Carl Schmitt, *Political Theology, Four Chapters on the Concept of Sovereignty,* George Schwab (trans.), Chicago: University of Chicago Press, 2005

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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*.

2

The Problem of Sovereignty as the Problem of the Legal Form and of the Decision

When theories and concepts of public law change under the impact of political events, the discussion is influenced for a time by the practical perspectives of the day. Traditional notions are modified to serve an immediate purpose. New realities can bring about a new sociological interest and a reaction against the "formalistic" method of treating problems of public law. But it is also possible for an effort to emerge that separates juristic treatment from changes in political conditions and achieves scientific objectivity precisely by a firm formal method of treatment. It is thus possible that this kind of political situation might produce various scientific tendencies and currents.

Of all juristic concepts the concept of sovereignty is the one most governed by actual interests. According to convention, the history of this concept begins with Bodin. But one cannot say that it has developed logically since the sixteenth century. The phases of its conceptual development are characterized by various political power struggles, not by a dialectical heightening inherent

in the characteristics of the concept. Bodin's concept of sovereignty was derived in the sixteenth century from the final dissolution of Europe into national states and from the struggle of the absolute rulers with the estates. The self-consciousness of the newly created states was reflected in the eighteenth century in Vattel's concept of sovereignty, which was formulated within the context of international law. In the newly founded German Reich it became necessary after 1871 to advance a principle for distinguishing the authority of member states from the federal state. On the basis of this principle, the German theory of the state distinguishes between the concept of sovereignty and the concept of the state. What is gained by this distinction is that individual states may retain their status as states without being endowed with sovereignty. Nevertheless, the old definition, in phraseological variations, is always repeated: Sovereignty is the highest, legally independent, underived power.

Such a definition can be applied to the most different political-sociological configurations and can be enlisted to serve the most varied political interests. It is not the adequate expression of a reality but a formula, a sign, a signal. It is infinitely pliable, and therefore in practice, depending on the situation, either extremely useful or completely useless. It utilizes the superlative, "the highest power," to characterize a true quantity, even though from the standpoint of reality, which is governed by the law of causality, no single factor can be picked out and accorded such a superlative. In political reality there is no irresistible highest or greatest power that operates according to the certainty of natural law. Power proves nothing in law for the banal reason that Jean-Jacques Rousseau, in agreement with the spirit of his time, formulated as follows: Force is a physical power; the pistol that the robber

holds is also a symbol of power.[1] The connection of actual power with the legally highest power is the fundamental problem of the concept of sovereignty. All the difficulties reside here. What is necessary is a definition that embraces this basic concept of jurisprudence. Such a definition cannot consist of general tautological predicates but rather must specify the essential juristic elements.

The most detailed treatment of the concept of sovereignty available in the past few years attempts a simple solution. This has been done by advancing a disjunction: sociology/jurisprudence, and with a simplistic either/or obtaining something purely sociological and something purely juristic. Kelsen followed this path in his *Das Problem der Souveränität und die Theorie des Völkerrechts*[2] and *Der soziologische und der juristische Staatsbegriff*.[3] To obtain in unadulterated purity a system of ascriptions to norms and a last uniform basic norm, all sociological elements have been left out of the juristic concept. The old contrast between *is* and *ought*, between causal and normative considerations, has been transferred to the contrast of sociology and jurisprudence, with greater emphasis and rigor than had already been done by Georg Jellinek and Kistiakowski, but with the same unproved certainty. The application of disjunctions emanating from another discipline or from epistemology appears to be the fate of jurisprudence. Using this procedure, Kelsen arrived at the unsurprising result that from the perspective of jurisprudence the state must be purely juristic, something normatively valid. It is not just any reality or any imagined entity alongside and outside the legal order. The state

1. *Du contrat social*, Bk. I, chap. 3.
2. Tübingen, 1920. [A second printing appeared in 1928.—tr.]
3. Tübingen, 1922. [A second printing appeared in 1928, and a third in Aalen in 1981.—tr.]

is nothing else than the legal order itself, which is conceived as a unity, to be sure. (That the problem resides precisely in this conception does not appear to create any difficulties.) The state is thus neither the creator nor the source of the legal order. According to Kelsen, all perceptions to the contrary are personifications and hypostatizations, duplications of the uniform and identical legal order in different subjects. The state, meaning the legal order, is a system of ascriptions to a last point of ascription and to a last basic norm. The hierarchical order that is legally valid in the state rests on the premise that authorizations and competences emanate from the uniform central point to the lowest point. The highest competence cannot be traceable to a person or to a sociopsychological power complex but only to the sovereign order in the unity of the system of norms. For juristic consideration there are neither real nor fictitious persons, only points of ascription. The state is the terminal point of ascription, the point at which the ascriptions, which constitute the essence of juristic consideration, "can stop." This "point" is simultaneously an "order that cannot be further derived." An uninterrupted system of orders, starting from the original, the ultimate, from the highest to a lower, meaning a delegated norm, can be conceived in such a fashion. The decisive argument, the one that is repeated and advanced against every intellectual opponent, remains the same: The basis for the validity of a norm can only be a norm; in juristic terms the state is therefore identical with its constitution, with the uniform basic norm.

The catchword of this deduction is *unity*. "The unity of the viewpoint of cognition demands peremptorily a monistic view." The dualism of the methods of sociology and jurisprudence ends in a monistic metaphysics. But the unity of the legal order, mean-

ing the state, remains "purged" of everything sociological in the framework of the juristic. Is this juristic unity of the same kind as the worldwide unity of the entire system? How can it be possible to trace a host of positive attributes to a unity with the same point of ascription when what is meant is not the unity of a system of natural law or of a general theory of the law but the unity of a positive-valid order? Words such as *order*, *system*, and *unity* are only circumscriptions of the same postulate, which must demonstrate how it can be fulfilled in its purity. It has to be shown how a system can arise on the foundation of a "constitution" (which is either a further tautological circumscription of the "unity" or a brutal sociopolitical reality). The systematic unity is, according to Kelsen, an "independent act of juristic perception."

Let us for now disregard the interesting mathematical assumption that a point must be an order as well as a system and must also be identical with a norm; let us ask another question: On what does the intellectual necessity and objectivity of the various ascriptions with the various points of ascription rest if it does not rest on a positive determination, on a command? As if speaking time and again of uninterrupted unity and order would make them the most obvious things in the world; as if a fixed harmony existed between the result of free juristic knowledge and the complex that only in political reality constitutes a unity, what is discussed is a gradation of higher and lower orders supposedly found in everything that is attached to jurisprudence in the form of positive regulations.

The normative science to which Kelsen sought to elevate jurisprudence in all purity cannot be normative in the sense that the jurist by his own free will makes value assessments; he can

only draw on the given (positively given) values. Objectivity thus appears to be possible, but has no necessary connection with positivity (*Positivität*). Although the values on which the jurist draws are given to him, he confronts them with relativistic superiority. He can construct a unity from everything in which he is interested juristically, provided he remains "pure." Unity and purity are easily attained when the basic difficulty is emphatically ignored and when, for formal reasons, everything that contradicts the system is excluded as impure. One who does not take any chances and remains resolutely methodological, not illustrating with even one concrete example how his jurisprudence differs from that which has been practiced until now as jurisprudence, finds it easy to be critical. Methodological conjuring, conceptual sharpening, and astute criticizing are only useful as preparatory work. If they do not come to the point when arguing that jurisprudence is something formal, they remain, despite all effort, in the antechamber of jurisprudence.

Kelsen solved the problem of the concept of sovereignty by negating it. The result of his deduction is that "the concept of sovereignty must be radically repressed."[4] This is in fact the old liberal negation of the state vis-à-vis law and the disregard of the independent problem of the realization of law. This conception has received a significant exposition by Hugo Krabbe. His theory of the sovereignty of laws rests on the thesis that it is not the state but law that is sovereign.[5] Kelsen appears to see in him only a precursor of his own doctrine identifying state and legal

4. *Das Problem der Souveränität*, p. 320.
5. His work on this subject was originally published in 1906; the enlarged edition appeared in 1919 under the title *Die moderne Staatsidee*. [English: *The Modern Idea of the State*, trans. George H. Sabine and Walter J. Shepard (New York and London, 1927).—tr.]

order. In fact, Krabbe's theory does share a common ideological root with Kelsen's result, but precisely where Kelsen was original, in his methodology, there is no connection between the exposition of the Dutch legal scholar and the epistemological and methodological distinctions of the German neo-Kantian. "However one wants to approach it, the doctrine of the sovereignty of law is," as Krabbe says, "either a record of what is already real or a postulate that ought to be realized."[6] The modern idea of the state, according to Krabbe, replaces personal force (of the king, of the authorities) with spiritual power. "We no longer live under the authority of persons, be they natural or artificial (legal) persons, but under the rule of laws, (spiritual) forces. This is the essence of the modern idea of the state." He continues, "These forces rule in the strictest sense of the word. Precisely because these forces emanate from the spiritual nature of man, they can be obeyed voluntarily." The basis, the source of the legal order, is "to be found only in men's feeling or sense of right." He concludes, "Nothing can be said further about this foundation: It is the only one that is real."

Even though Krabbe said he did not deal with sociological investigations into the forms of rule,[7] he did engage in essentially sociological explanations about the organizational formation of the modern state, in which the professional civil service, as an independent authority, identifies with the state, and in which the civil service status is represented as pertaining specifically to public law in contrast to the status of ordinary service. The distinction between public and private law is radically denied, insofar as it rests on a difference in the reality of subjects.[8] The further

6. *Die moderne Staatsidee*, 2d ed. (Haag, 1919), p. 39.
7. Ibid., p. 75.
8. Ibid., p. 138.

development of decentralization and self-government in all areas supposedly permits the modern idea of the state to emerge more and more clearly. It is not the state but law that is supposed to have power. "The old and oft-repeated view that power is the attribute of the state and the definition of the state as a manifestation of power can be conceded under the sole condition that this power is acknowledged as revealing itself in law and can have no effect except in issuing rules of law. What must be pointed out simultaneously is that the state reveals itself only in the making of law, be it by way of legislative enactment or by way of rewriting law. The state does not manifest itself in applying laws or in maintaining any sort of public interest whatever."[9] The only task of the state is to "make law," that is, to establish the legal value of interests.[10] "The concept of the state must not be defined by reference to the care of any specific interests whatever but solely by reference to the unique and original source of law from which all these interests and all other interests derive their legal value."[11]

The state is confined exclusively to producing law. But this does not mean that it produces the content of law. It does nothing but ascertain the legal value of interests as it springs from the people's feeling or sense of right. Therein resides a double limitation: first, a limitation on law, in contrast with interest or welfare, in short, with what is known in Kantian jurisprudence as "matter"; second, a limitation on the declaratory but by no means constitutive act of ascertaining. I will show that the problem of law as a substantial form lies precisely in this act of ascertaining. It must be observed that for Krabbe the contrast between law and

9. Ibid., p. 255.
10. Ibid., p. 261.
11. Ibid., p. 260.

interest is not the same as the contrast between form and matter. When he asserted that all public interests are subject to law, he meant that the legal interest is the highest in the modern state, the legal value the highest value.

Antagonism toward the centralized authoritarian state brought Krabbe close to the association theory. His fight against the authoritarian state is reminiscent of the well-known writings of Hugo Preuss. Otto von Gierke, the founder of association theory, formulated his notion of the state as follows: "The will of the state or the sovereign is not the final source of law but is the organ of the people convoked to express legal consciousness as it emerges from the life of the people."[12] The personal will of the ruler is spliced into the state as if into an organic whole. Yet law and state were for Gierke "equal powers," and he answered the basic question on their mutual relation by asserting that both are independent factors of human communal life, but one cannot be conceived of without the other, and neither exists before or through the other. In the instance of revolutionary constitutional changes there is a legal breach, a breach in legal continuity that can be ethically required or historically justified; but it remains a legal breach. As such, it can be repaired and can subsequently receive a legal justification "through some sort of legal procedure that will satisfy the legal consciousness of the people," for example, a constitutional agreement or a plebiscite or the sanctifying power of tradition.[13] There exists a tendency toward the reconciliation of law and power through which the otherwise unbearable "state

12. "Die Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorien" (Part I), *Zeitschrift für die gesamte Staatswissenschaft* 30 (1974): 31. [It is possible that Schmitt worked with an offprint whose pagination did not coincide with the above. The quote is from part I and the page is 179.—tr.]
13. Ibid., p. 35. [p. 183—tr.]

of tension" can be eliminated. The equality of the state with the law is nevertheless veiled in Gierke because, according to him, the state's lawgiving is only "the last formal seal" the state stamps on the law; it is an "imprint of the state" that has only "external formal value." It is what Krabbe calls a mere ascertaining of the legal value, which does not belong to the character of law. This is why, according to Gierke, international law can be law even though it lacks state character. If the state is pushed into playing the role of a mere proclaiming herald, then it can no longer be sovereign. On the basis of Gierke's association theory, Preuss rejected the concept of sovereignty as a residue of the authoritarian state and discovered the community, based on associations and constituted from below, as an organization that did not need a monopoly on power and could thus also manage without sovereignty.

Among the newer representatives of association theory is Kurt Wolzendorff, who has tried to use the theory to solve "the problem of a new epoch of state." Among his numerous works,[14] his last is of the greatest interest here.[15] Its starting point is that the state needs law and law needs the state; but "law, as the deeper principle, holds the state in check in the final analysis." The state is the original power of rule, but it is so as the power of order, as the "form" of national life and not an arbitrary force applied by just any authority. What is demanded of this power is that it intervene only when the free individual or associational act proves to be insufficient; it should remain in the background as the *ultima ratio*. What is subject to order must not be coupled with economic, social, or cultural interests; these must be left to

14. *Deutsches Völkerrechtsdenken* (Munich, 1919); *Die Lüge des Völkerrechts* (Leipzig, 1919); *Geist des Staatsrechts* (Leipzig, 1920).
15. "Der reine Staat," *Zeitschrift für die gesamte Staatswissenschaft* 75 (1920): 199–229.

self-government. That a certain "maturity" belongs to self-government could, incidentally, make Wolzendorff's postulates dangerous, because in historical reality such historical-pedagogic problems often take an unexpected turn from discussion to dictatorship. Wolzendorff's pure state confines itself to maintaining order. To this state also belongs the formation of law, because all law is simultaneously a problem of the existence of the state order. The state should preserve law; it is "guardian, not master," guardian, not a mere "blind servant," and "responsible and ultimate guarantor." Wolzendorff sees in the idea of soviets an expression of this tendency to associational self-government, to confining the state to the "pure" function that belongs to it.

I don't believe that Wolzendorff was aware of how close he came with his "ultimate guarantor" to the authoritarian theory of the state, which is so completely antithetical to the associational and democratic conception of the state. This is why his last work, compared with those of Krabbe and other representatives of the association theory mentioned, is particularly important. It focuses the discussion on the decisive concept, namely, that of the form in its substantive sense. The authority of the order is valued so highly, and the function of guarantor is of such independence, that the state is no longer only the ascertainer or the "externally formal" transformer of the idea of law. The problem that arises is to what extent, with legal-logical necessity, every ascertainment and decision contains a constitutive element, an intrinsic value of form. Wolzendorff speaks of form as a "sociopsychological phenomenon," an active factor in historical-political life, the significance of which consists in giving opposing political forces an opportunity to grasp, in the conceptual structure of a state's

constitution, a firm element of calculation.[16] The state thus becomes a form in the sense of a living formation. Wolzendorff did not distinguish clearly between a form that serves the purpose of calculable functioning and a form in the aesthetic sense, as the word is used, for example, by Hermann Hefele.

The confusion spreading in philosophy around the concept of form is repeated with especially disastrous results in sociology and jurisprudence. Legal form, technical form, aesthetic form, and finally the concept of form in transcendental philosophy denote essentially different things.

It is possible to distinguish three concepts of form in Max Weber's sociology of law. In one instance, the conceptual specification of the legal content whose legal form, the normative regulation, is as he says, but only as the "causal component of consensual acting." Then, when he speaks of differentiations in the categories of legal thought, he equates the word *formal* with the words *rationalized*, *professionally trained*, and, finally, *calculable*. He thus says that a formally developed law is a complex of conscious maxims of decisions, and what belongs to it sociologically is the participation of trained lawyers, representatives of the judiciary with civil service status, and others. Professional training, which means rational training, becomes necessary with the increased need for specialized knowledge. From this is derived the modern rationalization of law toward the specifically juristic and the development of "formal qualities."[17]

16. "Staatstheoretische Formen für politische Ideen," *Archiv des öffentlichen Rechts* 34 (1915): 477.

17. *Rechtssoziologie*, II, 1. [English: *Max Weber on Law in Economy and Society*, ed. Max Rheinstein (Cambridge, MA, 1966). This translation is mainly of Weber's "Rechtssoziologie" (Sociology of Law), which is a chapter of *Wirtschaft und Gesellschaft* (Economy and Society).—tr.]

Form can thus mean, first, the transcendental "condition" of juristic cognition; second, a regularity, an evenness, derived from repeated practice and professional reasoning. Because of its evenness and calculability, regularity passes over to the third form, the "rationalistic," that is, technical refinement, which, emerging from either the needs of specialized knowledge or the interests of a juristically educated bureaucracy, is oriented toward calculability and governed by the ideal of frictionless functioning.

We need not be detained here by the neo-Kantian conception of form. With regard to technical form, it means a specification governed by utility. Although it can be applied to the organized state apparatus, it does not touch the "judicial form." For example, the military command in its specification is in line with the technical ideal, not the legal one. That it can be aesthetically valued, perhaps even be made to lend itself to ceremonies, does not alter its technicity (*Technizität*). The age-old Aristotelian opposites of deliberation and action begin with two distinct forms; whereas deliberation is approachable through legal form, action is approachable only by a technical formation. The legal form is governed by the legal idea and by the necessity of applying a legal thought to a factual situation, which means that it is governed by the self-evolving law in the widest sense. Because the legal idea cannot realize itself, it needs a particular organization and form before it can be translated into reality. That holds true for the formation of a general legal norm into a positive law as well as for the application of a positive general legal norm by the judiciary or administration. A discussion of the peculiarity of the legal form must begin with this.

What significance can be given to the fact that in the contemporary theory of the state, neo-Kantian formalism has been

thrown aside while, at the same time, a form is postulated from an entirely different direction? Is that another expression of those eternal mix-ups that are responsible for making the history of philosophy so monotonous? One thing is certain to be recognized in this modern theory of the state: The form should be transferred from the subjective to the objective. The concept of form in Emil Lask's theory of categories is still subjective, as it must necessarily be in every epistemologically critical approach. Kelsen contradicted himself when, on the one hand, he took such a critically derived subjectivist concept of form as the starting point and also conceived the unity of the legal order as an independent act of juristic perception, but then, on the other hand, when he professed his world view, demanded objectivity, and accused even Hegelian collectivism of a subjectivism of the state. The objectivity that he claimed for himself amounted to no more than avoiding everything personalistic and tracing the legal order back to the impersonal validity of an impersonal norm.

The multifarious theories of the concept of sovereignty—those of Krabbe, Preuss, Kelsen—demand such an objectivity. They agree that all personal elements must be eliminated from the concept of the state. For them, the personal and the command elements belong together. According to Kelsen, the conception of the personal right to command is the intrinsic error in the theory of state sovereignty; because the theory is premised on the subjectivism of command rather than on the objectively valid norm, he characterized the theory of the primacy of the state's legal order as "subjectivistic" and as a negation of the legal idea. In Krabbe the contrast between personal and impersonal was linked with the contrast between concrete and abstract, individual and general, which can be extended to the contrast between

authority and legal prescription, authority and quality, and in its general philosophical formulation to the contrast between person and idea. Confronting in this fashion personal command with the impersonal validity of an abstract norm accords with the liberal constitutional tradition of the nineteenth century, which was lucidly and interestingly explained by Ahrens. For Preuss and Krabbe all conceptions of personality were aftereffects of absolute monarchy.

All these objections fail to recognize that the conception of personality and its connection with formal authority arose from a specific juristic interest, namely, an especially clear awareness of what the essence of the legal decision entails. Such a decision in the broadest sense belongs to every legal perception. Every legal thought brings a legal idea, which in its purity can never become reality, into another aggregate condition and adds an element that cannot be derived either from the content of the legal idea or from the content of a general positive legal norm that is to be applied. Every concrete juristic decision contains a moment of indifference from the perspective of content, because the juristic deduction is not traceable in the last detail to its premises and because the circumstance that requires a decision remains an independently determining moment. This has nothing to do with the causal and psychological origins of such a decision, even though the abstract decision as such is also of significance, but with the determination of the legal value. The certainty of the decision is, from the perspective of sociology, of particular interest in an age of intense commercial activity because in numerous cases commerce is less concerned with a particular content than with a calculable certainty. (So that I can accommodate myself accordingly, I am often less interested in how a timetable

determines times of departure and arrival in a particular case than in its functioning reliably.) Legal communication offers an example of such a concern in the so-called formal strictness of the exchange law. The legal interest in the decision as such should not be mixed up with this kind of calculability. It is rooted in the character of the normative and is derived from the necessity of judging a concrete fact concretely even though what is given as a standard for the judgment is only a legal principle in its general universality. Thus a transformation takes place every time. That the legal idea cannot translate itself independently is evident from the fact that it says nothing about who should apply it. In every transformation there is present an *auctoritatis interpositio*. A distinctive determination of which individual person or which concrete body can assume such an authority cannot be derived from the mere legal quality of a maxim. This is the difficulty that Krabbe ignored.

That it is the instance of competence that renders a decision makes the decision relative, and in certain circumstances absolute and independent of the correctness of its content. This terminates any further discussion about whether there may still be some doubt. The decision becomes instantly independent of argumentative substantiation and receives an autonomous value. The entire theoretical and practical meaning of this is revealed in the theory of the faulty act of state. A legal validity is attributed to a wrong and faulty decision. The wrong decision contains a constitutive element precisely because of its falseness. But what is inherent in the idea of the decision is that there can never be absolutely declaratory decisions. That constitutive, specific element of a decision is, from the perspective of the content of the underlying norm, new and alien. Looked at normatively, the

decision emanates from nothingness. The legal force of a decision is different from the result of substantiation. Ascription is not achieved with the aid of a norm; it happens the other way around. A point of ascription first determines what a norm is and what normative rightness is. A point of ascription cannot be derived from a norm, only a quality of a content. The formal in the specifically legal sense contrasts with this quality of content, not with the quantitative content of a causal connection. It should be understood that this last contrast is of no consequence to jurisprudence.

The peculiarity of the legal form must be recognized in its pure juristic nature. One should not speculate here about the philosophical meaning of the legal validity of a decision or about the motionlessness or the "eternity" of law, of law untouched by time and space, as did Adolf Merkl.[18] When Merkl said that "a development of the legal form is impossible because it dissolves the identity," he disclosed that he basically adheres to a roughly quantitative conception of form. But from this kind of form it is inexplicable how a personalistic element can appear in the doctrine of law and the state. This notion accords with the old constitutional tradition and its starting point that only a general legal prescription can be authoritative. The law gives authority, said Locke, and he consciously used the word *law* antithetically to *commissio*, which means the personal command of the monarch. But he did not recognize that the law does not designate to whom it gives authority. It cannot be just anybody who can execute and realize every desired legal prescription. The legal prescription, as the norm of decision, only designates how decisions should

18. *Archiv des öffentlichen Rechts* (1917): 19. [I have been unable to verify Schmitt's citation. It appears to me that what he had in mind was Adolf Merkl's "Die Rechtseinheit des österreichischen Staates," *Archiv des öffentlichen Rechts* 37 (1918), esp. 56–61.—tr.]

be made, not who should decide. In the absence of a pivotal authority, anybody can refer to the correctness of the content. But the pivotal authority is not derived from the norm of decision. Accordingly, the question is that of competence, a question that cannot be raised by and much less answered from the content of the legal quality of a maxim. To answer questions of competence by referring to the material is to assume that one's audience is a fool.

We can perhaps distinguish two types of juristic scientific thought according to whether an awareness of the normative character of the legal decision is or is not present. The classical representative of the decisionist type (if I may be permitted to coin this word) is Thomas Hobbes. The peculiar nature of this type explains why it, and not the other type, discovered the classic formulation of the antithesis: *autoritas, non veritas facit legem.*[19] The contrast of *autoritas* and *veritas* is more radical and precise than is Friedrich Julius Stahl's contrast: authority, not majority. Hobbes also advanced a decisive argument that connected this type of decisionism with personalism and rejected all attempts to substitute an abstractly valid order for a concrete sovereignty of the state. He discussed the demand that state power be subordinate to spiritual power because the latter is of a higher order. To this reasoning he replied that if one "power" (*potestas*) were to be subordinate to another, the meaning would be nothing more than that the one who possesses power is subordinate to the other who possesses power: "He which hath the one Power is subject to him that hath the other." To speak of superior and inferior and attempt to remain simultaneously abstract is to him incomprehensible ("we cannot understand"). "For Subjection,

19. *Leviathan*, chap. 26.

Command, Right and Power are accidents not of Powers but of Persons."[20] He illustrated this with one of those comparisons that in the unmistakable soberness of his healthy common sense, he knew how to apply so strikingly: Power or order can be subordinate to another just as the art of the saddler is subordinate to that of the rider; but the important thing is that despite this abstract ladder of orders, no one thinks of subordinating the individual saddler to every single rider and obligating him to obey.

It is striking that one of the most consequential representatives of this abstract scientific orientation of the seventeenth century became so personalistic. This is because as a juristic thinker he wanted to grasp the reality of societal life just as much as he, as a philosopher and natural scientist, wanted to grasp the reality of nature. He did not discover that there is a juristic reality and life that need not be reality in the sense of the natural sciences. Mathematical relativism and nominalism also operate concurrently. Often he seemed to be able to construct the unity of the state from any arbitrary given point. But juristic thought in those days had not yet become so overpowered by the natural sciences that he, in the intensity of his scientific approach, should unsuspectingly have overlooked the specific reality of legal life inherent in the legal form. The form that he sought lies in the concrete decision, one that emanates from a particular authority. In the independent meaning of the decision, the subject of the decision has an independent meaning, apart from the question of content. What matters for the reality of legal life is who decides. Alongside the question of substantive correctness stands the question of competence. In the contrast between the subject and

20. Ibid., chap. 42.

the content of a decision and in the proper meaning of the subject lies the problem of the juristic form. It does not have the a priori emptiness of the transcendental form because it arises precisely from the juristically concrete. The juristic form is also not the form of technical precision because the latter has a goal-oriented interest that is essentially material and impersonal. Finally, it is also not the form of aesthetic production, because the latter knows no decision.