

HUGO PREUSS, GERMAN POLITICAL THOUGHT AND THE WEIMAR CONSTITUTION

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Abstract: The reputation of Hugo Preuss has been tainted by the failure of the Weimar Republic, whose constitution he drafted. Preuss has consequently been comparatively neglected in the history of German political thought and some have seen him as trapped in the conceptual world of the German monarchical state. This article argues against that view of Preuss, and against the same view of Robert Redslob who influenced him at a crucial stage. It also argues that Preuss had good democratic reasons for advocating a directly elected president and that the later problems with the German presidency were a product of subsequent reinterpretation of the role of the president, which was contrary to Preuss's intentions.

The reputation of Hugo Preuss has been bound up with the fate of the Weimar Republic, whose constitution he drafted. Just as the Weimar Republic has been seen as fundamentally flawed and doomed to failure, so too have the ideas of Preuss. Central to the reputation of both Preuss and the Republic he helped to found has been the position of the president of the Republic. In retrospect at least, the president, especially in the shape of Paul von Hindenburg, readily appears as an *ersatz Kaiser*, and those who established the Republic readily appear to have failed to make a decisive break with Germany's authoritarian past. In this, Preuss's reputation has been further tainted by the fact that he was influenced by Robert Redslob, whose book *Parliamentary Government in its True and Unauthentic Form* has been regarded as trapped in the authoritarian conceptual world of pre-1914 Germany. This picture of Preuss, and Redslob, is not without some irony. In some sense it retrospectively confirms the views of the opponents of democratic and parliamentary government in Germany who had fought hard to assert the ideas of 1914 as true German virtues, against the ideas of 1789 and 'Western' political ideas in general.² They well knew that success in establishing a monochrome Germanic

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² The ideas of 1914 were the supposedly Germanic virtues of national unity in contrast to the ideas of revolutionary France of 1789. The literature on this is substantial. See Hermann Lübbe, *Politische Philosophie in Deutschland* (Frankfurt am Main, 1974). For an interesting argument see J. von Ungern-Sternberg's claim that 'The modern peoples' wars tend to become wars between good and evil, between the realm of light and darkness. Confirmation of this can sadly be found with little effort up to the present day. But, in the year 1914 the poets and thinkers stood completely unprepared for this. And they reacted correspondingly. Their own self-images are in a high degree a mirror of the foe's.' J. von Ungern-Sternberg, 'Wie gibt man den Sinnlosen einen Sinn? Zum Gebrauch der Begriffe "deutsche Kultur" und "Militarismus" im Herbst 1914', *Kultur und Krieg*, ed. Wolfgang J. Mommsen (Munich, 1996), p. 88.

tradition of political thought meant success in defeating their German political opponents, who could then be disparaged as bearers of alien ideas. There is further irony in the fact that the damning indictment of Preuss as a man trapped in a tradition of authoritarian political thought was consolidated by a genuine advocate of democracy, Ernst Fraenkel.

Yet it is wrong to force Preuss into the framework of a tradition marked by the authoritarianism of the Bismarckian and Wilhelmine political systems. It is inconsistent with his theoretical writings, his engagement as a practical politician, and his efforts to shape Germany's constitutional future. Preuss, moreover, had good democratic reasons for arguing as he did about the constitutional position of the president in the Weimar Republic. The problem was not the president's role, as understood by Preuss and by the National Assembly, which authorized the constitution, but subsequent interpretation of the role, which was contrary to the spirit, and arguably the letter, of the constitution.³

When Hugo Preuss was appointed State Secretary in the Ministry of the Interior by the Council of People's Commissars on 15 November 1918, with the task of drafting what became the constitution of the Weimar Republic, he already had behind him a substantial output as well as practical experience of the politics of his native Berlin. He had become a *Privatdozent* in 1889, at the age of only 29, on the basis of his habilitation thesis *Community, State, Reich as Territorial Corporations*, a work heavily influenced by Otto Gierke's *Genossenschaftstheorie*.⁴ Further works followed, especially on the development of communal law, including *City Office Law in Prussia* in 1902 and *The Constitutional Development of German Cities* in 1906, as well as a host of contributions to the journals of the day. Although the formulation of his argument varied, the underlying motive was consistent. Preuss sought to provide an alternative to those theories that he believed led to the polarization of the political community into an all-powerful monarch or despot on one side and an impotent, disorganized populace on the other side. A favourite target was the influence of private law on constitutional thought, which tended to reduce the populace to the status of an object, in effect to the status of the property of the state or monarch. Since organicist theories have often been associated

³ See Jorg-Detlef Kühne, 'Demokratisches Denken in der Weimarer Verfassungsdiskussion — Hugo Preuss und die Nationalversammlung', in *Demokratisches Denken in der Weimarer Republik*, ed. Christopher Gusy (Baden-Baden, 2000), p. 125. For recent surveys of Weimar see, *Weimar und die Deutsche Verfassung*, ed. Andreas Rödder (Stuttgart, 1999); and especially Detlef Lehnert, *Die Weimarer Republik* (Stuttgart, 1999).

⁴ Hugo Preuss, *Gemeinde, Staat Reich als Gebietskörperschaften* (Berlin, 1889) was dedicated to Gierke. The *Habilitationsschrift* was a post-doctoral thesis that qualified someone for the position of *Privatdozent*. A *Privatdozent* had limited remuneration, security and influence. For details see Martin Jay, *The Dialectical Imagination* (Boston, 1973), pp. 6–7.

with authoritarian or pseudo-democratic trends, it is worth noting that Preuss had no intention of replacing the tyranny of a monarch with the tyranny of a common will. Thus he specified that 'The differentiation of the legally normativized and organized expression of the common will through a plurality of organs is, in contrast to the absolute state, the conceptual essence of the constitutional *Rechtsstaat*.'⁵ It is true that Preuss often had difficulty clarifying the organicist standpoint. He retreated from the attempt to enlist the natural sciences only to take refuge in the notion that none of the sciences could fully grasp the great puzzle of organic development. Georg Jellinek rightly pounced on both strategies.⁶ Yet the underlying intent is clear and consistent. Preuss fought to establish the idea of a pluralist, constitutionally consolidated, society.

Despite Preuss's extensive publications he was denied a professorship at an established university. Here his Jewish ancestry as well as his radicalism hindered his career and he settled for a professorship at the Berlin *Handelshochschule* in 1906.⁷ A few years later his services to Berlin city politics were acknowledged when he was elected an honorary member of the magistracy.⁸ It was his experience of Berlin politics that mitigated his initial hostility to socialism. Indeed, looking back on this he took pride in having been 'more anti-capitalist' than the social democrats.⁹ By the time he was appointed to the Reich Ministry of the Interior he was well known not only as an advocate of municipal socialism but also as a tireless critic of the *Obrigkeitsstaat* (authoritarian state), a term he himself coined.¹⁰ Despite his

⁵ Hugo Preuss, 'Über Organpersönlichkeit', *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich*, 26 (1902), p. 135.

⁶ For the attempt to enlist the natural sciences see, for example, Hugo Preuss, 'Entwicklung und Bedeutung des öffentlichen Rechts', *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich*, 13 (1889), pp. 108–9; for the puzzle see Preuss, 'Über Organpersönlichkeit', p. 121; for Jellinek's criticism see Georg Jellinek, *Allgemeine Staatslehre* (Berlin, 1922), pp. 151–4. Constraints of space prevent any more than an indication of Preuss's theoretical position.

⁷ The *Handelshochschulen* or commercial colleges enjoyed lower status than established universities.

⁸ Dian Schefold, 'Hugo Preuss (1860–1925)', in *Deutsche Juristen jüdischer Herkunft*, ed. H.C. Helmut Heinrichs *et al.* (Munich, 1993), p. 432. Preuss had first been elected a deputy of the city assembly in 1895. For biographical information in English see Ernest Hamburger, 'Hugo Preuss: Scholar and Statesman', *Leo Baeck Institute Yearbook*, 20 (London, 1975), pp. 179–206.

⁹ This was in 1911. Quoted in Detlef Lehnert, *Verfassungsdemokratie als Bürgergenossenschaft* (Baden-Baden, 1998), p. 243.

¹⁰ The *Obrigkeitsstaat* was contrasted with the *Volksstaat*, though Preuss was not as strongly attached to the latter term as to the former. Although the *Obrigkeitsstaat* had an extensive set of characteristics, he tried to simplify the contrast as follows: 'One can, disregarding all constitutional paragraphs and legal-political forms, formulate the matter thus: is the political leadership and are political leaders selected and determined by a

boast about his anti-capitalism Preuss was a bourgeois liberal who, the day before his appointment, warned the Socialists against introducing an inverted *Obrigkeitsstaat*.¹¹ Indeed his liberal credentials, as well as his expertise, an expertise notably lacking in the ranks of the Socialists, may well have recommended him to the socialist leaders. Walter Jellinek, for one, presumed that Friedrich Ebert saw Preuss not just as a radical democrat and jurist but also as a bridge to the liberal camp in Germany.¹² Until his appointment to the Ministry of the Interior his practical engagement in politics mirrored his more theoretical work, for he had linked the beginning of the break with the absolutist state in Germany with the development of communal self-administration.¹³

As a theorist, radical democrat, liberal, and above all as the prime architect of the Weimar constitution, Preuss would seem to be a natural candidate for a prominent place in the history of German political thought.¹⁴ Yet those who have commented on him have frequently had cause to complain that Preuss has not received the attention he is due. Over forty years ago Ernst Maste noted the discrepancy between Preuss's role and the literature devoted to him.¹⁵ More recently Detlef Lehnert has written a substantial volume about Preuss, part of which attempts to explain why Preuss's reputation seems to have been the victim of a widespread 'loss of memory'. He notes the irony that the educational work of the FDP is conducted under the name of Friedrich Naumann, whose sympathy for Max Weber's power politics makes him a far less probable symbol for modern German liberalism than the comparatively neglected Preuss.¹⁶

It is also striking that even recent assessments of Preuss differ quite sharply. Detlef Lehnert argues throughout his volume for an interpretation of Preuss that emphasizes his modernity, his thorough break with authoritarian traditions in Germany, and his importance to the liberal, pluralistic, tradition

strong public opinion or by a self-contained elite [einer in sich selbst ruhenden Obrigkeit]?', Hugo Preuss, 'Weltkrieg, Demokratie und Deutschlands Erneuerung', *Archiv für Sozialwissenschaft und Sozialpolitik*, 44 (1917), pp. 252–3.

¹¹ Hugo Preuss, 'Volksstaat oder verkehrte Obrigkeitsstaat', in Hugo Preuss, *Staat, Recht und Freiheit* (Tübingen, 1926), pp. 365–8.

¹² Walter Jellinek, 'Insbesondere: Entstehung und Ausbau der Weimarer Reichsverfassung', in *Handbuch des Deutschen Staatsrechts*, ed. Gerhard Anschütz and Richard Thoma (Tübingen, 1930), Vol. 1, p. 127.

¹³ Preuss, 'Über Organpersönlichkeit', p. 135.

¹⁴ It even seemed so to Carl Schmitt; see C. Schmitt, *Hugo Preuss. Sein Staatsbegriff und seine Stellung in der Deutschen Staatslehre* (Tübingen, 1930).

¹⁵ Ernst Maste, 'Hugo Preuss. Vater der Weimarer Verfassung', *Aus Politik und Zeitgeschichte*, 43 (1960), p. 696.

¹⁶ Lehnert, *Verfassungsdemokratie als Bürgergenossenschaft*, pp. 46–7. Part three of the book is devoted to explaining the obstacles to the reception of Preuss, pp. 316–475. See also Lehnert's 'Hugo Preuss als moderner Klassiker einer kritischen Theorie der "verfassten" Politik', *Politische Vierteljahrschrift*, 33 (1992), pp. 33–54: 'Preuss has not even received a reception worth naming in his own land', p. 33.

of political thought. In a survey of Imperial and Weimar Germany, Peter Landau notes simply that Preuss 'can be characterized as the first German theorist of democracy in the twentieth century'.¹⁷ Others have been less charitable. In the same volume in which Landau praises Preuss, Dian Schefold concludes that he can be seen as 'a founder of modern pluralist theory', but casts doubt upon his grasp of the role of political parties. Moreover his constitutional writings were, according to Schefold, 'oriented toward the monarchic state'.¹⁸ The idea that Preuss remained trapped in the conceptual world of Wilhelmine Germany is much more strongly emphasized by Christoph Schönberger, who accepts that Preuss was a critic of authoritarian government but denies that he counts as a 'theorist of the organization and control of democratic authority [*Herrschaft*]'.¹⁹ It is notable that Schönberger becomes more scathing when he discusses the relationship between Preuss's constitutional drafts and the work of Robert Redslob. As noted above, Redslob was the author of *Parliamentary Government in its True and Unauthentic Form*, which appeared in 1918. In the early years of the Weimar Republic it was widely accepted that Redslob's book had had a significant impact upon Preuss.²⁰ More specifically it was accepted that this book had encouraged Preuss to argue for a president as head of state, and for a president directly elected by the populace. Later it was common to see Max Weber's influence behind Preuss's advocacy of the directly elected president, until Wolfgang J. Mommsen reasserted the role of Redslob.²¹

Both Schönberger and Mommsen refer to the judgment of Ernst Fraenkel on Redslob's influence and especially Redslob's interpretation of the English political system, that is, the 'true' form of parliamentary government in his title, and the French political system, the 'ungenuine' form of parliamentary government. Fraenkel's comments are so scathing that they are worth quoting at length:

Robert Redslob is responsible for the fact that in 1918 not the English constitution, but the glosses which French monarchists wrote about it, were taken up. The incorporation of the doctrine of the 'genuine parliamentary

¹⁷ Peter Landau, 'Juristen jüdischer Herkunft im Kaiserreich und in der Weimarer Republik', in *Deutsche Juristen jüdischer Herkunft*, ed. Heinrichs et al., p. 179.

¹⁸ Dian Schefold, 'Hugo Preuss (1860–1925)', in *Deutsche Juristen jüdischer Herkunft*, ed. Heinrichs et al., p. 450.

¹⁹ Christoph Schönberger, *Das Parlament in Anstaltsstaat. Zur Theorie parlamentarischer Repräsentation in der Staatsrechtslehre des Kaiserreichs 1871–1918* (Frankfurt am Main, 1997), p. 403.

²⁰ For a list of sources see *ibid.*, p. 384.

²¹ Wolfgang J. Mommsen, *Max Weber and German Politics 1890–1920* (Chicago, 1984), pp. 348–53. See also Ernst Portner, *Die Verfassungspolitik der Liberalen 1919* (Bonn, 1973), p. 137, and the earlier work by Günther Gillessen, *Hugo Preuss. Studien zur Ideen- und Verfassungsgechichte der Weimarer Republik* (Berlin, 2000), p. 111. Gillessen's work was completed in 1955.

government' in the Weimar constitution resulted in the hypertrophy of the plebiscitarian component in the governmental system of the first Republic. It corresponded to vulgar-democratic undertones which were active on the left and anti-democratic undertones on the right. It set out from a unified popular will and was therefore incompatible with the structure of the German party system, which reflected the pluralist character of German society. It led to a discrediting of political parties and indirectly to the shattering of the authority of parliament. It insinuated at the same time the existence of a party government and a Reich President 'standing above parties'. Since the Weimar constitution avoided an answer to the question whether the Republic was supposed to be a party state, it induced a kind of political schizophrenia. The Weimar Republic suffered from a defect of birth, on which it ran aground.²²

Although Fraenkel's work was a broad survey of the development of ideas of democracy, the vehemence of his judgment reflects the experience of Weimar. The plebiscitarian approach, often overtly appealing to Rousseau, saw democracy as an expression only of the unified common will. Underlying this was the demand for social homogeneity as a precondition of true democracy. From this perspective the assumption of social plurality and the diversity of interests in the model of representative government appeared as 'disruptive factors'.²³ In the hands of Carl Schmitt the assumption of social, and indeed ethnic, homogeneity was employed in the name of democracy against the liberal representative system.²⁴ Ideas of social homogeneity also appealed to those on the left of Weimar politics, for example to Otto Kirchheimer, although he soon saw the potential consequences of a Rousseauian approach to modern democratic systems. The complexity of Weimar political thought, the difficulty in clearly identifying democratic and non-democratic positions, explains the clarity of Fraenkel's distinction and the vigour of his judgment.²⁵

This indictment is reflected in Schönberger's criticism of the character of the broader debate: 'It was a genuinely German mixture of the independent political role of the head of state, traditional government by civil servants [*Beamtenregierung*] and a direct-democracy conception of democracy, which is also recognisable in Preuss.'²⁶ Both Fraenkel, in indictment of Redslob, and

²² Ernst Fraenkel, *Die repräsentative und die plebisitäre Komponente im demokratischen Verfassungsstaat* (Tübingen, 1958), p. 55. For the continuing influence of Fraenkel's contrast see Werner J. Patzelt, 'Verdrossen sind die Ahnungslosen', *Die Zeit* (22 February 2001).

²³ Fraenkel, *Die repräsentative und die plebisitäre Komponente im demokratischen Verfassungsstaat*, p. 7.

²⁴ Carl Schmitt, *The Crisis of Parliamentary Democracy* (Cambridge, MA, 1985).

²⁵ On Kirchheimer see William E. Scheuerman, *Between the Norm and the Exception* (Cambridge, MA, 1994), and the essays in *The Rule of Law under Siege*, ed. William E. Scheuerman (Berkeley, 1996). On the difficulty see Christoph Gusy, 'Einleitung', in *Demokratisches Denken in der Weimarer Republik*, ed. Gusy, pp. 12–13.

²⁶ Schönberger, *Das Parlament in Anstaltsstaat*, p. 394.

Schönberger, in allusion to Preuss, provide a catalogue of the intellectual barriers to a viable democratic and parliamentary government in Weimar Germany. There was oscillation between outright hostility to democracy and the invocation of a pure form of democracy, with the latter sometimes used to undermine the credibility of parliamentary government. There was the systematic misunderstanding of the English political system, either wilfully or because it was seen through the distorting lens of German or, in the case of Fraenkel's argument, French monarchism. There was, finally, the idea of some political instance that would stand above political parties, which Gustav Radbruch called the 'life-giving lie' of the authoritarian state.²⁷

Both Preuss and Redslob, then, stand accused of failing to break through the conceptual world of the authoritarian state, despite Preuss's long-standing criticism of the *Obrigkeitsstaat* and Redslob's praise of the 'true' parliamentary government of England. Though their ideas intersected only briefly, amidst the pressure of Preuss's work on the draft constitution to tight deadlines and amidst political turmoil, the reputation of both has been tainted by that brief period in German history, and even more so by the fate of the Weimar Republic.

Before turning to the content and influence of Redslob's book, it is worth making two points. The first is that Preuss was never attracted by the Rousseauian model. In an early work, he described Rousseau as an 'unrestrained visionary [*Schwärmer*]' and dismissed his opposition to representative government as a product of his 'sentimental radicalism', which was of little practical value.²⁸ 'Rousseau's spirit', he wrote, 'ruled in the later orgies of political madness; it animated the sentimental butcher Robespierre.'²⁹ As Detlef Lehnert has recently emphasized, Preuss had not changed his stance in his final reflections on the Weimar Republic: Rousseau was not a guide for the modern world.³⁰ The second point is that while neither Preuss nor Redslob was in thrall to an authoritarian political tradition, they were indeed responding to the concerns of their day and the history of their society. Especially in terms of identifying the problems they saw themselves confronted with, they were very much shaped by the history of their own society. There is a broader point here. Constructing traditions in the history of political thought is always problematic, and it is always a case of constructing them. Given the troubled history of Germany in the last century, it is not difficult to see that the general

²⁷ 'The government above parties was precisely the legend, the life-giving lie [*Lebenslüge*] of the authoritarian state [*Obrigkeitsstaat*]', Gustav Radbruch, 'Die politischen Parteien im System des deutschen Verfassungsrechts', in *Handbuch des Deutschen Staatsrechts*, ed. Anschütz and Thoma, Vol. 1, p. 289.

²⁸ Preuss, 'Entwicklung und Bedeutung des öffentlichen Rechts', pp. 106–7.

²⁹ *Ibid.*, p. 106.

³⁰ Detlef Lehnert, 'Der Beitrag von Hans Kelsen und Hugo Preuss zum modernen Demokratieverständnis', in *Demokratisches Denken in der Weimarer Republik*, ed. Gusy, pp. 238–9.

problem becomes quite acute here. Moreover, traditions, whether positively or negatively evaluated, can have a constricting effect, either forcing ideas into the national tradition or expelling them as alien. But while both Preuss and Redslob were shaped by German political traditions in the way they identified the problems of their day, they were open to other political traditions in seeking answers to those problems.³¹

According to Schönberger, Redslob had intended *Die parlamentarische Regierung* to be a contribution to the debate about the deficiencies of the French parliamentary system, and had intended to publish it in French.³² Only the prolongation of the war induced him to publish it in German in 1918. Be that as it may, the English political system was clearly identified as the model of 'true' parliamentary government. Again according to Schönberger, in Redslob's book the secret of the English system lay in the balance between parliament and government, each of which tended to encroach on the other. Where such encroachment led to irresolvable conflict, the solution lay in the dissolution of parliament, which in turn meant an appeal to the people as the arbitrator. The right to dissolve parliament supposedly lay with the monarch. Although Schönberger rightly notes that Redslob is far from unambiguous, he concludes that Redslob 'appears to be much more concerned about the conformity of parliament and the "true people's will" than about the balance between parliament and government, so emphasized by himself'.³³ The implication is clear. Redslob saw the English political system through Rousseauian eyes.³⁴ Worse still, Redslob, drawing in reality on Benjamin Constant's notion of the monarch as the '*pouvoir neutre*', grossly exaggerated the power of the

³¹ Preuss also invoked Germanic traditions of law, against, for example, Roman law, in arguing for this *Genossenschaftstheorie*, without ceasing to praise England. See Preuss, *Gemeinde, Staat Reich als Gebietskörperschaften*. One tradition's solution could also be another's problem. See Preuss's observation about the adoption of the trappings of the absolutist state in a fragmented Germany: 'This tragicomic caricature of the absolute monarchy often worked out grotesquely enough when some small dynast, in the purple of byzantine majesty, strutted about as the successor of the caesars and later imitated the *l'état c'est moi* of the sun king with unbelievable seriousness.' Hugo Preuss, *Die Entwicklung des deutschen Städtewesens* (Leipzig, 1906), p. 126. The German case is further complicated by the fact that, for younger theorists at least, the experience of emigration meant that they contributed to other traditions as much as to the German political tradition.

³² 'Redslob had originally written it [his book] in no sense in relation to the German situation.' Schönberger, *Das Parlament in Anstaltsstaat*, p. 388. Yet, as explained below, its relevance to German concerns is inescapable.

³³ *Ibid.*, p. 390.

³⁴ According to Winfried Steffani, an enduring obstacle to German understanding of British parliamentary government has been the fact that 'one sought to link parliamentary institutions, whose model had been developed in Great Britain, with a Rousseauian-radical understanding of democracy stemming from France'. W. Steffani, 'Das parlamentarische Bundesstaat in Deutschland heute', *Zeitschrift für Parlamentsfragen*, 16 (1985), p. 220.

English monarch: 'The conception that the English king could bring about the fall of a government commanding a parliamentary majority is, however, at the time of the publication of Redslob's book, highly anachronistic.'³⁵ Again the implication is clear: Redslob contributed to the search for a 'substitute *Kaiser*', who was found in the president of the Republic, who eventually contributed so much to its demise.

There are three general points about assessments of Redslob's argument that should be noted. First, many of the misinterpretations of which Redslob has been accused were endemic. The exaggeration of the power of the monarchy went back at least to the highly influential Rudolf von Gneist and proved difficult to shake off.³⁶ Yet monarchists in Germany were quite capable of emphasizing the weakness of the English monarch to the point where they spoke of England's crypto-republicanism, thereby, of course, intending to discredit England's status as a model for constitutional reform in Germany. Misunderstanding may have abounded, but there was no simple correlation between German domestic positions and the perception of England. Second, one of the common, and again enduring, assumptions was that the interval between the two great reforms of 1832 and 1867 in England was the golden age of parliamentary sovereignty. Thereafter, the extension of the suffrage, the growth of the party machine, and the rule of the whips in parliament supposedly undermined parliamentary sovereignty in all but name. Again this was compatible with a range of evaluations. It could be treated, for example, as a genuine lament or as a mock lament, behind which lay the implication that parliamentary government was obsolete even in the land of its birth.³⁷ In some respects Redslob shared this general assumption but he was also capable, at least implicitly, of distinguishing between parliamentary sovereignty and a 'parliamentary regime'. From this perspective the situation between 1832 and

³⁵ Schönberger, *Das Parlament in Anstaltsstaat*, p. 388. He lists several authors who criticized the anachronism of Redslob's account, from Wilhelm Hassbach in 1919 through to Fraenkel.

³⁶ On Gneist see the judgment of Reinhard J. Lammer: 'The Prussian sense of the state and the Prussian-monarchist tradition are so deeply rooted in Gneist's entire conceptual world that he could only look for the dynamic force of English constitutional development in the monarchy . . .'. R.J. Lammer, *Der englische Parlamentarismus in der deutschen politische Theorie im Zeitalter Bismarcks (1857–1890)* (Lübeck, 1963), p. 115. In the interwar period there was a tendency to emphasize the monarch's 'latent' and 'social' authority. See Otto Koellreutter, *Der englische Staat der Gegenwart und das britische Weltreich* (Breslau, 1930), pp. 27–8.

³⁷ For the persistence of the image and the diversity of conclusions see Adolf M. Birke, 'Die Souveränität des viktorianischen Parlaments und die moderne Parlamentarismuskritik', in A.M. Birke, *Deutschland und Grossbritannien. Historische Beziehungen und Vergleiche* (Munich, 1999), pp. 19–31. Birke's own judgment is that 'it is not only contemporary voices which led to the conclusion that the early Victorian Parliament was a transitional formation which must be seen rather as untypical for the parliamentary mode of government', *ibid.*, p. 31.

1867 was an 'incomplete parliamentary regime'.³⁸ Redslob pointed to the increased importance of the hustings, as opposed to parliament, as the settings for the great speeches of the day, to party discipline and 'subjection to the machine', to ministerial resignation after a lost election but before parliament met, to the increasing tendency to seek an electoral mandate for important legislation; but all this formed part of the development of the 'parliamentary regime'.³⁹ Third, Redslob was accused of dogmatism. Yet despite the forcefulness of some, and only some, of his claims and definitions, this is difficult to reconcile with, for example, his treatment of Belgium. Belgium posed a problem because it had a bicameral system but one in which the power of the senate had not been curbed in the way that the power of the English House of Lords had. This could have presented a problem as ministers sought to satisfy two legislative masters. However, Redslob argued that the Belgians had found a way out, not by constitutional revision but by tradition. The Senate simply exercised restraint. Redslob concluded: 'Belgium lives under a parliamentary regime like Great Britain.'⁴⁰

This in fact points to the prime attraction of the parliamentary regime for Redslob. He wrote repeatedly about it as a 'mechanism', as an 'artificial system of wheels [*Räderwerke*]' that kept the English constitutional system moving.⁴¹ It was this that prevented what Redslob most feared: constitutional and governmental paralysis. Indeed, so enamoured was he of this, that he turned it into the effective definition of a parliamentary regime: 'For in parliamentary regimes there is no conflict without a solution. It never happens that two organs neutralize each other or condemn each other to inactivity because no agreement is reached. The reason is that there is always a highest arbiter: the people.'⁴² The appeal to the people, of course, took place through the dissolution of parliament.

In France, however, it was different. According to Redslob, 'There is no right of dissolution in France . . . The appeal to the people is impossible.'⁴³ Moreover, he ascribed this impossibility to the weakness of the president, to the lack of balance between president and assembly. It is here that his critics see the origins of advocacy of a strong, Weimar, president, equipped with the right of dissolution, who was supposed to provide a counterweight to parliament but ended by undermining it on the basis of his claim, by virtue of his direct election, to more properly represent the general will of the people.

³⁸ Robert Redslob, *Die parlamentarische Regierung in ihrer wahren und in ihrer unechten Form* (Tübingen, 1918), p. 26.

³⁹ *Ibid.*, pp. 35–40.

⁴⁰ *Ibid.*, p. 81. He was also content to account for differences between the English and French in the nebulous terms of 'national psychology', *ibid.*, pp. 181, 183, 185.

⁴¹ *Ibid.*, p. 4.

⁴² *Ibid.*, p. 59.

⁴³ *Ibid.*, p. 120.

Before considering how sound this deduction is, it is worth asking why Redslob was so concerned about the possibility of governmental and constitutional paralysis. Here, Schönberger is clearly right: the answer lies, in part, in Redslob's contribution to a French debate. There is another answer, one that haunted German constitutionalists: that is, the constitutional conflict in Prussia between 1862 and 1866. Here was the archetypal failure of two organs to agree, with no mechanism or system of wheels to resolve it. The impact of this conflict is difficult to exaggerate. It arose because of the refusal of the Prussian *Landtag* to approve increased military expenditure. The newly appointed prime minister, Otto von Bismarck, proclaimed that there was a 'gap' in the constitution and relied upon a supposedly more original authority of the state to continue collecting taxes and running the government. The conflict was resolved in the wake of Prussian victories in 1866 when an Indemnification Bill retrospectively sanctioned Bismarck's action and split the liberals in the process. While those on the left have tended to see this as a triumph of the nationalist power state over political liberalism, those on the right were not necessarily reassured. Carl Schmitt, who saw the crisis as the 'central event' of the century, saw the resolution of the crisis as an unsatisfactory attempt to evade the real decision about the future of the German state.⁴⁴ The highly influential jurist, Laband, saw Bismarck's proclamation of a 'gap' in the constitution as a threat to the science of law, to which he devoted his life. He denied that there could be any such gap and indulged in considerable legerdemain to prove the point, while with greater distance Georg Jellinek lamented 'How much useless effort have people given themselves to prove that the budget-less economy in Prussia in 1862–66 was legal, at least to a certain degree!'⁴⁵ Here is the German problem to which Redslob had found an English political solution.

What stands out in Redslob's book is the quasi-automatic generation of the solution, the operation of his 'system of wheels'. It is true that he saw France's weakness arising from the weakness of its president and even that he cast doubt on the ability of republics in general to develop a 'true' parliamentary regime.⁴⁶ It is true that he exaggerated the residual powers of the English

⁴⁴ Hans-Christof Kraus, 'Ursprung und Genese der "Lückentheorie" im preussischen Verfassungskonflikt', *Der Staat*, 38 (1990), p. 209; and E.W. Böckenförde, 'Der Deutsche Typ der konstitutionellen Monarchie im 19. Jahrhundert', in E.W. Böckenförde, *Recht, Staat, Freiheit* (Frankfurt am Main, 1991), pp. 275–6.

⁴⁵ For an excellent summary of the crisis and Laband's solution see Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (London, 1997), pp. 16–25. The infamous 'gap' theory predated the crisis; see Kraus, 'Ursprung und Genese der "Lückentheorie" im preussischen Verfassungskonflikt', pp. 209–34. For Jellinek's lament see his *Allgemeine Staatslehre*, p. 359.

⁴⁶ 'And so we come to the conclusion that the parliamentary republic is not, by its nature, an illogical phenomenon, is not a contradiction in itself.' Redslob, *Die parlamentarische Regierung in ihrer wahren und in ihrer unechten Form*, p. 184.

monarch, though here he was, as he often was, equivocal. On the one hand he wrote that 'the head of state in a parliamentary regime is only free in the hour in which he chooses the government'. Yet he denied that the monarch was a mere figurehead, though he agreed that he could make use of his powers only 'in the case of most extreme danger'.⁴⁷ However, this does not prove that he favoured a directly elected president equipped with the power of dissolution, and much more beside, able to see himself as the incarnation of the general will.⁴⁸

There are indeed indications that this is not what he envisaged. Redslob was rather sceptical, at best, about the Rousseauian notion of the general will. He described it as a 'dogma', albeit one deeply rooted in the French mind, as France's two emperors had known all too well. For himself, however, it was not necessary 'to personify the people' as some 'kind of person capable of action like a human being'.⁴⁹ The French, he noted, had experimented with various mechanisms for constituting and selecting an executive. In terms of both political theory and empirical experience it had proved difficult to decide between the competing arguments. But Redslob continued, 'Soon the prophesies of those who recognized the danger of an executive produced by a plebiscite fulfilled themselves. The coup d'état of 2 December 1851 proved them right.'⁵⁰ He promptly added that the French had then swung to the opposite extreme, but that does not detract from his basic awareness of the dangers of an elected head of state. Indeed that was one of the reasons for his sympathy for monarchy. Redslob was also aware of the potential abuse of the right of dissolution, which he held to be so important. Despite his bald assertion that there was no right of dissolution in France, this was not strictly true, as he well knew. President Mac-Mahon had dissolved parliament in 1877 and Redslob even emphasized that this was perfectly legal. It was, however, in this case, quite contrary to the spirit of the constitution. Redslob went to considerable lengths to emphasize his distaste for Mac-Mahon's action. Dissolution, he wrote, 'may not be used in order to break resistance and help a policy to victory . . . Dissolution is no kind of weapon of attack. It is a question, perhaps a plea, but it is no kind of coup de main . . . To appeal to a people, whose

⁴⁷ *Ibid.*, pp. 6, 40–50.

⁴⁸ Thus Karl Loewenstein agreed with Redslob for whom, he wrote, 'the *prerogative of the electors* . . . is the expression for the locus of political power', and criticized Koellreutter for putting the 'existence of an independent instance for dissolution and the regulation of plebiscites too much in the foreground'. Karl Loewenstein, 'Zur Soziologie der parlamentarischen Repräsentation in England nach der grossen Reform. Die Zeitalter der Parlamentsouveränität (1832–1867)', *Archiv für Sozialwissenschaft und Sozialpolitik*, 51 (1924), p. 763.

⁴⁹ Redslob, *Die parlamentarische Regierung in ihrer wahren und in ihrer unechten Form*, p. 118.

⁵⁰ *Ibid.*, p. 114.

opposition one knows, means pursuing an act of repression, means not recognizing a people as a judge and degrading it to the roll of an instrument . . .'.⁵¹

Schönberger writes that 'it is interesting to see how Redslob assessed the reception of his own theory in Germany', and then continues to quote two long passages from *The Parliamentary Regime* of 1924. These warn against the excessive powers of the president of the Weimar Republic, especially the power to put a parliamentary law to a referendum, and against the possibility of a development of the 'predominance of the executive, which rests on the support of the people'.⁵² For Schönberger this warning is all the more striking because it came from the pen of the author of the theory of 'genuine parliamentarianism'.⁵³ It is, however, quite consistent with Redslob's book of 1918. He had clearly recognized, and warned against, excessive power, especially in the hands of a plebiscitarian executive, and the misuse of legitimate power. It is worth adding that Redslob also argued for the importance of political parties and for an opposition party capable of taking over the government of the country. If anything, he can be accused of idealizing his English model when he wrote that in England, in contrast to France, 'If a crisis breaks out, the leaders of the other party are ready to take over. The new government is already formed; it is like a completely constructed set of wheels that was until now immobile and only needs to be set in motion in order to function with precision.'⁵⁴

Redslob's account of his model England is not without its defects, and his sympathy for monarchy is evident. Both indeed are tied to his admiration for the 'system of wheels', which, albeit not without friction, had driven forward English constitutional development, avoiding the perils of paralysis to which the French, and surely also the German, state had succumbed. He was also pragmatic and well aware of the problems of plebiscitarian legitimation of a powerful executive. It is here that Preuss might have taken heed of Redslob's

⁵¹ *Ibid.*, p. 132. Mommsen notes, 'Redslob argued that dissolution was not an offensive weapon', but continues: 'But was it not, for all that, the major weapon of the constitutional monarch in his struggle against a recalcitrant parliament?', Mommsen, *Max Weber and German Politics*, p. 350. It was, as Redslob well knew, especially in Germany: 'Thus the dissolution in Germany is no appeal to the people as the arbiter of a conflict, but a weapon in order to break the resistance of the lower house.' Redslob, *Die parlamentarische Regierung in ihrer wahren und in ihrer unechten Form*, pp. 99–100. Redslob's point was that this was a misuse of the power of dissolution, as is clear from his comments on Mac-Mahon.

⁵² Schönberger, *Das Parlament in Anstaltsstaat*, pp. 399–400. Redslob had already issued the same warning, in the same words, the previous year. See Robert Redslob, 'Le régime parlementaire en Allemagne', *Revue du droit public*, 40 (1923), pp. 533, 535.

⁵³ Schönberger, *Das Parlament in Anstaltsstaat*, p. 400.

⁵⁴ Redslob, *Die parlamentarische Regierung in ihrer wahren und in ihrer unechten Form*, p. 140. See also his emphasis on parties and the 'policy of the majority' in judging Sweden, p. 104.

warnings or indeed the warnings of others.⁵⁵ Yet that does not mean that Preuss was trapped in the conceptual world of the authoritarian state, that his constitutional writing was oriented towards the monarchical state or the rule of officials standing above party conflict.

From the outset Preuss was a tireless critic of the fixation of the German theory of the state on monarchical power. In his *Community, State, Reich as Territorial Corporations* he complained that 'The German science of politics [*Staatsrechtswissenschaft*] has . . . long born traits that go together with its origins in the era of the absolutist princely states. So the starting point of all these reflections is . . . the union of personal and territorial power in the princely right of domination.'⁵⁶ It was precisely against these traits that Preuss set his *Genossenschaftstheorie*. For all his references to the 'old-Germanic' origins of this theory, he was scornful of the contemporary inclination to conjure up images of the medieval estates against the reality of modern-day politics. He explicitly defended the professional politicians, the modern parliamentarians who had so irritated Bismarck. These were the men who 'acted in parliament not just in a dilettantish fashion here and there but have dedicated their lives to this vocation; in brief the now so reviled, so called "vocational parliamentarians" [*Berufsparlamentarier*]'.⁵⁷ He had only contempt for the rhetoric of the stance above party politics and the disparagement of political motives, which he found on both the right and the left. Indeed even when he had become quite well-disposed towards Germany's socialists he complained of their attitude towards politics, an attitude he ascribed to their German nationality rather than their socialist doctrine. Thus, he wrote, 'The dogmatic one-sidedness of the materialist conception of history with its underestimation of purely political motives marks out Marx and Engels more strongly as Germans than as social democrats.'⁵⁸ Similarly, in an article published in 1912, he was highly critical of claims that administrative reform in Austria and Prussia could be carried out without touching the framework of the state. He noted, moreover, that he had always insisted that administrative reform and politics were

⁵⁵ See Hans Fenske, 'Nichtamtliche Verfassungsentwürfe 1918/19', *Archiv des öffentlichen Rechts*, 121 (1996), pp. 24–58. Fenske himself concludes that a more clear-cut presidential system would have been better. See also Heinrich Potthoff, 'Das Weimarer Verfassungswerk und die deutsche Linke', *Archiv für Sozialgeschichte*, 12 (1972), pp. 433–83. Potthoff notes (p. 457) that even those suspicious of presidential power initially failed to see any problem with Article 48.

⁵⁶ Preuss, *Gemeinde, Staat Reich als Gebietskörperschaften*, p. 287.

⁵⁷ Hugo Preuss, 'Deutschland und sein Reichskanzler gegenüber dem Geist unserer Zeit', *Deutsche Zeit- und Streit Fragen*, 14 (1885), p. 36.

⁵⁸ Hugo Preuss, 'Weltkrieg, Demokratie und Deutschland Erneuerung', *Archiv für Sozialwissenschaft und Sozialpolitik*, 44 (1917), pp. 256–7. See also his comment: 'Strange that one believes it necessary to continually warn the most unpolitical of all cultural nations of the enchantress, politics . . .', Hugo Preuss, 'Verwaltungsreform und Politik', *Zeitschrift für Politik*, 1 (1907), p. 96.

linked.⁵⁹ There is little room here for the notion that some institution or person could stand above the political fray.

Why, then, did Preuss subsequently argue for a powerful head of state equipped with the right of dissolution and much else besides, and why did he justify this in Redslob's language of 'genuine parliamentarianism'? Was Preuss, who was also an admirer of the British political system, drawing on the model of the British monarchy? In one sense the answer is no. It was not the British monarch that occupied pride of place in Preuss's frequent invocation of England as a model. Indeed, more generally, he held the choice between monarchy and republicanism to be a secondary issue, for, he argued, was there not more difference between monarchical England and monarchical Russia than between monarchical England and Republican America?⁶⁰ What recurred in Preuss's invocation of England was the close link between local and national self-government, the historical evolution of which had fostered a common sense of citizenship. That 'communal self-government' was the basis, and parliamentary government the capstone, of the English system was, he wrote, 'a commonplace of German science'.⁶¹

When Preuss joined the debate on constitutional reform during the war years, the English model was still in evidence, though on occasion he was more inclined to contrast German and Austrian forms of government with those of the remainder of 'Euro-American' culture.⁶² He was also concerned with specific German problems of constitutional reform. Prominent here was the arcane nature of the German *Reich*, above all the half-concealed hegemony of Prussia. It was this that led to his suggestion for a revision to Article 5 of the constitution. His revision specified that the consent of the Kaiser, *Reichstag* and *Reichsrat* should be required for legislation, whereas the existing article made no reference to the Kaiser. This was only an apparent increase in power for the Kaiser, for, Preuss explained, 'the *Kaiser* in reality has an

⁵⁹ Hugo Preuss, 'Verwaltungsreform und Staatsreform in Österreich und Preussen', *Zeitschrift für Politik*, 5 (1912), pp. 215–35.

⁶⁰ Hugo Preuss, 'Sozialismus und Konstitutionalismus' [1903], in Preuss, *Staat, Recht und Freiheit*, p. 244. See also his comments on Kant's conception of a republican constitution: Hugo Preuss, 'Nationaler Gegensatz und internationaler Gemeinschaft' [1918], in *ibid.*, p. 353.

⁶¹ Preuss, *Die Entwicklung des deutschen Städtewesens*, p. 235. In this text he rejected France as a model precisely because of its deficient local self-government. Prussia, with elements of local self-government but without a parliamentary constitution, was like a house without a roof (*ibid.*, p. 278). Preuss was however highly critical of the supposed link between monarchism and national unity in German history. This, he wrote, 'was a strange inversion of national values. The monarchical dynasties, whose history was the history of political fragmentation of Germany, as the bearers of the idea of national unity!'. Hugo Preuss, 'Republik oder Monarchie? Deutschland oder Preussen?' [1922], in Preuss, *Staat, Recht und Freiheit*, p. 453. See also Hugo Preuss, 'Die Wandlung des deutschen Kaisergedankens' [1917], in *ibid.*, pp. 273–89.

⁶² Preuss, 'Weltkrieg, Demokratie und Deutschlands Erneuerung', pp. 251–2.

absolute veto against the most important forms of *Reich* law, of course not openly in his capacity as *Kaiser*, but concealed in the Prussian votes in the *Bundesrat* . . .⁶³ Specific recent experience also lay behind the strict insistence that all acts of the Kaiser, whether civil or military, should require countersignature by the relevant minister, as should the publication of oral statements by the Kaiser on political matters. Indeed, Preuss wanted to specify that violation of the latter prescription should be treated as high treason.⁶⁴ Ironically, Preuss called for this provision not long before a political crisis confirmed the Kaiser's loss of *de facto* power to military high command. Yet the well-known and calamitous interventions before 1914 of the man whom Max Weber had privately described as far back as 1892 as an 'eccentrically gifted lieutenant' are all too clearly behind this very severe constitutional provision.⁶⁵ From the 1896 Krüger telegram, supporting the Boers against England, and the 1898 anti-strike prison speech through the Yellow Peril speech of 1905, the Moroccan crises and the *Daily Telegraph* affair of 1908, the Kaiser had made a series of disastrous interventions. Preuss's concern about the publication of oral statements was entirely in tune with Max Weber's exasperation: 'Again and again it was the *publication* of statements by the monarch which created these politically quite useless and damaging sensations.'⁶⁶

Preuss did not question the monarchical character of the *Reich*. To the contrary, he wanted to make this fact of German constitutional life more explicit. But it was to be a limited, constitutional monarchy, at the heart of which was a parliamentary government. The desire for transparency and an end to the 'life-giving lies' of the authoritarian state were nowhere more evident than in Preuss's suggestion for the revision of Article 21, which in its current form specified that a member of parliament lost his seat on taking up paid government office. Preuss wanted to exempt ministers from this provision on the grounds that 'The current stipulation is supposed to prevent deputies from exploiting their mandates to pursue careers, though it has not achieved this goal. The aspiration to implement his political convictions through government is the natural duty of every deputy who does not want to merely talk.'⁶⁷

⁶³ Hugo Preuss, 'Vorschläge zur Abänderung der Reichsverfassung und der Preussischen Verfassung, nebst Begründung' [1917], in Preuss, *Staat, Recht und Freiheit*, p. 304. Preuss explained that his draft was finished at the beginning of July 1917, before the ministerial crisis that had confirmed the discredit with which the German system was viewed.

⁶⁴ *Ibid.*, p. 310.

⁶⁵ For Weber's description see Mommsen, *Max Weber and German Politics*, p. 141.

⁶⁶ Max Weber, 'Parliament and Government in Germany under a New Political Order', in *Weber. Political Writings*, ed. Peter Laswell and Ronald Speirs (Cambridge, 1994), p. 201.

⁶⁷ Preuss, 'Vorschläge zur Abänderung der Reichsverfassung und der Preussischen Verfassung', p. 319. See also Weber's complaint, 'Parliament as a spring-board for the careers of talented candidates for state-secretaryships: this characteristically bureau-

That this was not only a matter of constitutional provision but also an essential part of an active and effective parliamentary life was evident in another text of the same year. There Preuss lamented the admission of one party leader that his colleagues were looking forward to a return to their accustomed role in opposition. His despair was palpable: 'Yes, there it is. The natural condition always appears to be that the authoritarian government alone can act; parliamentary parties engage in negative criticism.'⁶⁸

Preuss's support for an elected head of state had little to do with an inability to grasp the preconditions of democratic parliamentary government or lingering sympathy for the traits of the Bismarckian system, all of which he opposed. Preuss and his colleagues were faced with a limited number of possibilities. The first was a collegial head of state on the Swiss model. Once this was rejected, the two models for the election of a president were the American and French ones. The collegial option was viewed sympathetically by two socialists, Max Quarck and Joseph Herzfeld, though Quarck admitted there were advantages in a presidency.⁶⁹ Preuss's objection to this was quite different from Weber's more or less overt sympathy for a strong head of state. Preuss feared rather 'that each of the larger German states would claim a seat in the directorate and would presumably be able to push through this claim'.⁷⁰ Behind this concern lay Preuss's opposition to the nefarious influence of the *Bundesrat*, whose members were regarded as delegates of the states. That in turn had been used by Prussia to consolidate its hegemony and to screen it from accountability.⁷¹ Preuss argued, in fact, that his main reason for supporting a directly elected presidency was the lack of an alternative. Election by cratic conception is advocated by political and juristic literati who find the solution to the problem of German parliamentarianism in a specifically German manner. These are the same circles which sneer at the supposedly only west European and specifically democratic "place hunting".' Max Weber, *Gesammelte Politische Schriften* (Tübingen, 1980), p. 343.

⁶⁸ Hugo Preuss, 'Deutsche Demokratisierung' [1917], in Preuss, *Staat, Recht und Freiheit*, p. 343. See also his statement that 'For a real opposition, capable of government, is always the correlate of an effective parliamentary government' (Hugo Preuss, 'Die Improvisierung des Parlamentarismus' [1918], in *ibid.*, p. 363). See also Jasper Mauersberg, *Ideen und Konzeption Hugo Preuss' für die Verfassung der deutschen Republik 1919 und ihre Durchsetzung im Verfassungswerk im Weimar* (Frankfurt am Main, 1991), p. 42.

⁶⁹ Max Quarck was a majority socialist, Joseph Herzfeld an independent socialist. Quarck's concession was that a president could be useful in the armistice negotiations and the implementation of the planned socialization programme. The latter notion had been raised, possibly disingenuously, by Max Weber. See Max Weber, '[Beiträge zur Verfassungsfrage anlässlich der Verhandlungen im Reichsamt des Innern vom 9. Bis 12. Dezember 1918]', in *Max Weber zur Neuordnung Deutschlands. Schriften und Reden*, ed. Wolfgang J. Mommsen (Tübingen, 1988), pp. 82–3.

⁷⁰ *Ibid.*, p. 82.

⁷¹ See his early criticism in Preuss, 'Deutschland und sein Reichskanzler gegenüber dem Geist unserer Zeit'.

parliament, the French model, was less democratic. He added a tactical consideration: in parliament the 'bourgeois parties' were more likely to reach agreement than the 'strongly democratic' ones.⁷² He had also employed Redslob's language to dismiss parliamentary election of the head of state as characteristic of an 'ungenuine parliamentary system'.⁷³ Herzfeld's fears, similar to Redslob's here, that a directly elected president would gain the upper hand over parliament were countered with the reassurance that the president's position 'would be made similar to that of a limited parliamentary monarch'.⁷⁴

In his public justification of this outcome, Preuss took up Redslob's language with greater vigour: 'Genuine parliamentarianism assumes two essentially co-equal [*ebenbürtige*] highest state organs . . .', namely parliament and president.⁷⁵ Strictly, this equality was limited. Each had an autonomous source of legitimacy and each had the right to put the actions of the other before the people. The president could dissolve parliament and put parliamentary legislation to a popular referendum. Parliament could put the president and his record before the people, though if he survived this plebiscitary test it would count as re-election. The business of government, including control of the administration, however, was supposed to lie with the government, which was responsible to parliament. This was not the only option, for Preuss could have advocated the American model, vesting the business of government in the presidency. Yet Preuss rejected the American model, for its inherent dualism was all too familiar to Germany. According to Preuss, in the American system 'parliament was . . . limited to abstract legislation, to criticism and negation, impotent in the face of the administration, which really determined the practicalities of life'.⁷⁶ For Preuss it was vital that 'the real leadership of the *Reich* administration lies publicly and clearly in the hands of the government, which is politically responsible to the parliament'.⁷⁷ Preuss rejected the American model because he believed, not implausibly, that it would have perpetuated the old vices of the *Reich*. Preuss's arguments about the presidency were clear responses to the problems of German political life. They were responses intended to strengthen the power of parliament and to prevent political paralysis. In brief, Preuss had good democratic arguments for what he advocated and Redslob was a useful source of rhetorical support.

⁷² Preuss, '[Beiträge zur Verfassungsfrage anlässlich der Verhandlungen im Reichsamt des Innern vom 9. Bis 12. Dezember 1918]', p. 86.

⁷³ *Ibid.*, p. 84.

⁷⁴ *Ibid.*

⁷⁵ Preuss, 'Denkschrift zum Entwurf des allgemeinen Teils der Reichsverfassung vom 3. Januar 1919' [1919], in Preuss, *Staat, Recht und Freiheit*, p. 387.

⁷⁶ *Ibid.*, p. 386.

⁷⁷ *Ibid.*, p. 393. At the same time Preuss fought for self-government at the local level, albeit unsuccessfully. See Siegfried Grassmann, *Hugo Preuss und die deutsche Selbstverwaltung* (Lübeck, 1965), pp. 119–20.

Yet Preuss knew all along that constitutional provision alone was not sufficient. So far as he had been able, he had helped to create a 'differentiation of the legally normativized and organized expression of the common will through a plurality of organs'.⁷⁸ But this did not guarantee that the ever-changing common will would prove equal to the challenges he knew it would face. Indeed, Preuss had known all along that the challenges facing Germany were enormous. The established Western parliamentary democracies had benefited from a period in which parliamentary practices had been established on a far from democratic basis. This plutocratic or aristocratic parliamentarianism had been built upon a relatively homogenous social basis. Subsequent democratization, along with the heightened class conflict of industrialized society, took place against the background of established parliamentary institutions. In Germany there had been no such preparation, 'only a fairly weak and highly unorganized constitutional insertion into the surviving authoritarian system [*Obrigkeitsystem*]'.⁷⁹ The split between the socialists and the 'bourgeois' parties aggravated the situation. It was true that even in the established parliamentary democracies this division was a challenge to the political system, but in Germany the consequences were more perilous, 'for in the absence of an active sense of citizenship, authoritarianism [*die Obrigkeit*] offers itself as the supposedly sole unpolitical third element to the contending social forces'. Preuss added, 'In reality, of course, the authoritarian government floats in a socially empty space just as little as politically it can really "stand above parties"'.⁸⁰ The exigencies of war and the defeat of Germany were further obstacles. The propaganda of Germany's wartime enemies played into the hands of German opponents of democracy, who could argue that the Allied goal was 'not the democratization or subjection of Germany but rather the subjection of Germany through its democratization'.⁸¹ Then, of course, there was Versailles, which induced Preuss himself to resign.

Preuss soon had reason for concern as President Ebert resorted to decrees under Article 48. But worrying though this was, it was not the constitutional power of the president that was the biggest problem. It was the persistence of conceptions of the power of the state that long pre-dated the Weimar Republic. In October 1923 Preuss protested: 'One speaks continually of a military or

⁷⁸ Preuss, 'Über Organpersönlichkeit', p. 135.

⁷⁹ Preuss, 'Deutsche Demokratisierung', p. 342.

⁸⁰ *Ibid.*, p. 343. It was precisely this dilemma that bedevilled the efforts of the last three chancellors of the Weimar Republic, Heinrich Brüning, Franz von Papen and Kurt von Schleicher. See Hans Mommsen, 'State and Bureaucracy in the Brüning Era' and 'Heinrich Brüning as Chancellor', both in Hans Mommsen, *From Weimar to Auschwitz* (Princeton, 1991), pp. 79–118 and 119–40. Ironically, these men did not use Prussia as a bastion of power, and one of them, Franz von Papen, put an end to Prussian independence. The myth of Prussia, however, lived on and it was left to the Allied powers of the Second World War finally to fulfil Preuss's ambition of breaking up Prussia.

⁸¹ Preuss, 'Deutsche Demokratisierung', p. 339.

civil state of emergency [*Ausnahmezustand*]. Article 48.2 of the Constitution recognizes no state of emergency or siege in general, and absolutely no kind of military [state of emergency or siege].⁸² Hugo Preuss died on 9 October 1925 before the apparent triumph of those ideas. How different they were from his ideas is evident in the motivation behind the dissolution of the *Reichstag* in 1930, which led to the September 1930 elections and the electoral breakthrough of the National Socialists. The dissolution followed parliamentary rejection of a presidential decree implementing the policy of Chancellor Heinrich Brüning. According to Foreign Minister Julius Curtius, Brüning acted 'to protect the President's authority after it had been threatened by the nullification of the decrees'.⁸³ Constitutionally this was nonsense. The *Reichstag* had acted within its powers. Brüning, however, presumed that the president possessed an authority that was infringed precisely by such constitutional exercise of power. He presumed an authority that had less to do with plebiscitary legitimacy than with the autochthonous power of the state which Bismarck had invoked in the constitutional crisis of 1862 to 1866. This was an authority that had no connection with the ideas of Hugo Preuss. It was what he had fought against all his life. The dissolution has been aptly described by Lehnert as a 'political punishment'.⁸⁴ As such, it was, at best, precisely that abuse of power about which Redslob had complained.

Insofar as the Weimar Republic was Preuss's work, and it was so only to a limited extent, it failed not because of him but despite him. It failed not because one of the principal authors of its constitution remained trapped in a monarchist or pseudo-democratic conceptual world, but because his ideas did not find sufficiently fertile ground. To force Preuss into the framework of a tradition marked by the authoritarianism of the Bismarckian and Wilhelmine political systems underestimates the complexity of German political thought at the time. It is to go further even than Preuss's and Weimar's contemporary critics, who at least recognized the democratic credentials of both the man and the constitution, if only to denounce both as un-German.

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⁸² Quoted in Lehnert, *Die Weimarer Republik*, p. 276.

⁸³ Quoted in Erich Eyck, *A History of the Weimar Republic*, Vol. 2 (New York, 1963), p. 271.

⁸⁴ Lehnert, *Die Weimarer Republik*, p. 197.