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“Continuities and Discontinuities: Political Thought in the Habsburg Empire in the Long Nineteenth Century”

Ferenc Hörcher and Kálmán Pócza
Special Editors of the Thematic Issue

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Sara Lagi

Georg Jellinek, a Liberal Political Thinker against Despotic Rule (1885–1898)*

Georg Jellinek is commonly thought of as one of the most prominent representatives of German legal positivism. In this article I look at Georg Jellinek not only as a legal theorist, but also as a political thinker of liberal inspiration. In this sense, I seek to show some key continuities and connections between the fundamental aspects of his legal, positivistic theory and his political vision of liberal inspiration, and between his stay in Vienna and his move to Germany.

Keywords: legal positivism, liberalism, sovereignty, fundamental rights, limits of power.

Georg Jellinek as a Political Thinker: Introducing the Personage

“We hope and believe that society will be able to find and implement something that can preserve it from the lowly moral and spiritual leveling: the recognition of the rights of minorities!”¹ This quote, which one might easily attribute to John Stuart Mill or Benjamin Constant, is taken from the work of Georg Jellinek (1851–1911), a legal theorist who deserves the attention of scholars of the history of political thought. In this essay, I examine how this prominent thinker,² commonly associated with German legal positivism and the positivistic

* This article is based in part on a paper presented at the Institute of Philosophy, the Research Centre for the Humanities, Hungarian Academy of Sciences, on January 27, 2015.

1 Georg Jellinek, *Das Recht der Minoritäten* (Vienna: Hölder, 1898), 47.

2 The literature on Jellinek is vast. See: Christoph Schönberg, *Das Parlament im Anstaltsstaat: Zur Theorie parlamentarischen Repräsentation in der Staatsrechtslehre des Kaiserreichs (1871–1918)* (Frankfurt am Main: Klostermann, 1997); Stephan Breuer, *Georg Jellinek und Max Weber: Von der sozialen zu soziologischen Staatslehre* (Baden: Nomos Verlag, 1999); Stanley Paulson, ed., *Beiträge zu Leben und Werk* (Tübingen: Mohr Siebeck, 2000); Jens Kersten, *Georg Jellinek und die klassische Staatslehre* (Tübingen: Mohr Siebeck, 2000); David Kelly, “Revisiting the Rights of Man: Georg Jellinek on Rights and State,” *Law and History Review* 22, no. 3 (2004): 493–529; Andreas Anter, *Die normative Kraft des Faktischen: Das Staatsverständnis Georg Jellineks* (Baden: Nomos Verlag, 2004); Olivier Jounjan, *Le pensée juridique en Allemagne* (Paris: Presses universitaires de France, 2005); Christian Keller, *Victor Ehrenberg und Georg Jellinek: Briefwechsel des 19. Jahrhunderts* (Frankfurt: Vittorio Klostermann, 2005); Klaus Kempfer, *Die Jellineks 1820–1955: Eine Familienbiographische Studie zum deutschjüdischen Bildungsbürgertum* (Düsseldorf: Droste Verlag, 2005); Massimo La Torre, *La crisi del Novecento: Giuristi e filosofi nel crepuscolo di Weimar* (Bari: Edizioni Dedalo, 2006); Realino Marra, *La religione dei diritti: Durkheimer, Jellinek, Weber* (Turin: Giappichelli, 2006); Dagmar Drüll, *Heidelberger Gelehrtenlexikon 1803–1932* (Berlin–Heidelberg: Springer Verlag, 2012); Reut Y. Paz, *Constructing a Gateway between a Distant God and a*

foundation of the law, can be seen and considered as a political thinker of strong liberal inspiration.

With this purpose, I analyze the period between 1885 and 1898,³ when Jellinek published a series of scholarly works on legal and political theory and the history of political ideas in which he identifies two capital (legal and political) problems: the problem of granting fundamental rights and the problem of neutralizing and combating despotic rule, notably the tyranny of the majority. These are both issues belonging to the tradition of European liberalism. John Gray proposes a general definition of liberalism, observing that

common to all variants of the liberal tradition is a definitive conception, distinctively modern in character, of man and society [...] [i]t asserts the moral primacy of the person, [...] it confers on all men the same moral status, [...] it affirm[s] the moral unity of the human species and [...] [i]t is *meliorist* in its affirmation of the corrigibility and improvability of all social institutions.⁴

Yet when focusing our attention more precisely on the nineteenth century, we observe that the “map” of liberalism at the time was complex. When we use the term, we are referring to a complex tradition of political thought characterized by a variety of authors, approaches, and shades of nuance: from Benjamin Constant to Alexis de Tocqueville, from Madame de Staël to Sismondo de Sismondi, from J. S. Mill to T. H. Green, from the German state-centric liberalism to the English one.⁵ Nonetheless, within this variety, we can identify some key “shared principles.” As D. J. Manning clearly explains in his popular work on *Liberalism*,

the liberty that the nineteenth-century liberal believed his intellectual ancestors to have secured for the citizen, indeed, the liberty that made a man a citizen, is liberty defined in law. Liberty is the creation of legal restraint. It is to be found where restraint is justly imposed on government by constitutional law. [...] Liberty thus understood is not

Cruel World: The Contribution of German-speaking Scholars to International Law (Leiden–Boston: M. Nijhoff Publishers, 2013).

3 Between 1879 and 1889, Jellinek lived and taught in Vienna. From 1889 until he died in 1911, he lived and taught in Germany.

4 John Gray, *Liberalism* (Suffolk: Open University Press, 1986), X.

5 Ibid.

a power over others [...] the power of a master over his slave. It is security from interference which makes a man free.⁶

This implies a view of power as limited in order to protect individual freedom, minorities and “society’s dynamism.”⁷ At the same time, Manning reminds us that nineteenth-century European liberalism also thought that “individualism and the energy it generates were threatened by the tyranny of social conformism.”⁸

A particular vision of power and a kind of fear begins to emerge, for example, in the writings of people like Constant, Mill, and Tocqueville. In his reflections on the French Revolution Constant clearly criticized the crowd and the conforming masses. Both Tocqueville and Mill denounced the “tyranny of prevailing opinion” and the issue of “massification.”⁹

Thus, the question arises, in what sense can Jellinek be situated within nineteenth-century liberalism? He was a liberal thinker because he believed in the necessity of limited power—in the necessity of establishing boundaries of governmental power by means of a constitution and guarantees of public law in order to avoid despotic rule—and he feared social conformism and the negative implications it could have in terms of social progress and development.

The attention Jellinek paid to the problem of limited power and the issue of social conformism represents a point of political and ideological affinity between him and thinkers such as Constant, Tocqueville, and Mill, an affinity Jellinek recognized himself. In all his works, including for instance *Das System der subjektiven öffentlichen Rechte* (*System of Subjective, Public Rights*, 1892), *Die allgemeine Staatslehre* (*General Theory of State*, 1900), *Die Erklärungen der Menschen und Bürgerrechte* (*The Declaration of the Rights of Man and of the Citizen*, 1895), and *Das Recht der Minoritäten* (*The Right of Minorities*, 1898), he referred to the ideas of these three prominent authors, whom he regarded as personal, important points of reference.¹⁰

6 David J. Manning, *Liberalism* (London: J. M. Dent & Sons Ltd, 1976), 15.

7 Ibid.

8 Ibid., 18.

9 This is an aspect of political liberalism stressed by Manning, *Liberalism*, 17–18. Benjamin Constant, *Des réactions politiques* (Paris: n.p., 1797); Idem, *Des effets de la Terreur* (Paris: n. p., 1797); Alexis De Tocqueville, *De la Démocratie en Amérique*. 2 vols. (Paris: C. Gosselin, 1835–1840); John Stuart Mill, *On Liberty* (London: John W. Parker, 1859). See also: John Plamenatz, ed., *Readings from Liberal Writers: English and French*, Everyday Handbooks (London: Barnes & Noble Inc., 1965).

10 See: Georg Jellinek, *Das System der subjektiven öffentlichen Rechte*, 1892, 2nd ed. (N.p.: n.p., 1905); *Die allgemeine Staatslehre*, 1900, 2nd ed. (N.p.: n.p., 1905); 3rd ed. (N.p.: n.p., 1914).

As Manning writes, the protection of fundamental rights is central to nineteenth-century liberalism, a protection which is based on the “existence of legal restraints.” This is true for Jellinek too, in the sense that in all his works, and notably in his *Das System der subjektiven öffentlichen Rechte*, he delineates a system of legal protection of fundamental rights: legal protection which implies, as I will illustrate, a particular way to establish and justify conceptually fundamental rights within a theory of law and state which is positivistic.

This means that Jellinek’s liberal inspiration and belief cannot be separated from his legal reflections on the nature and components of the state and law. In other words, it cannot be separated and isolated from his idea that sovereignty belongs to the state alone. How did Jellinek balance his belief in a power that had to be limited with his idea of sovereignty? And what kinds of connections exist between Jellinek’s liberal inspiration (according to the definition of nineteenth-century liberalism outlined above) and his legal positivistic theory? In order to respond to this question, I will begin with a discussion of the period Jellinek spent in Vienna.

Jellinek in the Austro-Hungarian Empire (1879–1889): The Problem of Minorities

Georg Jellinek (1851–1911) was born in Leipzig into a Jewish family of German culture and language. His father, Adolf Jellinek, was a rabbi and one of the most important scholars of Jewish theology of his period. Georg Jellinek studied history, philosophy and law in Germany. In 1879, he became associate professor at the University of Vienna, where he lived and taught until 1889, when he decided to resign because of growing anti-Semitism and personal hostility towards him. In 1891, he moved to the University of Heidelberg, where he “inherited” the Chair of International Law, previously held by Johann Kaspar Bluntschli.¹¹

In Heidelberg Georg Jellinek published his most relevant and innovative works on the doctrine of law and the state, while also paying attention to politics and political changes in Germany and in the Austro-Hungarian Monarchy. Even after Jellinek moved to the University of Heidelberg, he kept studying the Austro-Hungarian political and juridical system.¹²

11 Christian Keller, *Viktor Ehrenberg und Georg Jellinek im Spiegel ihres Briefwechsels 1872–1911*, in idem, *Viktor Ehrenberg und Georg Jellinek*, 22.

12 In the 1880s and the 1890s, Jellinek wrote and published relevant works on the legal structure of the Austro-Hungarian Monarchy, and more specifically on the Settlement of 1867, while focusing on the

Jellinek spent intense and problematic years in Vienna, where he had firsthand experience of the complex political reality of the Austro-Hungarian Monarchy. Here he was particularly struck by the numerous and often violent political contrasts characterizing the Austrian Imperial Council. Jellinek dedicated to this particular issue an interesting essay entitled *Ein Verfassungsgerichtshof für Österreich* (*A constitutional court for Austria, 1885*), with the declared purpose of understanding how better to stabilize the Cisleithanian part of the Empire after the Settlement of 1867.¹³

In his opinion, the crucial component of the contrasts was the unsolved Austrian national question (*Nationalitätenfrage*) and, more precisely, the fact that the Austrian parties residing in the *Reichsrat* were not political but “national.”¹⁴

Jellinek stresses how most of the Austrian political parties embodied precise and defined national identities. Behind these parties there were specific national groups whose interests often conflicted.¹⁵ The Austro-Hungarian Monarchy was in fact a multinational state, made up of Germans, Hungarians, Czechs, Poles, Ruthenians, Romanians, Italians, Croats, Serbs, Slovaks, and Slovenes. As a result of the Settlement of 1867, the Habsburg Empire became the Austro-Hungarian monarchy. The Settlement was between two states which remained, respectively, “united” as political entities, though people of numerous different nationalities resided in each.¹⁶

In Jellinek’s opinion, the national connotations and attachments of the Austrian parties made the relationship between parliamentary minority and majority particularly controversial and difficult. The impact of this complicated

Hungarian half of the empire. These works included: *Die rechtliche Natur der Staatenverträge: Ein Beitrag zur juristischen Konstruktion des Völkerrechts* (1880); *Das rechtliche Verhältnis Kroatiens zur Ungarn: Mit einem Anhang das ungarisch-kroatische Ausgleichsgesetz enthaltend* (1885); *Ungarn und die österreichische Verfassung* (1897); *Ungarisches Staatsrecht* (1897).

13 Georg Jellinek, *Ein Verfassungsgerichtshof für Österreich* (Vienna: Alfred Hölder, 1885), 35.

14 Ibid., 6–8 ff. In the use of the term “national party” as opposed to “political party,” he claimed to have been inspired by Adolf Fischhof’s work on the Austrian national question. Jellinek, *Das Recht der Minoritäten*, 35. Adolf Fischhof, *Österreich und die Bürgschaften seines Bestandes* (1869).

15 Jellinek, *Ein Verfassungsgerichtshof für Österreich*, 6–8 ff.

16 Aviel Roshwald, *Ethnic Nationalism and the Fall of Empires* (London–New York: Routledge, 2005), 8–11. On the history of the Austro-Hungarian Monarchy and notably on the complex relationships between its nationalities there is a vast body of scholarly literature. Richard J. Evans, *Austria, Hungary and the Habsburgs: Central Europe 1683–1867* (Oxford: Oxford University Press, 1979); Alan Sked, *The Decline and the Fall of the Habsburg Empire 1815–1918* (London–New York: Longman, 1989); Mark Cornwall, *The Undermining of Austria-Hungary: The Battle for Hearts and Minds* (London: MacMillan Press, 2000); Idem, *The Last Days of Austria-Hungary* (Exeter: University of Exeter Press, 2001); Maureen Healy, *Vienna and the Fall of the Habsburg Empire: Total War and Everyday Life in World War I* (Cambridge: Cambridge University Press, 2004).

situation on the legislative process was often disastrous. Sometimes a minority felt mistreated or abused by the majority, and sometimes the majority vehemently opposed bills that would have given more rights or freedoms to a national minority.¹⁷

In legal terms, in Jellinek's opinion, the Austrian Imperial Council, which was the main and most important legislative body of the Empire, was characterized by widespread instability and "parliamentary illegality" (*Unrecht*).¹⁸

As a professor of law living in Vienna, Jellinek identified the *Verfassungsgerichtshof* (the Constitutional Court) as a perfect, *legal* solution to that problem. Jellinek's proposal can be better understood and clarified if we briefly take into account the Habsburg legal-political tradition embodied by the Imperial Court (*Reichgerichtshof*).

The Imperial Court was officially established in 1867 on the occasion of the Settlement, which transformed the Austrian Empire into the Austro-Hungarian constitutional dual monarchy. The Imperial Court was given relevant powers and tasks. It served to protect the rights of citizens, although it was not a court of cassation, i.e. it was not charged solely with the task of verifying the interpretation of the law given by a court of lower instance. It acted to neutralize potential conflicts between the *Länder* (the crownlands) and the central authority, and it could act to supervise the boundaries between administrative and judicial authorities, as well as between regional and state administrative authorities.¹⁹ According to Jellinek, the main challenge was to improve the traditional Austrian Imperial Court by transforming it into a true Constitutional Court.

He called for a Constitutional Court to make decisions about: 1. potential conflicts of competences between ordinary legislation and constitutional legislation; 2. conflicts of competences between the imperial legislation and the legislation of the crownlands.²⁰

17 In the 1880s, for example, the Austro-German deputies residing in the Austrian Central Parliament violently opposed decrees aimed at giving more "linguistic rights" to the Bohemian community. Gerald Stourzh, "Ethnic Attribution in Late Imperial Austria: Good and Evil Consequences," in *The Habsburg Legacy: National Identity in Historical Perspective*, ed. Ritchie Robertson and Edward Timms (Edinburgh: Edinburgh University Press, 1994), 71–74.

18 Jellinek, *Ein Verfassungsgerichtshof für Österreich*, 6.

19 See: Sara Lagi, "Hans Kelsen and the Austrian Constitutional Court (1918–1929)," *Co-herencia* 9, no. 16 (2012): 275–77.

20 Wilhelm Brauneder, *Österreichische Verfassungsgeschichte: Einführung in Entwicklung und Struktur* (Vienna: Manzsche Verlag, 1992), 38–739.

More precisely, as far as the potential conflict of competences between ordinary and constitutional legislation was concerned, Jellinek clearly proposed an interesting legal mechanism which would impact, for example, one of the most important twentieth-century jurists and scholars of constitutional law, Hans Kelsen.²¹

Jellinek's plan for an Austrian Constitutional Court recognized the right of a minority to submit bills to the Constitutional Court that could be considered detrimental to the constitutionally granted minority's rights and freedoms.²² In this sense, Jellinek's plan for a Constitutional Court had two main purposes: it aimed at improving and enforcing the division of competences between the imperial and crownlands authorities (which Jellinek judged to be utterly unclear and insufficient) and, moreover, it aimed at better defending the constitution from potential excesses and transgressions committed by the parties, parliamentary organs and, more notably, aggressive majorities. Through better protection of the constitution, better protection of minorities could be granted, and in Jellinek's opinion this was particularly useful and vital within the complex context of the Austrian Imperial Council, which was characterized by tensions between conflictual national parties.²³

Jellinek's plan for a Constitutional Court was based on a substantial mistrust of the legislative body, in this specific case the Austrian Imperial Council, because the majority residing in the legislative body could abuse its power by imposing its will to the detriment of the minority. In this sense, the transformation of the Imperial Court into a Constitutional Court was the only way, in Jellinek's opinion, to make the Austro-Hungarian monarchy a solid "constitutional state." The idea itself is perhaps not groundbreaking, but one truly interesting aspect is to observe how profoundly *political* this plan was.²⁴

In his 1885 work, Jellinek sought to arrive at a *legal solution* to an eminently *political problem*. This problem dealt with the protection of minorities from potentially illiberal laws wanted and pushed by the majority: the danger represented by a tyrannical majority was one of the major political issues with which Jellinek grappled all his life. As previously mentioned, in 1891 he moved to

21 Sara Lagi, *El pensamiento político de Hans Kelsen: Los orígenes de "De la esencia y valor de la democracia"* (Madrid: Biblioteca Nueva, 2007).

22 Jellinek, *Ein Verfassungsgerichtshof für Österreich*, 8 ff.

23 Ibid.

24 Elisabetta Palici di Suni, *Introduzione to Georg Jellinek, Una Corte costituzionale per l'Austria* (Turin: Giappichelli, 2013), 1–35.

Heidelberg to teach international law. In Germany he continued to reflect on the problem of minorities; a problem that he had experienced firsthand in Austria. If in the Austro-Hungarian monarchy Jellinek mainly focused on the concept of minorities with a *national and ethnic connotation*, in Germany his attention shifted to *political minorities*. Yet, a fundamental political problem remained: to Jellinek, the protection of minorities was profoundly connected with the question of granting fundamental rights in order to combat any form of despotic rule.

Jellinek in Germany: His Jus-political Vision and His Rejection of Despotic Rule

While living in Vienna, Jellinek was struck by the effects of having a parliament made up of many different national groups. This complex reality might have stimulated his interest in the problem of minorities. He never forgot the Austrian experience, which is apparent in his work *Das Recht der Minoritäten*, in which he referred to the national component of the Austrian parties and the instability of the Austrian Imperial Council.²⁵

Jellinek's focus on minorities and the importance of providing them with concrete and efficient protection recalls nineteenth-century liberalism. Like many other prominent liberal thinkers, such as Constant, Tocqueville, and Mill, Jellinek considered the protection of minorities (both national and political) as a value *per se*, as prerequisite of every truly liberal society based on respect for personal and human dignity and recognition of a "space of freedom" that no government could abuse or limit.²⁶

In terms of the history of political thought, Jellinek's concern with the problem of minorities and their protection (which in my view must have been influenced by his Austrian experience) was profoundly connected with his idea of *Selbstbeschränkung* (self-limitation), which is the core concept of his theory of law and the state.²⁷ What were the political foundations of this theory, and might we better understand these foundations if we take into account the definition of nineteenth-century liberalism given above?²⁸

25 Jellinek, *Das Recht der Minoritäten*, 35–36.

26 *Ibid.*, 17–40.

27 Massimo La Torre, *Constitutionalism and Legal Theory: A New Paradigm for the Concept of Law* (Dordrecht: Springer, 2007), 20.

28 On the concept of "self-limitation" see: Jens Kersten, *Georg Jellineks System: Eine Einleitung zu Georg Jellinek, System der subjektiven öffentlichen Rechte*, 2. Auflage von 1905, ed. and intr. Jens Kersten (Tübingen: Mohr Siebeck, 2011); Jens Kersten, *Georg Jellinek und die klassische Staatslehre* (Tübingen: Mohr Siebeck, 2001);

In 1892, when Jellinek was in Heidelberg, he published one of his major works: *Rechtslehre: Das system der subjektiven öffentlichen Rechte*. On the one hand, Jellinek proposed the classical concepts previously elaborated by Carl Friederich von Gerber and Paul Laband.²⁹ Like his predecessors, Jellinek recognized sovereign power as belonging to the state alone. Also, he reaffirmed that only positive law exists. At the same time, he distanced himself from the traditional German legal doctrine when he wrote that the state limits itself by recognizing and providing fundamental rights.³⁰ To better understand the difference between Jellinek's legal conception and that of his predecessors it is worth noting that Gerber considered "individual rights as 'objective' reflections of the legal order," and Laband defined rights and more precisely as "rights to liberty" and "norms for state power, which the state gives itself [...] but they do not establish subjective rights of the citizens."³¹ In other words, both Gerber and Laband actually theorized the principle that rights had to be understood correctly and considered a mere "reflection" of "the state-determined legal system."

Unlike Gerber and Laband, Jellinek envisioned the state as a subject capable of limiting itself and, consequently, capable of granting a "space of freedom" to individuals by establishing "subjective rights."³² In his works on legal theory, and most notably in *Das System der subjektiven öffentlichen Rechte*, Jellinek elaborates a compromise between the sovereignty of the state and fundamental rights by theorizing the legal protection of such rights by means of an act of state self-limitation with regards to individuals. In doing so, Jellinek conceptually ends up situating one of the capital principles of nineteenth-century liberalism within a legal positivistic theory, according to which these rights "are regarded and secured because of the existence of the state as the personified sovereign."³³

Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 2 (Tübingen: Mohr Siebeck, 1992). Also: Diego Quaglioni, "Sovranità e autolimitazione (Rileggendo la Dottrina generale dello Stato di G. Jellinek)," in *Crisi e metamorfosi della sovranità: Atti del XIX Congresso nazionale della Società italiana di filosofia giuridica e politica. Trento 29–30 settembre 1994*, a cura di Maurizio Basciu (Milan: Giuffrè, 1996), 276 ff; Massimo La Torre, *Disavventure del diritto soggettivo: Una vicenda teorica* (Milan: Giuffrè, 1996), 144–45.

²⁹ See: Carl Friedrich von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (1876); Paul Laband, *Das Staatsrecht des Deutschen Reichs* (1876–1882).

³⁰ Fabrizio Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (Oxford: Oxford University Press, 2014), 17–18.

³¹ Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham–London: Duke University, 1997), 30–31.

³² Jellinek, *Das System der subjektiven öffentlichen Rechte*, 67 f.

³³ Fabbrini, *Fundamental Rights*, 17.

In this sense, there is profound link between Jellinek's liberal spirit and his legal doctrine. I insist on this point because I think that even his work *Das system der subjektiven öffentlichen Rechte* (1892) can be considered, from the perspective of the history of political thought, a work of political theory and an excellent example of Jellinek's political thought and attitudes.

While living and teaching in Austria, Jellinek proposed a legal solution to an eminently political problem. As we have seen, this particular solution, consisting in the creation of a Constitutional Court, had a clear and undeniable liberal connotation because it was based on the idea that minorities should be respected and protected. The Constitutional Court, in Jellinek's view, could be a perfect antidote to the tyranny of the majority. In *Das system der subjektiven öffentlichen Rechte*, Jellinek theorized a positivistic foundation of fundamental rights based on the idea that the state was capable of limiting itself. In both cases, i.e. in his work on the Constitutional Court and his work on the *subjektiven öffentliche Rechte*, Jellinek was convinced, as a legal theorist and a political thinker, that granting and preserving fundamental rights implied protecting minorities and individuals from the abuses of despotic rule.

The central role played by this kind of problem in Jellinek's intellectual and academic production is also clear in three of his writings dedicated to the history of political ideas and published in the 1890s, namely *Hobbes und Rousseau* (*Hobbes and Rousseau*), *Adam in der Staatsrechtslehre* (*Adam in the theory of the state*) and, primarily, *Die Erklärungen der Menschen und Bürgerrechte* (*The declaration of the rights of man and the citizen*).³⁴

In the first two essays, Jellinek critically analyzed the tradition of natural law and its impact on European political thought and state organization, whereas in the third work he made a direct comparison between the Bill of Rights and the Declaration of the Rights of Man and of the Citizen. Despite evident differences in terms of content, all these essays shared the same questions: "is

34 Georg Jellinek, *Die Erklärungen der Menschen und Bürgerrechte: Beitrag zur Geschichte des Verfassungsrechts* (Munich–Leipzig: Duncker & Humblot, 1895). In this article, because the original text was unavailable, I refer to the Italian translation: Georg Jellinek, *Le dichiarazioni dei diritti dell'uomo e del cittadino*, ed. G. Bongiovanni (Rome–Bari: Laterza, 2002). And also Georg Jellinek, "Die Politik des Absolutismus und Radikalismus (Hobbes und Rousseau): Vortrag gehalten in der Aula des Museums zu Basel am 10. Februar 1891," in idem., *Ausgewählte Schriften und Reden* (Berlin: 1911), vol. 1 (Aalen: Scientia Verlag, 1970); Idem, "Adam in der Staatsrechtslehre: Vortrag gehalten in der historisch-philosophischen Verein zu Heidelberg (1893)," in idem., *Ausgewählte Schriften und Reden* (Berlin 1911), vol. 1 (Aalen: Scientia Verlag, 1970); Idem, *Allgemeine Staatslehre* (Berlin: O. von Häring, 1905).

state power unlimited?” and “does the majority have absolute power?” I examine how Jellinek responded to these crucial questions.

In the first of the three abovementioned works, Jellinek outlined a history of political and juridical concepts with a strong focus on the tradition of natural law. As a positivist, Jellinek was vehemently anti-jusnaturalist, but the truly interesting aspect emerging from his analysis, particularly from his work on *Hobbes und Rousseau*, is that he considered natural law mere philosophy, a *Weltanschauung*, a dream, a vision, with no historical basis, and characterized by undeniable elements of despotism.³⁵

The tradition of natural law had elaborated and justified the idea of state organization through the “paradigm” of the state of nature and the concept of a “contract” by means of which men would establish and legitimize political institutions. First and foremost, Jellinek criticized the tradition of natural law as a product of the imagination. He stressed that all natural law arguments were false because they were not based on historical experience.³⁶

Yet, in Jellinek’s opinion there was something even more dangerous in the teachings concerning natural law than their “falsehood.” He thought that they would inevitably “open the door” to despotic rule as a necessary and logical consequence of the idea that the only way to leave the state of nature with all its dangers and lack of safety is to give up one’s fundamental rights and liberties to a “third subject,” which is the state itself. From the perspective of the history of political ideas and ideologies, there was no difference between the author of *Leviathan* and the father of the Social Contract. Their use and legitimation of the “paradigm” of the state of nature inevitably would lead, in Jellinek’s assessment, to an illiberal, despotic political system.³⁷

His critique of the natural law tradition of thought was functional to his foundation and legitimation of law and the state in positivistic terms. But if jusnaturalism was nothing but a “philosophy,” a potentially dangerous dream, how could one explain his attachment to the Bill of Rights and the Declaration of the Rights of Man and of the Citizen, which seemed to have been inspired by the tradition of natural law? As a legal theorist and political thinker, Jellinek responded to this question in his work *Die Erklärungen der Menschen und Bürgerrechte*. In this essay, Jellinek offers his reply to those who contended that the Bill of Rights and the Declarations of the Rights of Man and of the Citizen were the

35 Jellinek, “Die Politik des Absolutismus und Radikalismus.”

36 Ibid., and idem, “Adam in der Staatsrechtlehre.”

37 Ibid., chiefly Georg Jellinek, “Die Politik des Absolutismus und Radikalismus.”

logical consequences of the intellectual tradition of natural law by explaining how, for example, the Bill of Rights—which he considered the “source” of the Declaration of the Rights of Man and of the Citizen itself—were nothing but the “historical product” of the very particular, unique American experience, characterized by the development of small communities of people who moved to the New World to profess their religious beliefs freely.³⁸

Despite his Jewish background, Jellinek studied Christian theology and the history of Christianity in depth.³⁹ His main interest was the history of the Reformation and Protestantism. In his essay *Die Erklärungen der Menschen und Bürgerrechte* he also emphasized the religious roots of the Bill of Rights in America and the influence that the Protestant spirit and culture had had on the history of the former British colonies. His idea was that some of the fundamental freedoms included in the Bill of Rights had a religious—and more precisely a Christian—origin.⁴⁰

Over the years, according to Jellinek, Americans had created a society based on the values of freedom and emancipation, and when they had gathered to establish a new political order against their former motherland, they had written the Bill of Rights in order to ensure protection of the freedoms and rights they had experienced before the revolution against England had broken out.⁴¹

As far as the Declaration of the Rights of Man and of the Citizen is concerned, Jellinek stressed the “debt” that the French revolutionaries owed to the American Bill of Rights. He also denounced the French revolutionaries, who—unlike the American revolutionaries—had been inspired by the tradition of natural law and more exactly by Rousseau and his theory of *volonté générale*, for having applied the philosophical concept of “people’s sovereignty” to the French political reality without seriously analyzing whether or not this kind of concept could be successfully transformed into a functioning political institution.

The “sin” of the French Revolution had been to apply the very abstract and intrinsically absolutistic political concepts elaborated by the tradition of natural law—and notably by Rousseau—to the French reality, a reality whose complexity, in Jellinek’s opinion, went beyond “natural law philosophy.” The American revolutionaries had been successful because they had established

38 Georg Jellinek, *Le dichiarazioni dei diritti dell'uomo e del cittadino*, 44.

39 Jellinek converted to Christianity a few years before his death. Klaus Kempfer, *Die Jellineks 1820–1955: Eine Familienbiographische Studie zum deutschjüdischen Bildungsbürgertum* (Düsseldorf: Droste Verlag, 2005).

40 Georg Jellinek, *Le dichiarazioni dei diritti dell'uomo e del cittadino*, 44–50.

41 Ibid.

their new independent political institutions on historical experience. The French revolutionaries had been unsuccessful because they had wanted to break radically with the past, introducing a totally new political system based on ideas and values people had never seriously experienced before.

In other words, under the French revolution one passed from a despotic rule embodied by the king to a despotic rule embodied by the people, and the people, as Jellinek stresses, meant the state.⁴²

Some questions arise: is there any connection between these works of the 1890s (*Hobbes und Rousseau; Die Erklärungen der Menschen und Bürgerrechte*) and, for example, Jellinek's essay on the Austrian Constitutional Court? Moreover, what can we learn about Jellinek's political views from his reflections on the American and French revolutionary legacy? First, I am convinced that a sort of intellectual continuity does exist between Jellinek's essay of 1885 and the works he published when he was already in Germany. This continuity consists in the fact that his plan for the Austrian Constitutional Court and his writings on and against the tradition of natural law, the Declaration of the Rights of Man and of the Citizen, and the comparison between the American and French revolutions share the conviction that there is a profound difference between "good rule" and "bad rule": a good rule is based on an intrinsically limited power, constitutional guarantees, and rights—that is, on a "space of freedom" that is to be protected—whereas bad rule is the opposite: it is despotic rule consisting of an unlimited kind of power and, according to Jellinek, this unlimited kind of power can sometimes be used in the name of the people.⁴³

All the writings I have discussed so far contain clear elements of a truly classical liberal political view according to the definition of liberalism I offered in the first paragraph of this paper. Jellinek emphasized the importance of limited power, a concept he elaborated further in *Das Recht der Minoritäten*.

Here Jellinek clearly drew a connection between individual rights and minority rights: the protection of minorities within and outside of legislative organs was functional to the protection of individuals and fundamental rights. Nonetheless, the protection of minorities and individual rights embodied an excellent limit to despotic rule, and the guarantees of the rights of minorities and individuals could also prevent the process of "massification" and growing social conformism, which in Jellinek's opinion was characteristic of modern democratic societies.⁴⁴

42 Ibid.

43 On this last aspect see: Georg Jellinek, "Die Politik des Absolutismus und Radikalismus".

44 Idem, *Das Recht der Minoritäten*, 42–44.

Jellinek directly and openly referred to Tocqueville when writing about the dangers of massification and social conformism within a democratic system. Tocqueville was always one of the main points of reference for the German jurist. Like Tocqueville, Jellinek spoke about the tyranny of the majority, and like Tocqueville, Jellinek thought that an efficient way to neutralize despotic majorities (inside and outside the legislative body) was to create and develop a political system based on fundamental rights, minority rights, efficient limits to power, and the creation and preservation of a lively civil society.⁴⁵ Jellinek concluded his work on the Rights of Minorities by mentioning Tocqueville's *Democracy in America*.⁴⁶

There is a common thread linking Jellinek's work on the Austrian Constitutional Court, on the one hand, and his writings published in the 1890s: the connection is his focus on the problem of minorities and liberty. In Austria and in Germany Jellinek always examined ways in which to avoid despotic rule.

Some Concluding Remarks on Jellinek's Liberal Political View

If we take into account Jellinek's intellectual trajectory from the 1880s until the publication of *Die allgemeine Staatslehre*, we can observe how the principle of limited power was central and crucial both to his legal doctrine and to his political view.⁴⁷

In terms of legal thought, Jellinek affirmed the pillars of legal positivism, while elaborating the idea that the state had both "a sociological and legal character." In his *opus magnum*, *Die allgemeine Staatslehre*, he distanced himself from Gerber and Laband. Whereas Gerber and Laband had tried to develop a merely legalistic understanding of the state, Jellinek insisted on the two-sided nature of the state: it should be considered not only a legal construct but also a "social fact," and therefore it had "legal functions" and "social functions."⁴⁸

The two-sided conception of the state implied a two-sided theory of the state. *Staatslehre* had to be divided into a "social theory of the state" and a "legal theory of the state."⁴⁹ From a social perspective, the state—as it was conceived by Jellinek—relates to individuals by limiting its own will and therefore establishing

45 Ibid.

46 Ibid., 46–47.

47 Idem, *Allgemeine Staatslehre* (1900), 3rd ed. (Darmstadt: Wissenschaftliche Buchgesellschaft, 1960), 180.

48 Ibid.

49 Ibid.

fundamental rights. From his work *System der subjektiven öffentlichen Rechte* to his *Allgemeine Staatslehre*, Jellinek continuously sought to present a balanced idea of the state which did not reduce the state to “the ruling subject, and there is nothing else to be said.”⁵⁰ As Peter M. R. Stirk correctly stresses,

His [Jellinek’s] opposition to any veneration of power is evident in his approach to the concept of sovereignty and in his theory of the autolimitation of the state. Jellinek argued that the concept of sovereignty was too often treated as a claim to unconstrained power rooted in the idea of sovereignty as ‘*summum imperium, summa potestas*’.⁵¹

Against any sort of hypostatisation of the state, Jellinek emphasized that sovereignty does not mean “lack of limitation,” but rather the capacity for self-limitation.⁵²

This continuous conceptual and legal framework which took shape between the 1880s and the early 1900s has to be taken into account when discussing Jellinek as a political thinker, because his defense of fundamental rights and minority rights is connected with his legal and political idea of state self-limitation.

Nonetheless, if we focus on Jellinek’s political view and spirit as it takes shape and emerges from the writings discussed so far, we observe how the defense of minority rights and individual freedoms seems to represent a value to protect and preserve *per se*, because, as Jellinek states in *Das Recht der Minoritäten*, some of the best innovations in human history were initiated by minorities, and minorities can exist and contribute positively to the development of society only if individual rights and freedoms are granted. These rights and freedoms, in Jellinek’s view, can act as a powerful bulwark against massification and social conformism.⁵³ At the same, granting minority rights represents a capital issue not only within society, but also within the legislative body. It is in this sense that we can better understand why, once again in *Das Recht der Minoritäten*, Jellinek dedicates so much attention and such thorough analysis to the American insistence on the importance of the protection of fundamental rights. This attitude, as Jellinek

50 Andreas Anter, *Max Weber’s Theory of the Modern State: Origins, Structure and Significance* (New York: Palgrave Macmillan, 2014), 50.

51 Peter M. Stirk, *Twentieth Century German Political Thought* (Edinburgh: Edinburgh University Press, 2006), 22.

52 Jellinek, *Allgemeine Staatslehre*, 180.

53 Idem, *Das Recht der Minoritäten*, 26.

stressed, was based on the centrality of the Constitution, and it was characterized by “the hypertrophy of constitutional legislation, since when a provision was included in the constitutional text, the parliamentary minority is provided with a powerful tool to prevent the majority from abusing its legislative power.”⁵⁴

Jellinek’s sensitivity to the questions of fundamental rights and the rights of minorities may well have been due in part to his having been part of a minority and also to the years he spent in the Austro-Hungarian monarchy, a multinational state made up of numerous ethnic minorities. His life-experience might have had an influence on his *Weltanschauung*, and his personal sensitivities, but the aforementioned works demonstrate clearly how, behind Jellinek’s interest in minority rights, liberty and fundamental rights, there was an actual attempt to understand how to avoid despotic rule, how to avoid the tyranny of the majority, how to establish a constitutional state, and how to create a true “liberal society.”

In this sense, from the perspective of the history of political thought, I agree with the distinguished European scholar of the history of political thought, the Italian Salvo Mastellone, who decided, in his book on *Storia del pensiero politico europeo* (*History of European political thought*), to include Jellinek among the “spiritual fathers” of nineteenth-century European liberalism.⁵⁵

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54 Ibid.

55 Salvo Mastellone, *Storia del pensiero politico europeo: Dal XV al XVIII secolo* (Turin: UTET, 2004), 167.

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