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# GEORG JELLINEK ON VALUES AND OBJECTIVITY IN THE LEGAL AND POLITICAL SCIENCES

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*Georg Jellinek was one of the legal theorists who brought a new level of methodological sophistication to German public law scholarship at the turn of the twentieth century. Where previous research has called attention to his theory of conceptual "types" and his application of contemporary neo-Kantian epistemology to the law, this article explores his thinking on the nature of values and value judgments, and the possibilities for objectivity in the legal and political sciences. Jellinek sought to open an increasingly calcified legal positivism to the findings of the social sciences and to an inherently pluralistic, changing world of subjective values, but without abandoning the positivist ideals of legal certainty and the exclusion of political and other value judgments. Analyzing his response to this challenge opens a window onto his broader work in public law and political science, illuminating doctrines like the "two-sided" theory of the state and the "normative power of the factual," which have achieved a lasting place in German legal and political theory. It also shows why Jellinek put aside the traditional ideal of bias-free objectivity for a surprisingly modern vision of a process of intersubjective agreement, driven by the institutions of free and open scholarly debate.*

In the three decades before 1914, German social scientists' interest in methodological questions ran unusually high. Disputes in political economy, history, and sociology addressed many lasting problems in the philosophy of social science, including the proper place of empirical and theoretical research, interpretive understanding and explanatory laws, objectivity and ethical–political purposes in scholarship.[1] Observant colleagues in the legal faculties of German universities also sought in these years to raise the level of philosophical reflection and clarity on the objects, methods, and aims of research in their discipline. Particularly in public law—the division of legal scholarship that embraced

[1] David Lindenfeld, *The Practical Imagination* (Chicago, 1997), 252–6, 315–22; Roger Chickering, *Karl Lamprecht* (Atlantic Highlands, NJ, 1993), chaps. 6–7; Johannes Glaeser, *Der Werturteilsstreit in der deutschen Nationalökonomie* (Marburg, 2014).

constitutional and administrative law, and *Staatslehre* or the theory of the state—jurists self-consciously confronted the dominant methodological approach of legal positivism and attempted either to strengthen or to replace it, as it seemed increasingly unsatisfactory after 1900.[2] Long before the better-known controversies over Weimar constitutional theory, both critics and defenders of positivism strove to clarify the proper relation of legal norms and social facts, objective scholarship and political engagement. The Heidelberg professor of law Georg Jellinek (1851–1911) developed one of the most sophisticated of these efforts to rethink the connections between law and sociopolitical reality. His major works on rights, constitutional change, and the theory of the state represented not merely a "synthesis" of nineteenth-century legal thought but an innovative and interdisciplinary rejuvenation of positivism.[3]

Although he was a teacher to Hans Kelsen, a friend and colleague of Max Weber, and an internationally influential jurist who helped establish the modern discipline of political science in Germany, historians have traditionally neglected Jellinek's thought. In the past two decades, however, some historically minded legal scholars and political theorists have devoted increasing attention both to his relationship with Weber and to his work as a whole.[4] In the area of methodology, scholars have gained most ground in exploring Jellinek's account of the formation of conceptual "types," in response to periodic debate about its possible influence on Weber's own notion of the "ideal type."[5] Two comprehensive treatments have also advanced our understanding of other epistemological and methodological

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2 Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 4 vols. (Munich, 1988–2012), 2: 155; Stefan Korioth, "Erschütterungen des staatsrechtlichen Positivismus im ausgehenden Kaiserreich," *Archiv des öffentlichen Rechts*, 117 (1992), 212–38, at 214.

3 Stolleis, *Geschichte des öffentlichen Rechts*, 2: 450.

4 Stanley Paulson and Martin Schulte, eds., *Georg Jellinek: Beiträge zu Leben und Werk* (Tübingen, 2000); Jens Kersten, *Georg Jellinek und die klassische Staatslehre* (Tübingen, 2000); Andreas Anter, ed., *Die normative Kraft des Faktischen* (Baden-Baden, 2004); Gangolf Hübinger, "Staatstheorie und Politik als Wissenschaft im Kaiserreich: Georg Jellinek, Otto Hintze, Max Weber," in Hans Maier, Ulrich Matz, Kurt Sontheimer, and Paul-Ludwig Weinacht, eds., *Politik, Philosophie, Praxis* (Stuttgart, 1988), 143–61; Stefan Breuer, "Fachmenschenfreundschaft II: Max Weber und Georg Jellinek," in Breuer, *Max Webers tragische Soziologie* (Tübingen, 2006), 294–325; Andreas Anter, *Max Weber's Theory of the Modern State* (New York, 2014; first published 1995); see also two notable accounts by historians: Duncan Kelly, *The State of the Political* (Oxford, 2003), chap. 3; Peter Ghosh, "Max Weber and Georg Jellinek: Two Divergent Conceptions of Law," *Saeculum*, 59/2 (2008), 299–347. In the past decade, Jellinek's thought has also drawn increasing interest in the literature on rights theory and international law.

5 Kersten, *Georg Jellinek*, 102–38; Oliver Lepsius, "Georg Jellineks Methodenlehre im Spiegel der zeitgenössischen Erkenntnistheorie," in Paulson and Schulte, *Georg Jellinek*, 309–43, at 322; Ghosh, "Max Weber and Georg Jellinek," 330–31; less persuasive are Andreas Anter, "Max Weber und Georg Jellinek: Wissenschaftliche Beziehung, Affinitäten und

issues in Jellinek's work, such as the ways in which he dealt with neo-Kantian ideas about the construction of objects of knowledge and the relation of "normativity" and "facticity."[6] But despite occasional reference to Jellinek as a contributor to "scientific value-relativism" or "value-free" social science,[7] his thinking on values, value judgments, and the objectivity of knowledge remains largely unexamined.[8]

Instead of addressing epistemological debates about concept formation, types, and the cognitive status of objects of knowledge, then, this article views Jellinek's work on public law through the lens of his attempt to secure the objectivity of legal scholarship. Jellinek adhered to legal positivism in his methodology. But he sought a form of legal "science" (*Rechtswissenschaft*) that was philosophically informed, remained flexible in the face of historical change, and acknowledged the importance of human values and of the knowledge generated by the social sciences. The following pages argue that Jellinek ruled the validity of value *judgments* out of consideration by scholars, but insisted that human values and purposes themselves (and their embodiment in social and political life) could not be excluded as assumed by leading nineteenth-century positivists.

Many of the ideas for which Jellinek became known in the German legal academy served in part as means to allow scholarly consideration of the impact of values and purposes on the legal order in a "positive" way—that is, without resorting to value judgment. As a result, understanding his methodological views on values and objectivity can help disclose a new angle from which to view his characteristic doctrines connecting legal *norms* and political *facts*, including the "two-sided" theory of the state, "constitutional transformation," and the "normative power of the factual," among others. Jellinek's thought is still little known in the English-speaking world, and as he was one of the principal foils against which Hans Kelsen developed the first versions of his "pure theory of law," a better understanding of Jellinek's position on the interaction of values and facts, law and sociopolitical reality, may also be useful for interpreting the significance of Kelsen's even sharper separation of fact and norm.[9]

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Divergenzen," in Paulson and Schulte, *Georg Jellinek*, 67–86, at 77–79; and Martin Sattler, "Georg Jellinek: Ein Leben für das öffentliche Recht," in Helmut Heinrichs, Harald Franzki, Klaus Schmalz, and Michael Stolleis, eds., *Deutsche Juristen jüdischer Herkunft* (Munich, 1993), 355–68, at 361–3.

6 Lepsius, "Georg Jellineks Methodenlehre"; Kersten, *Georg Jellinek*, 93–178.

7 Arnold Brecht, *Political Theory* (Princeton, 1959), 220; Anter, "Max Weber und Georg Jellinek," 69–70.

8 The only short treatment of Jellinek's methodology to take these issues fully into account is the fine work of Frederike Wapler, *Werte und das Recht* (Baden-Baden, 2008), 165–77.

9 Kelsen, who disliked Jellinek, attended his seminar and acknowledged his "philosophical–sociological" contributions: Hans Kelsen, "Autobiographie," in Kelsen, *Werke*, ed. Matthias Jestaedt, 5 vols. to date (Tübingen, 2007–), 1: 40–41. He dealt extensively with Jellinek's

But Jellinek's approach to values and objectivity is noteworthy in its own right as well, as an informed and suggestive contribution that pre-dates Weber's well-known essays on the subject.[10] Jellinek's skepticism about truth claims in matters of value, coupled with his liberal emphasis on decentralization, academic freedom, and individual development, yielded more than the customary call for the scholarly virtue of unbiased inquiry. Instead, he adopted a plausible process-oriented vision of intersubjectivity as a means of securing the relative certainty of knowledge in law and social science.

## JELLINEK'S INTELLECTUAL FORMATION

Some understanding of Jellinek's background in legal method and his social-scientific and philosophical interests is necessary in order to appreciate the sources of his thinking and of the particular problem that led him to develop his position on objectivity. Like most public law scholars in the German Empire, Jellinek was and remained a legal positivist. The positivist tradition in public law is typically identified with the work of C. F. von Gerber and Paul Laband. Both men had been trained in private law, the most methodologically advanced area of the law in the first half of the century,[11] and had absorbed from it two interrelated views on method that they then made highly influential, if never dominant, in their efforts to professionalize public law scholarship before 1900.[12]

The first was that positive-law doctrine, whether common or statutory, could be studied in isolation from its historical, political, or philosophical underpinnings, with the aim of identifying the fundamental legal concepts that ultimately underlay each positively stated or implied legal rule and laying out the logical relationships between these rules and basic concepts. Legal scholars' evaluative assessments of what the positive law *should be* in order to further particular political, social, or philosophical goals were extraneous to this project and led to dilettantish and unscientific mixtures of distinct questions.

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work in his early career; see Kelsen, *Hauptprobleme der Staatsrechtslehre* in Kelsen, *Werke*, 2: *passim*, esp. 87–9, on fact and norm.

[10] Space considerations make it impossible here to compare Jellinek with Weber's deeper and more elaborate reckoning with "objectivity" and "value-freedom" after 1904.

[11] See especially Hans-Peter Haferkamp, *Georg Friedrich Puchta und die "Begriffsjurisprudenz"* (Frankfurt am Main, 2004).

[12] Claus-Ekkehard Bärsch, "Der Gerber-Laband'sche Positivismus," in Martin Sattler, ed., *Staat und Recht* (Munich, 1972), 43–71; Peter von Oertzen, *Die soziale Funktion des staatsrechtlichen Positivismus* (Frankfurt am Main, 1974); Walter Pauly, *Der Methodenwandel im deutschen Spätkonstitutionalismus* (Tübingen, 1993); Manfred Friedrich, *Geschichte der deutschen Staatsrechtswissenschaft* (Berlin, 1997), 222–60; Stolleis, *Geschichte des öffentlichen Rechts*, 2: 330–50. For critiques of the tradition after 1900, see Korioth, "Erschütterungen."

Consequently, extralegal historical and social-scientific facts, and normative, value-oriented beliefs about what the law should be, were to be excluded from the scientific study of legal doctrine.[13]

The acknowledged reality that law changed over time in response to political and socioeconomic developments was for Gerber and Laband no excuse for introducing such extralegal facts and values into legal scholarship owing to a second methodological view, "constructivism." This was the doctrine that in a properly "constructed" legal order—where the jurist had followed the above injunction to simplify and unify all positive law sources into a clear systematic order of concepts and rules, using logic alone—legal concepts themselves were "productive," generating new rules in a determinate way to fit newly arising situations not envisioned by the original legislator or judge. The legal order was thus in principle "gapless," and there was no need to posit any intrusion of political or social values or purposes into legal reasoning to account for changes in the law.[14] As Laband put it, "statutes can have gaps [*Lückenhaft sein*], but the legal order itself can no more have a gap than can the order of nature," since any such omission in a statute could be filled through the use of general legal principles to decide the contested question.[15] Thus, although Laband acknowledged the value of historical, social-scientific, and philosophical studies of the law, he denied that they were useful in understanding legal doctrine itself.[16]

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[13] In addition to the accounts in the previous note, see Michael John, "Constitution, Administration, and the Law," in Roger Chickering, ed., *Imperial Germany: A Historiographical Companion* (Westport, CT, 1996), 185–214, at 201, and Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (Durham, NC, 1997), chap.1, esp. 15–16, 19.

[14] This description of constructivism, or "conceptual jurisprudence," necessarily simplifies a more complex tradition. On its origins in private law through the early Rudolf Jhering, and occasional coexistence with acceptance of historically and socially informed legal scholarship, see Haferkamp, *Georg Friedrich Puchta*; Mario Losano, *Studien zu Jhering und Gerber* (Ebelsbach, 1984); Alexander Somek, "Legal Formality and Freedom of Choice: A Moral Perspective on Jhering's Constructivism," *Ratio Juris*, 15/1 (2002), 52–62; Hasso Hofmann, "From Jhering to Radbruch: On the Logic of Traditional Legal Concepts to the Social Theories of Law to the Renewal of Legal Idealism," in Damiano Canale, Paolo Grossi, and Hasso Hofmann, eds., *A History of the Philosophy of Law in the Civil Law World, 1600–1900* (Dordrecht, 2009), 301–54; and Oertzen, *Die soziale Funktion*, 214–38, on Gerber. Arthur Kaufmann and Winfried Hassemer, "Enacted Law and Judicial Decision in German Jurisprudential Thought," *University of Toronto Law Journal*, 19/4 (1969), 461–86, remains a useful overview.

[15] See his comments in an influential passage in the book that made his reputation: Paul Laband, *Das Budgetrecht* (Berlin, 1871), 75–76.

[16] Paul Laband, *Staatsrecht des deutschen Reiches*, 3rd edn (Freiburg im Breisgau, 1895), x–xi.

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Jellinek had much in common with Laband, in his positivist rejection of natural law thinking, his concrete analyses of German state law (apart from the area of rights), his skepticism toward the role of parliament as truly coequal with the monarchical–bureaucratic administration, and his insistence that the state could be viewed from both a juridical and a social-scientific angle.[17] The fact that Jellinek is best known today for an 1895 historical essay on natural law, religious liberties, and the "rights of man" in France and the United States is somewhat ironic, as the essay was an outgrowth of his systematic theory of subjective public rights, a position quite distant from eighteenth-century natural law and best understood within the context of the German state-law positivist tradition.[18] Laband continued to see Jellinek as a methodological ally in ensuring that legal and factual–sociological analyses of the state were not improperly intermingled. In correspondence, he noted differences on points of doctrine but reiterated his view that "we rest in all principal matters on the same scientific standpoint," and on one occasion called on Jellinek to demonstrate "the worthlessness of political speculations for the knowledge of legal concepts."[19] Nevertheless, Jellinek's social-scientific and philosophical studies would prevent him from accepting the positivists' call for a complete exclusion of extralegal values and sociopolitical phenomena.

Jellinek was an early devotee of the social sciences and remained an omnivorous reader of works on economics, politics, and sociology throughout his life.[20] His first acquaintance with the field as a student was in the form of the old-fashioned moral–political science of *Staatswissenschaft*, which he preferred to his other legal studies.[21] But he was soon caught up in the efforts to construct a new discipline of sociology in the 1870s, advising a friend to "grapple …

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17 Christoph Schönberger, *Das Parlament im Anstaltsstaat* (Frankfurt am Main, 1997), 216–300, primarily emphasizes political commonalities. Kersten, *Georg Jellinek*, 50–68, offers an assessment of the importance of Gerber and Laband for Jellinek, esp. 54–55, 63 on the dual view of the state.

18 Georg Jellinek, *Die Erklärung der Menschen- und Bürgerrechte* (Leipzig, 1895). Jellinek's thesis must also be seen in light of late nineteenth-century German theories of the *Rechtsstaat* and perceptions of French parliamentarism. See Duncan Kelly, "Revisiting the Rights of Man: Georg Jellinek on Rights and the State," *Law and History Review*, 22/3 (2004), 493–529.

19 Laband to Jellinek, 21 Oct. 1895 and 6 Jan. 1889, in Nachlass Georg Jellinek, Bundesarchiv Koblenz, 1136/15, hereafter NL Jellinek; see also, e.g., 29 June 1892 for their "complete agreement" on the "legal nature of the state" in Laband's eyes.

20 Camilla Jellinek, *Georg Jellinek: Ein Lebensbild*, repr. in Georg Jellinek, *Ausgewählte Schriften und Reden*, 2 vols. (Aalen, 1970; first published 1911) (hereafter *ASR*), 1: 5*–140*, at 88*.

21 Jellinek to Victor Ehrenberg, 5 Aug. and 25 Sept. 1873, in Christian Keller, ed., *Victor Ehrenberg und Georg Jellinek: Briefwechsel 1872–1911* (Frankfurt am Main, 2005) (hereafter

with the field of social sciences [*socialen Wissenschaften*] which lies close to juridical studies—fresh life pulses there."[22] He himself sought to contribute to "the founding of a sociology [*Sociologie*] ... a science of the future which possesses the closest contact with the study of law and politics,"[23] and his first book attempted to bring social-psychological understanding to bear on the reform of criminal law.[24] Although subsequent works would no longer be marked by an evaluative (social-reformist) purpose, and his early Comtean search for stages and lawful regularities in historical development would fade, the interest in social psychology remained powerfully present in his major work, the *Allgemeine Staatslehre* (General Theory of the State) of 1900. So too did his belief that history was necessary for understanding legal doctrine, which can be seen in his work on statute and ordinance, on rights, and on *Staatslehre*.[25]

Jellinek continued to digest social-scientific literature with impressive thoroughness. His correspondence reveals a close familiarity with the *Methodenstreit*, or dispute over methods, in economics of the 1880s—one of its principals, Carl Menger, was a friendly senior colleague in Vienna—and an intensive study of political economy in the 1890s, in its "Austrian," "German historical," and even Marxist forms, as Jellinek was working on the study that would become the *Allgemeine Staatslehre*.[26] Jellinek's balanced reading in this

*Briefwechsel*), 197, 201; see also Wilhelm Bleek, *Geschichte der Politikwissenschaft in Deutschland* (Munich, 2001), 159–60.

22 Jellinek to Ehrenberg, 30 Dec. 1873, in *Briefwechsel*, 210.

23 Jellinek to Ehrenberg, 26 July 1878, in *Briefwechsel*, 278.

24 Jellinek, *Die sozialethische Bedeutung von Recht, Unrecht und Strafe* (Vienna, 1878), 3–5; Christian Keller, "Victor Ehrenberg und Georg Jellinek," in *Briefwechsel*, 50; Klaus Kempter, *Die Jellineks, 1820–1955* (Düsseldorf, 1998), 191–5. Jellinek's *Sozialethische Bedeutung* also took a sociological approach to the validity of law—the criterion being its acceptance as valid by society—and saw that validity as varying with historical and social changes, not owing merely to deductive logic: see, e.g., 32–33, 42.

25 Georg Jellinek, *Gesetz und Verordnung* (Freiburg im Breisgau, 1887), hereafter *GV*, 1–188; Jellinek, *Die Erklärung*; Jellinek, *Allgemeine Staatslehre*, 3rd edn (Berlin, 1914; first published 1900), 9 and throughout, esp. chaps. 3, 5–10, 13–15, 17–20. The *Allgemeine Staatslehre*, hereafter *AS*, is cited according to the third edition but checked against the 1900 and 1905 editions.

26 Jellinek to Lujo Brentano, 28 May 1889, in Nachlass Brentano, Bundesarchiv Koblenz, 1001/29; Jellinek to Ludwig Felix, 20 June 1894, 2 July 1894, 8 Jan. 1895, 15 March 1895, 20 Oct. 1895, 14 May 1896, 16 May 1896, 24 May 1896, in NL Jellinek, 1136/43. During or before these years, Jellinek read the work of such "historical" political economists as Brentano, Heinrich Herkner, Werner Sombart, and Max Weber, and such "theorists" as G. F. Knapp, Albert Schäffle, Adolf Wagner, and Menger, among others, including socialist writers. For a sense of the scope of his reading, compare Max Weber, *Allgemeine ("theoretische") Nationalökonomie: Vorlesungen 1894–1898*, in *Max Weber Gesamtausgabe*, ed. Wolfgang Mommsen, section III, vol. 1 (Tübingen, 2009).

methodologically sophisticated discipline may help to account for that work's explicit acknowledgment of the value of both the "historicist" form of interpretive study of individual, non-repeatable historical phenomena and the "positivist" pursuit of causal–explanatory, law-like accounts of social regularities.[27] Whatever their differences, both these forms of social science also counseled greater attention to the ways in which human values and purposes affected social institutions, including the state and law, whether at the level of individuals' beliefs (historicism) or of individual or group interests and actions (nondogmatic economic or sociological "positivism"). So did Jellinek's greatest inspiration as a jurist, the later work of Rudolf von Jhering. From being the embodiment of constructivism, Jhering's work had shifted by the 1870s to emphasizing law's purposes rather than its logic, as well as the way in which it was shaped by individuals' and groups' goals, interests, and practical needs, and also its direct impact as a coercive institution on social reality outside the world of legal norms.[28] Jellinek had the highest praise for Jhering's philosophical, historical, and post-constructivist sociological approach to law.[29] He accepted that purposes were instrumental in explaining society's decisions among changing legal norms,[30] and dedicated his 1892 book on the public law of rights to Jhering.

Before pursuing his legal studies, Jellinek had also obtained a doctorate in philosophy, which helped to shape his lifelong interest in epistemological and methodological questions. He quickly rejected both the speculative idealism and the materialist reaction of the early and mid-nineteenth century, preferring a balanced philosophy that would do justice both to human meanings and beliefs and to the obvious power of natural-scientific thought. Inspired by his teacher and friend Wilhelm Windelband, Jellinek found this philosophy in neo-Kantianism from the 1870s onward.[31] Windelband imparted his interest in the way in which philosophical psychology and value theory offered a chance to transcend materialist and positivist accounts limiting knowledge to causal and

[27] Jellinek, *AS*, 6–9, 28 ff. "Positivism" here refers to sociological or economistic, rather than legal, positivism.

[28] Hofmann, "From Jhering to Radbruch," 305 ff.

[29] Jellinek to Ehrenberg, 11 Nov. 1873, 30 Dec. 1873, 26 July 1878, in *Briefwechsel*, 205, 209, 278.

[30] Georg Jellinek, "Die Klassifikation des Unrechts" (1879), in Jellinek, *ASR* 1: 76–150, at 80–82; Jellinek, *GV*, 242.

[31] Georg Jellinek, "Die deutsche Philosophie in Österreich" (1874), in Jellinek, *ASR* 1: 55–68. Letters to Ehrenberg attest to Jellinek's intense interest in Windelband's work: e.g. 20 Oct. 1872, 29 April 1873, 9 June 1873, 27 June 1874, in *Briefwechsel*, 158, 180, 191–2, 222–3. On the question whether Jellinek was himself a neo-Kantian in his methodology see Lepsius, "Georg Jellineks Methodenlehre," esp. 331–42; Wapler, *Werte und das Recht*, 149–51, 165 ff.; Hans Boldt, "Staat, Recht und Politik bei Georg Jellinek," in Anter, *Die normative Kraft*, 13–25, at 15 n.12.

statistical laws of human behavior, while still remaining in tune with the findings of natural science. By the 1890s, Windelband and his student Heinrich Rickert evolved a conception of philosophy as the theory of the special sciences classified according to their methods. The basic division, alluded to above, was between law-generating natural sciences that abstracted from all individual details, and historical-descriptive cultural sciences that focused on individual details regarded as significant because of their relation to key human values. The latter doctrine, which became known as "value-relation" (*Wertbeziehung*) under Rickert, sought to avoid making arbitrary value judgments by allowing scholars to focus on universally acknowledged but purely formal values as criteria for significance.[32]

We cannot properly address here the disputed question whether Jellinek was a neo-Kantian or an empiricist in his treatment of objects of knowledge and concept- and type-formation.[33] Jellinek's published work and correspondence supports both readings at different times, and shows his substantial commitment to a critical discussion of methodology. But several other conclusions relevant to his views on values and objectivity can be drawn from his lifelong engagement with neo-Kantian philosophy. First, he accepted and used the neo-Kantians' view that the difference between "is" and "ought" was a logical distinction, and that the two realms of the positive and normative were not to be confused.[34] Second, he rejected a vulgar-positivist view of social science as able to explain human society and its development by reference only to causal or statistical laws, taking any values and purposes as epiphenomena changing in completely determined ways and thereby allowing them to be excluded as scientifically insignificant. Instead, the object of legal science could be understood only in light of the "human interests and passions" which laws were to regulate. "It is the world of human goals and values," and not of purely naturalistic regularities involving human beings, "in which the legal system has its place."[35] Third, he was aware that Windelband and Rickert sought a theory that would require the acknowledgment

[32] On Windelband and Rickert see Frederick Beiser, *The German Historicist Tradition* (Oxford, 2011), 365–441; Charles Bambach, *Heidegger, Dilthey, and the Crisis of Historicism* (Ithaca, NY, 1995), 57–125; and Guy Oakes, *Weber and Rickert* (Cambridge, MA, 1988), 41–110.

[33] See Lepsius, "Georg Jellineks Methodenlehre"; Wapler, *Werte und das Recht*, 169–73; and for a contrasting view on the question of types see Ghosh, "Max Weber and Georg Jellinek," 326, 330–31, who emphasizes Jellinek's empiricism and inductive approach in this area.

[34] Jellinek, *AS*, 19–20, 34, 36, 52; Jellinek, *System der subjektiven öffentlichen Rechte*, 2nd edn (Freiburg, 1905; first published 1892), 17–18; Jellinek, *Verfassungsänderung und Verfassungswandlung* (Berlin, 1906), 71.

[35] Jellinek, *System*, 16; also Jellinek, *AS*, 75–82.

of transcendentally valid values—even if purely formal ones—for any scientific knowledge to be possible.[36]

In applying these different traditions to public law, Jellinek could have taken various directions. His social-scientific and philosophical studies gave him the conviction that knowledge of human actions and social institutions (including law) did not lie in immutable causal laws that ignored human intentionality and will, and consequently he could not accept a legal science that excluded values, purposes, and politics.[37] Legal positivists who promoted such a view, he believed, simply introduced political and other values unconsciously into their construction of legal doctrine, often from natural law, and thus *could not* guarantee objectivity or legal certainty by excluding all values.[38] In light of this conviction, Jellinek might have gone on to accept an approach to law that embraced consideration of values and purposes, purportedly maintaining its own objectivity by rationally demonstrating that some of them should be accepted and others rejected in establishing and interpreting the law. He could, for instance, have followed a normative, social-reformist and social-scientific approach to law, such as his countryman Eugen Ehrlich elaborated in the form of sociological jurisprudence.[39] Contrariwise, he could have undertaken a neo-Kantian program of updating normative natural law by seeking to orient it toward purely formal but transcendentally valid values, with historically and socially changing content, as Rudolf Stammler would do in the 1890s and 1900s drawing on a different neo-Kantian tradition.[40] But neither of these paths appealed to Jellinek because, as the following section will show, he shared the positivist conviction that values were purely subjective and value judgments could have no rational grounding.

## SUBJECTIVE VALUES AND THE EXCLUSION OF VALUE JUDGMENTS

Jellinek's ideas about the nature of values were formed early on, at latest by the mid-1870s, and the formation process had much to do with his view of philosophy and natural science. Fascinated by philosophical problems, the

[36] For his attempts to grapple with Rickert's philosophy see Jellinek to Rickert, 6 June 1901 and 11 March 1905, Nachlass Rickert, Universitätsbibliothek Heidelberg, Handschriftenabteilung Hs. 2740.

[37] Wapler, *Werte und das Recht*, 175–6, points out that against Gerber and Laband, Jellinek thought such values could not be removed and should be made transparent.

[38] Jellinek, *AS*, 64.

[39] Marc Hertogh, ed., *Living Law: Reconsidering Eugen Ehrlich* (Oxford, 2009).

[40] Rudolf Stammler, *Die Lehre von dem richtigen Rechte* (Berlin, 1902).

young Jellinek nevertheless showed increasing frustration in the 1870s with the hope that philosophy could lead to knowledge of the true, the good, and the beautiful. As he completed his degree in the subject in 1871–2, he often remarked on what he saw as its negative impact on his life—studying philosophy was a "corrosive process" (*Zersetzungsprozess*) and it seemed to him that it "killed every fine original feeling with the icy breath of reflection."[41] In his dissertation on Schopenhauer and Leibniz, he attributed differences in their moral philosophies not to any underlying "metaphysical dogmas" but to their personal circumstances and temperaments, quoting with approval Fichte's famous remark that "which philosophy a man chooses depends on what kind of man he is."[42] By 1877, as Jellinek confessed to a friend, he had no faith that philosophy could offer answers, and he could no longer in good conscience consider teaching the subject to students.

> The older I get, [and] the more exhaustively I occupy myself with the old unsolved, unsolvable problems, the deeper I feel the impossibility of approaching the eternal, the absolute, the true, in any way other than by guessing; the more I realize that every apodictically expressed proposition about the ultimate things [*die letzten Dinge*] is necessarily a lie ... The philosophical signature of our time is skepticism.[43]

Windelband later suggested that in this regard Jellinek was enveloped by the "agnostic current" of the time in which he studied, and "that all his life he skeptically confronted all attempts at scientific metaphysics, and modestly committed the satisfaction of the metaphysical needs which no one could have possessed more than he, to personal convictions [alone]."[44] Jellinek's work in the 1870s reflected his belief that it was time to put the "phantasms" and "metaphysical orgies" of the past to rest, and that instead "the best criterion for any philosophy is its relationship to positive, particularly natural, science. No genuine philosophy can stand in opposition to it."[45]

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41 Jellinek to his parents, 1 Dec. 1871 and 27 June 1872, quoted in Camilla Jellinek, *Lebensbild*, 16*–18*.

42 Georg Jellinek, "Die Weltanschauungen Leibniz' und Schopenhauers" (1872), in Jellinek, *ASR* 1: 3–41, at 5, 16; also 32, 35, 40. Jellinek returned to the Fichte quotation throughout his life, calling it "Fichte's profound utterance" in Jellinek, *System*, 13 n. 1, and "Fichte's immortal word" in a 1907 speech: "Grossherzog Friedrich I. von Baden ... Gedächtnisrede," in Jellinek, *ASR* 1: 368–91, at 378.

43 Jellinek to Ehrenberg, 4 Jan. 1877, in *Briefwechsel*, 267.

44 Wilhelm Windelband, "Zum Geleit," in Jellinek, *ASR* 1: v–xii, at vii.

45 Georg Jellinek, notes "Aus einem Notizbuch," dated to 1871 and 1877 respectively, in Jellinek, *ASR* 1: 168, 171–2.

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Jellinek preferred to treat questions of values and "practical-philosophical" orientation naturalistically as givens of empirical psychology.[46] He was, however, enough of a Kantian to insist that the world of the individual psyche or *Geist* was not simply reducible to a scientifically irrelevant epiphenomenon of physical states of the human organism. The physical world, the domain of causality and "blind mechanism," contained no norms, and could not: only "in the pure region of thought does the perception of value-differentiations of what is [*das Seienden*] arise; only here are criteria [*Maßstäbe*] for assessing reality created!"[47] But he did not believe that this "creation" was entirely rational or that the human will could be directed in its goals by reason. "I know that in all human things there is no absolute measure [*Maß*]," he wrote his father in 1886 or 1887. "Each [human] subject is, with his historically conditioned subjectivity (as the sophists were already aware), the only possible measure [*Maßstab*] of things."[48] He refused, consequently, to teach that there were universally valid philosophical solutions to any problems which required that a normative judgment be made, including in legal philosophy. Given the chance that same year to suggest requiring that students in Vienna take a course in legal philosophy—one area of his own teaching remit—Jellinek declined, for, as he said, "There are no generally recognized doctrinal solutions to legal philosophical problems. Such solutions must be worked out by each individual who has the talent for it at all; a philosophical system must be lived [*erlebt*], not learned by rote."[49] Nor was this situation merely temporary, awaiting further development of a scientific philosophy or ethics. As he remarked in 1892, there simply was "no theoretically compelling proof of any basic ethical position, which is to a certain degree always a matter of not-further-deducible personal conviction."[50]

The upshot of these early conclusions was to set Jellinek in the camp of those who maintained that value judgments were unavoidably subjective and not capable of determination by scientific or reasoned efforts.[51] His sense of the limits to "knowledge" of morals, and his separation of theory and practice, were visible

46 See e.g. Jellinek, *Die sozialethische Bedeutung*, 37–42.

47 Jellinek, "Die Klassifikation des Unrechts," 87. See also Jellinek, *AS*, 332.

48 Quoted in Camilla Jellinek, *Lebensbild*, 10*. Wapler, *Werte und das Recht*, 166, also observes that his Kantianism did not extend beyond the separation of the worlds of causality and practical moral life to the acceptance of objectively valid norms of any sort.

49 Georg Jellinek, "Gutachten, betreffend die Stellung der Staatswissenschaften, der Rechtsphilosophie und des Völkerrechts" (1887), in Jellinek, *ASR* 1: 299–306, at 305.

50 Jellinek, *System*, 11.

51 I have emphasized his early views to make clear that Jellinek's value relativism did not stem from the Heidelberg milieu of his later work, but his opinions remained consistent; for just a few examples see Jellinek, *AS*, 21, 35–6, 171.

already in his first book.[52] People naturally looked to the new social sciences for answers in the pursuit of satisfying social needs, he observed. But

> giving the desired answer does not lie in the domain of science itself, for it can and wants to know only what is and whereby it is, nothing more. It is much more the work of the practical, purposive mind to apply the results won on the theoretical path towards its goals. In this respect it is indeed a contradiction to speak of a practical *science*.[53]

He emphasized that it was a mistake—commonly made by speculative metaphysicians—to claim the existence of a teleologically oriented social science, forgetting that human purposes must be exogenously supplied, and that "absolute knowledge" of universally valid purposes would be necessary for this to be a legitimate claim.[54] So long as the possibility of gaining knowledge of universally valid purposes "is more than problematic, social science will have to be on guard against pronouncing unconditional value judgments." Otherwise empirical social science would risk suffering scholars to absolutize their own "prejudices" or prejudgments to the level of facts.[55] Legal science was in a special position of delivering normative judgments based on applied knowledge of what the law *was*, having, like medicine, an active and therapeutic role, but not on what it *should* be, while empirical social science was to avoid making "value judgments" altogether.[56]

This most certainly included political science, as Jellinek developed it. As he stated classically in the introduction to the *Allgemeine Staatslehre*,

> As absolute goals can be demonstrated only by the route of metaphysical speculation, an empirical political science complete in itself and invested with the general power of conviction is not possible. Only relative political investigations can attain scientific value; that is, such as hypothetically take a certain goal to be achieved, but which must acknowledge the possibility of different teleological judgments. As a rule, for this reason, political investigations come by a partisan character ... Even a cursory glance at the political literature teaches that the difference between world views, between convictions about the final goals of human communal life, determines—often unconsciously—the direction of a very large part of political research.[57]

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52 Kersten, *Georg Jellinek*, 96.

53 Jellinek, *Die sozialethische Bedeutung*, 13. Italics added.

54 Ibid., 13–14. See also Jellinek, *AS*, 262.

55 Jellinek, *Die sozialethische Bedeutung*, 13–14. See also Jellinek, *AS*, 28–9.

56 Jellinek, *Die sozialethische Bedeutung*, 14. The source of Jellinek's early (1878–9) usage of the language of values (*Werte* and *Werturtheile*) is unclear. It may be owing to Windelband or the philosopher Hermann Lotze, whom Jellinek met in 1874 (*Briefwechsel*, 158, 223); it does not stem from Friedrich Nietzsche.

57 Jellinek, *AS*, 13–14.

The partisan character Jellinek attributed to the value judgments that lay behind the direction of scholarly investigations in the social sciences was a reflection of the basically "antinomian" vision of normative *Weltanschauungen* or value systems that he expressed toward the end of his life. That is, like Max Weber, the later Jellinek saw the world as a stage for the conflict of irreconcilable ideals.[58] Not only were human values subjective, but in fact there could never be agreement on a single set of them.[59] Indeed, even in a limited scientific area such as the definition of the state, no ultimate agreement was possible because different definitions rested on mutually conflicting and rationally non-demonstrable "metaphysical principles."[60] His account of the different attitudes toward the proper purposes and goals of the state (including utilitarian, welfarist, libertarian, and others) reflects their different and sometimes mutually exclusive value-orientations.[61]

Jellinek's conclusions obviously entailed difficulties for the possibility of a genuine science of the law. If values were subjective or even in unavoidable conflict, with a rational judgment between them impossible, then neither the social-scientific nor the neo-Kantian traditions which appealed to him could provide normative guidance. Any claim by reform-oriented sociological jurisprudence for the scientifically determined superiority of a particular vision of what the law *should* be would have to join much less fashionable ideas like natural law or speculative idealist philosophies of law in implausibility. Nor could a neo-Kantian approach adjudicate in a non-arbitrary manner between the different subjective-value "contents" with which it was possible to "fill" transcendentally valid but purely formal, abstract values as soon as they were applied to a given concrete situation. In short, without a way of rationally determining which basic values should be reflected in the legal order, and without being able in turn to exclude all consideration of values and purposes from law as Laband had attempted, it might appear that law was so shot through with arbitrariness that it

[58] As this section demonstrates, Peter Ghosh's nuanced comparison of the two men errs in portraying Jellinek as seeking eternally valid values and differing from Weber on their infinite variety and "mutability." Ghosh, "Max Weber and Georg Jellinek," 328.

[59] Perhaps Jellinek's clearest statement of this "antinomian" vision, and of incommensurable world views analogous to Kuhnian paradigms, can be found in Georg Jellinek, "Der Kampf des alten mit dem neuen Recht" (1907), in Jellinek, *ASR* 1: 392–427, esp. 396, 404.

[60] Jellinek, *AS*, 228.

[61] Ibid., chap. 8, esp. 239–50. Jellinek's nonnormative analysis of the state's "goals" in terms of non-metaphysical state functions was one of his major contributions to developing an empirical political science. Andreas Anter, "Georg Jellineks wissenschaftliche Politik: Positionen, Kontexte, Wirkungslinien," *Politische Vierteljahresschrift*, 39/3 (1998), 503–26, at 511. See also Boldt, "Staat, Recht und Politik," 20–21.

was a mere function of will or power, lacking both legitimacy and any objective certainty in its application.

In order to avoid this nihilistic thesis, Jellinek needed on the one hand to secure a broad area of public law from the intrusion of exogenous, ever-changing political or other value judgments, where there could be agreement about what the positive law objectively was, and where the only tool needed in order to apply it with certainty was logic. To this extent, he would follow Labandian positivism. But, *pace* Laband, the legal order as a whole was not to be seen as a "gapless" fabric stitched together by logic alone. For, on the other hand, Jellinek also needed to delineate the ways in which the constitutional and legal order was in fact *connected* with the subjective social and political values and purposes that influenced the state and provided the fundamental goals of its laws. The following section examines his attempt to combine these two aims.

## THE INTERFACE BETWEEN OBJECTIVE LAW AND SUBJECTIVE VALUES

Jellinek's first task was to establish the objectivity of the purely juridical science of the state, and he did so in a way indebted both to legal positivism and to neo-Kantianism: a strict separation of juridical from non-juridical considerations paralleling the distinction between "ought" and "is." Jellinek credited Gerber, among others, with showing the need for the separation,[62] and his earliest work on state law in the 1880s expressed a typical positivist concern about the threat of the "continual commingling of the political with the juridical, which is equally ruinous for the clear knowledge of the one as much as of the other."[63]

But he also went beyond his predecessors to call in 1892 for an epistemological justification of this split. "Without an exact demarcation of the world of juristic concepts from other areas of knowledge, a thriving investigation of the foundations of state law is impossible," he wrote.[64] Jurisprudence awaited a new Kantian "critique of the juridical power of judgment," which would start out from the fact of legal norms' supra-physical, abstract existence and ask about the conditions for their possibility and for their forming a contradiction-free unity.[65] As others were beginning to reassert the pre-positivist idea that the state could be approached from a variety of different perspectives,[66] Jellinek sought

62 Jellinek, *AS*, 63–4; Kersten, *Georg Jellinek*, 54–5.

63 Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Berlin, 1882), 7. For a later statement see Jellinek, *AS*, 550.

64 Jellinek, *System*, 13.

65 Ibid., 13, 16.

66 Andreas Anter, "Modernität und Ambivalenz in Georg Jellineks Staatsdenken," in Anter, *Die normative Kraft*, 37–59, at 38; Kersten, *Georg Jellinek*, 91.

to differentiate his approach and secure part of the positivist project by drawing the line of "exact demarcation" between the legal and social realities of the state on the basis of an epistemological distinction rooted in different methods of investigation. Although there were necessarily various social-scientific and even natural-scientific methods of investigating the object "law," only the approach of legal science opened up the specific reality of the law as valid *norm* rather than *fact*—"ought" rather than "is"—and it would be a logical mistake to employ the others for that purpose.[67] In the *Allgemeine Staatslehre*, he would thus suggest a division of *Normwissenschaften* and *Kausalwissenschaften*, sciences of norms and causal sciences, only the former of which could unlock the normative, "ought" aspect of law.[68]

Avoiding the mixing of political judgments with purely legal norms was thus not just an injunction for virtuous positivists to follow, but the consequence of logical consistency in applying one's method. "The doctrinal content of legal norms can be cultivated only through the art of abstraction from legal phenomena and of deduction from found norms, such as practiced exclusively by jurists," Jellinek wrote.[69] As the object of a *Normwissenschaft*, this doctrinal content contained nothing but norms ordered into "a knowledge without internal contradictions," and thus made no claim to describe the empirical reality of the state in its completeness, though Jellinek insisted that it could not *contradict* that empirical reality.[70]

Thus far, Jellinek would seem to have affirmed positivist and constructivist methods wholesale, protecting a pure and internally consistent, logical order of legal norms from the intrusion of nonlegal facts or values. But he recognized both that *Kausalwissenschaft* approaches could be taken to the factual reality of law, and that the body of pure norms studied by the legal method would have to be grounded in some way in that reality of social facts and values. Virtually all summaries of his thought observe that he divided the *Allgemeine Staatslehre* into a social–political–historical and a legal theory of the state, which came to be known as the "two-sided theory."[71] The "social" side included the descriptive and explanatory findings of the historical and social sciences on the common features of states, within geographic and temporal bounds, as well as on law as "a factual

67 Jellinek, *System*, 14, 19.

68 See especially Jellinek, *AS*, 19–21. Non-Kantian positivists like Laband had, by contrast, preferred to view *Rechtswissenschaft* on the model of a natural science of causality. Lepsius, "Georg Jellineks Methodenlehre," 316; Wapler, *Werte und das Recht*, 176–7.

69 Jellinek, *AS*, 51. See also Jellinek, *System*, 3, for another (implicit) endorsement of constructivist methods within their limited sphere.

70 Jellinek, *AS*, 138, 17.

71 See esp. Oliver Lepsius, "Die Zwei-Seiten-Lehre des Staates," in Anter, *Die normative Kraft*, 63–88; Lepsius, "Georg Jellineks Methodenlehre," 329–30; Kersten, *Georg Jellinek*, 145–69.

element in popular life [*Volksleben*]."[72] These findings were established at the level of physical causality and human psychology and not the level of pure norms, but they were necessary for the legal scholar to consider nonetheless.[73] For although it was no excuse for confusing methods, Jellinek acknowledged Otto von Gierke's criticism that use of the legal method alone would lead to a fruitless scholasticism detached from the realities that produced and altered the law over time.[74]

If both theories were necessary for a general theory of the state, and yet not to be mixed indiscriminately, either Jellinek could simply place them side by side as unconnected supplements—a frequent but ill-founded description of his approach[75]—or he could isolate limited points of connection where facts and values were transmuted into legal norms. He took the latter path, insisting from the beginning that there was a difference between separating "is" and "ought" to avoid confusing indicative and imperative propositions, and disallowing any connection between the two.[76] Throughout his career, he saw the social or political "side" of the state, and the social-scientific methods for studying it, as more than a mere supplement to the juristic "side."[77] "I have always represented the methodological separation and the scientific connection of both [political science and state law]," he wrote.[78]

One of Jellinek's achievements as a scholar was to identify significant but discrete and enumerable areas of connection, which may be called "interface points," between the stable area of the positive public law and the changing world of values which provided its exogenous sources of normative orientation. The interface points localized those tensions over what the law *should* be which were divisive or otherwise unresolved enough that jurists could not be certain what the law in these areas in fact *was*, leaving "gaps" in the legal order until the real-world conflict over values was resolved in some manner that would

72 Jellinek, *AS*, 7–11, 20–21.

73 Jellinek, *System*, 18–19.

74 Jellinek, *Staatenverbindungen*, 9; Jellinek, *AS*, 12.

75 E.g. Hans-Joachim Koch, *Seminar: Die juristische Methode im Staatsrecht* (Frankfurt am Main, 1977), 67; Stefan Korioth, "The Shattering of Methods in Late Wilhelmine Germany: Introduction," in Arthur Jacobson and Bernhard Schlink, eds., *Weimar: A Jurisprudence of Crisis* (Berkeley, CA, 2000), 41–50, at 45. Kersten, *Georg Jellinek*, 95, rightly notes the strangeness of this conventional wisdom given Jellinek's clear attempts to show connections between the legal and social aspects of the state.

76 An especially clear statement is Jellinek, *Staatenverbindungen*, 9–11.

77 Jellinek, "Die Klassifikation des Unrechts," 122–5; Jellinek, *System*, 18; Jellinek, *AS*, 12, 122–5; Jellinek, *Verfassungsänderung*, 31. This meant that state law could not consist of a *purely* conceptual account of the order of legal norms without input from "outside." Schönberger, *Parlament*, 210–11. See also Lepsius, "Zwei-Seiten-Lehre," 73–5.

78 Jellinek, *Verfassungsänderung*, v.

allow the jurist to identify a positive and legally certain outcome. In order to ensure that legal knowledge remained objective, the value conflicts that took place at the interface points could not be resolved normatively by the jurist's own value judgments. Resolutions could be identified only retrospectively as positive (factual) results delivered to the jurist by the "social theory of the state"; that is, by the findings of the social and political sciences as they studied the state and the political and social groups which were the sources of the new legal norm.[79]

First of all, Jellinek readily acknowledged—against Laband and in agreement with Otto von Bismarck—that there could be gaps in the legal order, including the constitution.[80] He criticized "the false dogma of the closed nature [*Geschlossenheit*] of the legal system," and pointed out that there were both breaks in the historical development of the legal order and law-free areas within the order itself at any given time.[81] Political upheaval through a succession of regimes, conquest, or revolution was an obvious source of discontinuity which required historical or political-scientific analysis for an understanding of the new norms that it introduced into the legal order or constitution, even if much of the old law continued in force.[82] But the absence of upheaval still left areas where logic alone could not decide the law. Jellinek was aware that judicial law-making in "hard" civil and criminal cases potentially represented one of these areas.[83] His principal focus, however, was on the public law issues of lawfully binding the sovereign state and on constitutional "transformation," two further interface points which will be discussed in sequence.

Like others in the German positivist tradition, Jellinek accepted that the reality of state power preceded the constitutional order, and he located sovereignty in the state itself, composed of the monarchical executive and the popular legislature, rather than in the monarch or the people.[84] Since the state possessed sovereignty, its "will" could not be bound by any higher authority, and even its constitution

79 Here it may be useful to draw an analogy to the widespread model of a "core" of certainty and "penumbra" of uncertainty in the law later evolved by H. L. A. Hart, e.g. in his *Essays in Jurisprudence and Philosophy* (Oxford, 1983), 62–72, although Jellinek's and Hart's specific views, of course, differ.

80 Sinzheimer rightly differentiated Jellinek from other positivists on this front. Hugo Sinzheimer, *Jüdische Klassiker der deutschen Rechtswissenschaft* (Amsterdam, 1938), 210–11.

81 Jellinek, *AS*, 353.

82 Jellinek, *GV*, 297, 300; Jellinek, "Der Kampf des alten," 393–5; *Verfassungsänderung*, 43 ff.; Jellinek, *AS*, 353, 359 and chap. 9.

83 Jellinek, *AS*, 356–8, 619–20: in contrast, judicial lawmaking was not possible in constitutional law for Jellinek because he rejected judicial review of legislation for constitutionality, making constitutional "gaps" even more serious.

84 Jellinek, *GV*, 300; Jellinek, "Die Politik des Absolutismus und die des Radikalismus," in Jellinek, *ASR* 2: 3–22, at 22; Jellinek, *AS*, chap. 14.

could be revised like any correctly formulated and positivized statute if the political will existed.[85] Sovereignty thus marked one of the most important interface points between political reality and an otherwise stable legal order. Achieving the *Rechtsstaat*—the state governed by the rule of law—meant that the sovereign state must somehow be able to bind itself to its own laws.[86] Jellinek's justification for this "self-binding" or "auto-limitation" doctrine at the level of legal theory was that if the autonomous subject of Kantian moral philosophy could bind himself or herself to rules, so could the state. Since it was constitutive for the idea of a legal relationship that it must always presuppose at least two "legal subjects" bearing certain rights, the state must accord its citizens such rights and mechanisms for their protection, which meant that the state would have to limit itself or abandon the notion of a legal order entirely.[87]

But whether one accepted this argument or not, Jellinek emphasized that what really limited state power and helped establish a legal order based on the rule of law, as opposed to absolutism, patrimonial justice, or some other type of order, were the concrete historical circumstances that allowed for competing social and economic powers to check the state.[88] Whereas Labandian positivism completely excluded analysis of political realities, Jellinek saw it as providing jurists with the certainty that the fabric of the legal order would be upheld rather than torn or replaced by sociopolitical powers and their values, regardless of the state's theoretical sovereign omnipotence.[89] If the social or political scientist could supply the jurist with accurate *factual* data regarding the ways in which the state's power was constrained, and forced to establish a legal order that accorded with the balance of conflicting interests, then the jurist would be able to pursue his normative inquiries at the juridical "level" without fear of making subjective assumptions about what the precariously unstable legal order should be. Hence he would need to make no value judgments and would retain his objectivity.

Even with the threat of a constant flux of constitutional orders alleviated in this manner, legal certainty and thus freedom from value judgments was

85 Jellinek, *AS*, 368–9, 475–7, 481.

86 Caldwell, *Popular Sovereignty*, 42, has aptly termed this problem "Jellinek's paradox."

87 For this argument, first made in 1880, see Jellinek, *System*, 10; Jellinek, *AS*, 478; Keller, "Victor Ehrenberg und Georg Jellinek," 56; Anter, "Modernität und Ambivalenz," 47–50; and Christoph Schönberger, "Ein Liberaler zwischen Staatswille und Volkswille," in Paulson and Schulte, *Georg Jellinek*, 3–32, at 20–21, and the sources cited there.

88 Jellinek, *AS*, 369–74, 616, with earlier hints in Jellinek, *GV*, 262–76. See the analysis in Caldwell, *Popular Sovereignty*, 42–3, Kelly, *State of the Political*, 98–9, and Boldt, "Staat, Recht und Politik," 23–5. Jellinek was well aware that such circumstances, interests, and powers were constantly changing; see e.g. Jellinek, *AS*, 257.

89 Jellinek, "Der Kampf des alten," 416–18, 421.

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still at risk from what Jellinek termed "constitutional transformation." When the constitution was amended following its specified procedures, no threat to legal certainty resulted. But Jellinek recognized that political realities or new interpretations owing to changing ideas or social circumstances sometimes forced a transformation of a constitutional provision without formal amendment.[90] In a late work, he identified and gave concrete historical examples of such possibilities. They included such factors as changes in interpretation by courts, legislators, and administrators; the effects of political necessity; the results of letting particular powers fall into disuse; decisions by all branches of the state not to enforce a given provision; and the way in which historical development could cause the increasing irrelevance of particular institutions—particularly, Jellinek thought, deliberative parliaments.[91]

With uncertainty over the status of a particular provision—whether it was still in force or not—came the possibility that jurists could no longer make purely logical and thus objective determinations of the law in particular cases. Only an empirical study like Jellinek's *Verfassungsänderung*, which addressed the realities of political change and the way in which it transmuted political values into new legal norms, would allow jurists to make these determinations again on an objective basis without involving their own value judgments. Jellinek's work on this topic has been criticized for being merely a listing of these different types of transformation rather than a theoretical resolution of the problems of constitutional interpretation.[92] But when seen in light of Jellinek's attempt to secure the possibility of objectivity in legal scholarship by using the findings of social science, there was no need for him to move beyond empirical analysis. Political changes would occur, the constitution would, de facto, be transformed, and thus the order of legal norms would be influenced from "outside." But

[90] Jellinek, *Verfassungsänderung*, 8–9, 21.

[91] Ibid., esp. 8–46. For Max Weber's praise of this work and interest in the problem of connecting the legal and political "sides" see Weber to Jellinek, 27 Aug. 1906, in *Briefe 1906–1908*, in *Max Weber Gesamtausgabe*, ed. M. Rainer Lepsius and Wolfgang Mommsen, section II, vol. 5 (Tübingen, 1990), 149. Although he found Jellinek's approach to the study of politics too formalist and legalistic (Weber to Alfred Weber, 22 May 1907, in ibid., 311), Weber was actively interested in Jellinek's attempts in 1909 to gain funding from Andrew Carnegie for a German–American institute for comparative politics in Heidelberg, which would have been devoted to such political foundations of *Staatsrecht*. Weber was willing to participate provided that the institute emphasized studies of the sociopolitical rather than the legal "side" of the state. See Weber's letters to Jellinek of July, August, and September 1909 in *Briefe 1909–1910*, in *Max Weber Gesamtausgabe*, ed. M. Rainer Lepsius and Wolfgang Mommsen, section II, vol. 6 (Tübingen, 1994), 179 ff. Weber was also engaged enough with Jellinek's work to write a review of one of the latter's essays as late as 1909, which appears to have been lost prior to publication (ibid., 225).

[92] Korioth, "Shattering of Methods," 45–6.

so long as social science could supply a factual account of the changes, the order of norms could be revised without subjective judgments on the part of jurists.[93]

Finally, in addition to the inevitability of "gaps," sovereignty and self-binding, and constitutional transformation, a fourth major interface point lay in human psychology, the pivot between the world of norms and the world of causality. In his *System* and *Allgemeine Staatslehre*, Jellinek suggested that the connection between the state's "sides" lay not in raw power or force imposing law, but in the psychological states of the people who together made up both the state itself and the community regulated by the state. Their wills and purposes (*Zwecke*) were the factual grounding for the most basic axioms from which the entire system of legal norms branched off.[94] In what he labeled "the normative power of the factual," Jellinek called attention to the tendency of habitually performed actions to generate a psychological sense of normative force. "Man considers that which always surrounds him [*das Umgebende*], that which he continually perceives, that which he uninterruptedly practices not only as a fact, but rather also as a norm for judgment," by which he judges deviations from standard practice as being foreign to him. This was true, Jellinek said, of all "values" or value spheres, including those in daily life as well as in ethics or law.[95] Such a tendency could be observed in the development of children, and throughout human history, he argued, obviating the need to presume any special law-creating "act" of the *Volksgeist* or any other collective entity beyond one of the commonest human psychological predilections. And it explained not merely the origin of modern law in customary law, but its continuing authority.[96]

Less noticed by some later commentators but given equal weight by Jellinek himself was a complementary doctrine that might be called the "factual power of the normative" in reference to the way in which ideas and values could come to shape the body of legal norms factually in force.[97] As society changed, so did the goals and demands of some or all of its groups. What came to be known as natural law was not really a fixed and eternal set of higher laws, he argued, but

93 At a minimum, this would be true of *theoretical knowledge* of the law, even if *application* to concrete cases might involve interpretive difficulties or practical considerations going beyond pure science, as noted by Boldt, "Staat, Recht und Politik," 29.

94 Lepsius, "Georg Jellineks Methodenlehre," 319, suggests that Jellinek treats common purposes as the fulcrum of connection between the normative and the factual in the *System*, and factual agreement among wills in the *Allgemeine Staatslehre*, but both ideas are present in both works. See e.g. Jellinek, *AS*, 333; Jellinek, *System*, 42 ff.

95 Jellinek, *AS*, 337–8.

96 Ibid., 338–44.

97 Jellinek did not use this label for the doctrine, which appears to have been introduced in the mid-twentieth century, and was later employed by Kersten, *Georg Jellinek*, 372–5.

must nonetheless be taken more seriously than other positivists allowed as the actual expression of such ideas and goals by social groups to the legislator and the judge. Not just by force or revolution but through persuasion and over time, the existence of these natural-law demands could come to alter the actual order of legal norms.[98]

Part of the purpose of the "social theory of the state" was consequently to provide a persuasive social-scientific account of how groups of people came to agree on basic rules through these two processes, with attention to how their goals and values shifted over time, bringing the law with them.[99] Again, this was not the claim that the "ought" of law could be "derived" logically from the "is" of factual acceptance, but that the social scientist could establish the fact of acceptance which the jurist could then take as a "given" from which to derive legal conclusions in a more or less constructivist manner. Once a "gap" had been factually resolved, it could be legally resolved, even if this required "a little dialectical work of art" like Laband's analysis of the Prussian budget controversy of 1862–6.[100] This did not mean that anything that was factually settled was "right" or just, only that it allowed the law to be known, leaving the scholar free to have his own opinions on its rightness or wrongness while acknowledging the objective legal answer. As Oliver Lepsius has put it, for Jellinek the "givens" of the factual level, of the "is" as opposed to the "ought," "form the basis for the normative constructions [*Konstruktionen*, of the law], make them possible, and limit them. The legal level is indeed dependent on them as its point of departure, but then independent in its juristic validity."[101]

## CRITIQUE OF JELLINEK

In short, Jellinek attempted to defend a broadly positivistic conception of the task of *Rechtswissenschaft* while acknowledging and actively promoting the social-scientific study of law, and recognizing the importance of changes in society and its values for correct legal analysis. As a response to the demand for greater attention to social problems in the law which nonetheless protected legal reasoning from becoming the mere expression of personal opinions on those

98 Jellinek, *AS*, 344–50.

99 Ibid., 353 ff., on Jellinek's discussion of the tensions between conservative and progressive tendencies in the law, and the constant change it underwent in response to social changes. For an assessment of how well Jellinek actually employed social-scientific and especially sociological theories to these ends, see Kersten, *Georg Jellinek*, 151–6; the results are mixed, though this has no necessary bearing on his theory.

100 Jellinek, *AS*, 359.

101 Lepsius, "Georg Jellineks Methodenlehre," 318.

problems, this conception was a nuanced position. Nonetheless, it was open to criticism. From one angle, it minimized the tensions between juridical analysis and social needs by assuming that the latter could be settled first and then taken as givens by jurists, whereas on the most contentious issues, a consensus was not likely in the offing—if ever in the older Jellinek's world of antinomian value conflict. The law itself would "take sides" in the meantime if only because it would continue to employ its traditional holdings until and unless they became invalidated.[102] Jellinek never argued that the factual findings of the political and social sciences could supply immediate solutions, but in many cases the pressing need for a legal decision would oblige jurists to *find* an immediate solution, even if that meant introducing their own value judgments. Moreover, Jellinek's assumptions about the antinomian nature of values and worldviews meant that it was possible that a change in social and political opinions and powers that altered one basic legal principle might create contradictions within the legal order as a whole—by altering that principle's place in the network of *other* basic principles—which could not be worked out by legal reasoning alone.

The plausibility of his position also relied on his assumption that the same object ("the state") was the object of investigation of both the juristic and the social-scientific methods, even if they focused on different aspects of it. For logical consistency, the basic premises supplied to the *Normwissenschaft* of legal science by the *Kausalwissenschaft* of the social or political study of the state needed to be propositions of the same type, or they could not be legitimately transferred between the two types of science. Here Jellinek showed his debt to Gerber and legal positivism by conceiving of the state as a primordially "given" object studied by different perspectives, rather than as an object *constructed* in neo-Kantian fashion by the particular method deployed by the scholar.[103]

But this premise opened him to criticism from the man who would become the most consistent neo-Kantian positivist, Hans Kelsen, who reviewed Jellinek's work in his massive habilitation book, *Hauptprobleme der Staatsrechtslehre*. Kelsen argued that Jellinek's attempt to explain the connection between the normative and factual levels violated his own injunction to separate "is" and "ought." Jellinek's mediation did not ultimately work, according to Kelsen, because the methods of *Normwissenschaft* and *Kausalwissenschaft* created *two different objects*

[102] A related criticism is that made by Stefan Korioth, "Shattering of Methods," 46, who remarks that for Jellinek, "The theory of the law of the state can merely track the success or failure of transformative strivings of political forces," and must acknowledge irrational political faits accomplis without any normative theory of why it must do so.

[103] Breuer, "Fachmenschenfreundschaft," 314–15; Hübinger, "Staatstheorie und Politik als Wissenschaft," 147; also see e.g. Jellinek, *AS*, 74–5.

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*of study*, namely the state taken as a unified normative order, and the state taken as a concrete political and historical phenomenon. To refer to them by the same predicate created a confusion between the two objects that Jellinek then employed to suggest a connection.[104] This critique was to be extremely influential for the more raucous debates of Weimar jurisprudence, which involved accenting either the normative or the factual "side" of the state at the expense of the other.[105] Jellinek's psychologism, founded as it was on the work of Christoph Sigwart, would no longer persuade philosophically after the critiques of Frege and Husserl, leaving only dialectical attempts at mediating the two sides in the 1920s.[106]

A defender of Jellinek might respond that it was not necessary to assume that there could be no single "thing-in-itself" lying "behind" the objects constructed by the two methods.[107] But the mere possibility of a single *Ding-an-sich* could not justify the necessary assumption that it *was* in fact legitimate to transpose factual propositions into normative ones at Jellinek's interface points. As a result, Jellinek could not rely on a purely logical distinction between "is" and "ought" and retain his approach, which failed if seen as a form of rigorous neo-Kantian theory. Taken as empiricist positivism, however, Jellinek's theory could still draw its functional distinction between legal norms and sociopolitical realities while outlining sharply delimited connections between the two. This pragmatic solution to the problem of objectivity worked best for the historically minded legal scholar accounting for the gradual development of the law, or for the practitioner in an era of legal stability. It worked less well for the judge or lawyer confronted with deep ruptures in the law owing to radical change and sharply diverging political and constitutional values, like those of Weimar. For jurists in a time of crisis, Jellinek could offer little aid in separating law from politics.

Finally, Jellinek's theory meant that the problem of objectivity was moved back a step from the juridical to the social sciences. Social science was to supply facts for the jurists' consumption, but, as we saw above, Jellinek

[104] For Kelsen's critique see Stolleis, *Geschichte des öffentlichen Rechts*, 2: 453; Lepsius, "Zwei-Seiten-Lehre," 81–2; Kersten, *Georg Jellinek*, 169–77.

[105] Caldwell, *Popular Sovereignty*, chaps. 4–5; Arthur Jacobson and Bernhard Schlink, "Introduction: Constitutional Crisis: The German and American Experience," in Jacobson and Schlink, *Weimar*, 1–39, at 16–17.

[106] Eva Picardi, "Sigwart, Husserl, and Frege on Truth and Logic," *European Journal of Philosophy*, 5/2 (1997), 162–82; even Carl Schmitt, who ultimately emphasized the "factual," political side of the state against Kelsen's "normative" side, attempted to employ a dialectical approach. John McCormick, *Carl Schmitt's Critique of Liberalism* (Cambridge, 1997).

[107] As Wapler, *Werte und das Recht*, 171–3, observes, noting that neither Windelband nor Rickert joined Kelsen in assuming this.

believed that social-scientific researchers relied inevitably on purely subjective value orientations to give them their direction. How, then, could the objective *social-scientific* knowledge of the state be provided, which was necessary for understanding both its factual reality *and* the underpinnings of its normative reality as a legal order? This objection would seem to threaten both the juridical and the social-scientific "sides"—both the normative science of law and the factual science of state. Although Jellinek never wrote an essay specifically on the "objectivity" of the social sciences, he did express his views on this problem in a way that suggested its reformulation as one of intersubjective agreement.

## OBJECTIVITY AS INTERSUBJECTIVITY

At a personal level, like most contemporary German academics Jellinek sought objectivity by being nonpartisan, emphasizing theory over practice, and even engaging in a sort of virtuous asceticism.[108] His younger colleague Gustav Radbruch observed that even Jellinek's interventions on topical political issues were written "with the skepticism of the theoretical-contemplative man,"[109] a trait he had possessed since youth, when he was willing to criticize his liberal compatriots in the feuilletons of the Vienna press for debasing "true, genuine science" by politicizing it for their own gain against clerical adversaries.[110]

To be sure, Jellinek took an active interest in politics throughout his life. Until the turn of the twentieth century, he continued to follow and write about political developments in his native Austria, where he observed the anti-Semitic tendencies that had hindered his career in the 1880s fully emerge into Viennese politics with the success of the Christian Social movement.[111] He had a long-standing interest in international relations and agreements, and in 1907–8 he took an active part in debating the desirability of "parliamentarization" of the German state, publicly favoring a limited expansion of parliamentary control over the imperial chancellor after the 1908 *Daily Telegraph* affair.[112] But he certainly rejected explicitly partisan scholarship. Like the distinguished historian Theodor Mommsen, with whom he discussed their shared belief in scholarly "truthfulness"

[108] Anter, "Modernität und Ambivalenz," 42, calls attention to his "Calvinistically stringent ideal of science," and self-discipline bordering on asceticism, and points to Jellinek's various rejections of political passion in favor of calm scientific analysis from 1885 to his death.

[109] Gustav Radbruch, untitled review essay (1911), reprinted in *Gustav Radbruch Gesamtausgabe*, ed. Arthur Kaufmann, vol. 16 (Heidelberg, 1988), 21–4, at 22.

[110] Jellinek, "Die deutsche Philosophie," in Jellinek, *ASR* 1: 55–68, at 65–6.

[111] Kempter, *Die Jellineks*, 246–53; 324–32.

[112] Ibid., 339–48.

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over the impossible ideal of complete objectivity,[113] Jellinek was disturbed by what they both perceived as the establishment of a specifically Catholic chair of history at Strasbourg for the son of a Catholic Center Party leader in the "Martin Spahn affair" of 1901.[114] In his academic work, he typically left contentious political questions open,[115] and sought to emphasize that he wrote with the "cool objectivity of the man of science," and not the partisan.[116]

Nonetheless, for reasons suggested above, it was clear to Jellinek that a call for personal virtue would never be enough to secure objectivity. In remarks on legal scholarship that were nonetheless readily applicable to scholarship in general, he observed that those who relied on ethical injunctions to exclude what he called "political value-criteria" usually made either explicit or implicit value judgments with abandon. If anything, the process was intensifying, threatening to make the science of state law merely a "handmaid" for party politics much as philosophy once was for theology.[117] This problem was not peculiar to law, because the very idea of producing scientific knowledge of the human world without the presuppositions supplied by subjective values was "impossible." He insisted that "absolute presuppositionlessness in human things does not exist," and the human subject conditioned the knowledge that he or she produced just as the physical composition of a mirror conditioned what and how it could reflect:[118]

> Man is himself always the presupposition of his research, and this man is not thinkable as a *tabula rasa* which is to be first described by the researcher. Each individual can approach the material he is to study only in his capacity as the product of an unending series of cultural forces [*Kulturwirkungen*]. So it is, then, quite natural that the scholar of state law cannot be entirely without political opinions when he enters his area of knowledge. Who could address himself to the study of human institutions, according to any particular orientation, if he were not able to ascribe some values to them![119]

These orientation-providing values were obtained simply by commitment or avowal:

> For the final foundations of our research here, as everywhere, there is no doubt-free knowing, but rather only an avowal [*Bekennen*] is possible, and unity in commitment

[113] Jellinek recounted the conversation to Ludwig Felix, 5 June 1893, in NL Jellinek 1136/43 (reprinted with deletions in Camilla Jellinek, *Lebensbild*).

[114] Jellinek to Ehrenberg, 29 Dec. 1901, in *Briefwechsel*, 419; and Paul Hensel to Jellinek, 20 Dec. 1901, in NL Jellinek 1136/11. See also Kempter, *Die Jellineks*, 334.

[115] Kempter, *Die Jellineks*, 241, 245.

[116] Jellinek, *Verfassungsänderung*, 44; also vi.

[117] Jellinek, "Der Kampf des alten," 423.

[118] Jellinek, *System*, 11–12.

[119] Jellinek, "Der Kampf des alten," 424–5.

[*Bekenntnis*] is as little to be found here as in any other area. But random, arbitrary will in the choice of commitment by no means prevails in science.

For, he argued, every scientific stance (*Richtung*) "which wants to pass critical muster can in the final analysis grow only from the soil of a firm and self-contained *Weltanschauung*."[120] This meant, above all, a thoroughgoing and rational consistency within one's value set. If one were to adopt a particular value-based preference, for instance that of the medieval conception of sovereignty as the preferred doctrine of state, one would then have to abjure all other modern developments that would conflict with this preference. If unable realistically to remove these developments, one must either abandon one's value commitment or adopt the attitude of Don Quixote, who, Jellinek observed, at least maintained his nobility through a consistency of world view and a denial of opportunism.[121]

As this example was meant to show, such world views might be more or less appropriate to their times, and on a practical level this fact helped the individual in deciding between them.[122] Nevertheless, he wrote, "in all the opposition of opinions, which is unavoidably connected with any activity of valuing, the possibilities for assessing the past from ... a universal standpoint are limited."[123] There was, after all, inevitably a plurality of "living" world views at any given time, and even those which were not "live options" for many people were capable of resuscitation by quixotic individuals. Universal agreement in Jellinek's pluralist world was not likely. Far from deploring this situation, however, Jellinek saw in it the very precondition for progress in knowledge. In his academic addresses during his year as pro-rector of Heidelberg University (1907), Jellinek voiced approval of the plurality and competition of opinions and world views, and the danger of having unity in intellectual life at the cost of authoritarian imposition. "[A] great people can regard the subjection of its whole intellectual life under

120 Ibid., 425.

121 Ibid.

122 Sinzheimer, *Jüdische Klassiker*, 228, points to Jellinek's use of historical appropriateness and "world history as judge" to suggest which self-contained *Weltanschauungen* might be most appropriate, though he leaves the mistaken impression that Jellinek regarded the judgments of world history as more definitive—oriented toward real, inevitable "progress"—than in fact he did. Other scholars, too, see in Jellinek a vision of "assured evolutionary progress" with little sense of historical contingency (Ghosh, "Max Weber and Georg Jellinek," 329–30, 334). They are right that Jellinek believed in progress, but as a hope and ideal and not as an inevitability: he was quite clear that any attempts to see change as teleological development were speculative and made no claims to scientific status even if such speculations were difficult to eliminate entirely (Jellinek, *AS*, 7, 42–3, 262–3).

123 Jellinek, "Der Kampf des alten," 426.

central direction [*zentrale Leitung*] only as a grievous national disaster,"[124] he observed, since it was awareness and acknowledgment of plurality that kept the researcher from "one-sidedness" and the restraint or limitation of knowledge.[125]

The Grand Duke of Baden, whom Jellinek deeply admired, had done his duchy a great service by his willingness to promote intellectual and academic freedom. The freedom to argue as one saw fit was not secure from threat in 1907, and never would be. "Once," Jellinek wrote,

> one believed naively that popular freedom [*Volksfreiheit*] also meant intellectual freedom. Today we know that political parties that have their firm support in broad popular circles can become even more dangerous to the freedom of research and teaching, as the governments are often dependent on the support of those parties.[126]

Doubtless his own experience with political interference in academic life in the 1880s had a bearing on his views, as did the concerns about both right- and left-wing populism that he held as a moderate liberal and an assimilated Austrian-German Jew interested in the rights of minorities.[127] It was, above all, federalism, decentralization, and competition among universities and among professors that Jellinek saw as ensuring the progress of science, by keeping it free of external political threats and the internal threat of a single opinion.[128] The comments he made in October 1907 at the opening of a museum in Frankfurt make this point explicit. He found it especially admirable that the museum had been opened with the support and at the behest of private citizens, a deed that

> enhances and supports in a peculiar way not only German science, but science as a whole. There is no human and national interest which so requires decentralization [*Dezentralisation*] as science, which can indeed be supported from the outside, but never created; which can only bloom in the greatest multiplicity of institutions and personalities—science, whose lifeblood is the fullest freedom of intellect and research. Such freedom is protected, with us, by the wise self-limitation of the state, protected through the existence of a great number of independent members of our Empire all competing with each other in the wide domain of the fostering of culture. But even with the best intentions of the leading men, political streams may well up that threaten a flood against this freedom. Moreover, one-sided dominance of schools within the academies can lead to the exclusion of newly emerging directions and thereby to a bending of the free mind. And therefore it is of the highest importance that free associations exist, which

[124] Jellinek, "Grossherzog Friedrich," 385–6.
[125] Jellinek, *AS*, 74.
[126] Jellinek, "Grossherzog Friedrich," 381.
[127] Kempter, *Die Jellineks*, 325, 330.
[128] Jellinek, "Grossherzog Friedrich," 386.

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in their way promote multiplicity and safeguard and guarantee intellectual freedom, out of which alone the bloom of science can rise.[129]

There could be no complete certainty in science because of the unavoidable presence of subjective values. But Jellinek was convinced that through the mechanism of academic freedom and the competition of ideas, science could be driven forward toward agreement through the persuasion of argument rather than the force implemented by one-sided schools or political authorities. The value of his own works, he wrote in the preface to his 1892 *System*,

> in no way ... lay in their content of absolute truth, which is never to be stated with certainty, but much rather in ... [their being suited to be] a driving moment [*Moment*] in the scientific process of knowledge [*Erkenntnisprocesse*]. Not so much their lasting results as the measure of forward-driving power that they foster, assigns them their scientific place.[130]

It was the task of social scientists to attempt to provide a comprehensive view of the state—or by extension any other subject matter—for *their time*.[131] Jellinek, whose own world view as a moderate liberal emphasized progress and the almost "religious" commitment to the ideal of the individual personality and its moral growth,[132] ultimately hoped that properly channeled ideational conflicts would lead the history of science, like history in general, to be a genuine development rather than an arbitrary sequence.[133]

## CONCLUSION

To the degree, then, that "objectivity" in social science was possible, Jellinek thought, one could not rely on moral injunctions alone, but only on the establishment of a framework of institutions and processes. His insistence on the inclusion of positive discussion of purely subjective values in the concepts and explanations of legal and political scholarship made it possible to open the law to the findings of the new social sciences. It also allowed for greater realism

[129] Jellinek, "Ansprache des Prorektors in Frankfurt am Main bei der Eröffnung des Museums der Senckenbergischen Naturforschenden Gesellschaft," 13 Oct. 1907, in Jellinek, *ASR* 1: 359–61, at 360. Jellinek always included science alongside the economy as areas that could not be directed by a single, planning will, even though he took note of the ability of the state and other associations to further or hinder it, e.g. in Jellinek, *AS*, 4.

[130] Jellinek, *System*, vi.

[131] Jellinek, *AS*, xvi.

[132] See, e.g., Radbruch, untitled review essay, 22, for this characterization; but see also note 122 above for Jellinek's recognition that "progress" was a speculative ideal.

[133] For remarks on his hopes for such conflicts leading to moral development in history, see Jellinek, "Der Kampf des alten," 427.

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than had the positivism he inherited. But it meant that he had to abandon the possibility of fully fledged objectivity in favor of an intersubjective agreement whose nonarbitrary character was maintained only to the extent that it was constantly subjected to challenge by those of differing views.

On the one hand, this outcome could be seen as a failure, as could the methodological impurity critiqued by Kelsen which prevented Jellinek from truly bridging the divide between "is" and "ought." Moreover, Jellinek's theory could have only limited appeal in times of upheaval when social, political, and cultural divisions were so sharp that agreement became impossible, and the social theory of the state could deliver no guidance to the jurist.

On the other hand, however, the theory had much to recommend it. It served to unify many of Jellinek's specific contributions to the theory of the state and to constitutional law within a coherent framework, calling attention to areas of intersection with social reality, where social-scientific knowledge could assist in determining the law. It simultaneously reaffirmed the positivist effort to prevent the jurist's sociopolitical values from reducing legal certainty and leading to arbitrary justice. In the absence of a successful defense of objectivity, Jellinek's vision of freely reached, evolving intersubjective agreement nonetheless provided a reasonable and workable description of the ideal goal of scholarship. In a stable pluralist society, his thought offers more than historical interest.