jurisprudence confronts the extreme case disconcertedly, for not every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception. What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes. Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind.

The existence of the state is undoubted proof of its superiority over the validity of the legal norm. The decision frees itself from all normative ties and becomes in the true sense absolute. The state suspends the law in the exception on the basis of its right of self-preservation, as one would say. The two elements of the concept *legal order* are then dissolved into independent notions and thereby testify to their conceptual independence. Unlike the normal situation, when the autonomous moment of the decision recedes to a minimum, the norm is destroyed in the exception. The exception remains, nevertheless, accessible to jurisprudence

because both elements, the norm as well as the decision, remain within the framework of the juristic.

It would be a distortion of the schematic disjunction between sociology and jurisprudence if one were to say that the exception has no juristic significance and is therefore "sociology." The exception is that which cannot be subsumed; it defies general codification, but it simultaneously reveals a specifically juristic element—the decision in absolute purity. The exception appears in its absolute form when a situation in which legal prescriptions can be valid must first be brought about. Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations. The norm requires a homogeneous medium. This effective normal situation is not a mere "superficial presupposition" that a jurist can ignore; that situation belongs precisely to its immanent validity. There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists.

All law is "situational law." The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision. Therein resides the essence of the state's sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide. The exception reveals most clearly the essence of the state's authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law.

The exception was something incommensurable to John Locke's doctrine of the constitutional state and the rationalist

eighteenth century. The vivid awareness of the meaning of the exception that was reflected in the doctrine of natural law of the seventeenth century was soon lost in the eighteenth century, when a relatively lasting order was established. Emergency law was no law at all for Kant. The contemporary theory of the state reveals the interesting spectacle of the two tendencies facing one another, the rationalist tendency, which ignores the emergency, and the natural law tendency, which is interested in the emergency and emanates from an essentially different set of ideas. That a neo-Kantian like Kelsen does not know what to do with the exception is obvious. But it should be of interest to the rationalist that the legal system itself can anticipate the exception and can "suspend itself." That a norm or an order or a point of reference "establishes itself" appears plausible to the exponents of this kind of juristic rationalism. But how the systematic unity and order can suspend itself in a concrete case is difficult to construe, and yet it remains a juristic problem as long as the exception is distinguishable from a juristic chaos, from any kind of anarchy. The tendency of liberal constitutionalism to regulate the exception as precisely as possible means, after all, the attempt to spell out in detail the case in which law suspends itself. From where does the law obtain this force, and how is it logically possible that a norm is valid except for one concrete case that it cannot factually determine in any definitive manner?

It would be consequent rationalism to say that the exception proves nothing and that only the normal can be the object of scientific interest. The exception confounds the unity and order of the rationalist scheme. One encounters not infrequently a similar argument in the positive theory of the state. To the question of how to proceed in the absence of a budget law, Gerhard

Anschütz replied that this was not at all a legal question. "There is not only a gap in the law, that is, in the text of the constitution, but moreover in law as a whole, which can in no way be filled by juristic conceptual operations. Here is where public law stops."[5]

Precisely a philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree. The exception can be more important to it than the rule, not because of a romantic irony for the paradox, but because the seriousness of an insight goes deeper than the clear generalizations inferred from what ordinarily repeats itself. The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.

A Protestant theologian[6] who demonstrated the vital intensity possible in theological reflection in the nineteenth century stated: "The exception explains the general and itself. And if one wants to study the general correctly, one only needs to look around for a true exception. It reveals everything more clearly than does the general. Endless talk about the general becomes boring; there are exceptions. If they cannot be explained, then the general also cannot be explained. The difficulty is usually not noticed because the general is not thought about with passion but with a comfortable superficiality. The exception, on the other hand, thinks the general with intense passion."[7]

5. [Tr.] See Georg Meyer, *Lehrbuch des Deutschen Staatsrechts*, 7th ed., vol. 3, ed. G. Anschütz (Munich and Leipzig, 1919), p. 906.
6. [Tr.] The reference here is to Søren Kierkegaard.
7. [Tr.] The quote is from Kierkegaard's *Repetition*.

3

Political Theology

All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver—but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology. Only by being aware of this analogy can we appreciate the manner in which the philosophical ideas of the state developed in the last centuries.

The idea of the modern constitutional state triumphed together with deism, a theology and metaphysics that banished the miracle from the world. This theology and metaphysics rejected not only the transgression of the laws of nature through an exception brought about by direct intervention, as is found in the idea of a miracle, but also the sovereign's direct intervention in a valid

legal order. The rationalism of the Enlightenment rejected the exception in every form. Conservative authors of the counterrevolution who were theists could thus attempt to support the personal sovereignty of the monarch ideologically, with the aid of analogies from a theistic theology.

I have for a long time referred to the significance of such fundamentally systematic and methodical analogies.[1] A detailed presentation of the meaning of the concept of the miracle in this context will have to be left to another time. What is relevant here is only the extent to which this connection is appropriate for a sociology of juristic concepts. The most interesting political application of such analogies is found in the Catholic philosophers of the counterrevolution, in Bonald, de Maistre, and Donoso Cortés. What we immediately recognize in them is a conceptually clear and systematic analogy, and not merely that kind of playing with ideas, whether mystical, natural-philosophical, or even romantic, which, as with everything else, so also with state and society, yields colorful symbols and pictures.

The clearest philosophical expression of that analogy is found in Leibniz.[2] Emphasizing the systematic relationship between jurisprudence and theology, he rejected a comparison of jurisprudence with medicine and mathematics: "We have deservedly transferred the model of our division from theology to jurisprudence because the similarity of these two disciplines is astonishing." Both have a double principle, reason (hence there is

1. *Der Wert des Staates* (Tübingen, 1914); *Politische Romantik* (Munich and Leipzig, 1919); *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (Munich and Leipzig, 1921). [A second edition of *Politische Romantik* appeared in 1925; on the various editions of *Die Diktatur*, see the introduction, note 15.—tr.]
2. *Nova Methodus*, paras. 4, 5.

a natural theology and a natural jurisprudence) and scripture, which means a book with positive revelations and directives.

Adolf Menzel noted in an essay[3] that today sociology has assumed functions that were exercised in the seventeenth and eighteenth centuries by natural law, namely, to utter demands for justice and to enunciate philosophical-historical constructions or ideals. He seems to believe that sociology is inferior to jurisprudence, which is supposed to have become positive. He attempts to show that all heretofore sociological systems end up by making "political tendencies appear scientific." But whoever takes the trouble of examining the public law literature of positive jurisprudence for its basic concepts and arguments will see that the state intervenes everywhere. At times it does so as a *deus ex machina*, to decide according to positive statute a controversy that the independent act of juristic perception failed to bring to a generally plausible solution; at other times it does so as the graceful and merciful lord who proves by pardons and amnesties his supremacy over his own laws. There always exists the same inexplicable identity: lawgiver, executive power, police, pardoner, welfare institution. Thus to an observer who takes the trouble to look at the total picture of contemporary jurisprudence, there appears a huge cloak-and-dagger drama, in which the state acts in many disguises but always as the same invisible person. The "omnipotence" of the modern lawgiver, of which one reads in every textbook on public law, is not only linguistically derived from theology.

Many reminiscences of theology also appear in the details of the argumentation, most of course with polemical intent. In a positivistic age it is easy to reproach an intellectual opponent

3. *Naturrecht und Soziologie* (Vienna and Leipzig, 1912).

with the charge of indulging in theology or metaphysics. If the reproach were intended as more than mere insult, at least the following question could suggest itself: What is the source of this inclination for such theological and metaphysical derailments? One would have had to investigate whether they may be explained historically, perhaps as an aftereffect of monarchical public law, which identified the theistic God with the king, or whether they are underpinned by systematic or methodical necessities. I readily admit that because of an inability to master intellectually contradictory arguments or objections, some jurists introduce the state in their works by a mental short circuit, just as certain metaphysicians misuse the name of God. But this does not yet resolve the substantive problem.

Until now one was generally satisfied with casual intimations only. In his publication on the law in the formal and material sense, Albert Hänel[4] raised the old objection that it is "metaphysics" to demand, for the sake of the uniformity and reliability of the state's will (both of which he thus does not deny), the concentration of all functions of the state in one organ. Hugo Preuss[5] too attempted to defend his association concept of the state by relegating his opponents to theology and metaphysics. The concept of sovereignty in the theory of the state by Laband and Jellinek and the theory of the "sole supremacy of the state" make the state an abstract person so to speak, a *unicum sui generis*, with a monopoly of power "mystically produced." To Preuss this was a legal disguise of the theory of the divine right of kings, a repetition of the teachings of Maurenbrecher with the modification that the religious fiction is replaced by the juristic fiction. Thus

4. *Das Gesetz im Formellen und Materiellen Sinne* (Leipzig, 1888), p. 150. [2d printing (Darmstadt, 1968)—tr.]
5. *Festgabe für Laband*, vol. 2 (1908), p. 236. [I was unable to verify this citation—tr.]

Preuss, a representative of the organic theory of the state, reproached his opponent for theologizing. In his critical studies of the concept of the juristic person, Bernatzik[6] maintained, on the other hand, that it is precisely the organic doctrine of the state that is theology. Bernatzik attempted to destroy the organic ideas of Stein, Schulze, Gierke, and Preuss with the sneering remark that if the organs of the collective legal person should once again be persons, then every administrative authority, every court, and so on, would be a juristic person and the state in its entirety would also once again be such a sole juristic person. "The attempt to comprehend the dogma of the Trinity would, by comparison, be an easy matter." He also dismissed Stobbes's opinion that the entire collective personality is a legal person with the sentence that he does not understand "twists like this one that are reminiscent of the dogma of the Trinity." Yet he himself said, "It already resides in the concept of legal competence that its source, the state's legal order, must posit itself as the subject of all law, consequently as a juristic person." This process of positing itself was apparently so simple and plausible to Bernatzik that he mentioned a deviating opinion as representing "only a curiosity." Nevertheless, he did not ask himself why there is a greater logical necessity for the source of legal competence, namely, the legal order, that is, the state's legal order, to posit itself as a product than there is for Stahl's dictum that only a person can be the basis for another person.

Kelsen has the merit of having stressed since 1920 the methodical relationship of theology and jurisprudence. In his last

6. "Kritische Studien über den Begriff der juristischen Person und über die juristische Persönlichkeit der Behörden insbesondere," *Archiv des öffentlichen Rechts* 5 (1890): 210, 225, 244.

work on the sociological and the juristic concepts of the state[7] he introduced many analogies. Although diffuse, these analogies make it possible for those with a deeper understanding of the history of ideas to discern the inner heterogeneity between his neo-Kantian epistemological point of departure and his ideological and democratic results. At the foundation of his identification of state and legal order rests a metaphysics that identifies the lawfulness of nature and normative lawfulness. This pattern of thinking is characteristic of the natural sciences. It is based on the rejection of all "arbitrariness," and attempts to banish from the realm of the human mind every exception. In the history of the parallel of theology and jurisprudence, such a conviction finds its place most appropriately probably in J. S. Mill. In the interest of objectivity and because of his fear of arbitrariness, he too emphasized the validity without exception of every kind of law. But he probably did not assume, as did Kelsen, that the free deed of legal perception could shape just any mass of positive laws into the cosmos of its system, because this would nullify the objectivity already achieved. For a metaphysics that suddenly falls into the pathos of objectivity, it should make no difference whether an unconditional positivism directly adheres to the law that presents itself, or whether it bothers to first establish a system.

Kelsen, as soon as he goes one step beyond his methodological criticism, operates with a concept of causation that is entirely natural-scientific. This is most clearly demonstrated by his belief that Hume's and Kant's critique of the concept of substance can be transferred to the theory of the state.[8] But he fails thereby

7. [Tr.] *Der Soziologische und der juristische Staatsbegriff* (Tübingen, 1922).
8. Ibid, p. 208.

to see that the concept of substance in Scholastic thought is entirely different from that in mathematical and natural-scientific thinking. The distinction between the substance and the practice of law, which is of fundamental significance in the history of the concept of sovereignty,[9] cannot be grasped with concepts rooted in the natural sciences and yet is an essential element of legal argumentation. When Kelsen gives the reasons for opting for democracy, he openly reveals the mathematical and natural-scientific character of his thinking:[10] Democracy is the expression of a political relativism and a scientific orientation that are liberated from miracles and dogmas and based on human understanding and critical doubt.

For the sociology of the concept of sovereignty it is altogether vital to be clear about the sociology of legal concepts as such. The aforementioned systematic analogy between theological and juristic concepts is stressed here precisely because a sociology of legal concepts presupposes a consistent and radical ideology.[11] Yet it would be erroneous to believe that therein resides a spiritualist philosophy of history as opposed to a materialist one.

The political theology of the Restoration offers an exemplary illustration of the sentence Max Weber articulated in his critique of Rudolf Stammler's philosophy of right, namely, that it is possible to confront irrefutably a radical materialist philosophy of history with a similarly radical spiritualist philosophy of history. The authors of the counterrevolution explained political change as a result of change in outlook and traced the French Revolution to the philosophy of the Enlightenment. It was nothing more than

9. *Die Diktatur*, pp. 44, 105, 194.
10. "Vom Wesen und Wert der Demokratie," *Archiv für Sozialwissenschaft und Sozialpolitik* 47 (1920–21): 84.
11. [Tr.] Schmitt uses the word *radical* here in the sense of "thought out to the end."

a clear antithesis when radical revolutionaries conversely attributed a change in thought to a change in the political and social conditions. That religious, philosophical, artistic, and literary changes are closely linked with political and social conditions was already a widespread dogma in western Europe, especially in France, in the 1820s.

In the Marxist philosophy of history this interdependence is radicalized to an economic dependence; it is given a systematic basis by seeking a point of ascription also for political and social changes and by finding it in the economic sphere. This materialist explanation makes a separate consideration of ideology impossible, because everywhere it sees only "reflexes," "reflections," and "disguises" of economic relations. Consequently, it looks with suspicion at psychological explanations and interpretations, at least in their vulgar form. Precisely because of its massive rationalism, this philosophy can easily turn into an irrationalist conception of history, since it conceives all thought as being a function and an emanation of vital processes. The anarchic-syndicalist socialism of Georges Sorel thus linked in this fashion Henri Bergson's philosophy of life with Marx's economic conception of history.

Both the spiritualist explanation of material processes and the materialist explanation of spiritual phenomena seek causal relations. At first they construct a contrast between two spheres, and then they dissolve this contrast into nothing by reducing one to the other. This method must necessarily culminate in a caricature. Just as Engels saw the Calvinist dogma of predestination as a reflection of capitalist competition in terms of its senselessness and incalculability, it would be just as easy to reduce the modern theory of relativity and its success to currency relations in today's

world market, and thus to find the economic basis of that theory. Some would call such a procedure the sociology of a concept or a theory. This, however, is of no concern to us.

It is otherwise with the sociological method, which, with a view to certain ideas and intellectual constructions, seeks the typical group of persons who arrive at certain ideological results from the peculiarity of their sociological situations. In this sense one can speak of a sociology of juristic concepts, in the case of Max Weber, who traced the differentiation of the various legal fields to the development of trained jurists, civil servants who administer justice, or legal dignitaries.[12] The sociological "peculiarity of the group of persons who professionally concern themselves with forming law" necessitates definite methods and views of juristic thinking. But this is still not a sociology of a legal concept.

To trace a conceptual result back to a sociological carrier is psychology; it involves the determination of a certain kind of motivation of human action. This is a sociological problem, but not a problem of the sociology of a concept. If this method is applied to intellectual accomplishments, it leads to explanations in terms of the milieu, or even to the ingenious "psychology" that is known as the sociology of specific types, that is, of the bureaucrat, the attorney, or the professor who is employed by the state. The Hegelian system, for example, if investigated by applying this method, would have to be characterized as the philosophy of the professional lecturer, who by his economic and social situation is enabled to become, with contemplative superiority, aware of absolute consciousness, which means to practice his profession as a lecturer of philosophy; or it would be

12. *Rechtssoziologie*, II, 1.

possible to view Kelsen's jurisprudence as the ideology of the lawyer-bureaucrat practicing in changing political circumstances, who, under the most diverse forms of authority and with a relativistic superiority over the momentary political authority, seeks to order systematically the positive decrees and regulations that are handed down to him. In its consequent manner this type of sociology is best assigned to belles-lettres; it provides a socio-psychological "portrait" produced by a method that cannot be distinguished from the brilliant literary criticism of a Sainte-Beuve, for example.

Altogether different is the sociology of concepts, which is advanced here and alone has the possibility of achieving a scientific result for a concept such as sovereignty. This sociology of concepts transcends juridical conceptualization oriented to immediate practical interest. It aims to discover the basic, radically systematic structure and to compare this conceptual structure with the conceptually represented social structure of a certain epoch. There is no question here of whether the idealities produced by radical conceptualization are a reflex of sociological reality, or whether social reality is conceived of as the result of a particular kind of thinking and therefore also of acting. Rather this sociology of concepts is concerned with establishing proof of two spiritual but at the same time substantial identities. It is thus not a sociology of the concept of sovereignty when, for example, the monarchy of the seventeenth century is characterized as the real that is "mirrored" in the Cartesian concept of God. But it is a sociology of the concept of sovereignty when the historical-political status of the monarchy of that epoch is shown to correspond to the general state of consciousness that was characteristic of western Europeans at that time, and when the juristic construction of the

historical-political reality can find a concept whose structure is in accord with the structure of metaphysical concepts. Monarchy thus becomes as self-evident in the consciousness of that period as democracy does in a later epoch.

The presupposition of this kind of sociology of juristic concepts is thus a radical conceptualization, a consistent thinking that is pushed into metaphysics and theology. The metaphysical image that a definite epoch forges of the world has the same structure as what the world immediately understands to be appropriate as a form of its political organization. The determination of such an identity is the sociology of the concept of sovereignty. It proves that in fact, as Edward Caird said in his book on Auguste Comte, metaphysics is the most intensive and the clearest expression of an epoch.

"Imitate the immutable decrees of the divinity." This was the ideal of the legal life of the state that was immediately evident to the rationalism of the eighteenth century. This utterance is found in Rousseau's essay *Political Economy*. The politicization of theological concepts, especially with respect to the concept of sovereignty, is so striking that it has not escaped any true expert on his writings. Said Emile Boutmy, "Rousseau applies to the sovereign the idea that the philosophes hold of God: He may do anything that he wills but he may not will evil."[13] In the theory of the state of the seventeenth century, the monarch is identified with God and has in the state a position exactly analogous to that attributed to God in the Cartesian system of the world. According to Atger, "The prince develops all the inherent

13. "La declaration des droits de l'homme et du citoyen et M. Jellinek," *Annales des sciences politiques* 4 (1902): 418.

characteristics of the state by a sort of continual creation. The prince is the Cartesian god transposed to the political world."[14]

There is psychologically (and, from the point of view of a phenomenologist, phenomenologically as well) a complete identity. A continuous thread runs through the metaphysical, political, and sociological conceptions that postulate the sovereign as a personal unit and primeval creator. The fine tale of the *Discours de la méthode* provides an extraordinarily instructive example. It is a document of the new rationalist spirit. In the depth of doubt, it finds consolation by using reason unswervingly: "J'étais assuré d'user en tout de ma raison." But what is it that becomes clear in the first place to the mind suddenly forced to reason? That the works created by several masters are not as perfect as those created by one. "One sole architect" must construct a house and a town; the best constitutions are those that are the work of a sole wise legislator, they are "devised by only one"; and finally, a sole God governs the world. As Descartes once wrote to Mersenne, "It is God who established these laws in nature just as a king establishes laws in his kingdom."

The seventeenth and eighteenth centuries were dominated by this idea of the sole sovereign, which is one of the reasons why, in addition to the decisionist cast of his thinking, Hobbes remained personalistic and postulated an ultimate concrete deciding instance, and why he also heightened his state, the Leviathan, into an immense person and thus point-blank straight into mythology. This he did despite his nominalism and natural-scientific approach and his reduction of the individual to the atom. For him this was no anthropomorphism—from which he was truly free—but a methodical and systematic postulate of his juristic thinking. But

14. *Essai sur l'histoire des doctrines du contrat social* (1906), p. 136.

the image of the architect and master builder of the world reflects a confusion that is characteristic of the concept of causality. The world architect is simultaneously the creator and the legislator, which means the legitimizing authority. Throughout the Enlightenment period until the French Revolution, such an architect of world and state was called the legislator.

Since then the consistency of exclusively scientific thinking has also permeated political ideas, repressing the essentially juristic-ethical thinking that had predominated in the age of the Enlightenment. The general validity of a legal prescription has become identified with the lawfulness of nature, which applies without exception. The sovereign, who in the deistic view of the world, even if conceived as residing outside the world, had remained the engineer of the great machine, has been radically pushed aside. The machine now runs by itself. The metaphysical proposition that God enunciates only general and not particular declarations of will governed the metaphysics of Leibniz and Nicolas Malebranche. The general will of Rousseau became identical with the will of the sovereign; but simultaneously the concept of the general also contained a quantitative determination with regard to its subject, which means that the people became the sovereign. The decisionistic and personalistic element in the concept of sovereignty was thus lost. The will of the people is always good: "The people are always virtuous." Said Emmanuel Sieyès, "In whatever manner a nation expresses its wishes, it is enough that it wishes; all forms are good but its will is always the supreme law."

But the necessity by which the people always will what is right is not identical with the rightness that emanated from the commands of the personal sovereign. In the struggle of opposing

interests and coalitions, absolute monarchy made the decision and thereby created the unity of the state. The unity that a people represents does not possess this decisionist character; it is an organic unity, and with national consciousness the ideas of the state originated as an organic whole. The theistic as well as the deistic concepts of God become thus unintelligible for political metaphysics.

It is true, nevertheless, that for some time the aftereffects of the idea of God remained recognizable. In America this manifested itself in the reasonable and pragmatic belief that the voice of the people is the voice of God—a belief that is at the foundation of Jefferson's victory of 1801. Tocqueville in his account of American democracy observed that in democratic thought the people hover above the entire political life of the state, just as God does above the world, as the cause and the end of all things, as the point from which everything emanates and to which everything returns. Today, on the contrary, such a well-known legal and political philosopher of the state as Kelsen can conceive of democracy as the expression of a relativistic and impersonal scientism. This notion is in accord with the development of political theology and metaphysics in the nineteenth century.

To the conception of God in the seventeenth and eighteenth centuries belongs the idea of his transcendence vis-à-vis the world, just as to that period's philosophy of state belongs the notion of the transcendence of the sovereign vis-à-vis the state. Everything in the nineteenth century was increasingly governed by conceptions of immanence. All the identities that recur in the political ideas and in the state doctrines of the nineteenth century rest on such conceptions of immanence: the democratic thesis of the identity of the ruler and the ruled, the organic theory of the

state with the identity of the state and sovereignty, the constitutional theory of Krabbe with the identity of sovereignty and the legal order, and finally Kelsen's theory of the identity of the state and the legal order.

After the writers of the Restoration developed a political theology, the radicals who opposed all existing order directed, with heightened awareness, their ideological efforts against the belief in God altogether, fighting that belief as if it were the most fundamental expression of the belief in any authority and unity. The battle against God was taken up by Proudhon under the clear influence of Auguste Comte. Bakunin continued it with Scythian fury. The battle against traditional religiosity can be traced naturally to many different political and sociological motives: the conservative posture of ecclesiastical Christianity, the alliance of throne and altar, the number of prominent authors who were "déclassé," the appearance of an art and literature in the nineteenth century whose genial representatives, at least in the decisive periods of their lives, had been spat out by the bourgeois order—all this is still largely unrecognized and unappreciated in its sociological detail.

The main line of development will undoubtedly unfold as follows: Conceptions of transcendence will no longer be credible to most educated people, who will settle for either a more or less clear immanence-pantheism or a positivist indifference toward any metaphysics. Insofar as it retains the concept of God, the immanence philosophy, which found its greatest systematic architect in Hegel, draws God into the world and permits law and the state to emanate from the immanence of the objective. But among the most extreme radicals, a consequent atheism began to prevail. The German left-Hegelians were most conscious of

this tendency. They were no less vehement than Proudhon in proclaiming that mankind had to be substituted for God. Marx and Engels never failed to recognize that this ideal of an unfolding self-conscious mankind must end in anarchic freedom. Precisely because of his youthful intuition, the utterance of the young Engels in the years 1842–1844 is of the greatest significance: "The essence of the state, as that of religion, is mankind's fear of itself."[15]

If viewed from this perspective of the history of ideas, the development of the nineteenth-century theory of the state displays two characteristic moments: the elimination of all theistic and transcendental conceptions and the formation of a new concept of legitimacy. The traditional principle of legitimacy obviously lost all validity. Neither the version of the Restoration based on private law and patrimony nor the one founded on a sentimental and reverent attachment was able to resist this development. Since 1848 the theory of public law has become "positive," and behind this word is usually hidden its dilemma; or the theory has propounded in different paraphrases the idea that all power resides in the *pouvoir constituant* of the people, which means that the democratic notion of legitimacy has replaced the monarchical. It was therefore an occurrence of utmost significance that Donoso Cortés, one of the foremost representatives of decisionist thinking and a Catholic philosopher of the state, one who was intensely conscious of the metaphysical kernel of all politics, concluded in reference to the revolution of 1848, that the epoch of royalism was at an end. Royalism is no longer because there are no kings. Therefore legitimacy no longer exists in the traditional sense.

15. Friedrich Engels, *Schriften aus der Frühzeit*, ed. G. Mayer (Berlin, 1920), p. 281.

For him there was thus only one solution: dictatorship. It is the solution that Hobbes also reached by the same kind of decisionist thinking, though mixed with mathematical relativism. *Autoritas, non veritas facit legem.*

A detailed presentation of this kind of decisionism and a thorough appreciation of Donoso Cortés are not yet available. Here it can only be pointed out that the theological mode of thought of the Spaniard was in complete accord with the thought of the Middle Ages, whose construction was juristic. All his perceptions, all his arguments, down to the last atom, were juristic; his lack of understanding of the mathematical natural-scientific thinking of the nineteenth century mirrored the outlook of natural-scientific thinking toward decisionism and the specific logic of the juristic thinking that culminates in a personal decision.