

German Historical Institute
Washington, D.C.
Occasional Paper No. 13

CORNERSTONE OF DEMOCRACY
The West German *Grundgesetz*,
1949–1989

with Contributions by

Erich J. C. Hahn
Michaela Richter
Gebhard Ziller
David Clay Large

CORNERSTONE OF DEMOCRACY
The West German *Grundgesetz*, 1949–1989

Occasional Paper No. 13

Edited by Detlef Junker, Manfred E. Boemeke
and Janine Micunek
© Copyright 1995

Published by the
GERMAN HISTORICAL INSTITUTE
1607 New Hampshire Avenue, N.W.
Washington, D.C. 20009
Tel. (202) 387-3355

Contents

<i>Erich J. C. Hahn</i> The Occupying Powers and the Constitutional Reconstruction of West Germany, 1945–1949	7
<i>Michaela Richter</i> The Basic Law and the Democratic Party State: Constitutional Theory and Political Practice	37
<i>Gebhard Ziller</i> Trends in the Development of Federalism under the <i>Grundgesetz</i> (Basic Law), 1949–1989	73
<i>David Clay Large</i> Normifying the Unnormifiable: The Right to Resistance in West German Constitutional History	83

Preface

THE FIFTIETH ANNIVERSARY of the end of World War II is a time for commemoration and celebration, for remembrance and retrospection. It is a time to reflect on the results of this most destructive of all wars and to pay tribute to the victims of the Nazi terror, while also remembering the tremendous effort that went into rebuilding the political, economic, and social structures that had been shattered throughout Europe.

In Germany, the shock of total military defeat and the liberation not only from a brutal dictatorship but also from a centuries-old mind-set that had paid uncritical obeisance to state authority resulted in the search for a new political orientation and a new constitutional foundation. In the western zones of occupation, Allied military governments cooperated closely with a new group of German political leaders in ensuring that the emerging Federal Republic would be based on democratic principles and the ideas of freedom and justice. They wanted to make certain that the new West German state was solidly grounded in Western values, in the traditions of liberalism and the Enlightenment, which had always played a part in German political thought but had never completely taken hold in the reality of German politics. The upshot of these deliberations was the adoption, on May 8, 1949, of the Basic Law, the *Grundgesetz*, as the constitution of the Federal Republic was called.

Over the next forty years, the Basic Law, drawn up as a provisional expedient for an interim state, proved the cornerstone of one of the world's most stable and prosperous democracies. A success story in virtually every respect, it also provided the legal basis for the recent unification of the two Germanies. As the constitution of a united Germany, the *Grundgesetz* has undergone substantial modifications, and while the two parts of the country grow closer together, the Basic Law will continue to change to accommodate the new situations.

In 1989, the then newly established German Historical Institute in Washington, D.C., marked the fortieth anniversary of the adoption of the Basic Law by several events: two lectures by Professors Peter Graf Kielmansegg and Gordon A. Craig, published together as the first of the Institute's *Occasional Papers*; and an international conference in Philadelphia to analyze and discuss the origin,

meaning, and impact of the *Grundgesetz*. It was at that conference that the essays collected in this volume were originally presented. We print them here in the belief that, by examining and evaluating important aspects of the West German Basic Law, they contribute significantly to explaining the immediate postwar history of Germany as well as major constitutional developments in the Federal Republic from 1949 to 1989.

We are grateful to Professor Erich Hahn, Professor Michaela Richter, Dr. Gebhard Ziller, and Professor David Large for granting us permission to publish their articles in this form.

Washington, D. C.
April 1995

The Occupying Powers and the Constitutional Reconstruction of West Germany, 1945–1949¹

Erich J. C. Hahn

In late April 1949, the military governors of the United States, France, and Great Britain and representatives of the West German Parliamentary Council (Parlamentarischer Rat) agreed on the Basic Law, the constitution for the new West German state. Immediately afterward, leaders of the main political parties in the Council declared that they "were guided in their decisions by German considerations and *free from foreign influences*."² The statement was designed to inhibit destructive controversies like those that the dictated Versailles Treaty had brought into the Weimar Republic thirty years earlier. But, while shielding the Basic Law from the odium of imposed democracy and reinsuring one another against charges of collaboration, the party leaders also drew attention to the extraordinary circumstances under which constitutional government was restored in Western Germany. It does not seem plausible that the victors would have allowed the vanquished Germans, whose experience with democracy had been brief and disastrous, complete freedom in drafting a constitution. If the claim is correct, the Germans had either resisted Allied pressure successfully or adopted the political goals of their occupiers.

According to Hans Simons, who was the liaison officer of the U.S. military government to the Parliamentary Council, both the Basic Law and the East German constitution of 1949 are exceptional in constitutional history, because they were "made primarily for international purposes."³ The Western powers required a West

¹ A generous grant from the Social Sciences and Humanities Research Council of Canada enabled me to do the archival research for this paper. I also gratefully acknowledge the cordial welcome that M. and Mme. Burnand de Dardel of Paris extended to me on several occasions.

² Quoted, with emphasis, in Peter H. Merkl, *The Origins of the West German Republic* (New York, 1963), 125.

³ Hans Simons, "The Bonn Constitution and its Government," in Hans J. Morgenthau, ed., *Germany and the Future of Europe* (Chicago, 1951), 114–30, citation on 114.

German government that could consolidate their zones against Communism, bring about prosperity under the Marshall Plan, and be a partner in an integrated Western Europe. Simons reported that the Allies and the West Germans agreed, in principle, on a federal democratic system. While the Allies pressed the Germans to adopt or alter specific constitutional provisions, these demands were usually neither practical nor unanimous. For the most part, the Germans ended up getting their way.⁴ This opinion is shared by others familiar with the development of the Basic Law.⁵

Nevertheless, the United States, Great Britain, and France had a decisive role in the constitutional reconstruction of Western Germany after 1945, when they began the democratization of local and state government in their zones. The Basic Law, which capped the process, was initiated by the Western powers, vetted by them as it was being drafted, and ratified only after their approval. However, the victors needed an effective West German government and, therefore, approved a charter that was assured broad public acceptance, even though it did not meet all their requirements. While West German political leaders were not always united during the drafting of the Basic Law in 1948–49, they could resist attempts to prescribe specific constitutional provisions. Although Simons had suggested as much, the records of the three powers show more clearly where French, American, and British goals diverged, when pressure was exerted, and how it was foiled for the most part.

The German Federal Republic is the outcome of piecemeal political reconstruction that began in the summer of 1945. At the Yalta and Potsdam summits, Great Britain, the United States, and the

⁴ Ibid., 115–21.

⁵ Carl J. Friedrich, "Rebuilding the German Constitution," *American Political Science Review* 43 (1949): 461–82; 44 (1949): 704–20. Friedrich, an eminent scholar of constitutional thought at Harvard, had advised U.S. officials in Germany and Washington. He found that the Basic Law incorporated Western constitutional ideas but was rooted predominately in German tradition; cf. 462–5; Merkl, *Origins of the West German Republic*, 114–15; John F. Golay, *The Founding of the Federal Republic of Germany* (Chicago, 1958), 108–10; John Gimbel, *The American Occupation of Germany: Politics and the Military, 1945–1949* (Stanford, Cal., 1968), 256; Gimbel stresses that, in drawing up the Basic Law, the Germans adopted the agenda set by the victors, in particular the Americans, cf. 230.

Soviet Union agreed to restore the German state eventually, after thorough internal changes. Those mentioned in the final Report of the Potsdam Conference were a decentralized political structure and local self-government. The three victors agreed to phase in local, regional, and state administrations based on elective representative principles and to encourage democratic parties throughout Germany. They did not foresee a national government in the immediate future, only "central administrative departments" for essential domestic tasks, such as "finance, transport, communications, foreign trade, and industry."⁶ Each portfolio would be headed by a German official working under directions from the Allied Control Council. Eventually, after an indefinite period of Allied tutelage, a decentralized democratic Germany would emerge to rejoin the comity of nations.

In the summer of 1945, the immediate task was to restore the German civil administration that had vanished as the Allied armies advanced.⁷ The Soviets were best prepared for this task. They arrived with small teams of German communist expatriates trained to rebuild the Communist Party, take charge of local and regional government, and establish Soviet political practice.⁸ The Western powers did not have schooled German collaborators to implant a particular concept of democracy. In the U.S. zone, the Deputy Military Governor, General Lucius D. Clay, firmly believed that the Germans would best acquire democratic habits from responsibility in elected local government.⁹ In 1945, the U.S. military government had appointed all German authorities. To replace them, Clay authorized local elections in early 1946. Of greater consequence was

⁶ "Report on the Tripartite Conference of Berlin," Aug. 2, 1945, in *Treaties and Other International Agreements of the United States of America, 1776–1949*, comp. Charles I. Bevans (Washington, D.C., 1969), 3:1229.

⁷ For a survey of the development in the four zones, see Theo Stammen, „Das alliierte Besatzungsregime in Deutschland," in Josef Becker, Theo Stammen, and Peter Waldmann, eds., *Vorgeschichte der Bundesrepublik Deutschland Zwischen Kapitulation und Grundgesetz* (Munich, 1987), 63–82.

⁸ Hermann Weber, *Geschichte der DDR* (Munich, 1985), 54–85, examines early political reconstruction of the Soviet zone.

⁹ Clay to McCloy, Sept. 16, 1945, in Jean Edward Smith, ed., *The Papers of General Lucius D. Clay: Germany 1945–1949* (hereafter referred to as *Clay Papers*), 2 vols. (Bloomington, Ind., 1974), 1:77.

his decision to establish a representative government at the state level. He ordered that elections be held in June 1946 for constituent conventions that would draft state constitutions. U.S. officials monitored this work closely and also gave directions that were not always welcome. Before approving the constitutions, Clay signaled the limits of German autonomy by suspending specific constitutional provisions favoring separatism in Bavaria and socialization in Hesse.¹⁰ In late 1946, the state constitutions in the U.S. zone were ratified by popular referenda, legislatures were elected, and responsible cabinets chosen. Clay's initiatives established the first constitutional state governments with democratic credentials. Of course, the military retained supreme authority. Yet, the procedure featuring an elected convention and popular referendum set a precedent for the time when a democratic national government would be constituted.

In the French and British zones, democratization proceeded more slowly than in the U.S. zone. The French put local government on a popular basis, with elections held in the autumn of 1946. The state administrations appointed by the French military government were replaced in May 1947 by constitutional state governments. However, they were closely supervised, as were political parties. The French were determined to rebuild a Germany of strong states and sought to block all national politics by confining political activity to the states. In the British zone, local government was also made more directly accountable.¹¹ State governments gained a popular mandate through elections held in April 1947. But the British did not share the U.S. optimism that authoritarian political traditions could be overcome quickly by experience in democratic practice. State constitutions were not drawn up in the British zone, and military government continued to exercise wide authority, particularly in economic matters.¹²

After two years of reforms in the Western zones, local, regional, and state governments had a popular mandate. The states were to be

¹⁰ Barbara Fait, "'In einer Atmosphäre der Freiheit'. Die Rolle der Amerikaner bei der Verfassungsgebung in den Ländern der US-Zone 1946," *Vierteljahrshefte für Zeitgeschichte* 33 (1985): 420–55, esp. 453–5.

¹¹ F Roy Willis, *The French in Germany 1945–1949* (Stanford, Cal., 1962), 180–208.

¹² Michael Balfour, *Four Power Control in Germany and Austria, 1945–1946* (New York, 1972), 193–4.

the building blocks for a unified, decentralized Germany. But, since the autumn of 1945, France and the Soviet Union had cut political and economic links across zonal boundaries. France rejected the Potsdam Report and vetoed the central administrations. The Soviets foiled a common reparations program. In the spring of 1946, the British Foreign Secretary Ernest Bevin declared that every zone had become a "self-contained unit."¹³ The Potsdam program for a demilitarized, unified, democratic Germany was clearly in peril. The forum where it might be salvaged was the Council of Foreign Ministers (CFM). Germany's future government was on the agenda of the CFM meetings in 1946 in Paris and in 1947 in Moscow and London. The foreign ministers' statements and discussions reveal wide disagreement about the form of government that Germany should have, the pace with which it should be established, and the role that Germans might be allowed in the constituent process. But, by late 1947, at the London CFM, the United States and Britain had a similar program for a German government, which France and the Soviet Union opposed.

At the Paris CFM (April-May, June July 1946), French Foreign Minister Georges Bidault dismissed the Potsdam plan, to which France had not been a party. He did not want to see one German economy where Eastern agriculture complemented Western industries: "The Allied Armies had broken up this economic marvel and had done well." For France, "the issue is what is to be the composition and size of Germany, what is to be its extent? Is it to approach the doorstep of France, or is it to be reduced?"¹⁴ The official French answer was that there could be no German government nor any central administrations unless the Ruhr, the Rhineland, and the Saar were first detached in the west; and until the rump of Germany between the Oder and the Rhine was organized into democratic states strong enough to resist centralization.¹⁵ As Bidault explained: "It is in the framework of the states or Länder that Germany should find again a political life. For the moment, there can be no question

¹³ Record, Council of Foreign Ministers (hereafter referred to as CFM), May 16, 1946, *Foreign Relations of the United States* (Washington, D.C., 1861-; hereafter referred to as *FRUS*) 1946, 2:428.

¹⁴ Record, CFM, May 15, 1946, *ibid.*, 394, 397.

¹⁵ Memorandum by the French Delegation, CFM/46/1, April 25, 1946, *ibid.*, 109-11.

of thinking of a central German government." Allied controls had to continue until disarmament was achieved, the level of industry fixed, and democracy set up, so that a new Germany could "lose its centralizing and militaristic Prussian character."¹⁶ In reality, France had the will but not the power to truncate Germany and impose particularism.

British Foreign Secretary Bevin rejected dismemberment. The British zone needed an annual subsidy of about \$320 million because, contrary to the Potsdam agreement, surplus goods were not traded among the zones nor exported to pay for essential imports.¹⁷ Therefore, Bevin wanted economic unity restored under four-power control while militarism and Nazism were uprooted and democratization took hold. With regard to a German government, Bevin was in no hurry:

One the frontiers had been fixed ... certain limited functions in Germany would be centralized pending the final setting up of a central German government. The British Government had an open mind about the question of a federal Germany or a centralized Germany. They would favor leaving wide powers in the hands of the provincial administrations and opposed rebuilding of a closely knit German state such as existed before the war. That was the British approach to the problem.¹⁸

Unlike Britain, the U.S. wanted to proceed quickly and let the Germans design their government. Since security loomed so large in the French plans for dismemberment and the British policy of postponement, U.S. Secretary of State James F. Byrnes offered to conclude a four-power treaty to guarantee German demilitarization and disarmament for twenty-five years or more.¹⁹ Byrnes, like Clay, believed that the Germans should learn democracy while shouldering the burdens of government. Under an extended security treaty, there was no reason to delay a provisional or even a permanent German government. Nor did its form have to be fixed to the last detail. Byrnes suggested that the CFM prepare a peace treaty to let Germans know what settlement awaited them. He expected that they

¹⁶ Record, CFM, July 10, 1946, *ibid.*, 862–3.

¹⁷ Record, CFM, July 11, 1946, *ibid.*, 866.

¹⁸ Record, CFM, July 11, 1946, *ibid.*, 885.

¹⁹ Record, CFM, April 29, 1946, *ibid.*, 166–7. Byrnes interpreted the U.S. draft treaty on July 9, 1946, *ibid.*, 847–8.

would then become committed to reconstructing their country and take the initiative to bridge the zonal separatism imposed by the victors. The Soviet Foreign Minister Vyacheslav Molotov acknowledged that Germany needed a democratic national government that could eliminate fascism and deliver reparations. But he did not even hint at how or when it was to be set up.²⁰ In all, the Paris CFM of 1946 demonstrated conclusively that the programs of the victors for restoring German unity under a national government had very little in common.

Byrnes turned this discord into an opportunity to win German opinion for a U.S. plan that promised quick action and maximum self-determination. In his address on the German policy of the United States given in Stuttgart on September 6, 1946, Byrnes suggested that the ministers-president (heads of state government) or other officials should constitute a provisional government to restore German economic unity and to draft a federal constitution that guaranteed civil liberties and individual rights. The constitution would be approved by the Allied Control Council, reviewed by an elected constituent assembly, and ratified by a national referendum.²¹ To give the constitution democratic legitimacy, Byrnes adapted the procedure Clay had just introduced to prepare state constitutions in the U.S. zone.

With the commitment to begin the constituent process without delay and give the Germans a central role in it, Byrnes claimed the political high ground in the autumn of 1946. But the other powers ignored the U.S. challenge when the CFM returned to the question of a German constitution and government in 1947 at Moscow (March-April) and London (November-December). The Soviets produced a vague proposal for a closely monitored democracy. The French and the British now submitted more detailed projects that still showed neither urgency nor concern for German opinion. The U.S. military government took up the Byrnes plan but placed particular emphasis on an early start and minimum guidance.

²⁰ Record, CFM, July 10, 1946, *ibid.*, 872.

²¹ Stuttgart Speech by J. F. Byrnes, Sept. 6, 1946, in Beate Ruhm von Oppen, ed., *Documents on Germany under Occupation 1945–1954* (London, 1955), 158.

According to the new French proposal circulated in January 1947, Germany would be made up of states that were virtually sovereign but forbidden to unite. The states would appoint a national assembly or *Staatenhaus*. This legislature would choose the federal president for a one-year term as head of state and government. He would choose cabinet ministers, whom the assembly could topple individually by a vote of no confidence.²² This blueprint for an unstable national government with only limited authority in economic and foreign policy ignored constitutional wisdom and entirely subordinated German traditions and opinion to French security concerns.

The British specifications for a provisional German constitution were presented in "Supplementary Principles" to the Potsdam Report. Among the details they prescribed were: a president without executive authority; a bicameral legislature in which the lower chamber was popularly elected and the upper chamber was an elected senate with equal representation for each state and limited veto powers; and a cabinet whose members were individually responsible to the lower chamber, to which they did not have to belong. Working under close Allied supervision, the central government would be responsible for economic, fiscal, and legal unity. A supreme court would adjudicate disputes among the states and between them and the central government.²³ This composite of constitutional elements was to be tried out and amended as required over time. Thus, the British would let the Germans take a trial run at democracy for an indefinite term.

The U.S. military government, which paid a large part of the deficit of the Western zones, sought to reduce this heavy charge by making the Germans responsible for their economy and government. In late 1947, before the London CFM, the U.S. military government augmented the British "Supplementary Principles" by adding a strict schedule so that, within a year, the states would set up a provisional government to draft a constitution: "This constitution shall be freely determined by the Germans themselves, who, in a democratically

²² Memorandum, Jan. 17, 1947, *Documents français relatifs à l'Allemagne* (Paris, 1947), 45–56.

²³ Document, "Supplementary Principles to Govern the Treatment of Germany," CFM (47)(L)7, Nov. 27, 1947, *FRUS* 1947, 2:780–2. The document was first circulated during the Moscow CFM in March 1947.

elected assembly, shall prepare, debate, revise, and adopt it."²⁴ After approval by the victors, the constitution would be ratified by popular referendum before March 31, 1949. The U.S. plan set down a strict schedule but did not prescribe how the Germans should organize their government so long as it respected civil liberties, legal equality, an independent judiciary, freedom of the press and radio, and equality of opportunity in education and employment. Furthermore, once a German government was established, its laws would take effect without prior Allied approval. Although a majority vote in the Allied Control Council could still suspend German laws, the U.S. proposed to end the veto that had stymied German unity.

Before the foreign ministers could discuss Germany's future political organization, the London session of the CFM broke up over the issue of reparations in mid-December 1947. The Western foreign ministers immediately agreed to talks on solving together the economic and political problems in their zones. The three-power negotiations on West Germany began in London in late February 1948. At times, Benelux representatives were included. In early March, the talks adjourned to Berlin and continued among the military governors and their advisors. The London conference on West Germany completed its work from late April to the end of May 1948. It arrived at a series of inter-Allied agreements on security and economic recovery. The West Germans were to establish a responsible democratic federal government and become associated with the Marshall Plan (European Recovery Program). To ensure long-term security against Germany, the Allied occupation was extended, and the Ruhr coal and steel industries were placed under international control.

Before the London conference opened, the U.S. and British delegations met to concert their plans for Germany and their strategy to win over France. The British now agreed that there should be a permanent West German government based on broad self-determination. According to Sir William Strang, who headed the British delegation and chaired the conference, "the character of the constitution of Germany was not in itself of such importance. What mattered

²⁴ Document, CFM(47)(L)7-US Rev., Nov. 27, 1947, Para.A.4(d), National Archives, Record Group 260 (hereafter NA, RG 260), OMGUS, 1/162-1/20, fiche 1.

was that we should know what was going on and be prepared to take action if necessary.”²⁵ The West Germans would set up a central government strong enough to bridge the separatism of the zones, subdue the economic selfishness of the states, and mobilize the economic potential of the region for the Marshall Plan that they had accepted.²⁶

In his opening remarks on February 24, Lewis W. Douglas, the U.S. ambassador in the United Kingdom, emphasized, for the benefit of the French, that a truncated, occupied, and disarmed Germany could become a threat only if it came under Soviet influence. To prevent that danger, the Western zones had to be unified and linked to Western Europe, which needed their resources for its own economic recovery.²⁷ A few days later, when the conference returned to the question of the future organization of Germany, the communists had just seized power in Czechoslovakia. This time, the Benelux delegate spoke out for a German confederation of small, semi-sovereign states. He conceded that such terms had to be imposed and maintained by lengthy occupation. Douglas, who rejected a dictated arrangement as undemocratic and unacceptable, now also pondered how secure a number of small German states would be against a threat from the East.²⁸

The fate of Czechoslovak democracy exposed the threat of Soviet expansion and discredited French partition plans. Yet a subsequent discussion on sovereignty showed that France would still accord sovereignty only to each state or its citizens, not to the German people as a whole. French Ambassador René Massigli argued that

²⁵ Minutes, Feb. 22, 1948, USDEL/MIN/L/G/48/Prelim. 3, 7, NA, RG 260, OMGUS, 3/162–2/30, fiche 1.

²⁶ Minutes, Feb. 21, 1948, USDEL/MIN/L/G/48/Prelim. 3, 8, *ibid.*

²⁷ Douglas to Secretary of State, Feb. 25, 1948, *FRUS* 1948, 2:87–89. Cf. Douglas's instructions, Secretary of State to Douglas, Feb. 20, 1948, *ibid.*, 71–3.

²⁸ Minutes, "Three Power Talks on Germany," 5th Meeting, Feb. 28, 1948, 5–7, Public Record Office, British Foreign Office (hereafter PRO, FO) 371/70581; the French record is slightly more detailed on the French and the Benelux position: "Conversations sur l'Allemagne, C.R./5," Feb. 28, 1948, Ministère des Affaires Etrangères (hereafter MdAE), Série Y Internationale 1944–49, vol. 300, fols. 224–9. Cf. Douglas to Secretary of State, Feb. 29, 1948, *FRUS* 1948, 2:104–7.

popular sovereignty could quickly lead to plebiscites and a new Hitlerism, because the Germans were imbued with the "*Führer Prinzip*"²⁹ To block this national tendency, Massigli reiterated the French position that the sovereign states should grant and define the powers of the central government and keep it small and weak by controlling its revenues. The British and the United States had no qualms about a national assembly based on universal suffrage. They thought that the German people held sovereignty and would delegate a portion to the central government and the rest to the states, in accordance with the principle of dual sovereignty. Douglas insisted on a constituent assembly elected by the people and a referendum on the constitution in each state in order to give the German government a broad popular base. Moreover, to be effective, it would need its own bureaucracy, courts of law, and independent revenues. The British supported the U.S. position.³⁰

Thus, profound differences over the constitutional structure for Western Germany had been brought out when the London negotiations recessed on March 6, 1948, to continue in Berlin. In principle, the powers did agree that the German constitution should provide for a federal state, a bicameral legislature, an executive, and an independent judiciary.³¹ In addition, they made genuine progress on matters relating to security. A draft agreement on international control of the Ruhr was ready, and the United States offered informally that it would help monitor German disarmament, hold consultations in case of a renewed threat from Germany, and keep forces in Germany until the threat from the East had disappeared.³²

Shortly after the first round of London talks had recessed, a committee of French Foreign Ministry experts met on four successive days to review French policy toward Germany. Then Paris issued new, unwavering instructions to its Military Governor General Pierre Koenig. These included a detailed plan for a Germany reorganized into seven new states with populations ranging from four to almost nine million. The German constitution would be drafted by an

²⁹ Minutes, "Conversations sur l'Allemagne, 6e Séance," March 1, 1948, MdAE, Série Y Internationale 1944–49, vol. 300, fol. 250.

³⁰ Ibid., fols. 247–8; cf. Douglas to Secretary of State, March 1, 1948, *FRUS* 1948, 2:107–10.

³¹ Douglas to Secretary of State, March 5, 1948, *ibid.*, 132–3.

³² Douglas to Secretary of State, March 6, 1948, *ibid.*, 138.

assembly chosen by the legislatures of these new states or by local authorities, but not directly by the people. On that point in particular, Koenig had to be inflexible:

France cannot accept the reestablishment in Germany of a *Reichstag* elected by universal suffrage. With the authority it will gain from the fact that it will represent the whole German people, this *Reichstag* would soon impose its whims not only on the central government and the upper chamber, but above all on the legislatures of the states. That would be the end of federalism.³³

Therefore, each chamber had to represent the states, not the nation. The lower chamber was to be elected by the state legislatures, the upper appointed by the state governments. Customs receipts would be the only independent source of revenue for the central government. For additional revenue, it would depend on grants from the states which would administer all other taxes. This scheme to contain the central government was not unlike the matricular contributions of the Bismarck constitution. Maurice Baumont, the historical advisor of the Quay d'Orsay, noted the similarity approvingly.³⁴ He did not comment on the irony that the French would imitate an element of Bismarck's constitution to ensure a weak Germany. Altogether, these quixotic French instructions could hardly find favor with the British and U.S. military governors in Berlin when the tripartite talks resumed in late March 1948.

Before the French delegation could present its new instructions, the United States boldly redefined the agenda for the talks on a German government. On March 22, 1948, Clay's advisor, Edward Litchfield, astonished everyone by suggesting that the schedule for setting up a West German government had to be agreed upon before the details of a German constitution could be discussed. He wanted a provisional government by September 1948 and a permanent West German government in May 1949.³⁵ This pace required the full

³³ Minister of Foreign Affairs to Koenig, Despatch 250, Mars 13, 1948, Archives de l'Occupation Française en Allemagne et en Autriche, Colmar (hereafter AOFAA), Cabinet Civil Pol V, E 3, Négotiations à Berlin, Mars 1948, Instructions.

³⁴ Minutes, Commission pour l'Examen des Affaires Allemandes, Mars 12, 1948, 4, AOFAA, Cabinet Civil Pol V, E 3, Groupe d'études N° 5.

³⁵ Litchfield to Tripartite Working Party, Memorandum, "Proposed Schedule for Political Development of Western Germany," March 22, 1948,

cooperation of the Germans, which could not be expected if they were given detailed directives and close supervision. The British were ready to discuss the U.S. proposal and speculated that the French would not be able to stand apart.³⁶ Litchfield tabled the plan two days after the Soviets had stalked out of the Allied Control Council in Berlin on March 20 to protest against the London talks on Germany. The Soviet action ended the ineffectual four-power condominium over Germany. Rather than risk complete isolation, France yielded.

In early April, Maurice Couve de Murville, the director of political affairs in the French Foreign Ministry, made a hurried trip to Berlin for talks with Clay. A broad proposal drawn up by Clay scaled the French reversal. Couve accepted a U.S. schedule to convene a constituent assembly by September 1948. It would be elected according to procedures adopted in each state and would review state boundaries and draft a federal constitution safeguarding the rights of the states and liberties of individuals.³⁷ More specific details on the structure and powers of the future German government could not be agreed upon in Berlin and were referred back to London.³⁸ General Koenig's political advisor, Jacques Tarbé de Saint-Hardouin, predicted gloomily that the "Anglo-Saxons" would not prescribe any constitutional provisions to a German assembly, because their long-range policy was "to rebuild Germany, to give it back its power and independence in order to make it the first stronghold in a defense against the expansion of the USSR."³⁹ Facing a development it

NA. RG 59, Decimal File 1945–1949, 740.00119 Control (Germany)/ 3–3048.

³⁶ Christopher E. Steel, political advisor to the British Commander in Chief in Germany, to Patrick H. Dean, head of the German Political Department in the British Foreign Office, Letter, March 25, 1948, PRO, FO 371170584.

³⁷ Murphy to Secretary of State, April 9, 1948, *FRUS* 1948, 2:175–6; for a slightly expanded version of the Clay-Couve paper, see Clay to William H. Draper, Jr., Under Secretary of the Army, April 15, 1948, *Clay Papers*, 2:630–2.

³⁸ Report, "Future Political Organization of Western Germany," MGC/ P(48) 8, April 1948, *FRUS* 1948, 2:170–5.

³⁹ Saint-Hardouin to Bidault, Despatch 209, April 12, 1948, MdAE, Série Y Internationale 1944–49, vol. 302, fols. 254–9, citation fol. 259. General Koenig's summary of the Berlin negotiations is similarly subdued about the prospects of the French confederate plan: Koenig to Minister of Foreign Affairs, Report, April 15, 1948, AOFAA, Cabinet Civil Pol V, E 3, *Négotiations à Berlin, Mars 1948, Préliminaires*.

could no longer stall, France adjusted its policy in order to retain a voice in the formation of Western Germany. However, in accepting the U.S. schedule for a West German government, France had not accepted American or British ideas on West Germany's constitution.

In London, where the talks resumed on April 20, the three powers could not agree on a list of constitutional principles to guide the Germans. Instead, the conference adopted three documents that instructed the military governors how to get the West German constituent process under way, how to evaluate the constitution once it was drafted, and how to draw up an occupation statute defining the relationship between the Allies and the new West German government.

Among these three documents, the one on "Political Organization," which set out the constituent process, was agreed upon only on the final day. The United States and Britain were determined that the constituent assembly should have a democratic mandate in order to associate all Germans with the new order and make them responsible collectively for its success. But France was haunted by the specter of another Reichstag. On May 20, 1948, a French note to the United States and Britain suggested that plans for a West German government should be postponed, because a constituent assembly elected "by direct universal suffrage" contradicted "the very principles of the federal system in view and may bring surprises" by reviving nationalism. The note also warned that the Soviets could see a threat in a West German state and retaliate in Berlin.⁴⁰ These belated French objections seemed to put the London talks into question. Strang and Douglas wondered aloud whether France had been negotiating with sincerity over the past months or ever intended to accept a West German government. They pointed out that the West Germans were ready and willing to implement the Allied program but "would reinsure with the Russians" instead, if the Allies wavered.⁴¹ A week earlier, British Military Governor General Sir

⁴⁰ Sir Oliver Charles Harvey, British Ambassador in France, to Foreign Office, Telegram 687, May 20, 1948, PRO, FO 371/70590; for the original text, see MdAE, Série Y Internationale 1944-49, vol. 305, fols. 169-73.

⁴¹ Minutes, "Talks on Germany," [May 21, 1948], PRO, FO 71/70590, citation on 4. (Crown copyright material in the PRO is reproduced by permission of the Controller of Her Majesty's Stationery Office). For an abbreviated report, see *FRUS* 1948, 2:266-9.

Brian Robertson and Clay had already told the main points of the London agreement to their ministers-president, who were grateful to be informed and eager to begin.⁴²

The French alert against a run-away constituent convention was not new, though serious. Couve de Murville feared that an assembly based on all-German election "would be recreating the old conditions which were so favorable to nationalism, namely the Reichstag." Therefore, France would only allow a lower house elected in the states. The intent was to preclude any national parties and national election campaigns. When pressed, Couve even hinted that France might veto a constitution that provided for a directly elected lower house.⁴³ The French yielded only after the U.S. and Britain had made it clear that they would not prescribe how the Germans had to constitute their lower house.⁴⁴ On May 31, the conference agreed that each state legislature could decide how the delegates for the constituent assembly would be "chosen." The ambiguous term allowed for popular elections, which the United States and Britain preferred, or indirect selection, favored by France.⁴⁵ The British and the U.S. were so annoyed with the last-minute French obstruction that they agreed informally that "the infirmities of unanimous consent among the military governors" would not delay the ratification of an acceptable constitution.⁴⁶

The other London instructions to the military governors were set down in two "Letters of Advice." One, "Regarding German Consti-

⁴² Memorandum, "Meeting Between Military Governors and Minister Presidents," May 15 [14?], 1948, NA, RG 260, OMGUS CAD, 17/254-3/13. At an earlier informal meeting, British and U.S. officials were assured by several ministers-president that they were eager to accept more political responsibility and would form a government, O'Neill to Steel, Letter, May 18, 1948, PRO, FO 371/70590.

⁴³ Minutes, "Talks on Germany," May 26, 1948, PRO, FO 371/71113, citation on 2.

⁴⁴ Foreign Ministry to Embassy London, Telegram 2817, May 29, 1948, MdAE, Série Y Internationale 1944-49, vol. 305, fol. 257.

⁴⁵ Document, "Political Organization," TRI/13 (Final), May 31, 1948, *FRUS* 1948, 2:305-6.

⁴⁶ Douglas to Secretary of State, Telegram NIACT 2360, May 30, 1948, NA, RG 260, Confidential Decimal File, 740.00119 Council/5-3048, citation on 2; cf. memorandum by Charles E. Saltzman, Assistant Secretary of State for Occupied Areas, May 31, 1948, *FRUS* 1948, 2:301.

tution," set out minimum requirements. It will be discussed below. The second instructed the military governors to prepare an occupation statute. This document would specify which powers the victors would hold in reserve after the West German government was established.⁴⁷ German political leaders had long demanded such a self-restricting instrument as an earnest sign that the victors would respect German law and use their unlimited rights of conquest only in very special circumstances. The occupation statute was to be published before the referendum on the constitution, so Germans would know of all constraints on their government and could not later accuse the victors of dictating the new political system, nor blame them for its flaws.⁴⁸

The London agreements for a West German government were embedded in additional three-power accords for international control of the Ruhr industries and resources and for an indefinite occupation to monitor German demilitarization.⁴⁹ Therefore, French security was not compromised, even though France gave up on a confederate Germany. The U.S. military government regarded French acceptance of the London agreements as a milestone. James K. Pollock, who had worked closely with Clay in 1945–46, noted in an off-the-record conversation in Berlin that France, which had rejected the Potsdam agreement, was now, for the first time, committed to finding a workable solution for the future of Germany.⁵⁰

On July 1, 1948, in Frankfurt, the Western military governors invited their ministers-president to set up the West German state and gave them the relevant portions of the London agreements in three "Frankfurt" Documents. One "authorized" the ministers-president to convene a constituent assembly; another to review state boundaries; the third promised them the occupation statute. The ministers-president were understandably reluctant to deepen their country's split and preferred to create a provisional Western government. They had to be nudged to accept the London terms without

⁴⁷ Document, "Letter of Advice ... Regarding Powers of Civil and Military Governments," TRI/17 (Final), May 19, 1948, *ibid.*, 260–2.

⁴⁸ Minutes "Talks on Germany," May 4, 1948, PRO, FO 371/70589,1–3.

⁴⁹ Communiqué, June 7, 1948, *FRUS* 1948, 2:313–7, summarizes the London conference results.

⁵⁰ Reported by SUDENA, Telegram 211, June 22, 1948, AOFAA, Cabinet Civil Pol V, E1/b.

amendments. But the Allies did not always speak with one voice. The British suggested that minor amendments to the Frankfurt Documents might be conceded even on the crucial term “constitution,” to which the Germans objected because it expressed commitment to a permanent government.⁵¹ U.S. officials, on the contrary, bluntly told German party leaders not to expect better terms and to accept the split of Germany.⁵² The mixed advice may have encouraged the ministers-president to decide to submit counterproposals. They maintained that the German people could not exercise self-determination under an occupation and could only set up a provisional order. Instead of a permanent constitution ratified by a popular referendum, they proposed a “basic law” ratified in the state legislatures; and, instead of a government, a “uniform administration.”⁵³

Faced with a half-hearted conditional acceptance, the military governors decided to set out clear alternatives: The ministers-president would either constitute a government on the London terms, or they would take all responsibility for the delays while their counterproposals were referred to the Allied governments. In explaining these options, Robertson stressed that no ultimatum was intended.⁵⁴ But the ministers-president no longer had any choice. Once they conceded that the Western zones had to be governed uniformly, they could not justify unpredictable delays over vocabulary. On July 26, 1948, they accepted the London terms, helped by three concessions that Robertson and Koenig wrested from Clay. The charter could be called “basic law (provisional constitution),” instead of “constitution,” as the London terms specified. The two other German requests—to ratify the Basic Law in the state legislatures, not by popular referendum, and to have more time to review state

⁵¹ Robertson to Regional Commissioners, Telegram BGCC 5149, July 4, 1948, PRO, FO 371/70595.

⁵² Murphy to Secretary of State, Telegram, July 9, 1948, *FRUS* 1948, 2:384.

⁵³ Minister Presidents to U.S. Military Governor, Letter, [July 10, 1948], *ibid.*, 385–9.

⁵⁴ Memorandum, “Notes on Meeting of Military Governors held on 19 July 1948,” PRO, FO 1049/1555; Minutes, “Meeting between Military Governors and Minister Presidents,” July 20, 1948, *FRUS* 1948, 2:404–6.

boundaries—were referred to the three governments, which ultimately granted them.⁵⁵

The West German Parliamentary Council began its work in Bonn in September 1948 and completed it in April 1949. Allied liaison officers monitored it and had informal contacts with Council members behind the scenes in Bonn. But neither the liaison officers nor the military governors could dictate to the Council without undermining the legitimacy of the Basic Law and reviving memories of Versailles. Moreover, in London, the three powers had not been able to agree on a short list of constitutional principles for the Germans. The first "Frankfurt" document offered only minimal guidance. The constituent assembly was to draw up a "democratic constitution which will establish ... a governmental structure of the federal type ... which will protect the rights of the participating states, provide adequate [central?] authority and contain guarantees of individual rights and freedoms." If the military governors found that the constitution did not "conflict" with these guidelines, they would submit it to popular ratification.⁵⁶

As mentioned above, the London agreement included a confidential "Letter of Advice ... Regarding German Constitution" to help the military governors assess the Basic Law. The Parliamentary Council was not given this letter so as to avoid the appearance of dictation. The military governors were told that a federal system could have many forms. At a minimum, it had to protect the states from the central government by enumerating the respective powers of each level. In particular, the powers to tax, to spend, and to administer revenues had to be clearly set out. Where uniformity was needed—for instance, in public health and social programs or in national taxes—the central government could legislate uniformity. However, the constitution had to keep the central authority in check by limiting its finances. It could only collect and administer revenues for its own programs, not for redistribution to the states. The states would administer most social services, such as education, health, and welfare, and would control the necessary revenues. Two institutional

⁵⁵ Frankfurt to Foreign Office, Telegram 240, July 26, 1948, PRO, FO 371/70596B; cf. Murphy to Secretary of State, July 26, 1948, *FRUS* 1948, 2:410–2.

⁵⁶ "Document I, Constituent Assembly," July 1, 1948, in Ruhm von Oppen, ed., *Documents on Germany*, 315–6.

checks on central power were also required: a bicameral legislature with an upper house that had “sufficient power to safeguard the interests of the states” and a system of independent judicial review to uphold the constitution and protect civil liberties.⁵⁷ In all, the Constitution would protect the states and block centralization in three ways: by specifying the central government's revenues, its legislative powers, and its authority to create its own field administrations; by making the upper chamber a bulwark of states' rights; and by establishing judicial review. Not knowing any of these detailed requirements, the Parliamentary Council (as the constituent assembly was called) soon opted for provisions that the military governors were bound to reject.

Two issues led to serious controversy between the governors and the Council. In the interest of efficiency, the Council proposed that all taxes should be administered by one agency of the central government; and, in the interest of social justice, the Council planned for equalization payments from the central government to poorer states. To carry out these tasks, the central government would need to set, collect, and distribute the most important taxes. Such concentration of fiscal power was contrary to the confidential “Letter of Advice,” which stated clearly that the central government could neither raise nor spend more revenues than it needed to fulfil its constitutional tasks. Evidently, the Allied liaison officers had to intervene.

First, they tried to meet officially with Konrad Adenauer, the president of the Parliamentary Council. Adenauer apparently did not care to receive Allied instructions and thus offered a pretext to avoid the meeting. The liaison officers then presented their “contribution” to the Council's deliberations to its vice-president, Adolf Schönfelder, on October 20.⁵⁸ Paraphrasing the letter of Advice, they ex-

⁵⁷ Document, “Letter of Advice ... Regarding German Constitution,” TRI/15 (Final), May 12, 1948, *FRUS* 1948, 2:240–1.

⁵⁸ Memorandum, “Statement to the President of the Parliamentary Council on the Distribution of Powers in the Financial Field,” n.d., and memorandum by Hans Simons, Oct. 22, 1948, NA, RG 260, OMGUS CAD, 17/254-2/5. The liaison officers met Schönfelder because Adenauer would not receive them. His excuse was a slight car accident. But, as Simons noted on October 22, Adenauer was fit enough to travel to Switzerland the next day. Golay, *Founding the Federal Republic*, 85.

plained that the central government should not administer more revenues than it needed for its constitutional tasks. The states should administer the rest. Schönfelder replied that, unlike the United States, Germany could not afford the luxury of duplicate federal and state tax agencies. One liaison officer brushed aside this appeal to frugality by observing that a dictatorship would doubtless be most efficient, admonishing that "to become democratic Germany had to make some sacrifices; the cause made them worth while."⁵⁹ The Council ignored this gratuitous, patronizing advice.

By mid-November 1948, the three military governors concluded that the Basic law "was going rather off the rails." To avoid a charter they might have to veto, the governors decided that the Council should be given the points of the confidential "Letter of Advice."⁶⁰ On November 22, the liaison officers handed them to Adenauer in an aide mémoire. The Allied officials stressed that the military governors were not dictating, but only informing the Council how they would evaluate the Basic Law.⁶¹ Once again, the Parliamentary Council took no notice. The leading member of the Social Democratic Party, Carlo Schmid, told his colleagues to ignore the military governors, finish the Grundgesetz, and challenge them to accept it or dictate amendments. Apparently, Schmid and others calculated that the Allies wanted a West German government so badly that they would accept almost any Basic Law.⁶² In mid-December, the military governors shook that optimism when they received a Council delegation. The meeting, which the Germans had requested, was carefully staged and somewhat cool. In response to their written questions, General Koenig said little about the Grundgesetz except that it did not conform to the November 22 aide mémoire. He left

⁵⁹ Minutes, "Compte-rendu de l'entretien entre les officiers de liaison et le vice-président du conseil parlementaire," CRF (LOCP/3ème séance), Oct. 20, 1948, AOFAA. Cabinet Civil Pol V, K 4. The memorandum does not identify the liaison officer who made the comment.

⁶⁰ Frankfurt to Foreign Office, Telegram 1009, Nov. 17, 1948, PRO, FO 371/70600, 2; cf. *FRUS* 1948, 2:440–1.

⁶¹ British Liaison Staff Bonn to Berlin, Telegram 41, Nov. 22, 1948, PRO, FO 1030/85; for the text of the aide mémoire, see *FRUS* 1948, 2:442–3.

⁶² Robertson to Foreign Office, Telegram 2200, Nov. 25, 1948, PRO, FO 1030/85; Chaput de Saintonge, Frankfurt to Berlin, Telegram FGCC 55423, Dec. 6, 1948, *ibid.*

no doubt that the central government controlled too many taxes, leaving the states only minor sources of revenue.⁶³ The Council ignored the Allied advice once more.

For France, which dreaded centralization, the correct division of financial powers in the constitution was essential. Since the Germans would not include this safeguard in the Basic Law, the French offered a radical alternative: to dictate the division of taxes through the occupation statute. The statute required the Germans to pay the costs of occupation. By one French estimate, these would be "35–40 percent of [all?] German budgetary outlays," by another, "80 percent of the German budget."⁶⁴ The French wanted to write into the occupation statute that this heavy but diminishing charge had to be paid from concurrent taxes, those that the two levels of government shared, and that the states alone would administer these taxes. The central government would be restricted from the outset to minor revenues such as customs and postal services. Although it would have to pay the occupation costs, it would be denied even temporary control of the shared taxes to do so.⁶⁵ However, the United States upheld the November 22 aide mémoire, which allowed the central government to raise revenues for all its obligations. By insisting that these include occupation costs, the United States blocked the French proposal.⁶⁶ The persistent attempt to circumvent the Basic Law with the occupation statute reveals continuing French malaise about the future West German government. Six months after accepting the London terms, France was still looking to keep the West German government, which was by now unavoidable, weak, and poor. French policy was revised in late February 1949, when the draft Basic Law was reviewed in Paris in a meeting chaired by Foreign Minister Robert Schuman, who had made up his mind that the Allied policy toward Germany had to succeed. He accepted an idea

⁶³ The meetings took place on Dec. 16 and 17, 1948. For the minutes and reports, see *FRUS* 1948, 2:641–50, esp. 648–9.

⁶⁴ The sources do not explain the base for the calculations: memorandum 667, Leroi-Beaulieu to General Koenig, Dec. 11, 1948, AOFAA, Cabinet Civil Pol V, F 1/14; memorandum Jan. 28, 1949, MdAE, Série Y Internationale 1944–49, vol. 319, fols. 253–4.

⁶⁵ French Embassy, London, to Paris, Telegram 280–84, Jan. 22, 1949, *ibid.*, fol. 161–bis.

⁶⁶ Secretary of State to London, Jan. 26, 1949, *FRUS* 1949, 3:21–2.

by George F. Kennan that the three powers might resolve differences on Germany and its constitution at top-level negotiations.⁶⁷

Meanwhile, the draft Basic Law had passed the committee on February 10, 1949. The military governors were asked to approve the draft before it went to the full Parliamentary Council. In preliminary review, they found it quite unsatisfactory and ordered their political advisors to draft amendments so the Basic Law would conform to the London terms.⁶⁸ The greatest problem was that the central government had too much legislative and fiscal power. In particular, it could legislate in matters of public health and welfare, fields that were expressly reserved for the states. It could also make payments to support poor states, which was dearly contrary to the restriction that the federal government could only raise revenues for its own obligations.⁶⁹

The military governors took up the report of their advisors on March 1–2, 1949. At issue was the central government's power to legislate, to tax, and to set up its own field administrations to apply its laws and collect its revenues. With regard to taxes, the governors would let the central government administer only its own portion of the concurrent taxes—those that it shared with the states. If costly parallel tax bureaucracies were to be avoided, the states could administer all concurrent taxes. But the reverse arrangement, whereby the central government would administer all concurrent taxes, was expressly ruled out. Thus, the military governors upheld the policy made explicit since the autumn of 1948 that the central government could not administer more revenues than it required for its particular obligations. The restriction ruled out federal transfer payments to needy states, for which the draft Basic Law also provided. These major objections, as well as lesser ones, were set out in "comments" on the draft. They were phrased in a kindly helpful way and included revised articles enumerating the fields in which each level of

⁶⁷ Schuman to Washington, Telegram 1162–63, Feb. 22, 1948, MdAE, Série Y Internationale 1944–49, vol. 321, fol. 146; memorandum 546 "Compte-rendu de mission," Feb. 24, 1949, AOFAA, Cabinet Civil Pol V, F 1/18, 3.

⁶⁸ Murphy to Saltzman, Feb. 17, 1949, *FRUS* 1949, 3:199–203.

⁶⁹ Murphy to Secretary of State, Feb. 19, 1949, *ibid.*, 204–6; Art. 3.(b) should read: "It gives the federation power to legislate...."

government could legislate. The military governors indicated that they would approve the Basic Law if their comments were adopted.⁷⁰

In the Parliamentary Council, a committee of seven representatives of the major parties drew up counterproposals and reviewed them with the Allied liaison officers and finance experts during five sessions that ended in an impasse on March 18, 1949. The sides could not agree on the central government's power to tax and spend. The Germans insisted that the central government would collect and redistribute a portion of the concurrent taxes to help all states meet their social burdens equitably. It was no secret that the military governors had instructions to prohibit such transfers. The Council's finance expert, Hermann Höpker-Aschoff, argued strenuously that fiscal redistribution would not threaten the states in any way; that such transfers were common in other federal systems, particularly the United States and Switzerland; and that transfers were necessary to keep the poorest states from bankruptcy. His appeal to precedent abroad and social justice at home failed completely.⁷¹ The central government would not get the opportunity to accumulate power by offering or denying a state equalization payments. For the same reason, the Allied officials would not allow the federal tax administration to collect both the federal and concurrent taxes. Federal revenues could only match federal needs. All other revenues had to be collected by and go to each state at the source, without redistribution.⁷²

On March 25, the representatives of the Parliamentary Council were told bluntly to find solutions in accord with the repeated notices from the military governors. To give the message weight, Jean Sauvagnargues, the deputy director of the Central European

⁷⁰ Murphy to Secretary of State, March 2, 1949, *ibid.*, 217–20. For the full text of the memorandum, listing the legislative fields to be reserved for the states, see *Documents on the Creation of the German Federal Constitution* (Berlin, 1949), 108–10.

⁷¹ Minutes, CRF/LOCP, 6ème séance, March 9, 1949, AOFAA, Cabinet Civil Pol V, K 4, 5–7.

⁷² Minutes, CRF/LOCP, 6ème séance, March 9, 1949, *ibid.*, 5–9; cf. 7ème séance, March 9, 1949, *ibid.* For a U.S. report of these meetings, see Simons to Litchfield, Telegram FMPO-531, March 11, 1949, NA, RG 260, OMGUS AG, 1949/67/1.

Section of the French Foreign Ministry, delivered a near ultimatum in the presence of the liaison officers. He ruled out compromise: "It is up to the Parliamentary Council to assume its responsibilities and to bring its task to a successful conclusion in full knowledge of the observations that have been conveyed to it. The Commanders in Chief will doubtless not take a stand on the Basic Law before it is submitted to them officially." After reading his text, Sauvagnargues ended the exceptional meeting without further discussion.⁷³

In truth, Sauvagnargues' curt message and abrupt delivery merely feigned Allied unity and determination. Clay and Koenig found the financial provisions of the Basic Law unacceptable. But the British Cabinet had already accepted the draft Basic Law on March 10.⁷⁴ When Robertson's advisors joined their French and American colleagues in mid-March to press the Parliamentary Council's committee of seven for revisions, they were firmer than their government. In late March, Robertson began to backtrack. His liaison officer admitted to telling Adenauer that Robertson would veto a Basic Law that did not have the vote of the Social Democrats, the strongest proponents of federal payments to poorer states. The French concluded that Robertson had broken rank and allied with the Social Democrats.⁷⁵ Sauvagnargues reported in late March that the Germans would not be coerced, since they knew very well that the Allies were divided. As he saw it, in the Parliamentary Council, the Social Democrats controlled the situation. Bolstered by the British, they would make no concession the Free Democrats would follow suit; and the Christian Democrats alone would not try to pass a Basic Law that had been amended to satisfy Allied specifications.⁷⁶ Apparently, Social Democratic leaders calculated that the Allied foreign ministers, who were scheduled to meet in Washington in early April, would be less rigid than the military governors.⁷⁷

⁷³ Minutes, CRF/LOCP, 10ème séance March 25, 1949, AOFAA, Cabinet Civil Pol V, K 4.

⁷⁴ Alan Bullock, *Ernest Bevin: Foreign Secretary 1945–1951* (Oxford, 1983), 662, n. 3.

⁷⁵ Saint-Hardouin to Paris, Telegram 298–99, March 31, 1949, MdAE, Série Y Internationale 1944–49, vol. 322, fol. 309.

⁷⁶ Sauvagnargues to Paris, Telegram 266–72, March 26, 1949, *ibid.*, fols. 279–81.

⁷⁷ Riddleberger to Secretary of State, March 28, 1949, *FRUS* 1949, 3:232.

In fact, in the second half of March 1949, at the time of the impasse between the military governors and the Parliamentary Council, a conciliatory policy was being considered in France and the United States. A major reason for making concessions to the West Germans was the possibility of renewed talks with the Soviets. If a West German state was needed to speed European recovery and contain Soviet influence, the Western zones had to be unified before another meeting of the Council of Foreign Ministers. Otherwise, the Soviets could try to undo all progress toward a West German government with an offer to end the Berlin blockade and to negotiate a four-power settlement of the German question. As a memorandum from the French Foreign Ministry warned in early March, the renewed four-power negotiations could result in a centralist German government in Berlin, Soviet participation in Ruhr control, and the end of the occupation itself, "with the loss of the presence of American soldiers in Germany which represent an essential guarantee of our security." Such dangers made a West German government under the Basic Law appear as an opportunity not to be missed.⁷⁸

In Washington, a sub-committee of the National Security Council had begun in early 1949 to review U.S. policy toward Germany. Much of the work went to George F. Kennan, the director of the Policy Planning Staff in the Department of State. After a trip to Europe in March 1949, Kennan reported to Secretary of State Dean Acheson that the United States should now support Germans of good will and "not press its federalization policy on the Basic Law."⁷⁹ The State Department took the same position in a report on "U.S. Policy Respecting Germany," submitted to President Truman on March 31, 1949. The Department recommended that the foreign ministers should review the difficulties with the Basic Law, but be "aware that insistence upon changes beyond those now proposed by the Germans will incur the risk of placing on the Allies themselves the onus for future difficulties encountered in the

⁷⁸ Note by de Leusse, March 9, 1949, MdAE, Série Y Internationale 1944–49, vol. 322, fols. 110–3, citation 113.

⁷⁹ Kennan report to Acheson, March 29, 1949, summarized in *FRUS* 1949, 3:137–8; George F. Kennan, *Memoirs 1925–1950* (New York, 1969), 453–65, gives a moving, mournful account of the journey.

working of the constitution."⁸⁰ The failure of the imposed Versailles Treaty was invoked to advocate moderation toward democratic forces in West Germany.

On April 6 and 7 in Washington, the foreign ministers resolved the impasse over finances and federalism in the Basic Law. Bevin, whose government struggled with the social burdens of war, took the lead in pleading the German case that political wisdom and social justice demanded equalization payments. He reported that, after "hours of discussion," the British Cabinet had concluded that transfer payments were necessary:

There is bound to be better off places, and when you think of the social conditions—the housing and all the other things that have got to be done in Germany—if you are going to restrict this financial basis further than the CEU [*sic*] and SDP [*sic*] agreed among themselves, I really can not see how our social program can be got going at all.... What I am anxious to do, if we are going to stop Communism we must develop a good social plan, and I think the point to which we have stuck over this finance is unreasonable.⁸¹

Schuman did not attempt to refute Bevin's homespun logic. But he wanted to wait for German concessions and upheld the principle that the revenues of the central government should not exceed its specific needs. That had been agreed in London, defended in Frankfurt, and reaffirmed by the foreign ministers themselves in a direct message to the Parliamentary Council.⁸² The next day, Bevin reviewed the plight of the agrarian state of Schleswig-Holstein. Refugees had doubled its population. The state could not afford an adequate education system. Bevin wanted the central government to supplement the health, education, and welfare budgets in poor states, so long as the upper chamber approved such measures. Schuman responded that the power of the states would be diminished unless they could finance autonomously whatever programs they legislated. But Acheson reassured him that the opposite was the case. In the

⁸⁰ Memorandum, "Outline of New Approach ...," March 30, 1949, *FRUS* 1949, 3:155.

⁸¹ Minutes, April 6, 1949, 11:10 a.m., MdAE, Série Y Internationale 1944–49, vol. 323, B-6. Another set of the verbatim typescript minutes of the Washington foreign minister's talks is in NA, RG 43, Box 303.

⁸² Minutes, April 6, 1949, 11:10 a.m., MdAE, Série Y Internationale 1944–49, vol. 323, B-8.

United States, federal grants-in-aid for specified programs were common and strengthened the states by allowing them to deal with social problems for which they could not pay otherwise. Since the states controlled the funds and the central government only audited their proper use, state autonomy was not threatened.⁸³ Unable to deny the social need or to challenge the U.S. experience in federalism, Schuman yielded. In effect, the foreign ministers amended the London terms and agreed to the German demands for equalization payments funded by the central government. A major obstacle to agreement on the Basic Law was removed in Washington. The military governors were authorized to inform the Parliamentary Council that they would not rule out grants by the central government from its own revenues to supplement state revenues "for education, health and welfare purposes, subject in each case to specific approval by the Bundesrat."⁸⁴

After the Germans received these concessions, the military governors and representatives of the Parliamentary Council met on April 25, 1949, to agree on the Basic Law. The Germans proposed to give the central government authority to uphold legal or economic unity or uniformity. The military governors found this formulation too elastic. If the central government could legislate uniformity, it might expand its activities almost without limit at the expense of the states.⁸⁵ The Germans then proposed a restrictive formula. The central government should assure equal economic opportunity or "homogeneity of living conditions."⁸⁶ In turn, the military governors made an important concession on financial equalization. In Washington, the foreign ministers had agreed, at Bevin's urging, that the "better off" regions had to help out the poor ones. The central government could supplement state expenditures for education, health, and welfare, if the upper chamber representing the states approved. But the central government could not make such grants unless it could raise additional revenue.⁸⁷ The solution, Article 106 (4) of the Basic Law, neatly balanced central against state power. If transfer payments were necessary, the central government could take

⁸³ Minutes, April 7, 1949, 11:15 a.m., *ibid.*, B-2-9.

⁸⁴ "Message to the Military Governors," April 8, 1949, *FRUS* 1949, 3:185.

⁸⁵ Record of Meeting, April 26 [25?], 1949, *ibid.*, 254, 257.

⁸⁶ *Ibid.*, 258-9.

⁸⁷ *Ibid.*, 255-6.

the revenue out of specific state taxes, but only if the Bundesrat approved such legislation. The revenues would flow directly to the needy states, which would decide how they would be spent.⁸⁸ The expansion of federal power was checked, but the needs of social justice were met. On May 12, 1949, the military governors gave their approval of the Basic Law to the representatives of the Parliamentary Council.

The Western Allies initiated the West German constituent process, monitored it, and approved the Basic Law before it could be ratified by the state legislatures. The Allied liaison officers, ready to advise at every stage, were a constant reminder that the Allies had the penultimate word. The statement by the party leaders, quoted at the opening, that the drafters of the Basic Law had been free from foreign influence is not accurate. There was influence. It focused in particular and repeatedly on the fiscal powers of the central government. On that issue, the intransigence of the Parliamentary Council was rewarded when the foreign ministers yielded in order to secure for the Basic Law the support of the major parties.

What circumstances allowed the defeated, occupied West Germans to get their way? The Council of Foreign Ministers in 1946–47 revealed profound Allied disagreement over the form and scope of a German government. The differences among the Western powers were not based in constitutional theory but reflected foreign policy objectives, economic interests, and security concerns. In general, two constitutional programs emerged. From their position of weakness, the French saw security in a dismembered, or at least highly decentralized, Germany. From 1946, their constitutional proposals reveal unvarnished determination to consolidate the gains of their policy of obstruction in the Allied Control Council. The unrelenting French efforts to keep the German federal government poor and weak, which continued into early 1949, were devoid of constitutional theory and indifferent to German opinion. If they did not prevail, it was because the economic and security interests of the United States (from 1946) and Great Britain (from 1947) demanded a credible West German government that could engage the people and mobilize the economic potential of their zones for the recovery of Western Europe. That was the goal of the United States and

⁸⁸ *Ibid.*, 259.

Britain when the three-power talks began in early 1948. It was affirmed in April 1949 in Washington by Bevin and Acheson, when they advocated acceptance of the Basic Law that suited the Germans. France adopted the program most reluctantly, because the alternative was complete isolation in Germany once the Soviets had withdrawn from the Allied Control Council in March 1948.

The Parliamentary Council prevailed against Allied pressure because the Allies could not reject its work without putting at risk their own policy to rebuild Western Europe as a stronghold against Soviet expansion. To succeed, the Allies needed the cooperation of German political leaders, many among them on the Parliamentary Council, who were committed to a democracy oriented toward the West. Because their good will, an asset developed over the previous years, had to be preserved, the Germans were in a favorable position at the outset. It improved as the Basic Law took form. On July 1, 1948, when the three military governors took turns reading the Frankfurt Documents to the ministers-president, the atmosphere was so chilly as to remind Hans Simons of the scene in Versailles in May 1919 when the German delegation, of which his father was a member, had received the peace treaty. On April 25, 1949, their meeting about the Basic Law ended on a different note. Clay brilliantly coaxed the Germans to negotiate until all issues were settled. After formulating how the central government could raise the revenues for equalization payments, "General Clay then left his chair and went over to the German delegation to personally explain what was meant by the Military Governors."⁸⁹ His spontaneous informality not only overcame the last difficulty; it shows how the standing of the German political leaders had evolved. The Basic Law finished off being a quadripartite agreement. The Germans emerged from the constituent process as partners, not full, not equal, but vital partners.

⁸⁹ Ibid.

The Basic Law and the Democratic Party State: Constitutional Theory and Political Practice

Michaela Richter

Political parties and the party system are often the key to a democracy's character and chances of survival. For Germany, that relationship is of particular significance. Explanations of the Weimar Republic's collapse have frequently centered on its parties and party system. Conversely, if "Bonn has not become Weimar," it is due in large measure to the establishment of an effective, democratic state supported by a stable structure of parties. In this development, the Basic Law and its interpretation and elaboration by the Federal Court of justice have played a decisive part.

The "democratic party-state" established by the Basic Law (and consolidated by the Federal Constitutional Court's decisions pertaining to parties), this paper argues, constitutes a unique synthesis of Western parliamentarism and the German state tradition. The constitution states unequivocally principles that are part of the Western and especially Anglo-Saxon parliamentary tradition: popular sovereignty, the role of parties and elections as mechanisms for giving expression to public opinion, and parliament as the sole source of political authority. On the other hand, the elevation of parties to constitutional rank, the way their role has been defined, the constraints imposed on them, and the mechanisms for ensuring effective governance derive from certain continuities with the German state tradition. Most important is the persistent concern with maintaining the coherence and effectiveness of the state, though this is now to be achieved through parties. In the process, the Basic Law and the Federal Constitutional Court's party rulings have endowed parties with a "quality of stateness" that they do not possess elsewhere. Nor has this quality remained at the theoretical level. The Federal Republic's main parties are said to have become identified, even fused, with the state in ways inconceivable in other representative democracies.

On the whole, this synthesis has been remarkably successful. Over the past forty years, the Federal Republic's parties have created a dynamic economy, presided over a major yet orderly social trans-

formation, and provided sound and stable government. By creating the framework and conditions for a viable, effective democratic party-state and party system, I maintain, the Basic Law and the Federal Court's party rulings helped to legitimate not only the Federal Republic's political parties and the concept of competitive, party-based democracy, but also the Basic Law itself. Despite recent signs of voter disaffection, I conclude, the Basic Law and the Court have achieved what had been absent in previous political regimes: a broad popular and elite consensus on democratic principles and the existing constitution. At a time when many are calling for a critical reassessment of the West German constitution in the face of reunification, it may be well to recall—as this paper aims to do—the positive contributions of the Basic Law and the Federal Constitutional Court to the legitimation of political parties and stable, democratic government by them.

As to the structure of this paper, part I offers a brief historical survey of Germany's anti-party tradition. Part II centers on the Basic Law's provisions concerning political parties and their implications. In part III, I turn to the Federal Constitutional Court and its role in consolidating the democratic party-state created by the Basic Law. Part IV then traces the impact of the Basic Law and the Court's jurisprudence on the actual evolution of the party-state and its popular legitimation. Finally, part V briefly examines recent signs of disaffection with the post-1949 parties and party-state and concludes that the evidence points neither to a party crisis nor to a fundamental "delegitimation" of the post 1949 institutional order.

I. The Road toward the Party State

Today, the Federal Republic is often called a democratic "party-state" (*Parteienstaat*). In the German context, this concept encompasses several dimensions: 1) the formal constitutional recognition of political parties; 2) constitutional provisions that ensure stable, responsible, effective party government; 3) a distinctive constitutional theory that not only views political parties as essential to the exercise of popular sovereignty but also elevates them to constitutional institutions funded and supported by the state; 4) the practical fusion of party, state, and society through state-funded political parties, the penetration of parties into state administration, a concomitant move-

ment of civil servants into the political parties and parliament, and the major role played by parties in publicly funded social institutions and activities. Together, these dimensions signify a profound change in the relationship between political parties and the state in both German constitutional theory and political practice.

To appreciate the full weight of this change, it may be worth recalling that during the nineteenth century, indeed right through the *Kaiserreich* and the Weimar Republic, this concept would have seemed an impossible, even "abominable hybrid."¹ It presupposes a relationship between state and society that political and legal theorists had, until then, categorically rejected. These had insisted not only on the complete separation of state and society but also on the natural subordination of society to the state. Society was, in essence, a "subjective" order composed of jostling, fragmented, selfish, transient interests, incapable of common purpose and action.² To the state, on the other hand, was attributed a universalist character. It alone possessed the permanence, unity of direction, concern for the general interest, the impartiality and creative energy necessary for the orderly functioning of society. True or "ordered" freedom was to be found within the state rather than in independence from it or its representatives. Hence, Rudolf Gneist held, "only in the permanent subordination of society to a higher, steady authority could the personal liberty, the moral and spiritual development of the individual be realized."³

Government, from this perspective, functioned solely within that concept of the state that "endowed public power with a unique mission and stressed the interdependency and integration of its constituent organs with reference to this mission."⁴ Both in the Empire and in the Weimar Republic, government was thought to be an

¹ Gordon Smith, "West Germany: The Politics of Centrality," *Government and Opposition* (1976): 398.

² Gordon Smith, *Democracy in Western Germany*, 2d ed. (New York, 1982), 3.

³ Quoted in Karlheinz Nicklauss, *Demokratiegründung in Westdeutschland: Die Entstehung der Bundesrepublik von 1945–1949* (Munich, 1974), 242.

⁴ Kenneth Dyson, "Party State and Party Government," in Herbert Döring and Gordon Smith, eds., *Party Government and Political Culture in Western Germany* (New York, 1982), 80.

organ of the state, "the political aspect of the public power which, unlike administration, provided leadership and control."⁵

Not surprisingly, German legal and political thought during the Kaiserreich was hostile not only to political parties but also to parliamentarism. Increased power for the parliament, after all, would invariably enhance the influence of political parties and thus endanger both sound government and the objectivity of the state. As "the embodiment of society's inherent fragmentation and conflicts," parties could never forge, in Hintze's phrase, the "inner unity" necessary for good government.⁶ Worse, their participation in the governance of society would inevitably weaken the state itself, rendering it incapable of those impartial judgments on which the smooth functioning of the social and political order depended. No one had expressed the conservative anti-party position more succinctly than Lorenz von Stein: "The parties serve to make an objective policy impossible. Their influence, indeed, the influence of society on the state and in the state is not legitimate."⁷ So stated, any constitutional reform toward democracy and the participation of elected parties in government had to be resisted at all cost. Of course, as Eberhard Pikard has pointed out, the Constitution of 1871, as well as the governmental practices of the Kaiserreich, did little to overcome the social and party pluralism that conservative elites and legal jurists condemned. For the "fiction of the neutral *Obrigkeitsstaat*" could be sustained and legitimized only through the perpetuation of "party particularism."⁸

Acceptance of parties as necessary elements of modern constitutional democracy was grudging even after the collapse of the monarchic order and the establishment of the Weimar Republic. Until late in the Weimar Republic, constitutional theory saw parties as "extra-constitutional givens," which played their part in the political life of

⁵ Ibid.

⁶ Otto Hintze, "Das Monarchistische Prinzip und die konstitutionelle Verfassung" (1911), in Otto Hintze, *Staat und Verfassung. Gesammelte Abhandlungen zur allgemeinen Verfassungsgeschichte* (Göttingen, 1962), 359–89.

⁷ Quoted in Otto von der Gablentz, *Politische Parteien als Ausdruck gesellschaftlicher Kräfte* (Berlin, 1952), 5.

⁸ Eberhard Pikard, "Die Rolle der Parteien im deutschen konstitutionellen System vor 1914," *Zeitschrift für Politik* (1962): 29–31.

the nation but had no constitutional relevance.⁹ The Weimar Constitution itself contains but one reference to parties in relationship to the civil service—and that, to use Wittmayer's phrase, in a tone of "sprödester Abwehr" or prudish rejection. (Thus, Article 130 of the Weimar Constitution reminds civil servants that they must serve the public as a whole and not a given party.)¹⁰

Formally, of course, the Weimar Constitution established parliamentary and, by implication, party government. But it also incorporated mechanisms specifically designed to circumvent and counter the "stultifying effects of parties."¹¹ The most notable of these anti-parliamentary and anti-party provisions were those for a directly elected president with broad governmental and emergency powers and for plebiscites and referenda.¹² In essence, the semi-presidential and semi-parliamentary system created by the Weimar Constitution continued the constitutional dualism of the Kaiserreich: "The dualism of the president and parties corresponded to the distinction between state and society in a new guise."¹³ The ultimate effect of this dualism was to undermine both parliament and responsible party government.

The aversion to political parties so central to German constitutional thought, it should be stressed, was not confined to conserva-

⁹ Werner Conze, "Die deutschen Parteien in der Staatsverfassung vor 1933," in Erich Matthias and Rudolf Morsey, eds., *Das Ende der Parteien 1933* (Düsseldorf, 1960), 9. As late as 1928, the eminent constitutional theorist Heinrich Triepel was to dismiss political parties as "extraconstitutional forces that by their nature were alien to the state." See Hans Justus Rinck, "Der verfassungsrechtliche Status der politischen Parteien in der Bundesrepublik," in Karl Dietrich Bracher, Christopher Dawson, Willi Geiger, and Rudolf Smend, eds., *Die moderne Demokratie und ihr Recht. Festschrift für Gerhard Leibholz* (Tübingen, 1966), 305.

¹⁰ For contemporary treatments of parties in Weimar constitutional theory, including that of Wittmayer, see Franz Adler, "Die Rechtstellung der politischen Parteien im modernen Staat," *Zeitschrift für Politik* (1933): 162–9.

¹¹ Michael Stürmer, "Der unvollendete Parteienstaat," *Vierteljahrshefte für Zeitgeschichte* 2 (1973): 119–26.

¹² For the "anti-party" elements of the Weimar Constitution, see especially *ibid.*

¹³ Smith, *Democracy in Western Germany*, 19.

tive elites and jurists.¹⁴ During both the Empire and the Weimar Republic, it was also a major component of popular political culture. The anti-party prejudice of ordinary citizens, however, owed less to abstract philosophical and juridical arguments than to broadly perceived failings of the parties themselves.

The political parties of the Kaiserreich, it has often been noted, manifested several negative tendencies that precluded them from playing the constructive role that organized mass parties assumed elsewhere in Western Europe. Among their most serious flaws were: ideological polarization, doctrinal rigidity, social and regional particularism, and an inability to cooperate either on key policy issues or on the larger task of greater parliamentarization and democratization.¹⁵ The denial of any governmental participation or responsibility under the 1871 Constitution did much to encourage these adverse features; it also all but forced the parties into playing a largely obstructionist role within the Reichstag. The actual behavior of the parties, in sum, not only justified conservative resistance to increased power for parliament but also encouraged popular support for the anti-democratic vision of a "neutral," nonpartisan (*überparteilich*) state as the sole guarantor of social order and stability.

The experience of party government in the Weimar Republic did little to erode the anti-democratic legacy of the Kaiserreich. Caught between rigid doctrines, competing demands of interested clients attached to them, and fear of electoral losses, the parties proved incapable of providing stable, effective, and responsible government. Finally, confronted with the severe crisis created by the Depression, the Weimar parties opted to avoid governmental power and responsibility altogether (*Machtabstinenz*), thus leaving the anti-democratic

¹⁴ For an excellent historical survey of the concept of party and the arguments against parties in German political and legal thought, see especially Klaus von Beyme's article, "Partei, Faktion," in Otto Brunner, Werner Conze, and Reinhart Koselleck, eds., *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, 7 vols. (Stuttgart, 1972–92), IV: 677–733. Also, Erwin Faul, "Verfemung, Duldung und Anerkennung des Parteiwesens in der Geschichte des politischen Denkens," *Politische Vierteljahresschrift* 5 (1964): 61–94.

¹⁵ For an excellent analysis of German parties during the Kaiserreich, see especially Thomas Nipperdey, *Die Organisation der deutschen Parteien vor 1918* (Düsseldorf, 1961).

bureaucracy and executive to fill the vacuum.¹⁶ The sorry political record of the Weimar parties only reinforced popular anti-party sentiments and the concomitant yearning for a strong, objective, neutral state above partisan squabbles. It was these collective outlooks that the NSDAP so successfully manipulated.¹⁷

II. The Basic Law and Political Parties

During both the Empire and the Weimar Republic, constitutional theory (*Verfassungstheorie*) and constitutional practice (*Verfassungswirklichkeit*) concerning political parties operated in separate, seemingly unrelated spheres. To an unprecedented extent, the framers of the Basic Law sought to bring traditional political and legal thought on the nature of the state in line with the structural characteristics of modern democracy in general and the party-political reality of post-1945 Germany in particular.¹⁸ Their endeavor was guided as much by normative as by practical concerns. The normative issue confronting them was to overcome the negative identification of political parties with the pluralistic interests of civil society. Parties had to be given positive status by associating them with the governing functions and responsibilities of the state. The practical problem was to avoid the mistakes of the Weimar Constitution by endowing the democratic state with the stability, coherence, and effectiveness identified with the traditional idea of the state.

The framers of the Basic Law recognized that, in the light of Germany's historical legacies and experiences, it was necessary to go beyond merely acknowledging the role played by political parties in modern democracies. The institution of the party itself had to be constitutionally legitimated and the concept of party government reconciled with the older state tradition. This was to be the major contribution and significance of Article 21, which gave political

¹⁶ See especially Karl Dietrich Bracher, *Die Auflösung der Weimarer Republik* (Düsseldorf, 1955).

¹⁷ Thomas Nipperdey, "1933 und die Kontinuität der deutschen Geschichte," in *Die Weimarer Republik: Belagerte Civitas* (Meisenhain a.G., 1980), especially 380–5.

¹⁸ On the Basic Law's reconciliation of constitutional theory and political reality, see especially Rinck, "Der verfassungsrechtliche Status," 307–9.

parties constitutional status. Designed to eliminate the contempt with which parties were previously regarded, this article thus constitutes, in Wilhelm Hennis' witty phrase, a form of reparation (*Wiedergutmachung*) vis-à-vis the parties.¹⁹ Yet the constitutional reconciliation of party and state also required some adaptation in the concept and constitutional character of the state itself.²⁰ Seen in this light, Article 20, which addresses the nature of the newly constituted state, is no less novel and important than Article 21. Together, these two articles provide a distinctive concept of the democratic party-state that combines elements of Western parliamentarism and the German state tradition.

Article 20 of the Basic Law begins by describing the new polity as a "democratic and social federal state." This formulation is crucial for a number of reasons. First, it implies that the state is an *association* among citizens and constituent states rather than a moral and legal entity independent of and superior to civil society. It also suggests the participation of social interests in the state and the interdependence of state and society. Most importantly, it combines what had been declared incompatible in the Kaiserreich: democracy, with its implicit pluralism of competing interests, and the state, viewed as the embodiment and guarantor of unity and order.

According to section 2, moreover, the authority of the state now "emanates from the people" rather than from the state's own universal, moral character. Popular sovereignty was to be exercised by means of "elections and voting and specific legislative, executive, and judicial organs." Thus, the new polity was to be a representative state, based on the separation of powers rather than on monolithic state power. The new set of rules was designed to be the product not of a *single* will but of a *process* requiring the interaction of voters, parties, and functionally specified institutions. Moreover, rather than the state itself serving as the embodiment of normative standards, section 3 stipulates that all the organs of the new state (including the judiciary) are bound by norms external to it—the constitutional order itself, the basic rights enumerated in Articles 1 through 18, law

¹⁹ Wilhelm Hennis, "Parteienstaat," *Feuilleton der Süddeutschen Zeitung*, Nov. 12, 1985.

²⁰ For the importance of transforming the concept of the state to meet the political realities of postwar Germany, see especially Dyson, "Party State and Party Government," 80ff.

and justice, "as well as by conceptions of man and society found. . . to be implicitly in the constitutional concept of 'human dignity.'" ²¹ Finally, in section 4, citizens are given the right of resistance against those within the state seeking to abolish the constitutional order. "Freedom," therefore, is no longer secured solely within the state but *may* have to be protected against the state. ²²

The characterization of the state as an association, whose power derives from civil society (i.e., the people) and is exercised through elections and specified institutions, can encompass political parties far more easily than could the traditional concept of the state. Yet the Basic Law does not treat parties as mere mechanisms by which the will of the people is to be heard and represented. Rather, it assigns them (in Article 21) a role far more compatible with older theories of the state than with Anglo-American conceptions of party government.

Article 21 begins with the statement: "The political parties shall participate in the forming of the political will of the people." This statement conveys the impression that parties are expected to create a single public will. ²³ That notion seems to owe a debt to Otto Hintze, who insisted that parliamentary government required the "inner unity of the governed," as determined by the constellation of parties. ²⁴ Insofar as the framers imply that the meaningful exercise of popular sovereignty requires a unified or common purpose, the opening statement seems to be a continuation of earlier theories of the state, which made "unity of will" into the precondition for coherent state policy.

But Article 21 also departs from that tradition in a number of ways. First, the unity of will once thought requisite to orderly and sound government is no longer to be sought in the state but in civil society. Government is no longer to rest on the "inner unity of state rule (*Herrschaft*)," to quote Dolf Sternberger, but on a unity

²¹ Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, N.C., 1989), 39.

²² A solid discussion of the significance of Article 20 is found in Kommers, *Constitutional Jurisprudence*, 36–44.

²³ Gerhard Leibholz likens it to Rousseau's general will; see his *Strukturprobleme der modernen Demokratie* (Karlsruhe, 1958), 93ff.

²⁴ Pikard, "Die Rolle der Parteien," 24–6.

achieved through consensus and agreements among citizens.²⁵ Second, this political will does not have a prior identity to be discovered through reason, laws of history, or some other mechanism. Instead, it is to be formed by political activities of parties. In other words, the function of parties is to shape the disaggregated wills of the individuals into a coherent consensus that can then become the basis of state action. Yet the use of the plural makes it impossible for any one party to claim to be the sole embodiment or creator of the popular will. Indeed, since political parties are merely called upon to "participate" in shaping the political will of the people, other agents (though never identified in the Basic Law) are clearly expected to perform this task as well. In short, the "inner unity of the governed" is the product of a dynamic, interactive, and, above all, competitive process. Nonetheless, this process is *expected* ultimately to yield coherent will or public consensus to be translated into government policy by the victorious party or parties.

The novelty and significance of Article 21 is precisely that, in assigning to political parties the function of forming the popular will, it elevates them from being mere representatives of the pluralist civil society to the higher level assigned to organs of the state. Like them (and unlike other social associations), political parties have "constitutional functions to discharge."²⁶ By incorporating political parties into the constitutional order of the new democratic state, Article 21, it has been argued, went beyond legalizing political parties to legitimizing them. In terms of previous German legal and constitutional norms, this was a "revolutionary step."²⁷

Yet, from an Anglo-American constitutional perspective, the Basic Law's resolution of the old party vs. state antithesis is quite unusual, both for the constitutional function assigned to parties and for the restrictions imposed on them. As to the first, Anglo-American theorists, without denying the possibility of a single public interest, generally conceive it as the aggregate of a multiplicity of separate interests. From this perspective, parties are meant to represent the

²⁵ Dolf Sternberger, "Das angebliche Unrecht der Parteiregierung," in Kurt Kluxen, ed., *Parlamentarismus* (Meisenheim a.G., 1980), 389–91.

²⁶ Smith, *Democracy in Western Germany*, 67.

²⁷ For this argument, see especially Gerhard Leibholz, "Volk und Partei im deutschen Verfassungsrecht," in his *Strukturprobleme der modernen Demokratie*, 72–3.

plural interests of society in parliament rather than to form a societal consensus. The second purpose of parties in the English-speaking world is to present alternatives among which the voter may choose rather than to help forge an "inner unity" among the governed. Finally, even when they enter or form a government, political parties continue to be viewed primarily as intermediaries between society and the state rather than as integral components of public authority.

But, of course, the divergent German and Anglo-American perspectives on the role and functions of parties in the political order reflect fundamental historical differences in the political and constitutional developments of their respective societies. The comparative ease with which parties and party government were accepted first in Britain and subsequently in the United States has been traced to the triumph of Parliament in the seventeenth century. Thereafter, the notion of a "realm of public affairs that was and ought to be separate from civil society" failed to take root. Instead, the key practical and theoretical issues concerned the "representativeness of civil society and how to provide responsible ... responsive ... and accountable government." As political parties became important in the nineteenth century, the model of the "balanced constitution, (which the Americans had adopted earlier) gave way gradually to that of responsible party government.²⁸

In Germany, by contrast, both historical developments and the ascendancy of Roman law helped to fortify a conception of the state and its component institutions as separate and above civil society, to which parties were external and alien. Given the different political reality and constitutional tradition confronting them, the framers of the Basic Law had to establish the legitimacy of parties by integrating them into a broader conception of public authority.²⁹ But, by raising them to the level of "crypto-state organs," parties would have to assume as well the obligations that this new status entailed. In other words, having been endowed with the *quality of stateness*, they would have to follow *state-supportive* norms and behavior. It is in this light that we have to understand both the restrictions imposed on parties in other sections of Article 21 and the mechanism for securing responsible and effective government.

²⁸ Dyson, "Party State and Party Government," 78–80.

²⁹ *Ibid.*, 80–1.

Although the Basic Law guarantees every party the freedom to organize, it also subjects their internal organization, sources of funding, and political orientation to constitutional limitations and legal regulation. Section 2 even stipulates the outright prohibition of political parties, "which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order." From the perspective of Anglo-American constitutional theories, these restrictions violate a cardinal principle of liberal democracy, namely that the ultimate arbiters of what is politically acceptable are the people themselves in their capacity as voters.

The framers of the Basic Law were, of course, aware of the tension between the democratic principles of free speech and free association and the constraints they imposed on that freedom. Nonetheless, there were two justifications for such constitutional limits. First, the experience of the Weimar Republic had shown that the rights of individuals and organizations to pursue ideas and actions fundamentally hostile to democracy must not supersede the right of the democratic state to defend itself.³⁰ Indeed, the commitment to democratic rights and values requires a "militant" defense of the democratic state through which these are secured and protected, even if that defense entails some restrictions on democratic freedoms. This obligation to a "militant defense of democracy" is proclaimed in the Basic Law in a number of provisions (notably, Articles 5.3, 9.2, 18, and 21.2).

But these limitations are also a logical extension of the parties' privileged constitutional position. As "constituent elements of the state itself,"³¹ their organization and aims must be compatible with those of the constitutional order of which they are an integral part. Since every party participating in the "formation of the popular will" could potentially also come to control the shaping of the "state's will," the democratic order can survive only if all parties agree to its constitutional principles, institutions, and rules of the game. Consequently, the rights of parties as "political-sociological" organizations

³⁰ On the debate concerning party constraints, see especially Volker Otto, *Das Staatsverständnis des Parlamentarischen Rates* (Bonn/Bad Godesberg, 1971), 153ff.

³¹ Leibholz, *Strukturprobleme*, 72.

must be balanced against their new constitutional obligations as public institutions.³²

It was no less important to the framers of the Basic Law that a state dominated by parties would provide sound government. The problem was how to achieve, in a state dependent upon the cooperation of competing parties, the "inner unity" traditionally thought necessary for good government. The Weimar experience had shown the dangers to a democracy in which authority is divided, governments weak and unstable, the structure of party competition highly fragmented. The institutional provisions ultimately incorporated into the Basic Law reflect, in my view, the framers' quest for that coherent and stable governmental order that the democratic constitution of the Weimar Republic had failed to provide.

To begin with, the Basic Law rejected both the dualism of presidential and parliamentary power and the plebiscitary components of the Weimar Constitution in favor of parliamentary supremacy.³³ With the primacy of parliament, the Basic Law thus restored—at least at the federal level—the unity of authority that the dualism of the Weimar Constitution had undermined with such fateful consequences.

But the framers of the Basic law were loath to make parliament, and with it the parties that dominated it, omnipotent. They distrusted party and parliamentary irresponsibility as much as "presidential prerogative and electoral hysteria."³⁴ Hence, it included provisions to strengthen the federal government (i.e., the chancellor and his cabinet). Among the most important and novel is Article 67, which provides for a "constructive vote of no confidence." It aims to forestall the governmental instability of the Weimar Republic by forcing opposition parties or coalition partners intent on over-

³² This has been forcefully argued by the Federal Constitutional Court in its decisions proscribing the right-wing Socialist Reich Party (SRP) in 1952 (BVerfGE 2, 73) and the Communist Party (KPD) in 1956 (BVerfGE 5, 134). See also Gerhard Leibholz, Hans Justus Rinck, and K. Helberg, *Grundgesetz für die Bundesrepublik Deutschland: Kommentar anhand der Rechtsprechung des Bundesverfassungsgerichts* (Cologne, 1968), 279 and 283.

³³ The exclusion of initiatives and referenda, however, was not extended to state constitutions, many of which in fact have such provisions.

³⁴ Peter Pulzer, "Responsible Party Government in the German Political System," in Döhring and Smith, eds., *Party Government and Political Culture*, 24.

throwing the current government into assuming governmental responsibility themselves and to do so with a parliamentary majority. The position of the federal government vis-à-vis parliament is further strengthened by Article 65, under which only the chancellor can set forth the overall policy framework of his government (*Richtlinienkompetenz*). In addition, Article 64 gives him the exclusive power to appoint and dismiss cabinet members. Article 113 prohibits parliament from enacting any legislation that increases or decreases revenues without the consent of the federal chancellor.³⁵ Finally, Articles 63 and 67 allow the president (at the recommendation of the chancellor) to dissolve the Bundestag should it fail to muster a majority either for the election of a chancellor or for a constructive vote of no confidence.³⁶ In short, the Basic Law's institutional provisions reveal a clear "executive bias." It is, of course, the executive (now admittedly derived from the parliament and backed by a parliamentary majority) that has traditionally been viewed as the source of coherent, effective state action.³⁷

But the framers of the Basic Law were also aware that the future stability and effectiveness of the party-state would depend, in part at least, on limiting tendencies toward party fragmentation and polarization that had undermined party government in the Weimar Republic. Despite extensive debate on this issue, however, only two provisions affecting the structure of party competition were incorporated into the Basic Law. Article 21.2, which allows the prohibition of anti-constitutional parties, served to reduce both party fragmentation and polarization by eliminating contestants unwilling to abide by the democratic rules of the game. The second (Article 21.3) called for the regulation of parties by *federal*, rather than state, law.

³⁵ This provision in particular sought to prevent a recurrence of a favorite NSDAP tactic, namely to propose expenditures attractive to voters that it knew would be defeated and thereby score a propaganda victory.

³⁶ Here again, the framers sought to correct a major weakness of the Weimar Constitution by preventing parliament from playing a purely negative role of opposition to the executive. Under these provisions, the Bundestag must either support a government or face dismissal.

³⁷ An excellent summary of the debate over a strong executive either within parliament or through a modified presidential system can be found in Otto, *Staatsverständnis des Parlamentarischen Rates*, 122–48.

This was to prevent the proliferation or entrenchment of anti-democratic or splinter parties at the state or local level and thereby to limit any indirect influence they might exert on national politics through the makeup of the Bundesrat.

Intense disagreement over the electoral system, by far the most important mechanism for controlling party fragmentation, led the Parliamentary Council to draft a separate electoral law and exclude it from the constitution.³⁸ Operative for the first Bundestag election of 1949, this law incorporated a modified proportional representation system and, at the insistence of the Allies, a 5-percent threshold.³⁹ Such a threshold has since been incorporated in all state constitutions and repeatedly upheld by the Federal Constitutional Court. In the process, it has achieved both "quasi-constitutional status" and popular legitimation for providing electoral and governmental stability.⁴⁰

To summarize, while it accepted the general framework of parliamentary democracy, the Basic Law also incorporated elements better understood against the background of German constitutional theory and the political experiences of the Weimar Republic. The most important of these was the elevation of political parties to constitutional status. Through this step, the Basic Law finally sought to end the tradition of a state separate from and above society. But, in line with earlier conceptions of the state, the Basic Law also sought to achieve the coherence requisite to effective state action. It did this by providing for the banning of parties whose goals, activities, and organization violate the core principles of the democratic constitutional order, strengthening the executive; and limiting party fragmentation.

³⁸ *Ibid.*, 164–72.

³⁹ For the role of the Allies in drafting the first electoral law, see John F. Golay, *The Founding of the Federal Republic of Germany* (Chicago, 1958), 145ff.

⁴⁰ Kommers, *Constitutional Jurisprudence*, 185–9 and 191. The Court had nonetheless invalidated efforts to increase the 5-percent hurdle as in the Schleswig-Holstein Voter Association case, when the Schleswig-Holstein government sought to impose a 7-percent hurdle (1 BVerfGE 208, [1952]). It has also refused to apply the 5-percent threshold to procedures for getting parties onto ballots or for receiving public funding (e.g., 12 BVerfGE 10, 25 [1960]; 20 BVerfGE 56, 1956). For more details, see Kommers, *Constitutional Jurisprudence*, 204ff. and 552–3. Also, Jürgen Schwabe, ed., *Entscheidungen des Bundesverfassungsgerichts*, 4th ed. (Hamburg, 1988), 313–24.

It is this synthesis that has led many analysts to describe the Federal Republic's parliamentary system as a "party-state."

It is important to stress, however, that, while the Basic Law legitimized political parties and created the conditions for effective and stable government by parties, nowhere does it ever use the term "party-state." The main responsibility for introducing it as a constitutional concept and standard lies with the Federal Constitutional Court. It was the Court that first brought the concept of the democratic party-state into constitutional discussions, and it was the Court that, through its interpretation of Article 21, sought to give it concrete shape.

III. The Federal Constitutional Court and the Theory of the Party State

In its efforts to strengthen the constitutional legitimacy and role of political parties, the Federal Constitutional Court relied to a considerable extent on a "pre-constitutional" model of the party-state found in the writings of one of its own long-time members, the constitutional theorist Gerhard Leibholz. At the same time, the Court, like the Founding Fathers, aimed not merely to raise the constitutional status of political parties but also to ensure effective party government. I cannot here treat comprehensively the political theory of Leibholz and its full development as a constitutional doctrine, nor examine in detail all the party cases. But it is important to identify at least the Court's principal contributions toward the realization of the party-state established (but not elaborated) in the Basic Law.

Much of the credit—or, in the eyes of some, blame—for anchoring Article 21 to the constitutional doctrine of the party-state rests with the legal theorist Gerhard Leibholz. His theory of the party-state as a distinctive, modern form of democratic government provided the standard for most of the Court's party rulings.

Briefly put, Leibholz's principal thesis is that universal suffrage, political democratization, the emergence of mass parties, and their participation in government have brought about a structural change in the form of democracy. This has moved away from the classical parliamentary system of representation in the nineteenth century to

the democratic party-state of today.⁴¹ Under modern conditions, he argues, parties alone give meaning to the ideals of democracy and popular sovereignty. Parties have become the "mouthpiece of the people," the sole means through which mature citizens can articulate and express their interests and reach political decisions.⁴²

In the modern democratic party-state, therefore, the boundary between state and society, parties and people disappears. Parties give civil society its political character and enable it to shape and control state action. Thus, party competition is, in effect, a "rationalized version of plebiscitary democracy" or a "surrogate for direct democracy." Since it is the parties that articulate and aggregate the demands of individual citizens and thereby give them coherent expression, the party that emerges with a majority of the vote and seats in parliament exemplifies the "will of the people" or the *volonté general*.⁴³ In other words, rather than see parties as a source of division and, hence, weakness for the exercise of public authority, Leibholz insists that it is possible to achieve the same "unity of will" allegedly embodied by the traditional model of the state through political parties in a modern democracy.

Even a cursory review of the Federal Constitutional Court's most important party rulings reveal the extent to which it has followed Leibholz's theory of the party-state. His ideas and even his formulations run through the Court's decisions like a red thread.⁴⁴ Thus, the Court has generally described parties in Leibholzian terms as "mouthpieces" through which the people articulate their interests and shape state action, "constitutionally necessary instruments for the formation of the political will of the people," "central factors of constitutional life," and quasi-constitutional institutions (*Verfassungsgane*).⁴⁵ Similarly, it has concluded with Leibholz that, because of their incorporation into the Basic Law, political parties "are no longer merely political and sociological but constitutionally relevant

⁴¹ Leibholz, *Strukturprobleme*, 93f .

⁴² *Ibid.*, 76–7.

⁴³ *Ibid.*, 76.

⁴⁴ Lothar Albertin and Werner Link, *Parteien auf dem Weg zur Parlamentarischen Demokratie: Entwicklungslinien bis zur Gegenwart* (Düsseldorf, 1981), 348.

⁴⁵ BVerfGE 1, 224–5; 2, 11; 6, 91; 20, 10; 44, 145; 47, 110; for details, see Leibholz et al., *Grundgesetz*.

organizations." They have become "integral components of the constitutionally ordered political life."⁴⁶ Indeed, in the Court's view, Article 21, by acknowledging the constitutional role of parties, "in effect legalized the modern democratic party-state."⁴⁷

More importantly, the Constitutional Court, in its interpretations of the tersely stated first sentence of Article 21, has consistently used Leibholz's theory of the party-state to strengthen the constitutional status of political parties in practice. It has granted political parties the same constitutional status at the state level that they enjoyed nationally.⁴⁸ In a 1954 decision, it ruled that, because of their constitutional status, political parties are entitled to argue their case in Court much as other organs of the state.⁴⁹ Most significantly, the Court has stipulated that political parties as constitutional institutions or organs of the state are eligible for public financing. The initial acceptance of this principle came in a 1958 decision: "It is admissible to make available public funds not only for elections but also for the parties participating in elections, because holding elections is a public function, and parties play a decisive role in carrying out this function under the Constitution."⁵⁰

The Court has, on occasion, deviated from the Leibholzian doctrine of the democratic party-state, most notably in the Party Finance Case of 1966 and the Official Propaganda Case of 1977.⁵¹

⁴⁶ BVerfGE 1, 225; cited in Leibholz et al., *Grundgesetz*, 274–8. The case involved a suit brought by the Schleswig-Holstein Voter Association against that state's introduction of a 7-percent vote threshold to enter parliament. The Court invalidated it, while confirming the 5-percent threshold of the national election law.

⁴⁷ BVerfGE 1, 223; 2, 1; 4, 149; cited in Leibholz et al., *Grundgesetz*, 276. For a critical but generally positive assessment of Leibholz's impact on the Court's party decisions, see especially Peter Haungs, "Die Bundesrepublik—ein Parteienstaat?" *Zeitschrift für Parlamentsfragen* 4 (1973): 502–24.

⁴⁸ BVerfGE 4, 375; in Leibholz et al., *Grundgesetz*, 272.

⁴⁹ BVerfGE 4, 30, 35; 375ff. (1954) in Leibholz et al., *Grundgesetz*, 277.

⁵⁰ BVerfGE 8, 51.

⁵¹ The 1966 case involved two federal laws passed by the CDU government allowing tax deductions for private contributions to political parties. These were challenged by the SPD as discriminating in favor of parties backed by wealthy individuals and corporations. The Court agreed and invalidated both laws. It found that private contributions and tax deductions for them were in principle acceptable, but only if they were limited to amounts that were not beyond the

In these two cases, the Court denied the constitutionality of publicly funding parties as organizations and parties using their control of government to promote their own re-election. In doing so, the Court seemed to be returning to the more traditional Weberian model of the party as "a freely formed, private association competing for power in order to achieve programmatic goals or personal advantages" rather than treating them as quasi-organs of the state.⁵² In both cases, moreover, it sought to draw a line between the activities of parties as societal organizations competing for power and those of the state, which is, once again, seen as a distinctive sphere of authority bound by a "public interest" that is above parties.⁵³ This would seem to be a rejection of the Leibholzian view that neither the state nor the public interest has a meaning or existence separate from political parties in a modern party democracy.

Yet the Court's deviation from the "party-state nexus"⁵⁴ should not be exaggerated. While the Party Finance decision of 1966 limited state contributions exclusively to defraying legitimate electoral costs, the Court never abandoned the principle of publicly financing political parties.⁵⁵ Indeed, in addition to direct reimbursements for

reach of less well-off individuals or smaller corporations. For details, see Kommers, *Constitutional Jurisprudence*, 205–10. The 1977 Official Propaganda Case was brought by the CDU against the SPD's use of public information and resources in the 1976 federal campaign. The Court agreed with the CDU that the use of state funds for the purpose of helping the re-election of the party in power violates the principle of *Chancengleichheit* or the equal chances of parties in elections. BVerfGE, 44, 125; Kommers, *Constitutional Jurisprudence*, 180–3.

⁵² Max Weber, *Wirtschaft und Gesellschaft* (1956), 167.

⁵³ For critical analyses of these two cases and their implications for the "party-state doctrine," see especially Rinck, "Der verfassungsrechtliche Status," 312–7; Eberhard Menze, "Staatliche Parteifinanzierung und moderner Parteienstaat," *Die öffentliche Verwaltung* 19 (1966): 585–608; Wilhelm Henke, "Bestand und Wandel im Recht der politischen Parteien," *Deutsches Verwaltungsblatt* (1979): 369–78; Peter Häberle, "Öffentlichkeitsarbeit der Regierung zwischen Parteien- und Bürgerdemokratie," *Juristenzeitung* 32 (1977): 361–71.

⁵⁴ Rinck, "Der verfassungsrechtliche Status," 312.

⁵⁵ BVerfGE 20, 56 (1966), cited in Kommers, *Constitutional Jurisprudence*, 205–12. After the 1958 decision, the Bundestag passed the Party Finance Act of 1959, which provided initially a sum of DM 5 million to finance "political education programs." By 1965, that sum had risen to DM 43 million. After the 1966 ruling, the Bundestag finally passed the 1967 Party Law. This provided DM 2.50 (DM 5.00 since 1983) per voter for parties that had at least 2.5 per-

campaign expenditures, the Court has also continued to accept a private tax deduction for party donations (although at reduced levels) and, in the controversial Party Foundation Case of 1986, has even approved state funding for party foundations.⁵⁶ The net effect of all these financial formulae has been to reinforce the position of parties as state-financed public institutions. Indeed, in subsequent decisions, especially those following the adoption of the Party Law in 1967, the Court modified (without renouncing) the 1966 decision and returned to earlier formulations of the party-state model.⁵⁷

The Leibholzian theory of the democratic party-state provided the Court with a doctrine that both legitimated and consolidated the constitutional and political position of the post-1949 parties. But the Court was no less intent on guaranteeing the security and orderly functioning of this newly established constitutional system. It did so in two ways: first, by supporting the decision of the Basic Law's framers that the new democratic party-state must be able to defend itself against anti-democratic groups and ideas, even if this entails restrictions on other rights guaranteed by the constitution; second, by trying to achieve the *coherence* or "unity of will" within the framework of the party-state that is requisite to provide good government.

From the beginning, the Court supported and regarded itself as bound by the "constitutional decision to create a *militant democracy*." Pointing to both the "historical experience of the Weimar Republic"

cent of the second-ballot vote. Amounts for campaign contributions were left open, but there was to be limited reporting and disclosure on such contributions.

⁵⁶ Between 1968 and 1986, the Court set limits on tax deductible campaign contributions for individuals and corporations, reduced the threshold for eligibility from 2.5 percent to 0.5 percent, accepted contributions to party foundations as distinct from those for parties, and tightened disclosure rules. On the Court's rulings concerning party financing, see especially Albrecht Randelzhofer, "Probleme des Parteienrechts," *Juristenzeitung* 17 (1969): 535–41; Wilhelm Henke, "Bestand and Wandel im Recht der politischen Parteien," *Deutsches Verwaltungsblatt* (1979): 369–78. For a good treatment of party financing in the Federal Republic, see Arthur Gunlicks, "Campaign and Party Finance in the West German 'Party State'," *The Review of Politics* (Winter 1987).

⁵⁷ See especially F. K. Fromme, "Parteienfinanzierung and Bundesverfassungsgericht," *Aus Politik and Zeitgeschichte* 23 (1969): 3–17; Randelzhofer, "Probleme des Parteienrechts," 533–41.

and the "special status of the political parties," it has found restrictions on, or even the abrogation of, certain rights constitutionally permissible in the case of parties, associations, or individuals whose outlooks, behavior, or organization violate "democratic principles" and who seek actively to impair, abolish, or harm the "free democratic basic order."⁵⁸ The most dramatic step the Court has taken along these lines was the prohibition of the Socialist Reich Party (SRP) in 1952 and the German Communist Party (KPD) in 1956.⁵⁹

The second way in which the Court sought to protect the democratic party-state was to ensure its capacity to *act*. The Basic Law sought to achieve governmental effectiveness primarily by strengthening the executive. The Court, by contrast, has sought to produce the coherence requisite for state action by reducing tendencies toward *fragmentation* in the "process of forming the political will of the people." Unlike Leibholz, the Court has recognized that the unity of the "popular will" and the "state will" are often difficult to achieve in a multi-party system. Yet, such a system can function effectively only if party fragmentation (*Parteiensplitterung*) can be minimized, both in the electoral process and in parliament. For the Court, then, a choice had to be made between guaranteeing equality of opportunity for parties to compete without restrictions (*Chancengleichheit*) on the one hand and securing stable government by limiting the number of parties on the other.⁶⁰

⁵⁸ BVerfGE 2, 1 (1952); BVerfGE 5, 141 (1956); Leibholz, et al., *Grundgesetz*, 285. The principle of a "militant democracy" was first articulated in the 1956 ruling banning the KPD. Kommers, *Constitutional Jurisprudence*, 224–8.

⁵⁹ But the Court has extended the principle of "militant democracy" to curtail other democratic rights as well. Thus, it has backed the right of the Office for the Protection of the Constitution to gather information on and identify publicly suspected radical groups; permitted the confiscation of subversive literature by public officials; supported governmental tapings of telephones; upheld various civil service loyalty requirements at the state level, as well as the federal Public Service Loyalty Decree of 1972 (known as the extremist or radical resolution or *Extremistenerlaß*); supported the exclusion of the Greens from the parliamentary committee involved with sensitive intelligence issues. For details of these cases, see Kommers, *Constitutional Jurisprudence*, 175ff., 224–41.

⁶⁰ The principle of *Chancengleichheit* is nowhere expressed in the Basic Law. It was first established by the Court as a natural extension of such constitutional provisions as the free formation of parties and, more importantly, the principle

The Court has, in fact, tried to keep the competitive process relatively open to smaller parties: by supporting proportional representation, reducing discrepancies in electoral districts, invalidating signature quotas for entering elections, and providing access for small parties to public funding and to the public media.⁶¹ At the same time, the Court has also argued that elections must ultimately produce a coherent outcome: "The goal of elections is not only to assert the political will of voters as individuals ... [it] is also to ... form a government capable of acting both internally and externally ... [and, for this,] clear parliamentary majorities conscious of their responsibilities to the public weal are necessary."⁶²

To help limit electoral fragmentation and governmental instability, the Court has consistently supported the 5-percent threshold vote for entering parliament and has extended it to local, state, and European elections.⁶³ For the same reasons, the Court deemed it constitutionally justifiable to discriminate in favor of larger parties in the actual allocation of both broadcasting time in publicly owned radio and television stations and public funds for campaign activities.⁶⁴ The Court's clear bias in favor of larger parties, it should be

of popular sovereignty: "Under the Basic Law ... the final verdict on the value of a party's program or the desirability of its participation in the forming of the state's will was to be rendered by the active citizenry. Such a decision can be made freely only if all parties can enter electoral campaigns with the same chances." BVerfGE 1, 208; BVerfGE 3, 13(26ff.); BVerfGE 6, 273 (280); quoted in Rinck, "Der verfassungsrechtliche Status," 320.

⁶¹ See, among other cases, BVerfGE 6, 84; BVerfGE 7, 99; BVerfGE 3, 19ff.; BVerfGE 24, 300; BVerfGE 14, 121; cited in Rinck, "Der verfassungsrechtliche Status," 310–28.

⁶² BVerfGE 6, 84; quoted in Kommers, *Constitutional Jurisprudence*, 186.

⁶³ The 5-percent clause was first challenged in 1957 by the Bavarian Party. The Court dismissed the challenge on the ground that unrestricted proportional representation might "split parliament into many tiny groups, which would make it difficult if not impossible to form a majority." For details, see Kommers, *Constitutional Jurisprudence*, 187–9.

⁶⁴ BVerfGE 1, 228; BVerfGE 3, 393; BVerfGE 6, 373; BVerfGE 11, 276; cited in Leibholz et al., *Grundgesetz*, 274–8. But, while allowing differentiation in the actual allocation of media time and public funding, the Court opted for a relatively lenient standard of eligibility. Thus, the threshold for getting party financing is only 0.5 percent of the vote in the preceding election.

stressed, reflects not just a pragmatic preference for stable government but also normative concerns.

Ultimately, the Court believes that the "public interest" is best served in the democratic party-state by large, integrative "people's parties" (*Volksparteien*). Only such parties can both "harmonize" the disparate interests of an electorate and translate its demands into state action. Splinter parties, on the other hand, weaken effective democratic government because they appeal "essentially to one-sided interests" and, hence, can never form viable governments.⁶⁵ This line of argument reflects not only the Weimar experience but also a continuity with the classical German state tradition. The difference—and it is a major one—is that governmental unity, stability, and effectiveness are now to be achieved through political parties and them alone. In other words, parties are no longer the antithesis of the state but the modern instruments of achieving a sound state.

To conclude, the Leibholzian doctrine of the party-state provided a coherent theoretical framework for developing and elaborating the meaning and actual political implications of Article 21. But the Court never opted for a "maximalist" position on the Leibholzian theory. It accepted limits to the party-state set both by other provisions of the Basic Law and by political reality. Rather than use Leibholz's theory of the party-state as a "magic formula" for reconciling such tensions, the Court has used it flexibly to solve many of the concrete issues on the roles, functions, organization, behavior, and practices of parties that Article 21 had left (deliberately) vague. (These were not to be addressed until the Party law of 1967.) Moreover, the Court's party rulings reflect as well a strong pragmatic concern to ensure responsible, orderly, and stable government in a multi-party context. Consequently, in the spirit of the Basic Law, the Court has sought to find the proper balance between democratic freedoms and the security of the democratic party-state on the one hand and equality of competition and effective government on the other. In doing so, it has tried to minimize the tension that often separated constitutional theory and political reality in the past.

⁶⁵ For evidence of this bias against small parties, see especially BVerfGE 24, 148 (248); BVerfGE 44, 143; BVerfGE 40, 313; BVerfGE 44, 125; BVerfGE 52, 83 (92). For details, see Leibholz et al., *Grundgesetz*.

IV. The Democratic Party State in Practice

Thus far, the democratic party-state has been considered largely as a constitutional doctrine and construct. But the concept of the party-state is also widely used to describe the distinctive character of the Federal Republic's democratic system. This, I argue in this section, has been shaped by three political changes: in the actual relationship of parties and the state, in the outlooks of the parties themselves, and in the structure of party competition. To a considerable extent, these changes have followed from the constitutional elevation of parties as well as from those Court rulings that have sought to strengthen the political position of the founding parties.

Both the Basic Law and the Federal Constitutional Court created conditions for a fundamentally new relationship between political parties and the state. The new constitutional status achieved by the political parties in the Basic Law and the constitutional doctrine of the "party-state" gave the founding parties a political confidence that they had lacked in the past. This status emerges clearly from the 1967 Party Law. Although the parties had difficulties coming to an agreement over the specific provisions, they adopted the lofty conception of political parties found in both the Basic Law and the party-state doctrine of the Constitutional Court. Thus, Article 1 of the Party Law states: "Political parties form an integral part of the free democratic basic order. Their free and continuous participation in the formation of political opinions among the population enables them to discharge the public tasks incumbent upon them pursuant to the Basic Constitutional Law."⁶⁶ Among these tasks are "political education" and "political development," both vague and broad enough to give parties virtually unlimited room for expanding their sphere of activities both in the state and in society.

Their newly acquired constitutional status thus became a convenient formula for legitimating the politicization of the state machinery and public institutions. Today, the *Parteienstaat* as an analytical concept refers, above all, to the fusion of party and state

⁶⁶ The Law on Political Parties (*Parteiengesetz*): Internal Organization, July 24, 1967; *Documents on Politics and Society in the Federal Republic of Germany* (Bonn, 1978).

bureaucracies. This entails, on the one hand, the primacy of party affiliation for appointments and career advancement in state administration, the public sector, and a wide array of publicly funded institutions and, on the other, the central role played by civil servants in the parties. Public service laws and Court rulings have legitimized both the "participation (*Hineinwirken*) of parties within the system of state institutions" and the right of civil servants to be active in party work and pursue a parliamentary career.⁶⁷

What started out as a strategy for ensuring loyalty to the regime by civil servants through party control over at least the top echelons has since turned into a vast party patronage network. "Party book" appointments not only dominate at all levels of federal, state, and local administration, but they have come to include a vast array of publicly supported societal institutions as well; for example, media, universities, hospitals, theaters, and sports facilities.⁶⁸ Equally striking has been the permeation of parties by public servants. By the mid-1970s, 49 percent of members of the Bundestag were public servants. At the federal level, some 15 percent of public officials had had political careers.⁶⁹ The net effect of these developments has been that "state power in the Federal Republic has come to be equated unequivocally with party power."⁷⁰

No less marked has been the change in the outlooks and conduct of the parties. In both the Empire and the Weimar Republic, parties perceived themselves as inferior to or antagonists of the state.

⁶⁷ BVerfGE 52, 83 (93); BVerfGE 44, 1256: Consistent with the party-state theory, Leibholz and the Court have tried to balance the ideal of a "neutral" or non-partisan civil servant (which is reflected in Article 33 of the Basic Law) with the need for a civil service loyal to the new democracy. Their fear was that, carried to its logical conclusion, the ideal of a non-partisan civil service might once again lead to the emergence of a separate political elite likely to be in conflict and opposition to the party-state. Hence, they have accepted the politicization of civil servants, at least in the upper echelons. See Leibholz, *Strukturprobleme*, 11ff.

⁶⁸ For details on the permeation of parties in the state and public institutions, see especially Dyson, *Party, State and Bureaucracy*, 21–55.

⁶⁹ Dyson, "Party State and Party Government," 86; also H. W. Schmollinger, "Abhängige Beschäftigte in Parteien der Bundesrepublik: Einflußmöglichkeit von Arbeitern, Angestellten und Beamten," *Zeitschrift für Parlamentsfragen* V (1974).

⁷⁰ Smith, "Politics of Centrality," 399.

Because of this strained relationship to the state, parties also tended toward irresponsible ideological posturing and polarization. By contrast, the post-1945 parties, as co-founders of the Federal Republic and endowed with a special constitutional status by the Basic Law and the Federal Constitutional Court's party rulings, have seen themselves as the only legitimate agents, managers, and defenders of the democratic party-state. This "etatization" or attitudinal identification with state has frequently led the "founding" parties to join in a common front against radical challengers to the constitutional order, as they did in support of the 1972 Public Service Loyalty Decree (or *Extremistenerlaß*).

The integration of parties into the state and civil servants into parties, moreover, has created a "coincidence" of state and party outlooks and a preference for an administrative style of politics that values, above all, "official expertise and technical competence."⁷¹ Unlike Italy, where parties are accused of having "colonized" the state, in the Federal Republic it is the state that has allegedly captured the parties. The established parties are thus sometimes said to see themselves more readily as representing and maintaining the state's interests (*staatstragend* and *staatserhaltend*) rather than those of the citizen.

Such a self-image (and memories of the Weimar Republic) also encouraged the post-1945 parties to prefer pragmatism to ideological posturing and "constructive" to "adversarial" opposition.⁷² What this meant was articulated most succinctly by the SPD's leader, Kurt Schumacher. "The essence of opposition," he declared, "is the permanent attempt to force the positive, creative will of the opposition in concrete instances and with concrete propositions on the government and its parties."⁷³ Certain institutional provisions in the Basic Law also encouraged inter-party consensus and collaboration. Federalism and the legislative involvement of opposition parties in the working committees of the Bundestag, for instance, stimulate opposition parties to cooperate and bargain with the

⁷¹ Dyson, *Party, State and Bureaucracy*, 20.

⁷² Gordon Smith, "The German *Volkspartei* and the Career of the Catch-All Concept," in Döring and Smith, eds., *Party Government and Political Culture*, 66ff.

⁷³ William Paterson and Floyd Webber, "The Re-Emergent Opposition?" in Eva Kolinski, ed., *Opposition in Western Europe* (London, 1987), 92.

governing party to make their influence felt.⁷⁴ Because most legislation accommodates the views of different parties, it tends to pass with opposition support. Consequently, parties in the opposition came to see themselves as sharing responsibility for government rather than as its enemies and radical critics.⁷⁵

The Federal Republic's democratic party-state was reinforced also by the emergence of an altogether new pattern of party competition after 1949. Its key dimensions were, first, a marked reduction in the number of party competitors and, second, a change in the character of the main parties.

The party systems of both the Empire and the Weimar Republic were highly fragmented, ideologically polarized, and marked by rigid class, confessional, and regional alignments. At first glance, some of these characteristics seemed to reemerge in the first Bundestag election of 1949. Fourteen parties competed, including parties of the extreme Left and Right. Although the three founding parties—the SPD, the CDU/CSU, and the FDP—received together four-fifths of the vote, a similarly lopsided support for the pro-republican parties in 1919 had proved short-lived. Yet, by 1957, only the three founding parties remained. This rapid consolidation of the party system was facilitated both by the 5-percent threshold, which worked against small parties, and the prohibition of the SRP and KPD, which reduced the political space available for mobilization by radical parties.⁷⁶ The stable tri-partite structure of competition, which lasted until the entry of the Greens into the Bundestag in 1983, still necessitated coalition governments. But the presence of two domi-

⁷⁴ Pulzer, "Responsible Party Government," 31; Michael Hereth, *Die parlamentarische Opposition in der Bundesrepublik* (Munich, 1969), 92.

⁷⁵ Such a conception of the opposition was, in fact, formally acknowledged in the 1947 constitution of the state of Baden. Article 120 states: "Political parties must view themselves as co-responsible for the formation of political life as well as the direction of the state, whether they participate in the state government or are in opposition to it." The framers of the Basic Law ultimately decided against incorporating a similar cause. Quoted in Leibholz, *Strukturprobleme*, 91.

⁷⁶ In Gerhard Loewenberg's view, both the rapidity and the subsequent stability of this process constituted the most remarkable transformations in the history of the modern political party system. For details, see his essay, "The Development of the German Party System," in K. Cerny, ed., *Germany at the Polls: The Bundestag Elections of 1986* (Washington, D.C., 1987).

nant parties and a third "swing" party have made the process of coalition formation far more predictable and stable than it had ever been in the Weimar Republic.

The second significant change in the post-1949 party system was the breakdown of the rigid class, confessional, and regional alignments of the past. This societal transformation had resulted from the combined impact of twelve years of Nazi rule, military defeat and occupation, and the division of Germany on the one hand, and the Federal Republic's rapid economic recovery and a prolonged period of prosperity on the other.⁷⁷ The erosion of old socio-political alignments, in turn, encouraged the main parties to abandon previous conflictual or parochial appeals in favor of more pragmatic and instrumental vote-getting strategies. The post-war parties became, in both their orientation and social base, what Otto Kirchheimer called "catch-all people's parties" (or *Volksparteien*).⁷⁸

The CDU/CSU, with its heterogeneous electorate and status as the governing party, was the first to opt for such a "catch-all" or non-ideological, vote-maximizing stance. This ensured its electoral predominance for the first two decades. It took ten years of sterile opposition and a stagnating voter base before the SPD followed the CDU's example.⁷⁹ After 1959, these two broadly based, integrative *Volksparteien* monopolized the Federal Republic's competitive political space. Their electoral hegemony, in turn, worked against parties with narrow social appeals or radical ideological profiles. Of the small parties, only the FDP survived. It did so not because of a loyal and stable base of support but because of its critical role in effecting transfers of power between the party giants. This ensured that

⁷⁷ For details concerning the post-war social and electoral transformation, see especially Russell J. Dalton, *West German Politics* (Boston, 1988), 76–90, 285–92.

⁷⁸ Otto Kirchheimer coined the term to convey the special character of the post-1945 "postindustrial and postideological" competitive party. Otto Kirchheimer, "The Transformation of Western European Party Systems," in Joseph LaPalombaro and Myron Weiner, eds., *Political Parties and Political Development* (Princeton, N.J., 1966), especially 184–90.

⁷⁹ This shift led to a rapid improvement in the SPD's electoral fortunes: between 1953 and 1972, its vote went from 27 percent to 50 percent. For the development of the *Volkspartei* in the Federal Republic, see especially Alf Mintzel, *Die Volkspartei* (Opladen, 1984), 26ff.

neither of the two major competitors deviated too much from the center.⁸⁰ The arrival of the "catch-all party" thus facilitated the rapid "post-war conversion from polarized pluralism to a stable party concentration of the center."⁸¹

How did this new structure of party competition help to consolidate the "party-state"? First, the strategic role of the FDP strengthened the tendency toward "cooperative opposition" by forcing the two principal *Volksparteien* to give "priority to the task of finding a coalition partner at the expense of the opposition function."⁸² More important, the "grip" on the party system by the two *Volksparteien* and their junior partner reinforced the fusion of party and state examined previously. Because the electoral survival of the founding parties gave them added legitimacy, they found it easier to expand their spheres of activity. Moreover, until the appearance of the citizen movements in the mid-1970s, there was no one to challenge the interlocking (*Verfilzung*) of party, state, and society. Finally, the stability of the tri-partite arrangement made it easy to work out collaborative agreements for sharing power and positions in the vast network of administrative and public agencies.

V. The Popular Legitimation of the Party State

Many critics have by now bemoaned or condemned the "cheerless pragmatism" and "etatisation" of the post-1945 political parties as well as the interlocking of party, state, and society. It is worth stressing, however, that the founding parties, whatever their faults, have presided over an astounding yet orderly economic, social, and political transformation. From this has emerged a political situation in the Federal Republic characterized by "hyper-stability" and an "almost aberrant cohesion."⁸³ Against the background of Germany's previous history, the achievement of a stable, effective democratic

⁸⁰ The special role of the FDP in strengthening "centrist" elements within both parties has been emphasized especially by Smith, "Politics of Centrality," 393–4.

⁸¹ Smith "Career of the Catch-All Concept," 66ff.

⁸² Paterson and Webber, "The Re-Emergent Opposition?" 151.

⁸³ Donald Schoonmaker, "The Changing Party Scene in West Germany and the Consequences for Stable Democracy," *Review of Politics* (Winter 1988): 51.

system "amounted to a political miracle no less spectacular than the much-praised economic one."⁸⁴

Although criticisms of the fusion of party and state administration are in part justified, one should not ignore its positive effects. In the view of at least some analysts, it has moved parties away from narrow sectional or exclusively short-term electoral concerns. Instead, West Germany's parties are more sensitive to expertise, technical knowledge, long-term planning, and considerations of the public welfare than Anglo-American parties or those of many other continental parliamentary democracies.⁸⁵

Finally, the successful implementation of an effective democratic party-state has achieved what no other regime had done previously: a democratic political culture and a fundamental consensus on the Basic Law and its central values. To a degree unknown in German history, public opinion strongly approves of political parties, citizen involvement in politics, party competition, and government by parties. This could not have been predicted in 1949.

From the early post-war opinion polls emerged the profile of a politically indifferent population with lingering attachments to the symbols, institutions, and personalities of the previous authoritarian regimes. Voters had a poor understanding of and commitment to democratic procedures, and their orientations toward politics were those of passive subjects rather than active citizens. Attitudes toward political parties and institutions were said to be primarily "output-oriented, detached, over-pragmatic, almost cynical."⁸⁶ In the early years of the Federal Republic, then, it appeared that—the good intentions of its founders and its well-crafted constitution notwithstanding—the new democracy might duplicate the fate of its predecessor by becoming a "Republic without Republicans."⁸⁷

⁸⁴ Donald Schoonmaker, "The West German Greens," in Kay Lawson and Peter H. Merkl, eds., *When Parties Fail* (Princeton, N.J., 1988), 44.

⁸⁵ Dyson, *Party, State and Bureaucracy*, 57–8.

⁸⁶ Gabriel Almond and Sidney Verba, *The Civic Culture* (Boston, 1963); see also Russell Dalton, *Politics in West Germany* (Glenville, Ill., 1989), 103–4.

⁸⁷ Such fears were not unwarranted, since the handicaps confronting the new democracy were, if anything, worse than those of the Weimar Republic military defeat and occupation, a constitution made by a relatively small group of indirectly elected representatives under Allied supervision and never popularly ratified; an economic and social crisis every bit as grim as that at the end of World War I.

By the late 1970s, however, the new political order had obviously proven itself to the mass of ordinary citizens. Public opinion surveys at the time indicated that a democratic political culture had evolved in the Federal Republic. In 1959 only 7 percent regarded the country's political institutions as a source of pride; by 1978, the figure had risen to 31 percent.⁸⁸ More significantly, the proportion of citizens who felt that the parties in the Bundestag represented the public's interests rose from 35 percent in the mid-1950s to 70 percent by 1980. By 1972, one finds a broad acceptance of the importance of the parliament, irrespective of satisfaction with its output. Fully 86 percent of those currently dissatisfied with the parliament nonetheless regarded it as an essential institution.⁸⁹ Party competition and elections have also come to enjoy strong public approval: A survey conducted in 1978 showed that 79 percent of those polled saw political competition as essential to democracy, and 90 percent believed it was an operative principle in the Federal Republic. Finally, the "passive subject orientation" of voters in the 1950s gave way to an active, politically involved, and sophisticated citizenry.⁹⁰

The positive popular orientations toward the democratic parties and the new party-state also helped create a popular consensus supporting the Basic Law itself. Public support for the new constitution in the immediate period following its implementation was limited. In 1955 only 30 percent approved of the Basic Law. Since then, however, there has been a dramatic rise in positive attitudes toward it. By 1978, 71 percent of those questioned supported the Basic Law. More indirectly, but no less importantly, "subsequent elections to the Federal Parliament and the high voter turnout in these elections provided, as it were, retrospective legitimation of the *Grundge-*

⁸⁸ Dalton, *Politics in West Germany*, 107.

⁸⁹ David Conradt, "The Changing German Political Culture," in Gabriel Almond and Sydney Verba, eds., *The Civic Culture Revisited* (Boston, 1980), 224–5.

⁹⁰ Some have likened this change to a "political awakening." See especially Kenneth Dyson, "Left-Wing Political Extremism and the Problem of Tolerance in Western Germany," *Government and Opposition* (Summer 1975): 319–20; for the shift toward political activism, see also Kendall L. Baker, Russell J. Dalton, and Kai Hildebrandt, *Germany Transformed* (Cambridge, Mass., 1981), especially 38–58.

setz"⁹¹ For the first time in German history, then, there was a common elite and public consensus in favor of a democratic constitution and a political order based on government by parties. In this transformation of the political culture, the Basic Law, supported by the Federal Constitutional Court, has played a central role by providing the framework and conditions for a stable and effective democratic government.

During the past decade, however, there have been signs of disaffection with the founding parties and the type of party-state they helped to establish and sustain. Since the late 1970s, public opinion surveys have consistently revealed public unhappiness with the performance of the main parties, their policy priorities, attitudes toward citizens, administrative perspective, and corruption.⁹² This growth in anti-party sentiments was accompanied by disturbing political and electoral trends: the proliferation of citizen initiatives in the 1970s and 1980s,⁹³ a decline in voter turnout and party identification, a marked erosion in the core support for the three main parties, and increases in party switches, ticket splitting, and protest voting.⁹⁴ The stable tri-partite symmetry of the past now threatens to turn into a more unpredictable four- or five-party system.

The sources of the current "party crisis" have been traced to the competitive dynamics created by the catch-all parties and the "etatization" of politics that has resulted from the party-state.⁹⁵ The

⁹¹ Gunnar Folke Schuppert, "The Constituent Power," quoted in Kommers, *Constitutional Jurisprudence*, 36.

⁹² For details, see Manfred Küchler, "Staats-, Parteien-, oder Politikverdrossenheit?" in Joachim Raschke, *Bürger und Parteien* (Opladen, 1982), 295–317.

⁹³ By the end of the 1970s, there were an estimated 50,000 citizen initiative groups that mobilized more people than all the political parties combined. Udo Kempf, "Bürgerinitiativen—Der empirische Befund," in Bernd Guggenberger and Udo Kempf, eds., *Bürgerinitiativen und Repräsentatives System*, 2d ed. (Opladen, 1984), 295–317.

⁹⁴ Russell J. Dalton, "The West German Party System between Two Ages," in Russell J. Dalton, Scott C. Flanagan, and Paul Allen Beck, *Electoral Change in Advanced Industrial Democracies: Realignment or Dealignment?* (Princeton, N.J., 1984), 104–33; also Rainer Olaf Schultze, "Meinungsforschung: Vom aktiven Wähler zum passiven Befragten," in Peter Haungs and Eckhard Jesse, *Parteien in der Krise?* (Cologne, 1987), 169–74.

⁹⁵ The catch-all party explanation for the current party crisis can be found in Bergedorfer Gesprächskreis, *Repräsentieren die Parteien unsere Gesellschaft?*

overemphasis on "vote-maximizing" electoral strategies by the established parties has allegedly come at the expense of their democratic functions.⁹⁶ The elevation of parties to semi-public institutions financed by the state and the interlocking of parties and state administration has further weakened the democratic role of parties: to mediate and address the interests of citizens, control the state, and provide critical alternatives.⁹⁷

Yet deep pessimism about the future of the democratic party-state is unwarranted. The current voter disaffection points neither to a return of anti-party traditions of the past nor to a fundamental challenge of the post-1949 constitutional order. On the contrary, the current political and scholarly debate over the state of the parties demonstrates just how much the German party system has, in fact, changed. There is no quest for a state above parties as the alternative to the present constitutional order. Parties are criticized not for furthering social disunity but for ignoring the social pluralism and diversity of society. Similarly, the conflict is not over whether a party-based democracy is inherently a threat to the social order. Rather, it rests on whether the parties themselves are sufficiently

(Hamburg, 1982), 71; Wolf-Dieter Narr, ed., *Auf dem Weg zum Einparteienstaat* (Opladen, 1977); Bernd Guggenberger, "Bürgerinitiativen—oder wie repräsentativ ist die 'Repräsentative Demokratie' in der Bundesrepublik?" in Guggenberger and Kempf, eds., *Bürgerinitiativen und Repräsentatives System*, 172–87. For explanations that stress the negative effects of the party-state, see especially Michael Stolleis, *Parteienstaatlichkeit—Krisensymptome des demokratischen Verfassungsstaats?* (Berlin and New York, 1986); Hermann Scheer, *Parteien kontra Bürger* (Munich, 1982); Dyson, "Party State and Party Government."

⁹⁶ See, e.g., Narr, *Auf dem Weg zum Einparteienstaat*; Guggenberger, "Bürgerinitiativen," especially 175–8; Scheer, *Parteien kontra Bürger*; and the various essays in Raschke, ed., *Bürger und Parteien*.

⁹⁷ For arguments to this effect, see especially Karl Dietrich Bracher, "The Bonn Party System," in his *The German Dilemma* (London, 1979), 231; Smith, "German Volkspartei"; Ossip Flechtheim, "Die Institutionalisierung der Parteien," *Politische Vierteljahresschrift* (1963): 103; Joachim Raschke, "Introduction," in Raschke, ed., *Bürger und Parteien*, 12; Ulrich Scheuner, "Zur Entwicklung des Parlaments unter der Ordnung des Grundgesetzes," in Gerhard Ritter, ed., *Gesellschaft, Parlament, Regierung* (Düsseldorf, 1974), 434. Günter Hofmann, "Politik als Beruf," in Raschke, ed., *Bürger und Parteien*, 55–7; Katrin Lederer and Peter Knoepfel, "Menschliche Bedürfnisse und Parteipolitik," in *ibid.*, 69–86.

committed to the principles of democracy within their own organization and in their relationship to the citizens. Parties are not chided by voters for undermining the capacity of the "state" to provide efficient, neutral administration in the public interest of a unified community. Rather, the parties are said to have become too "stratified," thus failing to articulate divergent social interests, identify citizen grievances, and respond to citizen demands. That this debate is carried on within rather than against the framework of the Basic Law itself attests to its vitality and viability and to that of the democratic political order it helped create.

Conclusion

The Basic Law, unlike the two constitutions that preceded it, deliberately sought to break down the traditional antithesis between state and society. It provided political parties with a central role in the new republic's constitutional and political order. It sought to ensure the stable functioning of the newly established democracy by defining the norms of acceptable party behavior and forcing them into constructive cooperation within the parliament. The Federal Constitutional Court, through its party rulings, consolidated and strengthened the newly established democratic party-state. It provided a strong constitutional doctrine for legitimating the constitutional status, as well as the electoral and political positions of the main founding parties. Its legitimation of the party-state also facilitated the integration of parties into the state. The smooth functioning of party competition, combined with a high level of governmental performance, ensured as well the popular legitimation of the parties, the democratic party-state, and, most important, the constitution itself.

As has been noted, the stability of the party system has recently been questioned. Once again, the relationship of parties and the state is the subject of intense debate. But the potential outcome of this current voter disaffection is altogether different from that in the Weimar Republic. Both electorally and politically, the established parties are firmly entrenched. They are also deeply committed to maintaining the present political order and their place, even dominance, in it. The alternative at this point is one customary in all democracies: Which of the two main parties will achieve power in

the upcoming election? Given the German party situation, the only open question is which party will be the junior partner in a future coalition. The very lack of drama is perhaps the greatest achievement of the Federal Republic's *Parteienstaat*.

Recent developments have raised new issues for the party system. In a reunified Germany, the party situation may be less predictable, less cohesive, and less stable. However, the fact that the process of reunification is dominated by the Federal Republic's two main *Volksparteien* and that it will be carried out within the framework of the Basic Law bodes well. This constitution, those who have interpreted and applied it, as well as the main parties have consistently shown the necessary political flexibility to meet new social, economic, and political challenges. There is every reason to believe that the Federal Republic's political institutions and political elites will manage the new party situation likely to emerge in a reunified Germany with the same seriousness of purpose and responsibility that they have shown since the establishment of the Federal Republic.

Trends in the Development of Federalism under the *Grundgesetz* (Basic Law), 1949–1989

Gebhard Ziller

When the authors of the *Grundgesetz* met in 1948 to draft a provisional constitution for the new West German state that was about to be founded, they did not have to start from scratch. *Länder* (states) had already been re-established in the three Western zones of occupation, and the members of the Parliamentary Council received their political authority from them. The post-war debate on the new constitution was conducted against the background of the Third Reich, and the aim was to avoid the mistakes of the past. For example, the concept of the centralized state had been discredited by the experience of National Socialism; the idea of federalism,¹ on the other hand, had gained strong support in the scholarly and political publications of German emigrants, who had found asylum particularly in the United States and in Switzerland. The principles of subsidiarity and solidarity, tenets of Roman Catholic social teaching, had become more influential following the collapse of Prussia and the loss of eastern and central Germany—areas that were more strongly influenced by Protestantism. Finally, another important factor affecting the deliberations were the goals prescribed by the occupying powers in the Frankfurt Documents and in the dialogue between the Parliamentary Council and the military governors.

Despite the difficult negotiations concerning specific problems between the Parliamentary Council and the military governors, it can be said that the federal structure of the Federal Republic of Germany has continued the tradition of Bismarck's 1871 Constitution of the German Empire and the Weimar Constitution of 1919. The drafting of the Basic Law was an attempt to profit from the experience of the past and to design a modern constitution that incorporated the concepts of a political system held by both politicians and scholars of the time. Of course, many issues were the subject of controversy, such as the distribution of competence between the federal and state

¹ In order to avoid a misunderstanding, I would like to point out that, in German usage, the term “*federal*” refers to the enhancement of the powers of the *states*, not those of the central government.

governments, the financial constitution, and the structure of the second chamber of the federal parliament. Some matters remained controversial to the very end. It is well known, moreover, that the Bavarian parliament was the only state parliament not to approve the Basic Law, because it maintained that the federal structure had not been sufficiently defined in the constitution. These examples clearly show—and this is my hypothesis—that it cannot be argued that the federal system was simply imposed on the Federal Republic of Germany by the occupying powers.

I. The Situation in 1949

How did the Basic Law frame the federal system of government when it was implemented in 1949? Article 30 of the Basic Law states: "The exercise of governmental powers and the discharge of governmental functions shall be incumbent on the Länder in so far as this Basic Law does not otherwise prescribe or permit." Paragraph (1) of Article 70 reads similarly with regard to legislative powers: "The Länder shall have the right to legislate in so far as this Basic Law does not confer legislative power on the Federation." Article 83 makes a similar provision for the execution of federal laws: "The Länder shall execute federal laws as matters of their own concern in so far as this Basic Law does not otherwise provide or permit." Finally, with regard to the administration of justice, provision is made to the effect that judicial power shall be exercised by the Federal Constitutional Court and the five highest courts with different areas of jurisdiction. As for the rest, jurisdiction shall be exercised by the courts of the Länder.

A glance at these texts could give the impression that the German Länder are at the hub of political activity. However, Länder competence is not, as it may seem, the rule but rather the exception—at least in the important sector of legislative powers. The list of legislative prerogatives of the federal government was so extensive from the very outset that, in the course of time, the Länder parliaments increasingly encountered situations that left them hardly any scope to exercise their own legislative powers. This concern about the "draining of political powers" existed to a far lesser extent with regard to the executive powers of the Länder and constituted no problem in the sector of jurisdiction.

II. Enhancement of the Competences of the Federal Government

Over the years, several factors gave rise to a permanent movement aimed at extending the powers of the central government. The following issues are just a few examples: the increasing coalescence of the federal territory; the growing political desire to bring about a greater harmonization of living conditions; the dramatic development of science and technology (for example, the use of nuclear energy); the development of specific problems into issues of supraregional importance (for example, ecology and environmental protection); and, finally, the growing integration of the Federal Republic of Germany in the Atlantic Alliance and in Europe.

Between 1949 and 1989, the Basic Law was amended no less than thirty-four times. Roughly half of these amendments to the Constitution extended the powers of the federal government with regard to legislation and administration, such as in the areas of defense, war-induced burdens, nuclear energy, the promotion of scientific research, public service regulations, waste management, air quality control, and noise abatement. To a lesser extent, the administrative competence of the federal government, too, was redefined. On the other hand, since 1949 there have been practically no shifts of competence in favor of the *Länder*. Quite a few members of the *Länder* parliaments therefore consider that steps should be taken to convert the "one-way street" of competence that leads from the *Länder* in the direction of the federal government into a street with two-way traffic. An analysis of whether the tasks handled by the federal government thus far would better be assigned to the *Länder* has not, however, yielded any definite conclusions. But this query has given rise to serious consideration. Since 1976, there have been no amendments to the Constitution that would have represented a shift in the distribution of competence.

In sum, one can say that this trend—dangerous for the *Länder*—toward a further shift of competence in favor of the federal government has stopped. Nevertheless, *Länder* parliaments are confronted with the problem that they do not have enough legislative tasks and therefore focus too much effort on executive tasks. But, in the long run, this should not be the only role for a state parliament, however important this function may be. In addition, the members of German *Länder* parliaments increasingly consider themselves full-time members of their respective legislatures by virtue of a

particular interpretation of a decision rendered by the Federal Constitutional Court.

III. More Participation for the Länder in the Affairs of the Federal Republic

Since 1949, the Länder have been able to secure a "political advantage" for themselves in one area. The lower chamber of the German parliament, the Bundesrat, is composed of members of the Länder governments, who are thus able to participate in the legislative and administrative decisions of the federal government. Moreover, as the legislative and administrative competence of the federal government was extended (requiring, by the way, in each case the approval of a two-thirds majority of the Bundesrat), the opportunities of the Länder to participate in such action via their role in the Bundesrat grew accordingly. Of course, it is the Länder governments, not their parliaments, that are represented in the Bundesrat, and so the enhanced role of the Bundesrat does not compensate for the loss of power of the state parliaments.

Under the Basic Law, the enactment of numerous federal laws requires the express consent of the Bundesrat. Each time a bill is adopted by the Bundestag, the Bundesrat may appeal to the Committee of Mediation. Like conference committees in the United States Congress, this body is composed of members of both houses, and its role is to find a compromise solution in the event of disputes. In addition, the Bundesrat's consent is required for legal ordinances and administrative regulations issued by the federal government.

The range of opportunities for participation of the Bundesrat today is without doubt greater than that planned by the authors of the Basic Law. On the one hand, it is due to the extended competence of the federal government. On the other hand, it is because the Bundesrat has always broadly interpreted its opportunities for exerting influence—applying, when necessary, to the Federal Constitutional Court.

Let me explain this institution by analogy to the American governmental structure. Imagine that the United States Senate was made up of the governors of the states. Congress would be unable to amend tax laws, nor could it pass other laws affecting major

interests of the states, without the formal approval of at least the majority of these governors.

The existence of the Bundesrat alone obliges the federal government to seek the approval of the state governments with regard to virtually every law with political dimensions. The passage of laws is particularly difficult if the Bundesrat is dominated by a party other than that holding the reins of government. But, even when the same political party comprises the majority in both houses, there are often complications—particularly when matters of importance to the Länder, such as finances and tax issues, are at stake.

IV. Cooperation and Coordination

Each state must deal with the issue of how the federal and state governments can cooperate—how they can coordinate their respective policies. The Federal Republic of Germany has experienced a development characterized by political scientists as "the entwinement of policies." Joint institutions were set up, financed, and operated by the federal and Länder governments. Institutions in several Länder were merged to form an organizational unit, or those in one state could be used by another. In particular, many activities that, according to the Basic Law, fall in the province of the Länder were funded to a considerable extent by the federal government. This situation often posed problems for the Länder, particularly when the Länder were forced to act because the federal government announced its intention to shoulder 50 percent of the costs incurred by a particular measure if the Länder were prepared to contribute an equal amount.

Growing reservation was expressed in the face of this development for reasons connected with the Basic Law. In 1969, a major amendment to the Basic Law put some of these joint activities on a constitutional basis, while others were abolished by a general "reorganizational clean-up." It can be said that cooperative federalism, or the entwinement of policies, was institutionalized and authorized. Without going into detail, I should like to point out the joint tasks established. Article 91(a) of the Basic Law mentions three areas: the extension and construction of institutions of higher education, including university hospitals; the improvement of regional economic structures; and the improvement of the agrarian

structure and coastal preservation. A joint planning procedure and a joint funding system have been legally established for these areas. The federal and state governments cooperate, but, here again, the result is a loss of the competence of the Länder parliaments.

With regard to the joint promotion of research and educational planning, Article 91(b) of the Basic Law provides for cooperation between the federal government and the Länder. Our national research centers are run in accordance with these rules, as are the German Research Society, the Max Planck Society, and the Fraunhofer Society.

In other areas as well, policy makers regularly coordinate their actions. The ministers-president of the Länder meet regularly for conferences, as do the ministers heading their respective government departments. They come together to coordinate policies pursued by the Länder in various areas: cultural, financial, economic, transportation, and so on. Regular meetings are also held between the Länder ministers-president and the corresponding federal ministers—again with the aim of coordinating policy. Political scientists sometimes refer to this as the "third level" of policy making that has developed alongside the levels of the federal government and the states.

Since decisions at these conferences are not based on a majority vote but on unanimity, one cannot object to these efforts to coordinate policy on constitutional grounds. However, it must be pointed out that this development has not contributed to the extension of the political scope of the parliaments concerned with making their own independent decisions.

V. The Financial System

During the first twenty years following the foundation of the Federal Republic of Germany, so-called "gray zones" developed in the delineation of responsibility for finances between the federal government and the Länder. The 1969 reform of the Basic Law envisaged a clear-cut distribution of labor between the federal government and the Länder. It sought to determine what level—federal or state—was responsible for the financial system and to outline a sound system for the distribution of financial resources between the two (vertical financial equalization scheme). It also intended to establish the basis for a sound horizontal financial equalization; in other words, for a

financial adjustment between Länder with low tax revenues and those with high tax incomes. In retrospect, it can be said that this reform constituted an important milestone on the road toward the further development of the federal system. Since that time, many issues have been properly settled and are no longer the subject of disputes. Other issues, however, cannot be resolved by this financial system, because there are no absolute yardsticks for establishing a fair distribution of funds. This question requires policy decisions. Since all of these decisions must take the form of federal acts, the Länder have an opportunity to participate in them via the Bundesrat. Despite all the problems encountered, it has always been possible to reach a compromise between the federal government and the Länder and among the Länder themselves. It can, however, be reliably stated that, in the past, the financial system of the Federal Republic of Germany has developed in such a way that the different territorial authorities are, on the whole, fairly treated when it comes to the apportionment of tax income.

VI. An Unfulfilled Task: Reorganization of the Federal Territory

One task originally envisaged by the Basic Law has not been fulfilled: the reorganization of the federal territory. The German Länder of the post-war years were set up by the occupying powers, with the exception of the Hanseatic cities of Bremen and Hamburg. Their borders partially follow the boundaries of the former occupation zones, and they were partially established following the collapse of Prussia. For this reason, Article 29 of the Basic Law originally made provision for the reorganization of the federal territory, giving due regard to regional, historical, and cultural ties, economic expediency, and the social structure.

It must be openly stated: German policy-makers have failed to accomplish this task. It has, however, become apparent over the years that German citizens no longer regard the existing Länder as artificial units. Indeed, a certain Länder consciousness has developed, and nowadays nobody feels that there is any real need for a reorganization of the federal territory. Therefore, the article in the Basic Law concerning such reorganization has been amended several times. The most recent amendment in 1976 changed the binding obligation into a mere authorization. It is assumed that it will be possible to

solve the problems posed by the different size and capacity of each state in some other way.

VII. As Federal State Member of the European Community

The membership of the Federal Republic of Germany in the European Community raised particular problems with regard to its federal structure. The result is that now an increasing number of decisions are being made by European authorities and no longer by national authorities. In other words, decisions that were formerly made within the Bundestag and the Bundesrat are now made by the Council of Ministers of the EC. Recently, following the enactment of the Single European Act, this policy applies to a greater measure to areas such as broadcasting and education, for which the Länder have responsibility. In the European Council of Ministers, the appropriate federal minister is thus required to vote on issues over which he has no authority in Bonn. This is a constitutional problem characteristic of Germany, since it is the sole federal state among the member countries of the European Community.

Since 1957, the German Länder have therefore been studying the question of how to secure for themselves an opportunity to influence the attitude of the German delegation in the European Council of Ministers. At first, the federal government was only prepared to inform the Bundesrat of events in Brussels. In 1979, the German chancellor agreed with the state ministers-president on an improved procedure that opened up more extensive opportunities for participation by the Länder. This was to apply particularly when the European bodies discussed projects that fell under the domain of the Länder. However, even this procedure did not grant the Länder any real opportunity for participation.

Parallel to the ratification of the Single European Act, the Länder managed to secure the commitment of the federal government to inform the Bundesrat in detail and at the earliest possible opportunity of all those European projects that might be of interest to them. In the European Community Council of Ministers, the German government is required to consider the positions adopted by the Bundesrat. To the extent that the Länder are competent, the federal government may dissent from the decision made by the Bundesrat only in the event of cogent reasons involving foreign and

integration policy. When Länder matters are under discussion in Brussels, their representatives of the Länder must be admitted as members of the German delegation to the Council if they so desire.

In 1987, an agreement was made between federal and Länder governments containing details of this legal arrangement. It is sometimes difficult to implement this new regulation, since decisions in Brussels are frequently made under time pressure, and because compromises sometimes have to be sought and decided upon at the conference table during a marathon session.

To date, insufficient experience has been gained with this procedure, and it is not yet possible to make a conclusive evaluation. Nonetheless, this endeavor to incorporate the Länder in decision-making had to be undertaken. The aim was to attain this goal without, at the same time, adversely affecting the federal government's scope of action in the European Community Council of Ministers. This aspect continues to gain importance as more progress is made toward European unification.

VIII. Conclusion

I have attempted to show that the federal system of the German Federal Republic is not static. Indeed, it is sufficiently flexible to adapt to changing requirements. In many fields of policy making, a federal system appears to be more complicated than a unitary state. On the other hand, it also promises many advantages for its citizens: the business of policy making is carried out, at least in part, with closer regard for citizens' needs. It can take into account regional differences and requirements more readily. The different political parties can also find room for action at the state as well as at the federal level. This helps to bring about not only a political climate which, on the whole, is moderate but also assists the change of government on the federal or the state levels.

The citizens of Germany have not always adopted a favorable attitude toward the federal system. Now, however, the pollsters tell us that more than 70 percent of the population is in favor of federalism in Germany. This is a good omen for further developments in the country.

Normifying the Unnormifiable: The Right to Resistance in West German Constitutional History

David Clay Large

In the constitutional history of the Federal Republic, few issues have been more controversial than the question of codifying a "right to resistance" (*Widerstandsrecht*). In the wake of the Third Reich, many Germans believed that such a step was necessary because their history—especially their most recent history—had shown the citizens to be essentially unwilling to stand up for their rights when they were abused or subverted by state authority. Presumably, a law allowing them—or perhaps even requiring them—to oppose the misuse of power by the authorities would induce the people to be more vigilant in protecting their democratic freedoms. Many jurists and politicians, however, saw the codification of a right to resistance in the constitution as deeply problematic for a host of reasons, not the least of which was that "resistance" became necessary and legitimate only in extraordinary circumstances—when the constitutional order had already been subverted. *Widerstand* in the true sense, it was argued, stood outside legal norms. How could one "normify" the unnormifiable?¹

I propose in this essay to provide a brief overview of the *Widerstandsrecht* codification debate from its origins in the immediate postwar period to the enshrinement of a resistance law in the *Grundgesetz* in 1958. After that, I will offer some observations about what this entire process—both the debate and its resolution—might tell us regarding the nature of political and legal discourse in the Federal Republic.

The earliest codification of a right-to-resistance in West German constitutional history occurred not in the *Grundgesetz*, but in the constitutions of the states of Hesse and Bremen (1946 and 1947, respectively). Article 147 of the Hesse constitution reads: "Resistance against unconstitutionally exercised official authority is everyone's right and duty. Whoever learns of a constitutional violation, or of an attempt to violate the constitution, has the duty to facilitate the

¹ Arthur Kaufmann, "Einleitung," in Arthur Kaufmann and L. E. Backmann, eds., *Widerstandsrecht* (Darmstadt, 1972), x.

prosecution of the guilty parties through the state court."² Article 19 of the Bremen constitution states: "Resistance is everyone's right and duty when human rights enshrined in the constitution are infringed upon by public authorities."³

These two initiatives at the *Land* level provided the model for a Widerstandsrecht clause drafted by the *Grundrechtskommission* of the Parliamentary Council at the Herrenchiemsee Conference in August 1948. This clause read: "When basic rights are subverted by public authority, resistance is everyone's right and duty."⁴ In support of this proposal, one member of the Commission argued that, if such a provision had been in place during the Third Reich, "perhaps many segments of the population would have decided earlier to resist the National Socialist regime."⁵ But Professor Carlo Schmid of the SPD, a professional jurist, debunked this argument in a way that went to the heart of the codification problem. He said:

This resistance clause is all too open to demagogical exploitation, to the abuse of the common man's innocent trust. The damage caused by such abuses would be greater than any civic advantage achieved by the provision. Moreover, it makes no sense to base a right to revolution on the constitution; if a citizen is fed up with the powers that be, and he has the strength and courage to stand up to the police, he will certainly do this whether or not the constitution sanctifies his action.⁶

Two of Schmid's colleagues at the Herrenchiemsee Conference raised other objections to codification. One pointed out that a "right to resist" was already inherent or implied in the proposed constitution's catalogue of basic rights. Another saw a "danger" in establishing resistance rights that embraced "the highest state officials" along with the common citizenry.⁷ For all those reasons, the Grundrechtskommission's proposal was voted down by the conference as a whole.

² *Verfassungen der deutschen Bundesländer*, 2d. ed. (Munich, 1981), 185.

³ *Ibid.*, 104.

⁴ *Der Parlamentarische Rat 1948–1949, Akten und Protokolle*. Vol. 2: *Der Verfassungskonvent auf Herrenchiemsee* (Boppard, 1981), 227, note 116.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

The same proposition, however, was raised once again during the discussions of the Parliamentary Council in Bonn, which had the task of putting together a final draft for the Basic Law. In the *Grundsatzausschuss*, Ludwig Bergsträsser of the SPD put forth a resistance clause modeled on a formula adopted by the United Nations. It read: "Everyone has the right, individually or with others, to engage in resistance against oppression or tyranny."⁸ Since the *Grundsatzausschuss* came to no resolution on this question, it was advanced again in the *Hauptausschuss*, this time by Hans-Christoph Seebohm of the FDP. His proposal went as follows: "A right to resist is recognized in cases of constitutional violation, and illegal or unethical actions by the state. In such moments public office-holders are duty-bound to resist."⁹ Again it was Carlo Schmid who led the opposition to the adoption of such a clause in the *Grundgesetz*. He insisted that, although Seebohm's proposal might be well meant, in practice it amounted to an invitation to a "breach of the peace" (*Landfriedensbruch*). To Seebohm's rejoinder that he had made his proposal because the German people had historically shown little inclination to resist office abuses of power, Schmid replied: "I'm afraid that with this law we would only lead many poor devils into temptation, from whose disastrous consequences we could not rescue them, because we will be at their side."¹⁰ Again, in other words, Schmid pointed up the danger of encouraging the common man, who presumably could not be expected to understand the full implications of his actions, to leap into the never-never land of political resistance. Other objections were raised as well. Some members of the Parliamentary Council saw *Widerstandsrecht* as an expression of that plebiscitary principle that had been so fatefully prominent in the Weimar Constitution and that they were determined to curtail in the *Grundgesetz*. Others argued that the right to resistance should be understood as a *Naturrecht* and, therefore, implicitly binding in a *Rechtsstaat*.¹¹ These arguments prevailed in

⁸ Quoted in Christoph Böckenförde, "Die Kodifizierung des Widerstandsrechts im Grundgesetz," *Juristenzeitung* 25 (1970): 169.

⁹ *Ibid.*

¹⁰ Quoted in Joseph Listl, "Staatsnotstand und Widerstandsrecht," in Kaufmann and Backmann, eds., *Widerstandsrecht*, 539–40.

¹¹ Torsten-Dietrich Schramm, *Der deutsche Widerstand gegen den Nationalsozialismus* (Berlin, 1980), 47–51.

the *Hauptausschuss*, with the result that the Basic Law as it was originally framed contained no explicit right to resistance among its catalogue of basic rights.

Although this state of affairs satisfied most jurists, some politicians, especially (but not exclusively) of the SPD, continued to believe that the absence of a codified *Widerstandsrecht* left the new democratic order insufficiently protected against abuses of power by state authorities. They remained convinced that, if the right to resist were written down, sanctified by federal laws, citizens and officials alike would be more inclined to check any challenges to the constitutional order as soon as they raised their ugly heads. In 1950, West Berlin, where the SPD governed in coalition with the CDU, joined Hesse and Bremen in codifying a right to resistance; unlike those states, however, Berlin did not impose upon its citizens a duty to resist constitutional infringements.¹² Three years later, the Bundestag added to the *Bundesbeamtengesetz* (federal civil service law) a clause ascribing personal responsibility to public officials for actions of state, a step that some saw as presupposing the officials' right and duty to oppose unconstitutional acts, from whatever quarter they might come.¹³

As the Federal Republic rapidly developed into Adenauer's *Kanzlerdemokratie*, with the chancellor repeatedly attempting executive end-runs around the parliament and the courts,¹⁴ insecurity in many quarters about the Basic Law's lack of a resistance clause grew apace. This was all the more the case when the government and parliament began discussions in 1958 about assuming the domestic emergency powers originally invested with the Western Allies. Obviously, such emergency legislation would dramatically enhance the prerogatives of the executive, a development that some legislators, especially within the SPD, viewed with severe misgivings. In essence, these critics were prepared to countenance a *Notstandsverfassung* only if it included provisions to safeguard basic civil liberties and if it was not so all-encompassing as to subvert, rather than to protect, the democratic order. It is, therefore, not surprising that the

¹² *Ibid.*, 51–2.

¹³ F. K. Fromme, *Von der Weimarer Verfassung zum Bonner Grundgesetz* (Tübingen, 1962), 207.

¹⁴ On this, see Arnulf Baring, *Außenpolitik in Adenauers Kanzlerdemokratie* (Munich, 1969).

SPD, now prodded by the DGB (German Trade Union Association), raised the issue of a *Widerstandsrecht* clause within the context of the proposed emergency legislation. More precisely, in the early 1960s, SPD and labor leaders demanded that the emergency legislation contain a guarantee of the right to engage in political strikes, or—put negatively—insisted that political or general strikes be explicitly excluded from the catalogue of "emergencies" that would prompt the invocation of special governmental powers. As historical justification for this demand, its proponents recalled the Kapp Putsch of March 1920, when a timely general strike had scuttled Kapp and company's attempt to overturn the Weimar Republic.¹⁵

In 1964, this question was taken up by the Bundestag's judicial and interior committees, but neither was able to agree on an acceptable formulation to bring before the full House. Since it seemed politically impossible to enshrine the political strike in constitutional law, the SPD and the labor movement abandoned this effort and reverted to their older demands for a more generally defined *Widerstandsrecht*. For the next couple of years, their lack of political clout at the federal level prevented any significant progress on this front, but, at the same time, they managed to prevent passage of the government's proposed *Notstandsverfassung*, which required a two-thirds majority in the parliament.¹⁶

There matters stood until the creation of the Grand Coalition in late 1966 prompted government and parliamentary leaders to begin redrawing the emergency laws in a way that would accommodate most critics on the Left. Included in the new drafts were obviously worded provisions for resistance. Now, however, CDU/CSU politicians articulated strong opposition to a *Notstandsverfassung* that contained any such proposition. They claimed that the inclusion of a right to resistance in the Emergency Powers Act would defeat the act's very purpose.¹⁷

Some of these conservative critics, however, had their minds changed on this matter by the outbreak of student rioting in 1968. It seems that many of the Berlin demonstrators were invoking the concept of *Widerstand* in the course of their often violent confronta-

¹⁵ Böckenförde, "Kodifizierung," 169.

¹⁶ *Ibid.*

¹⁷ See interview with Eugen Gerstenmaier in *Rheinische Post*, July 20, 1968.

tions with governmental authority. In a broad sense, they claimed to be the heirs of the anti-Hitler opposition during the Third Reich; more narrowly, they insisted that the Berlin constitution's resistance clause both sanctified their action and rendered a governmental prohibition of their demonstrations unconstitutional. This expropriation of the anti-Nazi resistance legacy by rioting students provoked outrage among many conservative commentators and politicians. In a *Frankfurter Allgemeine Zeitung* article entitled "Widerstand ohne Tyrannen," Dolf Sternberger complained that Germans never seemed to get things right: In the Third Reich, there was a genuine tyranny but all too little resistance; now there was no tyranny but plenty of people attacking the legal order in the name of "resistance." This contemporary "Widerstand" was, in reality, a mindless revolt of sons against fathers, its practitioners intent upon employing confused historical analogies to challenge a democratic system that neither deserved their reproaches nor required their dubious vigilance.¹⁸ Against this background, elements in the Union parties began to argue that a carefully worded resistance clause in the Basic Law might be useful in combatting such "misuse" of the *Widerstand* ideal. They saw that "resistance" might be defined not only as resistance *against* the state, but also as resistance *of* the state to transgressions among the citizenry. Thus, a CDU delegate to the Bundestag proposed the following formulation of a resistance law in May 1968: "If anyone through misuse or usurpation of authority hinders the constitutional organs of the Bund or a Land in the fulfillment of their duties, or attempts to subvert the free democratic order, it is the right of every German to resist the lawbreakers."¹⁹

Since this proposal was too transparently authoritarian to find much support outside the party from which it emanated, the legal committee of the Bundestag was obliged to go back to the drawing board in search of a compromise formula. Discussions at this level soon yielded a new approach: namely, a decision to append a resistance clause to Article 20 of the Grundgesetz, which defines the Federal Republic as a *Rechtsstaat* whose authority emanates from the people and whose three branches of government are bound by law and justice. Adolf Arndt, the SPD's chief legal expert, suggested that a resistance amendment to Article 20 made good sense but insisted

¹⁸ *Frankfurter Allgemeine Zeitung*, May 6, 1968.

¹⁹ Quoted in Böckenförde, "Kodifizierung," 171.

that it should be qualified so as to be operable only as a "last resort."²⁰ Presumably, this qualification would help placate those who regarded a constitutional right to resist as an open invitation to civil disobedience and anarchy. Arndt's suggestion was duly incorporated into a draft proposed by the Bundestag's legal committee and adopted by the federal parliament on June 24, 1968, as Section 4 of Article 20. It reads: "All Germans shall have the right to resist any person or persons seeking to abolish the constitutional order, should no other remedy be possible."²¹

I should emphasize that this provision became the law of the land in West Germany not because most politicians (let alone most jurists) were convinced that it was juridically sound, but because the Grand Coalition government saw it as a necessary price for the passage of the *Notstandsverfassung*, which became law at the same time. The resistance clause was clearly designed, as one commentator noted, to "take the wind out of the sails" of those who claimed that the new emergency powers would leave the Federal Republic defenseless against abuses by the state.²²

In reality, this belated codification of a *Widerstandsrecht* in the Basic Law did little to clarify its meaning or to still anxieties that it would be misused—either by the citizenry or by the state itself. Certainly, it was vague enough to allow just about anyone to don the mantle of "resistance," since *any* German person or agency could claim to resist any other German person or agency alleged to be acting unconstitutionally. Thus, after the kidnapping of the industrialist Hanns-Martin Schleyer by the RAF in the fall of 1972, the police themselves invoked the "right to resist" when they raided hundreds of apartments and houses without search warrants.²³ For some Germans, the police's assumption of this right seemed positively grotesque: Was it not supposed to protect the citizenry

²⁰ Ibid.

²¹ *The Basic Law of the Federal Republic of Germany* (Press and Information Office, Bonn, 1981), 23. For technical discussions of this clause and the *Notstandsverfassung*, see Karl-Heinrich Hall, "Ausgewählte Probleme des geltenden Notstandsrechts, dargestellt an Hand von ausgewählter Literatur," *Juristenzeitung* 25 (1970): 353–7; Carl-Otto Lenz, *Notstandsverfassung des Grundgesetzes* (Frankfurt/M., 1971).

²² Listl, "Staatsnotstand," 541.

²³ Jane Kramer, "Hamburg: Terrorism in Germany," in id., *Europeans* (New York, 1988), 131.

against an overbearing state? In any event, the objects of the police's attention, the terrorists and their sympathizers, also claimed to be operating within a framework of "resistance" against an allegedly oppressive political and social order. Soon all sorts of countercultural or "alternative" groups—house-squatters, gay rights crusaders, ecological activists, outraged feminists, peace demonstrators, anti-nude campaigners—claimed sanctification for their protests by evoking the ideal of *Widerstand*, if not explicitly citing Article 20, Section 4, then recalling historical precedents of resistance, especially during the Third Reich.

Predictably enough, these developments brought a new round of protests against a perceived "inflation" or "perversion" of the resistance ideal. In the late 1970s, the historian Peter Graf von Kielmansegg, whose father had had connections to the July 20 Resistance in Nazi Germany, denounced the self-professed resisters of the contemporary era for claiming a moral inheritance to which they had no title. "We Germans," he said, "who have had the opportunity to learn what resistance against a tyranny really means, ought to be the last people to allow ourselves this confusion."²⁴ In 1981, Eberhard Bethge, friend and biographer of the Resistance martyr Dietrich Bonhoeffer, indignantly objected to the adoption by contemporary counter-cultural protestors of the terms "Widerstand" or "Widerstandskämpfer," which obscured the stark differences between the present situation and the conditions prevailing in the Third Reich.²⁵ "The participants in the 20th of July [action]," he noted, "did not call themselves *Widerstandskämpfer*, while protest groups today blithely assume this title. That they can do this so freely signals immediately the contrast between them and the fighters against Nazism, who could not openly proclaim their resistance without endangering their lives, who had to avoid the street and all forms of media, whose risks, in short, were incomparably greater." A year later, the historian and political scientist Karl Dietrich Bracher warned that recent confusion regarding resistance and its legitimate exercise recalled the worst days of Weimar, when people "resisted" a parliamentary democracy and thereby helped bring about

²⁴ Peter Graf von Kielmansegg, "Frieden geht nicht vor Demokratie," *Die Zeit*, Oct. 7, 1983.

²⁵ Eberhard Bethge, "Widerstand—damals und heute," *Süddeutsche Zeitung*, July 25–26, 1981.

a dictatorship. Just like the Weimar protestors, said Bracher, contemporary opponents of the Bonn Republic consciously or unconsciously confused the difference between justifiable resistance exercised during times of tyranny and comfortable pseudo-resistance directed against a democratic *Rechtsstaat*. Political resistance was legitimate, he concluded, only where no legal opposition was tolerated; so-called "resistance" against a free, parliamentary, constitutional state, on the other hand, was nothing more than "an antidemocratic preparation for a future dictatorship."²⁶

Having reviewed the process through which a right to resistance eventually became codified in the West German Basic Law, and having examined the arguments surrounding the new provision's alleged abuse, I would like to move on to a more general critique of the entire debate, which, to my mind, reveals a good deal about how West German citizens understood fundamental questions of power, dissent, and state organization.

Those politicians and commentators who originally called for a codification of a *Widerstandsrecht* in the Basic Law clearly believed in the efficacy of hortatory admonitions on political behavior that were enshrined in elaborate, high-principled documents. In this sense, they were following in the noble but not terribly promising liberal tradition inherent in the 1848 and Weimar constitutions, both of which had long bills of rights, though no explicit "right to resistance." Bonn's committed democrats meant to erect a final statutory guarantee of liberty. They argued, as we have seen, that people were more likely to defend their liberties against the state if explicitly allowed to do so by the state itself. But does this make any sense? Does one act independently and resourcefully because allowed or instructed to do so? Can one be required to be free? Put in an historical context, would the strikers who thwarted the Kapp Putsch have moved sooner or more effectively if the Weimar Constitution had contained a resistance clause? In the same vein, did the lack of a constitutional *Widerstandsrecht* in the Third Reich have anything to do with the German people's failure to rise up against Hitler? I should point out in this context that Hitler, in fact, *did* encourage the Germans to stand up to "tyranny." In *Mein Kampf*, he wrote:

²⁶ Karl Dietrich Bracher, "Verwirrung um Widerstand," *Rheinischer Merkur*, Jan. 8, 1982.

State authority must never be allowed to become an end in itself, since this is the way every form of tyranny becomes sacrosanct and impregnable. When the policies of a government lead a people toward the brink of disaster, then rebellion is not just the right, but the duty, of every citizen. Human rights have priority over the rights of state?²⁷

Hitler had, in effect, instructed the German people to get rid of him, but for once, alas, the people refused to follow their Führer.

But this should not really surprise us, for reluctance to obey orders to disobey is an old story—and not strictly a German one. Citizens living in states with a codified right to resistance have generally been disinclined to exercise it, and this not because they saw no need to do so, but because the states that gave them this right were often the least inclined to tolerate its actual employment. The French Jacobin constitution of 1793 insisted that resistance against abuses of power by the government was the holiest duty of the citizenry.²⁸ But, since the government was defined as the direct embodiment of Rousseau's *volonté générale*, it was hard to imagine how the state could operate against the will of the people or how a rebellion could be anything but "counterrevolutionary" and treasonous.²⁹ The same might be said for the former GDR and the Soviet Union, both of which claimed to be perfected "people's democracies," and both of whose constitutions *required* the citizenry to resist abuses of power by the state.³⁰ Of course, that requirement did not prevent either government from severely punishing citizens who attempted to make use of it.

It is significant, I think, that the Germ politicians who wanted a codified *Widerstandsrecht* were generally anxious to see this defined as a *duty*, not just as a "right." On one level, this might be seen as an expression of the broader German mania for *Vorschriften*—an apparent disinclination to allow any realm of life, except perhaps driving on the Autobahn, to remain free from official tutelage or regulation. But, unlike many requirements, this one was not just potentially irksome, it was downright absurd. Who would enforce the requirement that citizens exercise their "duty" to resist? Presum-

²⁷ Adolf Hitler, *Mein Kampf* (Berlin, 1942), vol. I: 104.

²⁸ Listl, "Staatsnotstand," 542.

²⁹ Peter Schneider, "Widerstandsrecht und Staatsrecht," in Kaufmann and Backmann, eds., *Widerstandsrecht*, 365.

³⁰ *Ibid.*, 366.

ably, the state against which the resistance was exercised. And, if resistance was a legal duty, then there would have to be punishment for failure to comply; this punishment would also be meted out by the state whose abuses the citizen failed to resist. Indeed, the *Staatsgrundgesetz* of Hesse made failure to resist unconstitutional acts by the state a punishable crime, but it also stipulated that punishment could be applied only when the *Landtag* (state parliament) had established that the state constitution had indeed been endangered.³¹ A Frankfurt jurist (Carl Heyland) defended this provision by arguing that it was necessary, since the individual citizen could not be expected to know on his own when a defense of the constitution was required; he would have to be "guided" in this matter by the authorities.³²

I must confess that, upon reading this learned commentary, I thought I had stumbled onto a discussion between the Mad Hatter and the White Queen in *Alice in Wonderland*. The logical corollary of this, after all, is that one should not resist illegal exercises of authority until some other authority stipulates that the acts in question were in fact illegal. On closer inspection, however, one sees that there *was* a certain method to this madness. However dotty the reasoning, the thrust behind turning a right into a duty was to shift the whole business out of the hands of the citizen and back into the domain of the state. For, in the last analysis, this *duty* to resist challenges to the constitution made logical sense not if exercised by citizens against the state, but by state officials against an obstreperous citizenry. This tendency was only compounded by the vague wording of Article 20, Section 4 of the Basic Law. It seemed that the German jurists and politicians who had crafted it had managed not only to normify the unnormifiable, but to turn that norm upside down. As one commentator (Ernst Müller-Meiningen) noted after the passage of this law: "The right to resist abuses by state organs has been transformed into its opposite: this law carries the danger that critics or opponents of the established order, whose opposition is irritating to the authorities but entirely legal, will be set up as targets of the 'resistance of all Germans.'" ³³

³¹ *Ibid.*, 379.

³² *Ibid.*

³³ *Süddeutsche Zeitung*, May 21, 1968.

Many of the logical and political dilemmas inherent in the debate over codifying resistance stemmed from the definition of resistance that was employed by most participants in the discussion. Resistance was defined primarily in terms of revolution or violent rebellion against an entrenched tyranny. The model for this phenomenon was the assassination attempt against Hitler on July 20, 1944. If this indeed was the proper definition, then objections like Carlo Schmid's certainly were in order. Most people could not be expected to risk their lives to overthrow a tyranny *whatever* their constitution told them to do. Encouraging resistance of this magnitude through legal codification indeed seemed to obscure its risks and diminish its moral and political import. The central problem here, it would seem, involved the definition of resistance as a single great moment—a heroic upheaval against an entrenched dictatorship. This made resistance a last-ditch affair employed only after constitutional law had been eliminated or severely undermined.³⁴ Obviously, if one thought of a resistance "right" in these terms, one would either not exercise it or exercise it too late. Of course, this was precisely what the German people did during the Third Reich. As Erich Kästner noted, perhaps a little too dogmatically:

"The event of 1933–1945 needed to have been preempted before 1928. After that it was too late. One cannot wait until the fight for freedom turns into treason. One cannot wait until a snowball turns into an avalanche. One must stamp on the snowball, since no one can arrest the avalanche. It stops only when it has buried everything in its path.... Impending dictatorships are deferrable only before they have taken over power. *Resistance* is a matter of timing, not of heroism."³⁵

Kästner was right to worry about timing. Many Germans remained so uncomfortable with the concept of resistance that, even after the collapse of Nazism—a collapse, of course, not of their own making—they continued to believe that those who had tried to kill Hitler had been too hasty in their action. A public opinion poll taken in 1952 in the Federal Republic showed that only 20 percent of the respondents believed that Hitler's opponents should have

³⁴ Arthur Kaufmann, "Das Widerstandsrecht der kleinen Münze," *Süddeutsche Zeitung*, Dec. 31, 1981–Jan. 1, 1982.

³⁵ From a speech given at a PEN-club meeting in Hamburg on the occasion of the twenty-fifth anniversary of the Nazi book-burning, 1958. Quoted in Kaufmann, "Einleitung," xiii–xiv.

resisted during wartime; 34 percent insisted that they should have "waited until after the war," and 15 percent said there should have been no resistance at all.³⁶

If the definition of resistance was problematic, so, too, was the concept of the *Rechtsstaat*—the entity that was to be protected by a right to resist. Most German commentators clearly thought of the *Rechtsstaat* as something politically completed, something firmly *there*. Bonn was generally defined as a model *Rechtsstaat*, the opposite of the tyranny that had preceded it, and the opposite of the "tyranny" across the Elbe. But, if the *Rechtsstaat* was seen as something firmly in place, then challenges to it could be rejected as both unnecessary and dangerous.³⁷ And if, as was often done, the Bonn *Rechtsstaat* was seen in Kantian terms as an untouchable guarantor of order and security, then challenges to it would have to be condemned—in Carlo Schmid's words—as invitations to "*Landfriedensbruch*," or, in Dolf Sternberger's terms, as "untimely." The mistake here was to see the *Rechtsstaat*, like resistance, in monumental and static terms, rather than recognizing the democratic order as something that is never completed but always in the process of becoming.

If the *Rechtsstaat* is defined in these flexible terms, and resistance is also seen not as a single heroic moment but as a kind of ongoing vigilance on the part of the citizenry, then the concept of a "right to resist" indeed makes sense, though not necessarily in any codified form. But, perhaps in the German case, it would be better not to use the term "Widerstand" at all. This word is so heavily freighted with absolutist historical connotations that it cannot be employed in the "normal" political environment of the Federal Republic without inspiring charges of misappropriation. Certainly, protestors against Bonn's misdeeds or allegedly misguided policies would be well advised to stop romanticizing and mythologizing their actions by labeling them as *Widerstand*. Perhaps, if they did this, they might also better understand that their task cannot be accomplished in a few glorious *journées* but that it involves a permanent state of mind, an ongoing exercise of civil courage, a day-to-day rejection of the old German admonition: "Ruhe ist die erste Bürgerpflicht."

³⁶ Erich-Peter Neumann and Elisabeth Noelle, *Jahrbuch der öffentlichen Meinung 1947–1956* (Allensbach, 1956), 138.

³⁷ Hans Schneider, *Widerstand im Rechtsstaat* (Karlsruhe, 1959), 13–14.