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J. G. FICHTE

Foundations of Natural Right

According to the Principles of the Wissenschaftslehre

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Contents

Introduction

J. G. Fichte wrote *Foundations of Natural Right* in 1795–6, shortly after he had stunned the German philosophical world with his ambitious attempt to reconceive the foundations of Kant's Critical Philosophy in his *Wissenschaftslehre* (*Doctrine of Knowledge*), first published in 1794. Fichte was only thirty-four years old when he finished the *Foundations*, but by this time he already occupied a prestigious Chair at the University of Jena and was widely regarded (though not by Kant himself) as the brilliant young philosopher who would carry on the philosophical revolution that Kant had begun. Although politics played a prominent role in Fichte's thought from the beginning to the end of his career, this relatively early book remains his most comprehensive and sophisticated work in political philosophy.

Published in 1796–7, just before Kant addressed many of the same issues in his *Metaphysics of Morals* (1797),[1] the *Foundations* represents Fichte's attempt to establish the basic principles of a liberal political order by bringing a Kantian perspective to bear on the problems of legitimacy and right (*Recht*) that had been raised, but imperfectly resolved, by Hobbes, Locke, and Rousseau. (The German term *Recht* has no single English equivalent; it encompasses all of what English-speakers mean by "right," "law," and "justice.") Most importantly, Fichte's treatise is a defense of the claims that all individuals – all adult rational beings, regardless of social class – possess a set of natural rights

[1] The situation is more complicated than this. Part I of the *Foundations* was published before the whole of *The Metaphysics of Morals*, but the first part of the latter work, the "Doctrine of Right," appeared in January 1797 and hence before the publication of Part II of the *Foundations* in autumn of the same year. This enabled Fichte to make reference in Part II (§20.V) to certain of Kant's claims in the first part of *The Metaphysics of Morals*. (See editor's notes to §20.V.)

Then, if the transgressed party enforces his own rights and if the transgressor must fully submit, his hands bound, to the transgressed party's judgment and its implementation, who will guarantee to the transgressor that the transgressed party will not either intentionally exceed the limits of the law of coercion or make a mistake in applying it to the present case? Therefore, even the party being penalized would have to place an unheard of and impossible trust in the other's rightfulness, impartiality, and wisdom, [148] at a time when he no longer trusts the other at all. This is, without a doubt, contradictory.

Therefore, such a contract, as we have presented it here, is contradictory and simply unrealizable.

Such a contract could be realized only if the injured party were always the more powerful one – but only up to the limit dictated by the law of coercion deduced here – and then were to lose all power when he reached that limit; or – in accordance with the formula presented above – only if *each party were to have exactly as much power as right*. Now as we have also seen above, this occurs only within a commonwealth. Thus, the right of coercion can have absolutely no application apart from a commonwealth: otherwise, coercion is always only problematically rightful, and for this very reason it is always unjust actually to apply coercion, as if one had a categorical right to it.

(Accordingly, there is no *natural right* at all in the sense often given to that term, i.e. there can be no rightful relation between human beings except within a commonwealth and under positive laws. – *Either* there is thoroughgoing morality and a universal belief in such morality; and furthermore, the greatest of all coincidences takes place (something that could hardly occur, even if everyone had the best intentions), namely, the claims made by different human beings are all compatible with one another. In this case the law of right is completely impotent and would have nothing at all to say, for what ought to happen in accordance with the law happens without it, and what the law forbids is never willed by anyone. – For a species of perfected moral beings, there is no law of right. It is already clear that humankind cannot be such a species, from the fact that the human being must *be educated* and must *educate himself* [*sich erziehen*][11] to the status of morality; for he is not moral by nature, but must make himself so through his own labor.

[11] This is the same term Fichte used in §3 to characterize the summons that one free subject must address to another if self-consciousness is to be possible. See n. 5, p. 38.

Or – the second possibility – there is no thoroughgoing morality, or at least no universal belief in it. In this case the external law of right exists, but [149] can be applied only within a commonwealth. Thus, natural right disappears.

But what we lose on the one side, we recover on the other, and at a profit; for the state itself becomes the human being's natural condition, and its laws ought to be nothing other than natural right realized.)

[150] THIRD CHAPTER OF THE DOCTRINE OF RIGHT ON POLITICAL RIGHT [*STAATSRECHT*], OR RIGHT WITHIN A COMMONWEALTH

§16

Deduction of the concept of a commonwealth

The problem that we were left with, that we could not solve, and that we hope to solve through the concept of a commonwealth, was this: how to bring about a power that can enforce right (or what all persons necessarily will) amongst persons who live together.

(I) The object of their common will is *mutual security*; but since, as we have assumed, persons are motivated only by self-love and not morality, each individual wills the security of the other only because he wills his own, willing the other's security is subordinate to willing one's own; no one is concerned whether the other is secure against oneself, except to the extent that the other's security is the condition of one's own security against the other. We can express this briefly in the following formula: *Each person subordinates the common end to his private end*. (This is what the law of coercion reckons with; [151] by linking the welfare of each in reality to the security of the welfare of all others, the law of coercion is meant to produce this reciprocity, this necessary conjunction of the two ends, in the will of each individual.)

The will of a power that exercises the right of coercion cannot be constituted in this way; for, since the private will is subordinated to the common will only through coercive power, and since this coercive power is supposed to be superior to all other power, the private will of the coercive power could be subordinated to the common will only by its own power, which is absurd. Therefore, the coercive power's private

will must already be subordinated to and in harmony with the common will, and there must be no need to bring about such subordination and harmony, i.e. the private will of the coercive power and the common will must be one and the same; the common will itself, and nothing else, must be the private will of the coercive power, and this power must have no other particular and private will at all.

(II) Thus, the problem of political right and (according to our proof) of the entire philosophy of right is *to find a will that cannot possibly be other than the common will.*

Or, in accordance with the formula presented earlier (one that is more in keeping with the course of our investigation), the problem is: *to find a will in which the private and the common will are synthetically united.*

We shall solve this problem in accordance with a strict method. Let us call the will we are seeking X.

(a) Every will has itself (in the future) as an object. Everything that wills has self-preservation as its final end. The same goes for X; and so self-preservation would be *the private will* of X. – Now this private will is supposed to be one with the common will, which wills the security of the rights of all. Therefore, X, just as it wills *itself*, wills *the security of the rights of all.*

(b) *The security of the rights of all* is willed only through the harmonious will of all, through the concurrence of their wills. *It is only in this regard* that *all* agree; [152] for in all other matters their will is particular and directed to their individual ends. In accordance with our assumption of universal egoism (which the law of coercion presupposes), no individual, no single part of the commonwealth, makes this an end for himself; rather, only *all* of them, taken as a whole, do.

(c) Thus X would itself be this *concurrence* of all. This concurrence, as surely as it willed *itself*, would also have to will the security of the rights of all; for it is one and the same as that security.

(III) But such *concurrence* is a mere concept; now it should not remain so, but ought rather to be realized in the sensible world, i.e. it ought to be brought forth in some particular external expression and have effect as a physical force.

For us, the only beings in the sensible world that have wills are human beings. Therefore, this concept would have to be realized in and through human beings. This requires:

(a) That the will of a certain number of human beings, at some point

in time, actually becomes harmonious, and expresses itself or gets declared as such. – The task here is to show that the required concurrence does not take place of itself, but rather is based on an *express act* of all, an act *that takes place in the sensible world and is perceptible at some point in time and is made possible only through free self-determination.* Such an act is implied by a proof already presented above. That is, the law of right says only that each person should limit the use of his freedom through the rights of the other, but it does not determine how far and to which objects the rights of each ought to extend. These latter determinations must be expressly declared, and declared in such a way that the declarations of all are harmonious. Each person must have said to all: I want to live in this place, and to possess this or that thing as my own; and all must have responded by saying: yes, you may live here and possess that thing.

Our further investigation of this act will yield the first section of the doctrine of political right, *on the civil contract* [*vom Staatsbürgervertrage*].

[153] (b) That this will be established as the steadfast and enduring will of all, a will that each person – just as certainly as he has expressed this will in the present moment – will recognize as his own so long as he lives in this place. In every previous investigation it was always necessary to assume that such willing for the entire future is present in a single moment, that such willing for all future life occurs all at once. Here, for the first time, this proposition is asserted with justification.

Because the present will is established as valid for all time, the common will that is expressed now becomes *law.*

(c) This common will determines both how far the rights of each person ought to extend, in which case the legislation is *civil* (*legislatio civilis*); and how a person who violates these rights in one way or another ought to be punished, in which case the legislation is criminal or penal (*legislatio criminalis*, *jus criminale*, *poenale*). Our investigation of this will yield the second section of the doctrine of political right, on *legislation.*

(d) This common will must be equipped with a power – and indeed a superior power, in the face of which any individual's power would be infinitely small – that will enable it to look after itself and its preservation by means of coercive force: *the state authority.* This authority includes two elements: the right to judge, and the right to execute the judgments it has made (*potestas judicialis et potestas executiva in sensu*

strictiori,[12] both of which belong to the *potestas executiva in sensu latiori*[13]).

(IV) The common will has actually expressed itself at some point in time, and – by virtue of the civil contract that has been reached concerning it – has become universally valid as law.

In accordance with the principles established thus far, there can be no difficulty at all in seeing what this universal will will be, with regard both to the determination of each individual's rights, and to the penal laws [*Strafgesetze*]. But this will is still open-ended and has not yet been set down anywhere, nor has it been equipped with any power. The latter must occur if this will is to endure and if the previous [154] insecurity and war of all against all are to be prevented from returning again soon. The common will, as a mere will, is realized, but not yet as a power that can preserve itself: and therefore the final part of our problem remains to be solved.

The question seems to answer itself.

That is, those who are thus joined together, as physical persons in the sensible world, necessarily possess power of their own. Now since a person can be judged only by his actions, so long as no one transgresses the law, it can be assumed that each person's private will concurs with the common will, and thus that his power is part of the power of the state. Each person, even if he were privately to develop an unjust will, must always fear the power of all, just as they all must also fear his power, because they can know nothing of the unjustness of his will, which has not yet shown itself in actions. The power of all (which is to be assumed to have been declared in favor of the law) keeps each individual's power within its boundaries; and therefore there exists the most perfect equilibrium of right.

But as soon as someone transgresses the law, he is thereby excluded from the law, and his power is excluded from its power. His will no longer concurs with the common will, but becomes a private will.

Similarly, the person who has been wronged may not participate in executing the common will: for precisely because he has been wronged, his will that the offender pay compensation and be punished is to be regarded as his private will, not the common will. Now according to our presupposition, his private will is kept within its limits only by the

[12] Judicial power and executive power in the narrower sense.
[13] Executive power in the broader sense.

power of the common will. If he were now to be given control over this power for the purpose of executing what (we are assuming) is his private will, then this, his private will, would no longer be limited by the power of the common will, which contradicts the civil contract. Therefore, only a *third party* could be the judge, because this party (it is to be assumed) takes an interest in the entire conflict [155] only to the extent that the common security is endangered, since no private advantage can accrue to this party, regardless of who is allowed to keep the contested possession; therefore, it is to be assumed that the third party's will concerning this conflict is nothing other than the necessary, common will and is entirely free from influence by its private will, which remains completely silent and finds no application. –

(V) But it is always possible for the third party – out of some inexplicable preference for one of the parties, or because some benefit actually does accrue to it, or even out of error – to pronounce an unjust verdict and to carry it out in alliance with one of the parties to the suit. These two would then be united in an unjust alliance, and the superior power would no longer reside on the side of the law. Or to express this in more general terms:

In a situation of the kind just posited, it is possible for several persons to unite against one or against several weaker ones, in order to oppress them with their common power. In such a case, their will is indeed a will they share as oppressors, but it is not the common will, since the oppressed have not given their will to this arrangement: the oppressors' shared will is not the common will that had previously been made into law, a will to which those now being oppressed had also consented. It is therefore not the will of the law, but rather a will directed against the law, though one that possesses superior power. As long as it remains possible for such an alliance to exist, contrary to the law and on the side of injustice, the law does not have the superior power it ought to have, and our problem has not been solved.

How can such an alliance be made impossible?

According to our presupposition, each individual wills the common end, or right, because he wills his own private end; each desires public security because he desires his own security. Therefore, it is necessary to find an arrangement whereby individuals could not ally themselves against others without [156] surrendering – in consequence of some infallible law – their own security.

Now it is obvious that, given this kind of alliance, if it is possible once for a group of people within the state to unite against individual citizens and oppress them, then it is possible a second and third time as well; therefore anyone who now allies himself with the oppressors must fear that, in accordance with his own maxim, his turn may also come to be oppressed. However, it is still possible that everyone might think: but that won't happen to me; I, for one, will be clever enough always to manage to be on the side of the stronger, and never on the side of the weaker.

It is necessary to make this thought utterly impossible. Each person must be convinced that the oppression and unrightful treatment of *one* citizen will result with certainty in the same oppression and treatment of himself.

Such certain conviction can be produced in a person only by a law. Therefore unjust violence, by virtue of having occurred once and in a single case, would have to be made *lawful*. If something has occurred just once, then – precisely because it has occurred – everyone would have to have the full right to do the same thing. (According to the formula stated above: every deed that is allowed to occur would necessarily have to be made into a law, and so the law would then necessarily have to become a deed.)

(This proposition is grounded in the very nature of what is at issue here. The law is the same for all; therefore, if the law allows one person to do something, it must necessarily allow all to do it.)

But this proposal cannot be carried out: for if it were, the law itself would cancel out right and justice for all time. For precisely this reason, the law of right cannot imply that such injustice is to be declared just; rather, it can imply only that such injustice must absolutely not be allowed to occur in a [157] single case, for allowing such injustice to occur in a single case would necessarily result in its being legitimized, not only in thought, but also in reality. How this is to be arranged will soon become clear, when we return to take a closer look at the concept, presented above, of the law's power. We shall soon see how this must happen, when we return to take a closer look at the principle presented above.

We have said that the state's coercive power can preserve itself only on the condition that it be continually efficacious; therefore, it will be destroyed forever if it is inactive even for a moment; it is a power whose

existence at all depends on its *existence, or expression, in every single case*: and since this order of things cannot come into being on its own (at least not uninterruptedly and in accordance with a rule), it would have to be established by a fundamental law of the civil contract.

The required order of things gets established through the following decree: the law shall have absolutely no validity for future cases until all previous cases have been decided in accordance with it: no one shall be granted relief under a law until all previously aggrieved parties who have pursued their claims under the same law have been granted relief; no one shall be punishable for an offense under a law, until all previous offenses under the same law have been discovered and punished. – But since law in general is really only one law, it cannot pronounce anything in its particular applications, if it has not first resolved all the previous claims arising under it. Ensuring that previous claims have been resolved would have to be the job of the law itself: in doing so, the law would be prescribing a law to itself; and a law of this kind, one that returns into itself, is called a *constitutional* law.

(VI) Now if this order of things involving the administration of public power is itself secured by a law of coercion, then universal security and the uninterrupted rule of right will be firmly established. But how is this order itself to be secured?

[158] If – as we are still assuming here – the populace as a whole [*die ganze Gemeine*] administer the executive power, then what other power is there to force them to live up to their own law concerning the chronological order in which the executive power is to be exercised? Or, what if the populace, out of good intentions and devotion to the constitution, lived up to that constitutional law for a while, but because they were unable or unwilling to grant relief to someone who had been aggrieved, the administration of justice came to be suspended for a time? In such a case, the resulting disorders would soon become so great that the populace, out of necessity, would act contrary to their own constitution and would have to quickly pounce upon new offenses, before punishing the old ones. This standstill in the laws would be the populace's punishment for their laziness, negligence, or partisanship; and how should the populace be forced to inflict this punishment upon themselves and to endure it? – The populace would be their own judge in the administration of justice. Out of convenience or partisanship, the populace would allow many things to go unpunished, as long as the

resulting insecurity did not progress too far; and if the insecurity were to increase and make itself felt by the majority, then they would pounce, with an unjust and passionate harshness, on those offenders who have been emboldened by the previous leniency and who now expect the same leniency in their own cases, but who are unfortunate enough to be offenders precisely at this time, when the populace are being roused to act. This would continue until the resulting terror became widespread, the populace fell back into a slumber, and the cycle began all over again. This kind of constitution, the *democratic* one in the truest sense of the word, would be the most insecure there could be, since one would have to fear not only the violent acts of all the others just as he would outside the state, but also, from time to time, the blind fury of an enraged mob that acts unjustly in the name of the law.

Thus our problem has still not been solved, and the condition of human beings under the constitution just described is as insecure as it would be without a constitution. The real [159] reason for this is that the populace are simultaneously both *judge and party* in the administration of right.

This formulation suggests how the problem is to be solved. In the administration of justice, judge and party must be separated, and the populace cannot be both at the same time.

The populace cannot be the party being judged in this kind of proceeding. For, since the populace are, and ought to be, supremely powerful, a judge would never be able to carry out his verdict against the populace by force. The populace would have to submit voluntarily to his verdict. But if they do so, then they value justice above all else; and if we were to assume this about them as a general rule, there would be no need for a judge, and the judge would not in fact be one, but only an advisor. If the populace do not will right, then they will not submit to it, since they cannot be coerced; they will reproach the bearer of the unwelcome verdict for being blind or disloyal, and they will remain, as before, their own judge.

To summarize: the judgment as to whether state power is being applied in accordance with its proper end must be made in accordance with some law. In this matter, the same person (whether physical or mystical) cannot simultaneously be both the judge and the party being judged. But the populace (who, in a legal matter such as this, must be one or the other) cannot be a *party*; therefore – and this is the important

conclusion we draw here – the populace cannot administer public power, because, if they did, they would have to present themselves as a party before a higher tribunal.

(It is crucial that one be convinced of the conclusiveness of the reasoning just presented, for it contains, so far as I know, the very first strict deduction, based on pure reason, of the absolute necessity of representation within a commonwealth.[14] Moreover, it shows that representation is not just a beneficial and prudent arrangement, but one that the law of right demands absolutely, and that democracy in the sense explained above is not just an impolitic constitution, but entirely opposed to right. [160] The claim that the populace cannot be both judge and a party at the same time might not give rise to much doubt, but perhaps our other claim will, namely, that whoever administers public power must be made absolutely accountable. Yet this claim follows from everything we have said thus far. Every individual who enters into the state must be convinced that it is impossible for him ever to be treated contrary to the law. But being treated thus is a possibility if whoever administers the law cannot himself be made accountable for what he does.)

Therefore, the populace would have to alienate the task of administering public power; they would have to transfer it to one or several particular persons who would nevertheless remain accountable to them in administering it. A constitution in which the one who administers public power is not accountable is *despotism*.

It is, therefore, a fundamental law of any constitution that accords with reason and right that the *executive power* (which includes within it, as inseparable, the judicial power and the executive power in the narrower sense) and *the right to oversee and judge how such executive power is administered* (which I shall call the *ephorate* in the broadest sense of the word) are to be separate; and that this right to oversee and judge is to remain with the populace as a whole, but the executive power is to be entrusted to particular persons. Thus no state may be governed *despotically*, or *democratically*.

[14] This use of "representation" derives from Kant's use of the term in *Perpetual Peace* (p. 101). According to Kant, a representative government is one in which executive authority is not exercised by the people as a whole but delegated to a smaller group of individuals, who then become the people's "representative" in executing the law. Defined in this way, representation is the direct opposite of democracy "in the proper sense of the term." See n. 16, p. 14.

(Much has been said concerning the separation of powers (i.e. of the *pouvoirs*, the parts of one and the same public power). It has been said that the legislative power must be separated from the executive power; but this statement seems to contain something indeterminate in it.

It is true that, for each particular person, particular positive law becomes *law* and binding with respect to its *form*, only insofar as the person subjects himself to the law, i.e. only insofar as he declares: I want to live in this particular state, which includes this particular people, this land, these means of livelihood, and so forth. But the *content* of law, at least of civil law (other branches of legislation will be discussed separately), comes from the mere assumption that [161] these particular human beings, in this particular place, want to live alongside one another *in accordance with right*; and each person subjects himself to the law by declaring: I want to live with you people, and to do so in accordance with *all* the just laws that might ever be given in this state. Since those who administer the executive power are charged with presiding over right in general and are responsible for seeing to it that right prevails, it must be left up to them to care for the means by which right is to be realized, and therefore even to draft the ordinances themselves, which are not really new laws, but only more determinate applications of the one fundamental law, which states: these particular human beings are to live alongside one another in accordance with right. If those who hold power apply this fundamental law incorrectly, disorders will quickly develop for which they will be accountable; and thus they will be compelled to issue just laws, ones that every rational person could approve.

Separating the judicial from the executive power (the latter understood in the narrower sense of the word) is completely futile, and is possible only in appearance. If the executive power must carry out the verdict of the judicial power without any opportunity to object, then the judge himself holds unlimited power in his hands, and the two powers only seem to be separated in the two persons. But of the two, the one who carries out the verdict has no will at all, but only physical power directed by an external will. But if the executive power has the right to veto the verdict, then it is itself a judicial power – it is indeed the ultimate judicial power – and the two powers, once again, are not separate. – According to our investigation, the executive power (in the broadest sense of the word) and the ephorate are to be separate. The

former includes the entire public power in all its branches; but with respect to how such power is administered, the executive power must be made accountable to the ephorate (the concept of which is still far from being fully defined here).)

According to the usual classification, the executive power is entrusted [162] either to one person, as in a lawful and rightful *monarchy*, or to a body of persons organized under a constitution, as in a *republic* (in the narrower sense of the word): or to be more precise, the executive power is always held by a corps of persons, since one person can never do everything on his own. Thus the only difference between a monarchy and republic is that, if there is no unanimity within the corps of persons, the dispute is settled either by the unappealable decision of a life-long president (the monarch), or by some collective voice, such as a majority vote. In the latter case, the perpetual president is a mystical and often mutable person (i.e. those whose voices constitute a majority of votes and who decide the dispute without the possibility of appeal are not always the same physical persons).

Further, those who administer the executive power are either elected or not. In the former case, either *all* or only *some* are elected. In a *democracy* (in the narrower sense of the word, i.e. a representative, and therefore rightfully constituted, democracy), they are elected directly by the populace. If *all* persons in authority are directly elected by the populace, it is a *pure* democracy; if not, it is a *mixed democracy*. In an *aristocracy*, the corps of those who hold power can also vote to fill their own vacancies; if they fill all their own vacancies, it is a *pure* aristocracy; if they fill only some of them (such that the people elect some of the magistrates directly), it is a *mixed aristocracy*, or an *aristo-democracy*. It is also possible for a perpetual president of the government to be elected, in the case of an *elective kingdom*.

In all these cases, the vote is taken either from the entire populace (such that every citizen is eligible to vote) or only from a part of it. Thus the right to vote is either limited or unlimited. The only true limitation of the right to vote is when eligibility is based on birth; for, if each citizen can attain any office within the state, but [163] can ascend to the higher ones only step by step from the lower ones, then the vote is not absolutely, but only relatively, limited. But if the right to vote is absolutely limited and eligibility to vote is based on birth, then the constitution is a *hereditary aristocracy*; and this brings us to the second

possible scenario mentioned above, namely that the representatives are not personally elected.

That is, it is possible for the representatives to be such by birth; either they attain their status as representatives solely by birth (as does the crown prince in every hereditary monarchy); or they are, by virtue of their birth, at least the only ones eligible to vote for the highest state offices (as is the nobility in general in monarchies, and the patricians in particular in hereditary–aristocratic republics).

It is through the law (i.e. through the original will of the populace who give themselves a constitution), that each of these regimes obtains the force of right. All are rightful regimes as long as an ephorate is present; and all can produce and maintain universal right within a state, as long as the ephorate is efficacious and properly organized.

The question concerning which governmental constitution is best suited for a particular state is not a question for the doctrine of right but for politics; its answer depends on which constitutional form will enable the ephorate to function most strongly.

In cases where an ephorate has not yet been established, or where – because the majority are still barbarians – it cannot be established, hereditary representation is the most advantageous form. This is because someone who holds power unjustly and fears neither God nor any human tribunal, will at least fear the revenge that – because of all his wrongs – will pile on top of his (perhaps innocent) descendants and, in accordance with the necessary course of nature, come crashing down on them with complete certainty.

(VII) The persons to whom the populace have offered the execution of public power must have accepted it, and must have made themselves accountable for [164] how they administer it before the tribunal of the populace; otherwise, they would not be representatives and power would not have been transferred to them.

Their acceptance of public power must be voluntary, and both parties (the populace and representatives) must reach a good-faith agreement about it. For, although the law of right requires that there be public power as well as persons who are expressly appointed to administer it; and although there therefore exists a right to coerce each person to agree to the establishment of such power; nevertheless, the law of right says nothing about which particular persons should be given this power.

Here we shall follow the very same reasoning we followed above in

our examination of the contract concerning private property. Since the law of right cannot be applied at all unless a public power has been established, and since such a power cannot be established unless it is transferred to particular persons, it follows that there is a right to coerce each person to give his particular consent to the appointment of these persons; further, there is a right to coerce each person to decide (in the event that he is elected) whether he will accept the office or not. The election (and here this means the determination of how in general the representative positions in this state are to be filled, i.e. the entire section of the constitution dealing with this issue) must be established through the absolute *agreement of all.* For, although there is also a general right to coerce each person to enter into a civil constitution, there is no right to coerce a person to enter into any particular one. Now since a state becomes a particular state by virtue of both the persons who hold power and by the law that establishes how they are to be elected, no one has a right to force someone else to recognize as his own the representative or representatives that the first person has recognized. If people cannot agree about which representatives are to be recognized, the larger and therefore stronger group will lay claim to the territory in which they live, and the others (since they can no longer be tolerated in the same territory) will have a choice: either to join the majority, in which case the vote [165] becomes unanimous; or to leave the territory and thus no longer count themselves as belonging to this union, in which case the vote, once again, becomes unanimous. Since, in general, a contract becomes inviolable and irrevocable when (but *only* when) a rightful relation would not be possible without it, this also holds for the contract in which the state transfers executive power to particular persons, and which we shall call the transfer contract [*Uebertragungscontract*].

Once a person has accepted public power, he may not give it up unilaterally, but only with the consent of the populace, because if his position cannot be suitably filled, his resignation might, at the very least, interrupt the rule of right or even cause it to cease altogether. Similarly, the populace may not unilaterally cancel their contract with him: for the job of administering the state is his position within the state, it was allocated to him as his possession; and insofar as he holds this possession pursuant to the transfer contract, he has no other; this is what was allocated to him, when all the citizens were allocated their

property; therefore if the populace were to cancel the contract unilaterally, there could not be any *rightful relation* between him and the commonwealth. But if he willingly accepts such a cancellation and comes to an agreement with the populace concerning compensation, then he may do so.

Furthermore – since, under this contract, the one who administers public power makes himself accountable for seeing to it that right and security prevail, he must inevitably insist on having the power (and the free use thereof) that he deems, or ever will deem, necessary for achieving that end; and such power must be granted to him. He must be granted the right to determine what each person should contribute towards promoting the state's ends, as well as the right to apply this power entirely according to the best of his knowledge and conviction. (We shall soon see the extent to which this power must nevertheless be limited.) Therefore, the power of the state must be placed [166] at his free disposal, without any limitation, as is already implied by the concept of state power.

Public power must be used to secure right for all individuals in all cases, and to thwart and punish injustice. It accepts responsibility for doing so, and any undiscovered violation will have the most unfortunate consequences for the state and for public power itself. Therefore, those who administer public power must have the power and the right to keep watch over the citizens' conduct; they have *police power* and *police legislation*.

The foregoing account already implies that in the civil contract, each person has unreservedly subjected his own judgment concerning right to the judgment of the state and to the administrator of state power (now that we have posited such an administrator); and therefore that the administrator of state power is necessarily a judge whose decisions cannot be appealed.

(VIII) Now to which law of coercion is this highest state power itself to be subordinated, so that it can always bring about right, and nothing but right?

We said above in general: it must be physically impossible for the public power, or, in this case, those who administer it, to have a will other than the will of right. We have also already indicated above how, in general, this is to be achieved. Their private end, i.e. the end of their own security and wellbeing, must be linked to the common end and

must be attainable only if the common end is attained. They must be incapable of having any interest other than that of promoting the common end.

Right is merely *formal*; therefore, those who administer public power must be incapable of having any *material* interest whatsoever in their verdicts, any interest in how their verdicts turn out in this or that case. The only thing that can matter to them is that their verdicts accord with right (and certainly not how their verdicts might sound).

[167] Thus first of all, they must be completely independent of all private persons in all of their private ends (i.e. with respect to their needs). They must have an ample and secure income, so that no private person can do them any favors, and so that any inducement they might be offered will come to nothing.

In order not to be led astray into partisanship, those who administer the executive power must have as few friendships, connections, and attachments among private persons as possible.

Above we presented the following principle, aimed at securing equal right for all individuals in all cases: the law shall make its judgments in chronological order and shall not decide any future case until it has dealt with the earlier ones. Now once a regular judicial institution has been established (one that is always at work, perhaps with several things at once); and since some disputes concerning right may be easier to decide than others; and since it is of the utmost importance to avoid delays in the administration of right; it follows that this principle, as presented above, must cease to apply. But this judicial institution must always be able to prove that it is actually at work investigating all of the claims brought before it: furthermore, it is absolutely necessary that a definite time be fixed (according to the type of dispute at issue) within which each claim must be fully dealt with; otherwise, the law would lose its force (as implied by the principle stated above). Without these requirements, it would be completely impossible to tell whether everyone has really been treated rightfully; and no one could ever complain that he has been denied his rights, since the judge could always silence him by saying that his claim will be dealt with in the future.

But the following is a sure criterion for determining whether right is being administered as it should. The judgments and procedures of those who hold public power may never contradict themselves; they

must always handle a new case in the same way they handled a similar case in the past. Each of their public actions must be made into an inviolable law. This commits them to doing what is right. They can never will to proceed unjustly, [168] for if they did, they would have to do the same from now on in all similar situations, in which case the most obvious insecurity would soon result. Or, if they are later forced to deviate from their first maxim, everyone will immediately see that they proceeded unjustly.

In order to enable people to judge whether right is being administered as it should, all the proceedings of those who hold state power, along with all the circumstances and reasons for their decisions, must, without exception, be fully publicized – at least after each case has been closed. For in certain cases involving the police, state power might have to be exercised in secret, in order to ensure public safety (for which those who hold public power are accountable to the populace). Those who administer public power must be granted this much, but once public safety is ensured, their proceedings may no longer remain secret. And public safety is ensured, once their verdict has been pronounced and carried out.

(IX) If those who hold power administer their office according to the laws we have been describing, then right, justice, and security will prevail, and each person, on entering the state, will be fully guaranteed what is his. But since honesty and trust cannot be presupposed, how will those who hold power themselves be forced to adhere to these laws? This is the final issue to be addressed in solving the problem of a rational state constitution.

The executive power has the last word in judgments concerning right; its final judgments cannot be appealed; no one *may* (since such unappealability is the condition of any relation of right whatsoever) and no one *can* (since the executive branch has superior power, relative to which all private power is infinitely small) invalidate the executive power's judgments or prevent them from being carried out. Presumptive right, which is constituted as certain right, has spoken in the person of the judges, who have been declared infallible. Upon their judgment, every case must come to an end and every verdict must be carried out infallibly in the sensible world.

There are only two situations that clearly prove that the constitution has been violated: (1) where the law [169] has not been brought to bear

on a particular case within the prescribed amount of time; and (2) where those who administer public power contradict themselves or must commit obvious injustices in order not to contradict themselves.

Furthermore, it has been proved that only the populace can sit in judgment of those who administer the executive power. But there is a difficulty here: where, and what, is "the populace"? Is it anything more than a mere concept, and if it is supposed to be more, then how is it to be realized?

Before the tribunal of public power – and since this tribunal continues to exist without interruption and without end – all the members of the state are only private persons, and not the populace; each is always subordinate to the superior power of the state. Each person's will is only his private will, and the common will is expressed only through the will of the superior power. The populace, as such, do not have a separate will and cannot actualize themselves as the populace, until they have detached their will from the will of the executive power and retracted their declaration that the executive power's will is always their own.

But how can this happen? No private person has the right to say: the populace ought to convene, all individuals who until now have been private persons ought to come together and be the populace; for if this individual's will does not accord with the will of those who hold public power (a will that still does represent the common will), then the individual's will is a private will, one that contradicts and rebels against the common will and thus one that constitutes a rebellion and must immediately be punished as such. But the will of this individual will never accord with the will of those who hold public power, and those who hold public power will never want to convene the populace. Those who hold public power either know that their administration is just, in which case it would completely contradict the original common will if, in the absence of an emergency, one were to disturb individuals in their private affairs and interrupt the administration of right; or else they [170] know that they have acted contrary to right; in which case it is implausible that they will surrender the power that they still hold and will themselves call the populace together to be their judge. Thus, they continue to be their own judges; there is no higher judge for them to fear, since the very existence of such a judge depends on their decision to call the populace together; and the constitution remains, now as before, despotic. – In sum: only the populace can declare themselves to

be the populace; and thus – before they can declare themselves to be the populace – they would have to convene as the populace, which, as one can see, is contradictory.

There is only one way to eliminate this contradiction: *The constitution must specify in advance the circumstances under which the people shall come together as the populace.*

The most obvious scenario is that such a constitutional law could prescribe that the people assemble on a regular basis at certain, specified times, so that the magistrates could give them an account of how the state is being administered. Such an arrangement is feasible in small states (especially republics), where the population is not widely dispersed, and thus where they can convene easily and without taking up much time, and also where the state administration is simple and easy to assess. But even in small states, this momentous legal proceeding tends to lose its dignity when people become too accustomed to it; also, individuals will have time to prepare in advance for it, the usual result of which is that the private will of scheming, ambitious parties will prevail over the common will. But in a state of considerable size – and in several respects it is better for states not to be small – a constitutional law of this kind would not even be feasible. For, even abstracting from the fact that, in a large state, the above-mentioned abuses would occur only more extensively and with greater danger, regular assemblies would necessarily take up people's time and interfere with their private lives, so that their concern to protect themselves from such disruptions would itself become the biggest disruption of all.

Therefore, it is possible to establish the following principle: *The populace must never be convened except when it is necessary; but as soon as it* [171] *is necessary, they must come together immediately, and be willing and able to voice themselves.*

It will never be necessary for them to convene (and they will also never want to convene), unless right and the law have ceased to function altogether; but in that case they must, and surely will, convene.

In a rightfully ordered state, right and law in general must be linked to the rights of each individual; therefore, the law must be completely nullified wherever it has clearly failed to function as it ought (i.e. if a case has not been resolved within the specified amount of time, or if power has been applied in a contradictory manner, or if some injustice or violation is otherwise obvious).

But now who is to judge whether the law has thus failed? Not the populace, for they are not convened; not the state authorities, for they would then be judges in their own case. Even less can it be the person who believes that he has suffered injustice, for then he, too, would be judge in his own case. Therefore – *the constitution must establish a particular power expressly for the sake of judging whether the law has failed to function as it should.*

This power would have to oversee continuously how public power is administered, and thus we can call it the *ephors.*

The executive power is accountable to no one other than the assembled populace; thus the ephors cannot sit in judgment of those who hold public power; they must, however, constantly observe how state business is conducted. They therefore have the right to make inquiries wherever they can. The ephors may not block the judgments of those who hold public power, for such judgments cannot be appealed. Neither may the ephors themselves issue a verdict in a particular case, for the magistrative authority is the only judge in the state. *Thus the ephors have absolutely no executive power.*[c]

[172] But they do have an *absolutely prohibitive* power; not to prohibit this or that *particular* verdict from being carried out, for in that case they would be judges, and the executive power would not be unappealable; but rather to nullify henceforth all administration of right whatsoever; to suspend public power completely and in all of its parts. This nullification of all enforcement of right I shall call *state interdict* (by analogy to interdict within the church. The church long ago invented this infallible device to enforce the obedience of those who need her.).

Therefore, it is a principle of any rational and rightful state constitution that an *absolutely negative* power is to be posited alongside the *absolutely positive* one. Since the ephors hold no power at all and the executive power holds an infinitely superior power, one might well ask how the former, on the basis of their command alone, can coerce the latter to suspend its operations. But this coercion will come of its own accord. For the publicly announced suspension of the executive power

[c] In this respect, the ephorate (in the narrower sense of the word) that has been deduced here on the basis of pure reason is completely different from the ephorate in the [172] Spartan constitution, from the state inquisition of Venice, and the like. The *people's tribunes* in the Roman republic bear the closest resemblance to the ephorate discussed here.

is simultaneously an announcement that, henceforth, anything decided by the executive power is invalid and unenforceable as a matter of right; and it is only natural that, from that moment onward, parties whose claims have been denied by the executive power will no longer submit to its judgments, and – by the same token – parties who have won their cases before the tribunal of the executive power will no longer rely on its judgments.

Furthermore, the interdict declares that those who had previously administered the executive power are merely private persons and that all their orders commanding the use of power are unenforceable as a matter of right. From the moment of the interdict onwards, any use of power based on their command is an act of resistance against the common will as declared by the ephors, and is therefore an act of rebellion and must be punished as such, and so – as we shall soon see – will be punished with absolute certainty.

Can the magistrates [173] expect to incur a more severe punishment for resisting the ephors' interdict, than they would incur if their case is brought before the populace? This cannot be, for in the latter case, the highest possible punishment awaits them anyhow. However, if they resist the ephors' interdict, they are treating their case (a case they could still win) as a lost cause; and so by resisting the interdict they already incur – even before the reasons for imposing the interdict can be examined – the highest possible punishment, one they still might have been able to escape. Thus the magistrates are not likely to resist.

The announcement of the interdict is at the same time a call for the populace to convene. The populace are compelled, by this the greatest misfortune that could befall them, to assemble immediately. The ephors are, by the nature of their role, the accusing party, and they have the floor to state their case.

To say that the populace ought to convene does not mean that every person from every part of the (perhaps very extensive) state is supposed to gather in one place (which might be completely impossible in many cases); rather, it means only that everyone is to take part in the proposed investigation, which can certainly be discussed in every city and village of the realm, and that everyone is to cast his vote concerning it. How this is to be arranged so that the result truly reflects the common will, is a question for politics and certainly not for the doctrine of right. But, for a reason we shall indicate below, it is necessary in this kind of

proceeding that, here and there, large groups of the people actually do come together in one place.

Whatever the populace decide becomes constitutional law.

Therefore, it is necessary first of all for the populace to decide that the interdict announced by the ephors is formally valid as a matter of right – regardless of what they think about the content of the dispute – and that any resistance to it is to be punished as a form of rebellion. If they should decide otherwise, they would be annulling the entire interdict, and thus also nullifying the ephorate's very efficacy, and therefore, in essence, nullifying the ephorate itself, assigning to themselves [174] a superior power with no accountability, i.e. the populace would be establishing a despotism, which is contrary to the law of right and altogether unlikely. They will not do this, because what is right is bound up with what is advantageous to them.

Furthermore, as regards the content of this proceeding, the judgment of the populace will necessarily be just, i.e. in accordance with the original common will. If they acquit a magistrate who, according to the ephors' charge, had allowed a deed to go unpunished (and there can and must be no doubt concerning the *facts* of the case, and the ephors must see to it that there is none), they would be deciding thereby that such a deed ought never to be punished, but is instead a rightful action, i.e. one that can be done to any one of them as well. If the executive power is accused of acting in a contradictory manner or committing an obvious injustice and if the populace says that there is no such contradiction or injustice, then the populace thereby make the executive power's dubious or apparently unrightful maxim into a fundamental law of the state, in accordance with which each of them also wants to be treated. Therefore, the populace will doubtlessly reflect on the matter very carefully and strive to avoid rendering an unjust verdict.

The losing party, whether the ephors or the executive power, will be guilty of high treason. If the ephors' accusation turns out to be ungrounded, they will have interrupted the administration of right, which is the commonwealth's most important business; if the executive power is found guilty, it will be because it has used the power of the state to stifle the administration of right.

No one will think it excessive that the executive power can be held liable for high treason; but perhaps it might seem so in the case of the ephors. One could argue that it seemed to them that the law was in

danger; they acted according to their conscience and simply made a mistake. But the same can also be said of those who hold executive power, and the following answer applies in both cases: a mistake here is just as dangerous as a bad will, and the law must seek to prevent such mistakes just as vigilantly [175] as it suppresses bad wills. The wisest among the people ought to be elected as magistrates; and especially old, mature men as ephors.

Besides, before announcing any interdict, the ephors will probably negotiate with those who hold power, to try to get them to discontinue or correct their injustice voluntarily and without causing a stir; and by doing this, the ephors will automatically become thoroughly acquainted with what is really involved in the case.

The people's decision is retroactively valid; judgments based on maxims that have been rejected by the people's decision shall be annulled, and persons who have been harmed by such judgments shall be restored to their previous positions; but they shall be restored without detriment to other parties, who acted according to a presumptively valid, albeit now discredited, law of right. Compensation must be provided by the judges who caused the harm. The reason the people's decision is to be valid retroactively is that the losing party was not allowed to appeal against the judge's verdict, since it was necessary to presume that the judge's will agreed with the true, common will: the judgment's validity was grounded on the presumption that the judgment was lawful. Now it turns out that the opposite is the case: this ground no longer obtains, and so neither does the grounded. It is as if the judgment had never been pronounced.

The positive and negative powers – the executors and the ephors – are the parties to be judged before the assembled populace; therefore, they themselves cannot be judges in their own case and do not belong to the populace, who in this context can now also be called *the people* [*das Volk*]. – The ephors bring the suit, as noted above, and so are the accusing party; the executors are accountable for the charges, and so are the defendants.

(To what extent are the magistrates a part of the people? This question, like many others, has been raised before in general terms, and so people have answered it in a general, and therefore [176] one-sided way, because they failed to define the specific circumstances under which they wanted the answer to apply.

Here is the answer. Before the magistrates were elected, they were not magistrates; they were not at all what they now are; they were something different and therefore were part of the people. If magistrates are born as representatives, like a crown prince, then they never were part of the people. Before being elected to state office, persons born into the aristocracy or nobility are private persons and part of the people. They are not magistrates, but only eligible (exclusively eligible) to be elected as such. Since those who are born into the aristocracy and nobility might be biased in favor of the executive power, the constitution must include safeguards to ensure that their voice does not detrimentally influence the decisions of the common will; how this is to be done is a question for politics.

Just as soon as the magistrates have been elected, even before they have accepted their positions, they are no longer part of the people, for they are now negotiating with the people; and in such negotiations, they and the people are two different parties. If they clearly declare that they do not accept the office offered to them, they return to being part of the people.

But if they do accept the office offered to them, they are forever excluded from being part of the people.

In accepting responsibility for public security and right, the magistrates put their own person and freedom at risk, and so they must not merely be able to ratify legislation; they must have a decisive *negative* vote (a veto); i.e. the transfer contract must give them the option of saying: we do not want to rule in accordance with such laws; but then the people must also have the option of saying: if you do not want to rule in accordance with laws that we judge to be good, let someone else rule.

With the completion of the transfer contract, the populace automatically become subjects; and from that point onward, the populace as such no longer exist; the people are not a people, not [177] a whole, but only an aggregate of subjects: and the magistrates, too, are no longer part of the people.

If, with the announcement of the interdict, the populace convene in the manner described, then the magistrates, as we have shown, are parties in the case and once again are not part of the people. If the magistrates win this momentous legal proceeding, they are magistrates once again and not part of the people; if they lose it, their only possible

punishment is exclusion from the state, i.e. banishment, in which case, they again are not part of the people. Accordingly, the magistrates are never part of the people and are forever excluded from the people by the transfer contract.)

(X) The security of the whole commonwealth depends on the absolute freedom and personal security of the ephors. By virtue of their position, their job is to serve as a counter-weight to the executive authorities, who have been endowed with superior power. Thus, first and foremost, it must be completely impossible for the ephors to become dependent on the executive power in matters pertaining to their well-being, and so the ephors must be eminently well paid, as well paid as the executive power. Furthermore, as one would expect, the ephors will be exposed to the snares and threats of the executive power, and will have no defense other than the power of the populace, which, however, are not assembled. Therefore, the law must make them secure in their persons, i.e. they must be declared inviolable (*sacrosancti*). The slightest act of violence against them, or even only the threat of violence, shall be *high treason*, i.e. a direct assault on the state. Such an assault, encouraged or undertaken by the executive power, shall automatically count as an announcement of the interdict; for by assaulting the state in this way, the executive power clearly and directly severs its will from the common will.

Furthermore, the power of the people must exceed beyond all measure the power that the executive officials possess. If the power of the latter could even come close to counter-balancing that of the people, then – if the executive officials wanted to oppose the people – there would at least arise a war between them, something the constitution must make impossible. If the executive officials had superior power, or [178] if they could ever acquire it in the course of a war, they would be able to subjugate the people, which would result in unconditional slavery.

Therefore, a condition of the rightfulness of any civil constitution is that the executive power should never, under any pretext, acquire power that is capable in the slightest of resisting the power of the populace. Every end must be sacrificed to this, the highest possible end, the preservation of right in general.

Moreover, this is precisely why a principal maxim for a rational constitution (and it is necessary to make provisions for implementing

this maxim) is that when the populace convene throughout the country – for instance, in the country's remote villages – they should assemble in groups that are large enough to muster adequate resistance against any possible attempts by the executive officials to oppose them; so that, as a result, once the populace declare themselves as the populace, a very formidable force will have already been mobilized.

(XI) An important question in this connection is: how is the people's decision to be determined? Must their decision be unanimous, or is a majority of votes sufficient, and do those in the minority have to submit to the majority?

As we have shown above, unanimity is necessary where the civil contract is concerned. Each person must declare for himself that he wants to enter into a commonwealth with this particular group of people for the purpose of maintaining right.

The situation was quite different when it came to the election of magistrates. Of course, the minority were not required to accede to the majority; but since they were the weaker party, they could be forced by the stronger party to leave this place (i.e. the place where the majority now want to realize the constitution they have designed), and to take up residence elsewhere. If the minority do not want to leave – and they will hardly want to do so – then they will have to let themselves be bound by the majority's opinion. This is because they would obviously be too weak to resist the majority. Therefore, our proof implies that [179] here, too, there must be a decisive majority, such that there is no chance that violence might break out and no need at all to fear a war (which is always contrary to right): thus the election of magistrates must not rest on a margin of just one or a few votes. Until it is possible to achieve a decisive majority, they will have to try to reach some agreement among themselves.

In deliberations as to whether the accused executive officials have proceeded rightfully or not, there cannot be – in accordance with our premises – a great diversity of opinions. First of all, the *deed* to be judged must be clear, and – given the nature of the issue – it will be. Then the only question is: is this just or not, should it be, for all time, lawful for us, or not? This question is to be answered briefly, and with a decisive "yes" or "no." Thus there can be only *two* opinions, affirmation or denial; a third option is not possible.

Now assuming that the citizens all possess at least ordinary, sound

judgment, this question is very easy to decide and – as was already shown above – it is so directly related to the weal and woe of each individual that because of its very nature, it will always be answered with complete unanimity, such that one can assume in advance that whoever answers it differently from the majority either is partisan or lacks sound judgment. It will be incumbent upon the more sensible citizens amicably to correct those who lack sound judgment and to bring them around to accepting the general opinion. If they cannot be convinced, they will arouse the strong suspicion that they are partisan, and thus dangerous citizens. If they simply cannot agree with the majority's opinion, then, of course, they are not obligated to make their security depend on a law that they do not acknowledge as right: but by the same token, they can no longer live among a people that lets itself be judged in accordance with this law; they must [180] therefore emigrate from the state – without, however, any detriment to their property (to the extent that it is absolute property and can be taken with them, which shall be discussed in good time). Since emigrating may involve substantial inconveniences, it is hardly to be expected that anyone will undertake to do so unless he is firmly convinced that the majority's opinion will destroy general security, and so it is likely that people will accede to the majority's decision, so that the decision turns out to be unanimous. Thus in all cases, my theory, as always, assumes not the rightfulness of the *majority's* opinion, but only the rightfulness of *unanimity*; but I have claimed that those who do not want to submit to the overwhelming majority (which, in our case, could quite easily be set by the constitution at seven-eighths or even higher) thereby cease to be members of the state, thus making the vote unanimous. The main point not to be overlooked is this: the majority of votes, as we have shown, must come very close to being all the votes.

(XII) Under the constitution we have been describing, right, and only right, will infallibly and necessarily prevail, so long as the ephors do not unite with the executive power to oppress the people. This final and most challenging obstacle to a just constitution must likewise be removed.

The ephors ought not to be dependent on the executive power, and it ought to be impossible for the executive power to do favors for them. The ephors must not have any connections, relationships, friendships, or the like with those who administer executive power. The people will

be on guard against such relations, and – if they were to arise – the ephors would immediately lose the people's trust.

Furthermore it is advisable, in fact almost necessary, that those who hold executive power be appointed for life, because they must leave behind their professions in order to serve; but it is equally [181] advisable that ephors be appointed only for a *determinate* period of time, since they do not need to give up their professions in order to serve. Retiring ephors must give to the incoming ephors an account of what took place during their term of office; if some injustice has occurred and continues to make itself felt, the new ephors are immediately obligated to call the populace together by announcing the interdict and to let the populace have their say concerning both the retired ephors and the executive officials. It is obvious that an ephor who has been found guilty is to be punished for high treason. – But to have administered the duties of the ephorate with honor entitles a person to enjoy for life the highest of honors.

The ephors must be appointed by the *people*, not by the executive power (which would obviously be inappropriate); nor can the ephors appoint their own replacements, because the new ephors are the judges of the outgoing ones, and if the outgoing ephors could appoint the new ones, they would be able to insure their own impunity. The constitution must determine the manner in which the ephors are to be elected. No one may petition to become an ephor; the kind of person who should become an ephor is one who has gained the attention and trust of the people (who, precisely in order to fulfill this sublime task of electing the ephors, will continuously notice their great and honest men).

(XIII) If, after these provisions have been made, the ephors should still ally themselves with the executive power in order to oppose the freedom of the people, then such could be possible only if – of all the country's exemplary men who have been elected over time to be ephors – there is not even one who did not become corrupt immediately upon taking office; and furthermore only if every one of these ephors could count on the corruption of all the others with such confidence as to be able to let all of his own security depend on it. This is impossible, or, if it is possible, one could easily conclude: a people so corrupt that those who are universally recognized to be the best among them are of such low morals, do not deserve a better fate than the one they are given. [182] But since a rigorous science must take into account even

the most improbable of scenarios, the following advice applies to such a case.

Any private person who calls the populace together *in opposition to the will* of the executive power (which, as long as the populace are not convened, represents the common will) – and calling the populace together will always be contrary to the will of the executive power, because the latter, by nature, will never want to call the populace together – is, as shown above, a rebel (because his will is rebelling against the presumptive common will and seeking to amass a force against it).

But – and one should note this well – the people[d] are never rebels, and applying the expression *rebellion* to the people is the most absurd thing that has ever been said; for the people, both in fact and as a matter of right, is the highest authority, above which there is no other; it is the source of all other authority, and is accountable only to God. When the people assemble, the executive branch loses its power, both in fact and as a matter of right. A rebellion can only be a rebellion against a superior. But what on earth is superior to the people! The people can rebel only against themselves, which is absurd. Only God is above the people; therefore, one can say: if the people have rebelled against their ruler, then one must presume that the ruler is a god, which just might be difficult to prove.

Therefore, two scenarios are possible: *either* in such a case the people themselves rise up unanimously, perhaps provoked by violence too terrible to ignore, and pass judgment on the ephors and the executive officials. By its very nature, their uprising is always just – not only formally, but also materially – for so long as the insecurity and the poor administration of the state do not oppress them *all* and do not become universally harmful, every individual will look out only for himself and try to get by as best he can. No people have ever risen up in unison like a single man – nor ever will – [183] unless the injustice has reached an extreme.

Or, in the second scenario: one or more private persons will incite the state's subjects to constitute themselves as a people: these persons, of course, must be presumed to be rebels and – in accordance with presumptive right (as long as the populace have not yet constituted

[d] It should be understood that I speak of the *entire people*.

themselves) – will be punished as such by the executive power (assuming it can apprehend them), in accordance with the presumptive common will. But an unjust power is always weak, because it is inconsistent and because general opinion – and often even the opinion of those it uses as its tools – is opposed to it; and the more unjust it is, the weaker and more powerless it is. And so the more despicable the executive power is, the more likely it is that those who incite the people will escape their punishment.

Now the populace either will or will not rise up in response to the inciters' call. If they do, the executive power will dissolve into nothing and the populace will judge between the executive officials and the inciters, just as they would otherwise between the executive officials and the ephors. If the populace find that the call to rise up was well grounded, then the will of the inciters will be confirmed (by the will of the populace, declared after the fact) as the true common will; it will become clear that the inciters' will contains the *content* of right, and it will acquire the *form* of right (which it still lacks) from the assent of the populace. On account of their heart and virtue, the inciters will be the nation's saviors, and its unordained, natural ephors. By contrast, if the populace find that the inciters' call and accusations were ungrounded, then they are rebels, and will be condemned as such by the populace.

If the people do not rise up, this proves *either* that the oppression and public insecurity have not yet become sufficiently palpable, or that they really did not exist at all; *or* that the people have not yet awakened to will their freedom and to know their rights; that they are not yet mature enough to take up the great legal task assigned to them; and therefore, that they never should have been incited to rise up in the first place. [184] Those who incited the people are to be punished as rebels, in accordance with external right that is entirely legitimate, even though – according to internal right and before the tribunal of their own consciences – they may well be martyrs of right. As far as their intentions are concerned, they may be innocent; but as far as their actions are concerned, they will be punished as entirely guilty; they should have known their own nation better. If such a nation were to have risen up, the result would have been the destruction and nullification of all right.

The provisions presented here concerning the election of those who administer the executive power, the election of the ephors, and their

duties, are laws pertaining to how the law is to be administered; and all the laws of this kind, taken together, are called the constitution. Thus in the third section of the doctrine of political right, we shall discuss *the constitution*.

(XIV) The constitution (and by this we obviously mean a rightful and rational one) is unchangeable and valid for all time, and it is necessarily posited as such in the civil contract.

For every individual must consent to the constitution; therefore, the constitution is guaranteed by the original common will. Each individual has entered into the state only under the guarantee that this *particular* constitution provides for his security. He cannot be forced to consent to another constitution. But since – in the event that another constitution were to be implemented nonetheless – an individual could not live under a government ruled by a constitution that he has not approved but rather would have to leave the state (which contravenes the original contract), it follows that the constitution may not be changed at all, if even only one individual were opposed to the change. Thus a change in the constitution requires *absolute* unanimity.

The difference between the absolute unanimity needed to change the constitution, and the relative unanimity deduced above, is this: relative unanimity may be achieved by excluding some individuals from the state in cases of emergency, but absolute unanimity may not be achieved in this way. With relative [185] unanimity, an individual's right to remain a citizen is contingent on his accession to the majority; with absolute unanimity, the right to remain a citizen is absolute.

We have said that a constitution that is rightful in general (i.e. insofar as it contains a constituted, but accountable, executive power as well as an ephorate) is unchangeable. – But within the general parameters of rightfulness, an infinite number of modifications are possible, and it is these further determinations that are changeable.

If a constitution is not rightful, it may be changed so as to be made into a rightful one: and no one is permitted to say, I do not want to give up the previous constitution. For the people's tolerance of a previous, unrightful constitution is excusable only if they had been ignorant about, or incapable of adopting, a rightful one; but as soon as the concept of a rightful constitution is available to them and the nation is capable of realizing it, everyone is obligated to accept it, for *right ought to prevail*.

The situation is different when it comes to improving and amending civil legislation. This occurs of its own accord. At first, the state was composed of a particular group of human beings, who pursued this and that particular trade, and the law was tailored to these particular circumstances. These groups grew in number, new means of livelihood arose – of course, none may arise without the state's approval – and so then the law had to change out of necessity, in order to remain suitable for this people, which has completely changed; and the executive power is responsible for seeing to it that the law is always suitable for the people.

(XV) The entire mechanism described here is necessary if a rightful relation among human beings is to be realized; but it is certainly not necessary that all of these motors and springs always operate externally and visibly. Rather, the more finely tuned a state is, the less these things will be noticed, because the state's quiet power, its inner weight, will eliminate in advance any possibility of its [186] having to operate externally. The state itself pre-empts its own action.

The most immediate task of the state is to settle disputes among the citizens concerning property. The more simple, clear, and comprehensive the law is, and the more certain its infallible execution, the less frequent such disputes about property will be, because everyone will be able to know rather precisely what does and does not belong to him, and will hardly undertake what he can see will be a futile attempt to appropriate another's property. If the few disputes that might yet arise out of error are settled correctly and in a manner that is intelligible to both parties, then crime will cease to exist. For what is the source of all crimes other than greed and the passions it arouses, or also poverty and need – neither of which would exist if the law kept careful watch over each person's property? How can crimes occur, once their sources are eliminated? Good civil law, if it is strictly administered, will completely eliminate the need to enforce criminal law. – Besides, who will dare to commit a crime if he knows with certainty that it will be discovered and punished? If these laws were enforced for only half a century, the concept of crime would disappear from the consciousness of the happy people who lived under them.

If the executive power has so little to do, it will have that much less of an opportunity to be unjust. Its rare exercise of power will be an act that inspires respect for both the people and itself; all eyes will be upon the

executive power, and the respect it necessarily inspires in the nation will provide it with respect for itself (if there were any danger that it would not otherwise have any).

Likewise, the ephorate will never have to exercise its authority, because the executive power will always be just; there will never be any need to consider an interdict or a people's tribunal.

Therefore, if the concepts we have presented should cause anyone fear, or [187] if the idea of a people's tribunal should lead someone to imagine God knows what atrocities, here are two reasons why one should not be disturbed. First: only a lawless mob yields to excess, not a deliberative body that assembles under and in accordance with the law, and in conformity with a determined, formal procedure. Formal procedure – let it be said in passing – is one of human beings' greatest blessings. By forcing them to pay careful attention to certain details, formal procedures force human beings to take care in whatever they are doing. Anyone who wants to exempt humankind from all formal procedures does not have the good of humanity in mind.

Second: all of these provisions have been set up, not to be implemented, but to make the situations in which they would have to be implemented impossible. It is precisely where these provisions have been set up that they are superfluous, and it is only where they have not been set up that they are necessary.

[191] Foundations of Natural Right According to the Principles of the *Wissenschaftslehre*: Part II, or Applied Natural Right

First section of the doctrine of political right Concerning the civil contract [*Staatsbürgervertrag*]

§17

(A)

First of all, we shall analyze – and with greater care than has been necessary up to this point – the concept of a contract in general.

To begin with, a contract involves two persons, whether natural or mystical; these two persons are posited as each willing the same object as his exclusive property. – Therefore, the thing they contract about must be the kind of thing that can become a person's exclusive property, i.e. it must be the kind of thing that does not get changed when it becomes a person's property but (by virtue of its own essence and nature) remains as it was when a person thinks it in his concept of an end; furthermore, it must be the kind of thing that – if it remains the same as it was when the person thought it in his concept of an end – can be used only as exclusive property (see §11 (III)). If the first condition were not met, a contract would not be possible; if the second condition were not met, none would be necessary. For this reason, there can be no contract concerning a portion of air or light.

Furthermore, both parties must have the same right to the thing; otherwise, no dispute concerning right would arise between them; [192]

it is precisely this kind of dispute that the contract is supposed to mediate. Now, by their nature, all objects and all free beings who lay claim to such objects fit this description. Prior to the contract, the only right-based reason anyone can adduce as to why he ought to possess the disputed thing is his free and rational nature; but every free being can adduce this same reason. It is impossible for different persons to have a dispute over the ownership of their bodies; this is because it is physically impossible for more than one subject to make natural use of a human body, that is, to set a human body in motion through will alone; however, as we have shown, all free beings have an equal right to all the rest of the sensible world.

But it must be noted that in order for a contract to be possible it is not necessary that the two parties already, *in the present*, lay claim to the same possession; rather, it is necessary only that the two fear that such conflicting claims might arise *in the future*. But in order for a contract to be possible, one of these two scenarios must obtain; for otherwise, the spheres of the freedom of the two parties would be completely separate from one another, and would be regarded by them as such, in which case it would be entirely unnecessary to stipulate by contract what the spheres of their freedom ought to be. – For instance, if you and I are separated by a river we both take to be uncrossable, then it will not occur to either of us to promise the other not to will to cross the river and settle on the other bank. The river is posited for us, by nature herself, as the limit of our physical powers. But if the river were to become shallow enough to wade through, or if we should discover how to traverse it by boat, then – and only then – will it become necessary for us to make an agreement to limit our free choice.

This will of each party to possess this or that thing as his own property is the private will of each. Thus, first of all, a contract involves *two private wills*; since these private wills are directed at an object, they are to be called *material wills*.

Thus in order for a contract to be possible, both parties must will to enter into a contract concerning either their already conflicting claims or their claims that might possibly conflict in the future; [193] moreover, the two parties must will that each one of them, for his part, will yield in his claims to the disputed objects, until their two claims can co-exist. If only one of the two, or if neither, wants to enter into a contract, then no contract is possible and war will inevitably result. According to the law

of right, the rational being is required to will to enter into a contract, and so there is a right of coercion that can force each person to do so. (Admittedly, this right of coercion can not actually be applied, since it is impossible to determine how far a person ought to yield in his claims.) This right of coercion exists, because a state of actual war, or even just a state of fear about a possible war, is not a rightful state of affairs: this has all been demonstrated above. – Thus the second requirement for a contract to take place is that *the wills of the two parties be united for the purpose of peaceably resolving their dispute over rights*: and since this unity of will determines the form of a contract, we shall call it *the formally common will*.

A further requirement for the possibility of a contract is that both parties limit the private wills they initially have to the point where these wills are no longer in conflict; what is required, therefore, is that each party, for his part, give something up, and will never to possess what the other wants to keep as his own. We shall refer to this unity of wills as *the materially common will*. In this materially common will, the private wills of both are united in a single common will. – The will of each of the contracting parties is now also directed at the other's property, property that perhaps it was not directed at before; each party's will is now directed at property that he may not have even known about before, since in order for a contract to take place it is not necessary that there already be an actual dispute over the objects, but only that the parties fear a possible dispute in the future; or alternatively, the will of each of the contracting parties is now also directed at property about which he has not yet made any decisions (even if he already did know about the property). Each party's will now extends beyond his own private end, but only as a *negative* will. Each person simply refrains from willing to have the things that the other wills; beyond this, each makes no decisions about what the other wills, other than that he does not want those things for himself. Because of this merely negative will, each is completely indifferent to whatever else might happen to the other's property – e.g. to whether it might be taken from the other by some third party. [194] Thus the important point here is that the parties' material will – to the extent that it is a common will – is merely negative.

Finally, the concept of a contract also implies that this common will is established as an enduring will, one that guides all future, free actions of the two parties; it is established as their law of right that will determine

their future, rightful relation to one another. As soon as either of the parties goes even one step beyond his limit as specified in the contract, the contract is nullified, and the entire relation of right based on it is canceled.

One might think that in such a case the injured party has only to demand restitution, and that if this were simply provided, then the relation between the two parties would be restored. Now this is certainly correct if the injured party is satisfied with the restitution and wants to renew the contract with the offending party. But in order to understand what follows, it is important to realize that the injured party is not bound, as a matter of right, to be satisfied with such restitution, and that – to be perfectly consistent – the offense nullifies the relation of right between the two parties. We shall now prove this claim.

Before the contract existed, each of the parties had a complete right to anything that the other party wanted for himself, even those things that – as a result of the contract – were actually allotted to the other party. Even if one of the parties did not yet know at the time that a certain thing existed, he still could have learned of it later and subjected it to his ends. It is only through the contract that he lost his right to it. Now the contract exists only insofar as the parties continue to adhere to it; as soon as the contract is breached, it is nullified. But if the ground of something ceases to exist, then what is grounded also ceases to exist; and since the contract provided the only ground for each person's forfeiture of certain things, it follows that – when this ground ceases to exist – so too does each person's forfeiture of everything that belonged to the other. The two parties stand once again in the same relationship they were in before the contract existed.

[195] *(B)*

After these necessary premises, we now proceed to an examination of the civil contract in particular.

(I) There can be no rightful relation among persons without a positive determination of the extent to which each individual's use of his freedom ought to be limited; or, what amounts to the same thing: without some determination of property in the broadest sense of the word (i.e. insofar as it denotes not just the possession of real estate or the like, but a person's rights to free action in the sensible world in general).

Thus if the civil contract is to bring about a universal relation of right, each individual must reach agreement with all other individuals concerning the property – the rights and freedoms – he ought to have, as well as those he ought to leave untouched for the others and over which he ought to relinquish all of his natural entitlements. Every individual must be able to agree with every other individual, *as an individual*, about these things. Think of an individual at the moment of making such a contract; he is the first of the parties required for a contract. Now, in one general concept, bring together all those individuals with whom this first individual must, one by one, enter into a contract. This group of individuals constitutes all the rest – but *only as individuals*, for the first party must contract with them as individuals and as independently existing beings whose decisions are not influenced by anyone else. – What I am saying is that all of these individuals constitute the second party in the contract. Each individual has said to all of them: I will to possess this, and I demand of you that you give up your claim to have any right to it. And all of them have responded: we shall relinquish our claims on the condition that you relinquish your claims to everything else.

This contract contains everything that is required in a contract. First of all, it contains the merely private will of each individual to possess something as his own; without this, the individual would not have entered into the contract we are discussing here. (Thus, each citizen necessarily owns property. If the other citizens had not granted him anything, he would not have relinquished his claim to what they possess, for such [196] relinquishment must be reciprocal; therefore, he would not have entered the civil contract.) Our assumption here is that they all possess a formal will to enter into a contract. Each individual must have agreed with all the others, and all the others must have agreed with each individual, about the content of their possessions; otherwise, the contract would not have come to be, and no relation of right would have been established. – Each individual's will is *positive* only with respect to what he wills to possess for himself; with regard to everyone else's property, it is merely *negative*.

The proposition demonstrated above applies to this contract as well – namely, that each individual's property is recognized by every other individual, only so long as the first individual himself respects the other's property. The smallest violation of another's property nullifies

the entire contract and entitles the injured party to take *everything* from the transgressor, if he can. *Therefore, each individual pledges all of his own property as a guarantee that he will not violate any of the others' property.*

I shall refer to this first part of the civil contract as *the citizens' property contract*. If one were to articulate the result of all the individual contracts that have been made, it would be their merely *material* will, the will that is directed towards objects and that determines the limits of the individuals' freedom. This will is what yields *civil law* in the narrower sense of the word; it constitutes the foundation of all the laws that might possibly be enacted in this state concerning property, acquisition, freedoms, and privileges, and it is inviolable.

Each individual has at one time *actually* expressed himself in the manner described, whether through words or actions, by dedicating himself publicly and openly to a particular occupation; and the state has agreed to it, at least tacitly.

Throughout this discussion we have been supposing that everyone enters into a contract with everyone else. Against this, someone might observe: since human beings necessarily go about their business within a particular, limited region, nothing more is required than for each individual to contract only with his three or four closest neighbors. Now [197] we have been assuming that this would not be sufficient. Thus our assumption must be that it is possible for anyone to come into contact with any other individual, and therefore that individuals do not remain enclosed within their own spheres, but rather have the right to live among one another and to encounter one another in any region of the state. We shall see later, and in more detail, that this is really the case. Here we are only making the following point: the requirement that the civil contract should be a contract of everyone with everyone implies that any territory on the surface of the earth – although such territory might in part, i.e. in a certain respect, be divided up among individuals – must nevertheless be, in a certain other respect (which the civil contract is to determine), a sphere where everyone can exercise his efficacy. And so the merchant should be allowed to travel about in order to peddle his wares; the herdsman to graze his cattle; the fisherman to cross the farmer's land to reach the riverbanks, and so on – all of which can be allowed only in consequence of the contract.

(II) But now the purpose of the civil contract is to ensure that the boundaries of each individual's exclusive freedom (where such bound-

aries are determined by the property contract or civil contract) are protected through the coercive power of physical force (since individuals neither can nor will rely merely on the good will of others).

Such coercive power has not been established if – as we have shown – the will of each contracting party remains merely negative in relation to the other's property. Therefore, since the contract we are describing is supposed to be a civil contract, there would have to be yet a second contract joined to the first (i.e. to the property contract); and in this second contract, each individual would promise to all the other individuals (who are still regarded as individuals) that he will use his own power to help them protect the property that is recognized as theirs, on the condition that they, for their part, will likewise help to defend his property against violation. We shall refer to this contract as the *protection contract* [*Schutzvertrag*].

This second contract is conditioned with respect to its content by the first. Each person can only promise to protect [198] what he has recognized as the other's right, whether this is an actual, present possession or a general entitlement to acquire a possession in the future (in accordance with a certain rule). But a person can by no means promise to assist the other if the other were to be involved in dealings not allowed by the first contract.

This second contract is distinguished from the first in that the person's will, which had been merely negative in relation to the other's property, now becomes a positive will. Each person not only promises – as he did in the first contract – to refrain from violating the property of everyone else, but now also promises to help protect everyone else's property against possible violations by any *third* party. It makes no sense for a person to promise to protect the other from oneself. If the first person simply refrains from transgressing against the other, then the other already has sufficient protection from him.

The protection contract, like every other contract, is conditioned. In the protection contract each person pledges to help protect all the others, on the condition that the others likewise protect him. The contract and the right it grounds dissolve if one party fails to fulfill the contract's conditions.

(III) The protection contract is distinguished from the property contract by the interesting fact that, in the latter, the parties promise merely to refrain from doing something, while in the former they

promise something positive. Therefore, one can know at any time whether the property contract is being fulfilled, since it requires simply that the other party at all times *not* do certain things; by contrast, one cannot know equally well whether the protection contract is being fulfilled, since, according to it, the other party is supposed to do something that he cannot do at all times, and that he is not actually obligated to do at any time. – I shall explain myself more clearly with regard to this very important point.

The protection contract is a conditional contract concerning a positive performance, and as such – when viewed according to strict right – it can have absolutely no effect, but is completely null and empty. The protection contract could be formulated as follows: [199] "I will protect your right, under the condition that you will protect mine." By virtue of what does the one party obtain the right to the other party's protection? Evidently only by virtue of the fact that he *actually protects* the other party.

And if this is so, then, strictly speaking, no party would ever acquire a right to the other's protection. – For the sake of what will follow, it is important that this be clearly understood; and understanding it depends on understanding how this contract is conditioned. I am bound, as a matter of right, to protect you, only under the condition that you protect me. One should carefully consider what the latter clause means. It does not mean: "if you merely have the good will to protect me." For a good will cannot have any validity before the tribunal of external right; besides, a good will could change, and in general everyone has the right never to depend on the good will of others. This clause does not even mean: "if you have already protected me once before." For the past is past, and is of no help to me in the present; morality, gratitude, and other such good inner dispositions might well move me to compensate the other for his past protection; but what is to be grounded here is a claim of right. In the sphere of right, there is no way to bind human beings together other than through the insight: whatever you do to the other, whether good or bad, you do not to him, but to yourself. In the case at hand, this means that I would have to be able to see that, in protecting the other, I protect only myself; I do so either actually in the present, or else – if in the future I should need protection – his protection of me follows with absolute necessity from my having protected him. The former is impossible; for insofar as I do the

protecting, I neither need, nor receive, protection; the latter is equally impossible; for the decisions of the other's free will cannot be foreseen with absolute certainty.

The discussion just presented is the clearest way of seeing the matter, but it can also be viewed from several other angles. [200] Either both parties to the protection contract are attacked at the same time: then neither can rush to the other's defense, since each has to look after himself. Or, one of them is attacked first. Then what prevents the other, who is called to come to his defense, from saying: "Our contract is a conditional contract; you acquire the right to my protection, only if you have protected me. Now you have not actually fulfilled this condition – the issue is not whether you could have fulfilled it or whether you have always possessed the good will to fulfill it (if only the opportunity had arisen for you to do so); rather, the only issue is this simple fact – you have not fulfilled the condition. But if the condition does not apply, then neither does the conditioned." This is exactly how the other, for his part, will argue as well; and so what is conditioned will never obtain, since the condition can never obtain. If the one party actually does help the other, the two may come into a relation of moral obligation, but not a relation of right.

For the sake of clarity, let us compare this contract, which is intrinsically void, with the right that is grounded in the property contract. In the property contract, the condition is merely negative on either side; that is, the condition is that each party refrain from violating the rights of the others. It is for this reason that it is always possible to fulfill this condition, and to show clearly before the tribunal of external right, that the contract's binding force is rightfully grounded. The condition is not something, but nothing; it is not an affirmation, but a mere negation, which can always occur at any point in time; and therefore what it conditions can also always occur at any point in time. I am always bound to refrain from violating the other's property, because thereby, and only thereby, do I rightfully prevent the other from violating mine.

If this part of the civil contract, i.e. the protection contract, is void, then the security afforded by the first part, i.e. the property contract, is also nullified. To be sure, as we have just shown, the rights grounded in the property contract continue to exist and can always be shown to exist; but whether someone wants to let himself be [201] bound by right depends on his good will. (This is because the contract that was

supposed to justify a coercive power cannot ground even a single right.) Thus we remain, as before, in a state of insecurity and dependence on the good will of others, a will upon which we are neither inclined, nor obligated, to rely.

The difficulty we have just presented must be canceled: and once we solve it, the civil contract will be further – in fact, completely – determined. The crux of the difficulty is that it is always problematic whether or not a person fulfills the obligation he has incurred through the protection contract (and thus whether or not he imposes any obligation on the other). The difficulty would be canceled if things could be arranged such that the fulfillment of such obligations could never be problematic. And this would not be problematic, but certain, if each person's mere entrance into the state automatically entailed that he has already fulfilled protection contract; that is, if each person's promise and fulfillment of the promise were synthetically united, if *word and deed* were one and the same.

(What we have just proved concerning the protection contract in particular is valid for all contracts involving positive obligations, since our proof is based on the general character of any such contracts. Thus, by presenting the form through which the protection contract can become valid as a matter of right (i.e. when one's word itself becomes a deed), we are presenting a form that is valid for all contracts involving positive obligations, a form that, later in this treatise, we shall actually apply to such contracts.)

(IV) The mere existence of the protection contract ought simultaneously and directly to entail that any obligations existing under it have been fulfilled. How can this be arranged? Clearly, only as follows: when the civil contract is formed, a protective power (a power to which each person entering the contract contributes) is simultaneously assembled and posited by means of that very contract. By contributing to the protective power upon entering the state, each person would actually and immediately fulfill the obligations he has under the protection contract to all the others. Hence from that moment on and by virtue of his mere entrance into the state, the question of whether a person will fulfill his obligations under the protection contract would no longer be problematic, for the person [202] has already actually fulfilled them; and continues actually to fulfill them, so long as his contribution is contained as a part of the whole protective power in general.

Now how is this protective power to be established, and what actually takes place when it is?

In order to illustrate the important concept we are arriving at, let us return to the point at which we saw the individual as he entered into the contract with all the others. This individual is one of the contracting parties. As a condition of his entering the state, he is required to contribute to the protective power. But *who* requires that he make such a contribution? With whom does he actually negotiate about this, and who is the second party in this contract?

This second party demands protection; – for which particular individual, then, does this party demand protection? For no particular individual at all, and yet for all of them; that is, for every individual whose rights are violated; now every one of them may or may not be such an individual. Therefore, the concept of who is to be protected is in *oscillation* [*im Schweben*];[1] it is an indeterminate concept: and this is precisely how we get the concept of a whole that is not merely *imagined*, i.e. not merely produced by our thought, as was the case above (I), but rather the concept of a *real* [*reellen*] whole, one that is unified by virtue of the subject matter itself; it is not the concept of a bare "all," but of an "all-ness" or totality [*nicht bloß Aller, sondern einer Allheit*].

We shall describe this in more detail. A bare, abstract concept is formed entirely by a free act of the mind; so, too, with the concept of "all," which we presented above. The concept we have arrived at here is formed not just by an act of free choice, but by virtue of something real [*etwas Reelles*], by virtue of something that, however, is unknown and comes to exist only in the future, i.e. when the feared transgression actually takes place. No one ever knows who will actually be trans-

[1] In everyday German *schweben* can mean to hang freely in the air (to hover) or to go back and forth between two points (to waver or oscillate). Fichte introduces the term in the 1794 *Wissenschaftslehre* in his explanation of how the faculty of imagination, in its encounter with the check, or *Anstoß* (see n. 3, p. 32) produces the manifold of images that furnish the content for empirical intuition. In supplying the content of empirical intuition the imagination is said to oscillate (*schweben*) between subject and object; the imagination brings the two together in the sense that it is through its activity that the not-I first acquires empirical reality in relation to the I. The imagination's activity is characterized as an oscillating or wavering, because on its own – without concepts – it cannot yield a stable object of experience but only a set of fluctuating images (*The Science of Knowledge*, pp. 185, 194, 201–3). In the present context Fichte invokes the idea of oscillation in reference to a concept (that of who is to be protected by the protection contract) that is "indeterminate," or has no determinate referent. The connection between conceptual indeterminacy and oscillation is further articulated in the *Wissenschaftslehre nova methodo* (1796/99) (Breazeale, *Fichte: Foundations of Transcendental Philosophy*, pp. 360–1, 409).

gressed against; it can happen to anyone. Thus each individual can believe that this whole protective arrangement has been established solely for his benefit, and so will gladly make his own small contribution to it. It is also possible, however, for someone else to be transgressed against; but then the first individual's contribution [203] has already been woven into the whole and cannot be withdrawn. This indeterminacy, this uncertainty as to which individual will first be transgressed against – therefore this *oscillation* in the imagination – is the real bond that unites the different individuals. It is by means of this that all merge together into one, no longer united in just an abstract concept (as a *compositum*), but rather in actuality (as a *totum*). Thus in the state, nature re-unites what she had previously separated when she produced several individuals. Reason is one, and it is exhibited in the sensible world also as one; humanity is a single organized and organizing whole of reason. Humanity was divided into several independent members; the natural institution of the state already cancels this independence provisionally and molds individual groups into a whole, until morality re-creates the entire species as one.

The concept we have presented can be well illustrated by the concept of an organized product of nature, e.g. a *tree*. If each individual part of the tree were endowed with consciousness and a will, then each part, just as certainly as it wills its own self-preservation, must also will the preservation of the tree, since it can be preserved only if the tree is preserved. Now from the perspective of the individual part, what, then, is the *tree*? The tree in general is nothing other than a mere concept, and a concept cannot be harmed. But the part wills that *no* part among them all, regardless of which one it is, should ever be harmed, because the part itself would also suffer if any other part were harmed. – Such is not the case with a pile of sand, where each part can be indifferent to whether any other part is separated, trampled upon, or strewn about.

Therefore, what is to be protected is the whole that has come about in the manner just described. This whole is the second party to the contract that we have been seeking. Thus, the will that is declared in such a contract is not a private will at all (except temporarily, when it still relates to the individual contracting party, who – according to our presupposition – is first called upon to provide protection); rather, it is by its very nature a common will, since – in order to remain indeterminate – it can be nothing other than common.

[204] We have identified the point at which this whole becomes unified as a whole. But then how, and through which particular act of willing, has it come to be this whole? We realize perfectly well that this whole exists. But let us see with our own eyes how it comes to exist! – We shall stick to the perspective suggested earlier, i.e, the perspective from which we observe the individual in the act of negotiating, and our question will be answered right away.

In negotiating, the individual declares his will to protect – undoubtedly his will to protect the whole, as was required of him. He thus becomes a part of the whole and merges together with it; now unforeseeable contingencies will determine whether he will protect others or be protected by them. In this way, the whole has come to exist as a result of contracts among individuals, and it is made complete by all the individuals contracting with all other individuals, as with a whole.

This particular contract, by means of which alone the two previous contracts are protected and secured, and which makes all three contracts in their unity into a civil contract, shall be called the *unification contract*.

(V) In consequence of the unification contract, the individual becomes a part of an organized whole, and thus melts into one with the whole. Does the individual's entire being and essence become fully intertwined with the whole – or only partly so, such that in a certain other respect he remains free and independent?[a]

[a] Rousseau claims unconditionally: each individual gives himself up completely.[2] He arrives at this claim as follows. Rousseau assumes a right to property that pre-exists the civil contract; this right to property is grounded in the individual's formation of things. Now it is obvious that each individual must negotiate with all the others about his property, and that it can become his property *in the state* only if the others grant him possession of it; therefore, it is obvious that property is subjected to the decision of the common will, and thus that all property ceases to be property until such negotiations have been concluded. In this respect, each individual does indeed give up everything.

According to our theory, no individual can bring anything with him to the civil contract, for prior to this contract he *has* nothing. The first [205] condition of giving something up is that one already have received something. Therefore, this contract – far from starting with *giving* – ought to begin with *receiving*.

[2] Rousseau, *Social Contract*, I, ch. 6: "Properly understood, all of these clauses [of the social contract] come down to a single one, namely, the total alienation of each associate, with all his rights, to the whole community." (See also ibid., I, ch. 1.) Rousseau's view appears to be in direct conflict with Fichte's claim that citizens retain their original rights when entering the state, yet Fichte is correct to note that Rousseau's statement does not imply that his state provides no guarantee of personal property rights but only that property claims made in the state of nature are not valid unless compatible with the principles on which the social contract is based, the rights and freedom of all citizens. Presumably one of Fichte's aims in this note is to emphasize the similarities between his view and Rousseau's, despite what appears to be a fundamental disagreement.

[205] Each individual makes a *contribution* to the protective body: he votes to appoint magistrates, and to secure and guarantee the constitution; he makes his particular contribution in the form of abilities, services, products of nature, or – when transformed into the universal measure of a thing's value – money. But he does not entirely alienate himself or what belongs to him. For if he did, what would he still possess that the state, for its part, would promise to protect? The protection contract would then be only one-sided and self-contradictory, in which case it would have to be expressed as follows: all individuals promise to offer protection, while also promising not to have anything that could be protected. Therefore, the *protective body* is made up only of portions of what belongs to individuals. All individuals are included in the protective body, but only partly so. But to the extent that they are included in it, they constitute the state's authority (whose purpose is just to protect the rights of each individual), and they form the true sovereign. – Only in the act of making this contribution is each individual a part of the sovereign. In a free state, i.e. one that has an ephorate, even these contributions are ways of exercising sovereignty. But the idea of *what is to be protected* includes *everything* that everyone possesses.

The whole that has now been established cannot – according to the principle stated above – undertake to protect anything it has not recognized. Therefore, insofar as it undertakes to protect each individual's possessions, it also recognizes those possessions; thus, this real [*reelle*] whole of the state also validates the property contract, which above seemed to have been made by everyone only as individuals. The whole is the *owner* of all the possessions and rights of every individual, insofar as it regards and must regard any injury to such property or rights *as an injury to itself*. But insofar as the whole regards something as *subject to its free use*, [206] the state's property is limited to what each individual is obligated to contribute towards shouldering the state's burdens.

With respect to those things that he has not contributed to the state's ends, the individual is completely free; regarding these things, he is not intertwined with the whole of the body politic, but remains an individual: a free person, dependent only on himself. It is precisely this freedom that is secured for him by the state's power and for the sake of which alone he has entered into the contract. Humanity separates itself from citizenship in order to elevate itself with absolute freedom to the

level of morality; but it can do so only if human beings have first existed within the state. But, insofar as the individual is limited by the law, he is a *subject*, subordinate to the state's protective power within the sphere left over for him. The contract was made with the individual only on the condition that he contribute to the whole: thus, the contract is canceled as soon as the citizen does not contribute. Thus each individual continually pledges all his property as a guarantee that he will contribute, and he will forfeit it, if he does not contribute what he owes. The whole, or the sovereign, becomes his *judge* (since he himself withdraws from participating in this whole), in which case he and everything he owns become subjected to the whole: and all this together constitutes the *subjection contract*, which, however, is merely hypothetical. Thus, if I fulfill my duties as a citizen continually and without exception (which obviously entails that, in relating to other individuals, I do not transgress the limits to my freedom prescribed by law), then, as far as my public character is concerned, I am simply a participant in this sovereignty, and, as far as my private character is concerned, I am simply a free individual, but never a subject. I would become a subject only if I failed to fulfill my duties. – If there is a penal law dealing with such cases (as one would expect), then the individual can pay a penalty for his fault, and thus retain the whole of his possessions by giving up a part of them.

And thus our investigation returns into itself; and the synthesis is complete.

[207] The civil contract is one that each individual makes with the real whole of the state, a whole that forms and maintains itself by means of the contracts that individuals make with one another; by virtue of the civil contract, the individual merges with the whole of the state as regards some of his rights, but receives in return the rights of sovereignty.

The two parties in this contract are the individual on one side, and the body politic on the other. The contract is conditioned by the free, formal will of both parties to enter into contract with each other. The material will concerning which the parties must reach agreement aims (from the one side) at a particular portion of property, and (from the other side) at the renunciation of all other property plus a particular contribution to the protective power. Through the contract, the citizen (for his part) acquires a secure portion of property, while the state receives from him a renunciation of all his natural rights to what others possess (which is necessary, if all the state's other citizens are to have

rightful possession of their things), as well as a particular contribution to the protective power.

This contract is its own guarantee: it contains within itself the sufficient ground of its fulfillment, just as every organic being has within itself the complete ground of its existence. For any person, either this contract does not exist at all, or, if it does, then it binds him completely. Anyone who does not fulfill this contract is not a part of it, and anyone who is a part of it necessarily fulfills it entirely. If someone exists apart from this contract, then he stands outside every rightful relation whatsoever and is rightfully excluded altogether from any reciprocity with other beings of his kind in the sensible world.

Corollary

So far as I know, the only way in which anyone until now has conceived of the whole of the state has been by thinking of an ideal aggregation of individuals; and so true insight into the nature of this relation has been obstructed. By merely aggregating individuals, one can unite anything into a whole. In such an aggregation, the bond of unity exists only in our thought; and if we happen to think of the matter differently [208] (which is contingent on our free choice), then what had been united will be separated again, as before. One cannot comprehend the true unity, if one has not demonstrated the bond of the unity *apart from the concept.* (This is how we express ourselves from the empirical standpoint; from the transcendental standpoint, we would have to say: "if one has not demonstrated *that which rationally necessitates this unity.*") We have demonstrated this in our presentation. That is, in the concept of who is to be protected, all individuals merge into one, because of the inevitable indeterminacy concerning which individual will need visible protection, and – even more importantly – concerning which individuals benefit invisibly from the fact that the law holds bad wills in check, even before they break out into action.

The most appropriate image for illustrating this concept is that of an organic product of nature. This image has frequently been used in recent times[3] to describe the unity of the different branches of public

[3] Kant, for example, compares the state to an organism in the *Critique of Judgment*: "The analogy of . . . direct natural purposes can serve to elucidate a certain [kind of] association [among people], though one found more often as an idea than in actuality: in speaking of the complete transformation of a large people into a state, which took place recently, the word *organization* was frequently and very aptly applied to the establishment of legal authorities, etc., and even to the entire body politic. For each member in such a whole should indeed be not merely a means, but also an end; and while each member contributes to making the whole possible, the idea of that whole should in turn determine the member's position and function" (p. 254n).

power, but – so far as I know – it has not yet been used to explain the civil condition as a whole. In a product of nature, each part can be what it is only within this organic unity, and outside such unity, the part would not exist at all. Indeed, if there were no such organic unity, then absolutely nothing would exist, for without the reciprocal interaction of organic forces that keep each other in a state of equilibrium, there would be no enduring form at all, but only an eternal struggle of being and not-being, a struggle that cannot even be thought. Similarly, it is only within the unity of the state that the human being attains a particular place in the scheme of things, a fixed position within nature; and each person maintains *this particular* place in relation to others and in relation to nature only by existing in *this particular* unity. Apart from the state, human beings would experience only passing gratification, but never the least concern for the future; and even this passing gratification would be devoid of all rightfulness, because there would be others like us who had the same right to it. Nature constitutes herself by bringing all organic forces into a unity; humanity constitutes itself by bringing the free choice of all individuals into a unity. The essence of [209] raw matter, which itself can be conceived only along with organic matter and only as a part of the organic world-whole, consists in the fact that there is no part in it that does not contain within itself the ground of its own determinacy, there is no part in it whose moving force is not fully explained by its existence and whose existence is not fully explained by its moving force. The essence of organic matter consists in the fact that there is no part in it that contains within itself the ground of its own determinacy, there is no part within it whose motive force does not presuppose the existence of something outside it and whose own existence does not presuppose some motive force outside of it. The same relationship holds between the isolated human being and the citizen. The former acts merely in order to satisfy his needs, and none of his needs are satisfied except through his own actions; he is what he is externally only by virtue of himself. The citizen, by contrast, has various things to do and leave undone, not for his own sake, but for the sake of others; his highest needs are satisfied by the actions of others, without any contribution from himself. In the organic body, each part

continually preserves the whole, and by doing so, is itself preserved; the citizen relates to the state in the very same way. And in fact, in the one case as well as in the other, this preservation of the whole does not require any special arrangement; each part, or each citizen, preserves only itself in the place that has been determined for it by the whole, and in the very act of doing so, it preserves the whole in this particular part: and precisely because the whole preserves each part in its place, the whole returns into itself and preserves itself.

[210] Second section of the doctrine of political right
On civil legislation

§18

On the spirit of the civil or property contract

(I) The contract described above concerning property in general, which constitutes the first part of the civil contract, grounds the relation of right between each individual and all other individuals in the state. It is therefore the foundation of what we call civil legislation, civil right, and so forth. Thus we need only give a complete account of this contract, in order to exhaust the object of our investigation in the present section, i.e. civil legislation.

As we have shown above, original right consists essentially in an ongoing reciprocal interaction, dependent only on the person's own will, between the person and the sensible world outside of him. In the property contract, a particular part of the sensible world is allocated exclusively to each individual as the sphere of his reciprocal interaction with it; and this part of the sensible world is guaranteed to each individual under these two conditions: (1) that he refrain from disturbing the freedom of all others in their spheres, and (2) that, in the event that these others are transgressed against by some third party, he will contribute towards their protection.

At first, a sphere for the exercise of his freedom, and nothing more, is allocated to him. This sphere contains certain objects, as determined by the freedom that has been granted to him. *Thus his right to have property in these objects extends as far as the freedom granted to him extends, and no further*. He acquires such objects only for a particular use; and it is only