

REVOLUTION AND FREEDOM IN THEODOR MOMMSEN'S *RÖMISCHE GESCHICHTE*

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I

IN THE HALF-CENTURY BEGINNING AROUND 1830, German readers of narrative history were presented with a great number of histories of revolutions and of revolutionary ages. The authors of these histories were almost all liberals, among them many of the most illustrious names of two generations of German scholarship, including Carl von Rotteck, Friedrich Christoph Dahlmann, Johann Gustav Droysen, Georg Gervinus, and Heinrich von Sybel.¹ This interest in revolution as an historical event was not mere fashion. An array of the most important and troubling political questions of that explosive age hinged on the interpretation and evaluation of revolution, such as the question of the legitimacy and the limits of popular political expression and resistance, and of the nature and integrity of law and the state. Through an evaluation of revolution, liberals hoped to formulate their stance *vis-à-vis* the progressive currents of the day, and to secure their position against their chief opponents in the first half of the nineteenth century, the conservatives, and later, during and after the revolutionary events of 1848, against the nascent left.² Liberals were convinced, moreover, that an evaluation of the potential and significance of popular revolution was impossible without a serious consideration of the role that revolution occupied in history.

Despite the diverse character of the periods studied and the divergent

T. Mommsen, *Römische Geschichte* (Munich 1976, based on the 9th printing [1902–1904] of the original edition, to which page citations here refer) is abbreviated below *RG*, *Römisches Staatsrecht*³ (Berlin 1887) is abbreviated *Staatsrecht*, and *Römisches Strafrecht* (Berlin 1899) is abbreviated *Strafrecht*.

¹ C. von Rotteck, *Allgemeine Weltgeschichte für alle Stände* 4 vols. (Stuttgart 1833); F. C. Dahlmann, *Geschichte der englischen Revolution* (Leipzig 1844); J. G. Droysen, *Vorlesungen über das Zeitalter der Freiheitskriege* 2 vols. (Kiel 1846); G. Gervinus, *Geschichte des neunzehnten Jahrhunderts seit den Wiener Verträgen* 8 vols. (Leipzig 1855–1866); H. von Sybel, *Geschichte der Revolutionszeit von 1789 bis 1800* 5 vols. (Düsseldorf 1853–1879).

² Sybel's 1858 essay, "Über den Stand der neueren deutschen Geschichtsschreibung," *Kleine historische Schriften* 1 (Stuttgart 1880), locates the difference between liberal and conservative historiography in the interpretation of revolution: "Conservatives portray the modern revolutions as though they were the simple products of riotous demagogues and godless philosophers" (357). The essay also shows how well the liberals understood that their formidable political opponent came at this point from the left rather than the right. On this, see H. Seier, *Die Staatsidee Heinrich von Sybels in den Wandlungen der Reichsgründungszeit 1862–1871* (Lübeck and Hamburg 1961) 23.

approaches of the various liberal scholars, this intensive interest in revolution led to a certain uniformity in interpretation, which is now generally known as the liberal historiography of revolution.³ Liberals located similar and fundamentally comparable patterns of historical development in the Reformation, the Glorious Revolution, the Prussian Reforms, and the French Revolution of 1789. All these periods were represented—in terms that now, in the era of social history, look untenably legalistic—as struggles between constitutionally progressive and conservative forces, the former claiming to articulate the *Volkswille*, the ultimate power of the nation, while the latter comprised the direct ministerial authority of the state. In the liberal historical schema, conflict between a nation's conservative and progressive forces became revolution when, in a time of crisis, the older constitution was no longer able to function and the nation was compelled to intervene directly in the drafting of a new one. Liberal historians generally portrayed legitimate and successful revolutions as the great moments of a nation's history, and revolution itself was understood as an essential liberating force in history. To be sure, liberals did not consider every revolution to be legitimate or successful; for, as they knew, not every revolution could be deemed to voice a nation's best interests or to result in a true gain in its historical development. For liberals, who represented property and order as inviolable human rights but also claimed to stand for the "renewal and liberation"⁴ of the entire nation, the question of what constituted success and legitimacy in a past or contemporary revolutionary movement was most crucial and most difficult.

By far the greater part of this liberal interest in the interpretation and assessment of revolution was invested in studies of modern history; the French Revolution, which gave birth to the modern revolution as both a theoretical and a practical problem, was naturally the great favorite. But the liberal historiography of revolution also extended to the field of ancient history, in particular to the study of the Roman Republic, where it has had a lasting influence. One work, although seldom considered in the context of the liberal historiography of revolution, was chiefly responsible for this influence—Theodor Mommsen's *Römische Geschichte*, which was written immediately in the wake of the Revolution of 1848, and published in three volumes between 1854 and 1856. Mommsen, then still in his thirties, made no effort to conceal the influence of liberal ideas upon his first major work. He employed the theme of revolution—in the literal sense of a simple historical cycle—to give a general shape to Republic's long and complex history. The *Römische Geschichte* handled the entire period from the fall of

³The liberal historiography of revolution has been the object of many studies. Among the best in recent times are Karl Griewank's *Der neuzeitliche Revolutionsbegriff* (Weimar 1955) and M. Neumüller's *Liberalismus und Revolution* (Düsseldorf 1973).

⁴Sybel (above, n. 2) 1.352–353.

the Tarquinian monarchy at the end of the sixth century B.C. to Caesar's victory at the end of the first, as a single coherent historical movement that began and ended with an absolute monarchy. Revolution—in the more conventional sense of an extreme political and social conflict—served as the driving force of the Republic's internal development. The *Römische Geschichte* presented the revolutionary overthrow of an oppressive monarch as the founding act of the Republic, while it located the demise of the Republic in a long and gradual revolution that was born with the Republic and grew in strength as the Republic aged.

The attention given to the concept of revolution was one of the chief novelties of the *Römische Geschichte*. Indeed, from Mommsen originated the designation of the crisis of the final century of the Republic, beginning in the time of the Gracchi, as the "Roman Revolution." Fifty years after the publication of Ronald Syme's *The Roman Revolution*, the name and the emphasis that it implies are thoroughly commonplace.⁵ But at the time of Mommsen's writing, they were not. Mommsen's great predecessor, Barthold Niebuhr, working in the time and spirit of the Prussian Reforms, had attempted to show, in his own *Römische Geschichte* (1811–1832), that the intention behind the Gracchi's agrarian laws, the basis of their reforms and the beginning of Rome's great difficulties, was essentially conservative. Mommsen, working from a very different approach, was far less concerned with the intention or even the content of the laws that the Gracchi proposed than with the character of their actions and the short and long term repercussions on the constitution. He was convinced that the Gracchi and the response of the senate to the Gracchi provided the Republic's history with its great climax; in other words, the uprisings associated with the name of the Gracchi in the latter half of the second century B.C. were anticipated by the entire course of Republican history until that point and their failure brought the Republic to its conclusion in the "military monarchies" of Pompey and Julius Caesar as a matter of necessity. Hence, for Mommsen, although Tiberius and Gaius Gracchus may have harbored the hope of reforming—rather than subverting—the Republic's constitution, their actions compelled the historically progressive forces of Rome, "in a constantly accelerating progression, from reform to revolution, from revolution to anarchy, and from anarchy to war against property."⁶

⁵On the relation of R. Syme's *The Roman Revolution* (Oxford 1939) to Mommsen's *Römische Geschichte*, see the comments of K. Christ, "Crisi della Repubblica e 'Rivoluzione Romana'," *Labeo* 26 (1980) 82–90 (reprinted in *Rivoluzione Romana, In chiesta tra gli antichisti* 6 [Naples 1982] 11–19). Mommsen later related in a letter to Gustav Freytag that a lecture on the Gracchi brought him an invitation to compose a history of Rome from the publishers Karl Riemer and Salomon Hirzel. See Lothar Wickert's biography, *Theodor Mommsen. Eine Biographie* 4 vols. (Frankfurt 1959–1969) 3.655–656.

⁶RG 3.470. In the language common to Heinrich von Sybel and liberal political theorists, this is the movement from reform, to limited revolution, to absolute revolution, and finally, to

But despite the place that the notion of revolution has come to occupy in the study of Roman history and its importance for the liberal historiography of revolution, Mommsen's concept of revolution, as it emerged from the *Römische Geschichte* and pervaded his other works on Roman law and history, has not received much consideration.⁷ This study will undertake to remedy this oversight.

II

Mommsen deliberately set his *Römische Geschichte* apart from the studies of Roman history of the preceding generation by infusing it with his rigorous methodological priority of historical processes over first causes, and in particular from Barthold Niebuhr's *Römische Geschichte*, with his thoroughgoing insistence that Rome's beginnings, if they could be known with any certainty, would probably be found to be far less than impressive.⁸ But, although critical of his predecessors' search for first causes, Mommsen was nonetheless very concerned to trace the first causes and opening moves of Rome's revolutionary historical course. Indeed, Mommsen found the necessary ingredients for revolution in the social structure of the prehistoric city, long before the first signs of its destiny as the master of Italy were apparent.

In the *Römische Geschichte*, the original Italic constitution is represented as a monarchy structured on analogy to the ancient Italic family. The king was a *pater familias* on a grand scale, with an absolute power that monopolized both the executive and judicial functions of the state. Hence the Italic monarchy, for Mommsen, was comparable to any primitive state whose

monarchy—a formulation that captures the historical inevitability as well as the political danger that the liberals saw in revolution. See the account of H. von Sybel's still unpublished lectures on politics by Folkert Haferkorn, *Soziale Vorstellungen Heinrich von Sybels* (Stuttgart 1976, Kieler Historische Studien 23), on revolution, 198–206. See also H. Seier, "Sybels Vorlesungen über Politik und die Kontinuität des 'staatsbildenden' Liberalismus," *HZ* 187 (1959) 90–117.

⁷The few recent treatments of Mommsen's notion of revolution spring from the re-evaluation of the Roman Revolution that R. Syme has inspired, and are more concerned with the assets and shortcomings of Mommsen's notion than with its context and repercussions. See, for example, A. Heuss's "Der Untergang der römischen Republik und das Problem der Revolution," *HZ* 182 (1956) 1–28, and K. E. Petzold's, "Römische Revolution oder Krise der römischen Republik?," *RivStorAnt* 2 (1972) 229–243. On this re-assessment of the idea of the Roman Revolution since Syme's *The Roman Revolution*, see the collection of essays in *Labeo* 26 (1980) dedicated to Syme's work, and G. Alföldy's *Sir Ronald Syme: 'die römische Revolution' und die deutsche Althistorie* (SBHeidel 1983). On Alfred Heuss's attempt to re-formulate the notion of the Roman Revolution, see K. Christ's *Römische Geschichte und die deutsche Geschichtswissenschaft* (Munich 1982) 294.

⁸Hence the work's "Italian bias" and the quotation from Thucydides' famous Prologue at the beginning of Book 1 of the *RG*, "The things of old cannot be clearly investigated on account of the length of time; and from evidence which seems to me for the most part reliable, I do not believe they were considerable, in reference to war or other things."

head recognized no constitutionally defined constraints to his patriarchal authority. But Mommsen drew a very precise limit to this comparison. Unlike his primitive counterpart, the king in the Italic state did not represent himself to his community as divine. "It would be a mistake," Mommsen wrote, "to make a theocracy of the Roman constitution: never were, for the Italians, the notions of god and king intermingled in the Egyptian and Oriental fashion. The king was not the people's god but rather the owner of the state" (RG 1.64). The Roman state, therefore, was essentially secular, and in this secularity Mommsen finds the earliest proof that the sovereignty of Rome rested with the people rather than with the king: "the Roman community," Mommsen wrote in the first volume of his history, "just like the German, and probably like the oldest Indo-european community, was the true and ultimate holder of the concept of the sovereign state." But this sovereignty was constitutional rather than direct; as he immediately adds, "this sovereignty rested and expressed itself in the ordinary course of things solely in the fact that the citizen body voluntarily bound itself to its superior."⁹ Hence, for Mommsen, the founding principle of the Roman state was evident in nascent division between sovereignty of the people and ministerial authority of the king and his equals, the senate, before the Republic or even, paradoxically, the *populus Romanus* existed—that is, before the *clientes* had freed themselves from their patrons and come to form an independent political body.

This was the foundation that Mommsen saw as the guiding principle of the reforms of Servius Tullius and the eventual overthrow of the Tarquinian monarchy—movements that Mommsen represented, in fact, as "conservative revolutions," for their result was the elimination of the extraordinary power of the king and the unification of the magisterial power of the state into the single body of the Roman senate. From the fall of the Tarquins, the executive power of the monarch passed to the consuls and other elected magistrates, while the sovereignty itself was securely invested in the *comitia centuriata*, the principal political assembly of the entire Roman people.¹⁰ For Mommsen, the new formal sovereignty of the community expressed itself most obviously in the fact that the popular assembly now directly elected its own ministers. But in his treatment of the transition from the

⁹RG 1.72. This radical distinction between the ordinary and exceptional function of sovereignty is repeated in *Staatsrecht* 3.314: "The *comitia* are originally the possessors of that sovereign power of state that does not come into force in the functioning of the existing order, but rather when this is to be changed or set aside."

¹⁰On the "conservative revolution," see RG 1.257; on sovereignty, cf. *ibid.* 1.254, 262–263. See also *Staatsrecht* 1.13. For a recent analysis and critique of Mommsen's vision of the Roman legal system, see J. Bleicken, *Lex Publica, Gesetz und Recht in der römischen Republik* (Berlin 1975) 6–51, and on criminal law in particular, W. Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit* (Munich 1962, AbBayrAkadWiss. NF 56).

Roman Monarchy to Republic, Mommsen placed almost equal emphasis on a change in the character of Rome's judicial power. This change was the establishment of the appeal to the people (*provocatio ad populum*)—a procedure that the king had employed when he thought it necessary to invite a review of capital decisions—as a right of every individual who was condemned to death by a civil magistrate. Mommsen dated the institution of *provocatio* as a basic right—differently from what is now the generally accepted view—to the *lex Valeria* of 509 B.C., hence to the very first years of the Republic.¹¹

The right of appeal is a central theme in Mommsen's understanding of Roman history; indeed, he made it a cornerstone of the systematic account of Roman law that he developed and elaborated through the great part of his career. In fact, long before he began writing the *Römische Geschichte*, Mommsen had decided that the right of *provocatio* was the essence of the Roman judicial system.¹² He had not changed his mind by the time he wrote his mature studies of Roman law, the *Staatsrecht* and *Strafrecht*. There he described the judicial capacity of the *comitia*, which heard appeals in the early Republic, as "the full and correct expression of Roman freedom," and the establishment of the right of *provocatio* itself as "the mark of Republican liberty," while the disappearance of the right of *provocatio* was represented as a fundamental mark of the transition from the Republic to the Principate.¹³

It is not difficult to find an explanation for this interest in *provocatio*, which had not previously enjoyed a particularly outstanding place in presentations of Roman law. The right of *provocatio* clearly appealed to him as the mark of a state that was founded upon a constitutional limitation of magisterial power over individuals. He attributed to the establishment of *provocatio* the fact that the legal execution of Roman citizens gradually disappeared relatively early in the history of the Republic, and from that

¹¹RG 1.248. For problems in Mommsen's understanding of the Valerian Laws and of *provocatio* in general, see J. Bleicken's *provocatio*, RE 23 A (1959) 2446–2449, 2457–2460, and J. Kunkel, (above, n. 10) 24. Against Mommsen, it is now generally believed that the various *leges Valeriae* of the fifth and fourth centuries are probably not historical, the Law of the Twelve Tablets had no connection with the right of *provocatio*, and the institution of the *provocatio* should be dated to the third (the first that is historical) Valerian Law in 300 B.C. Kunkel has recently gone still farther and taken the extreme view that *provocatio*, once it became an institution, applied only to cases of magisterial *coercitio* (*ibid.* 131). In partial defense of Mommsen, see P. Garnsey, "The Lex Julia and Appeal under the Empire," JRS 56 (1966) 167–189, at 167–168.

¹²Mommsen's stress on the *provocatio* is first apparent a decade before the RG in his review of G. Gieb's *Geschichte des römischen Criminalprocesses bis zum Tode Justinians* (Leipzig 1842), in *Neue Jenaische Allgemeine Literaturzeitung* (1844) 245–254, 257–265 reprinted in *Gesammelte Schriften* 8 vols. (Berlin 1905–13) 3.469–494.

¹³*Strafrecht* 177; *Staatsrecht* 2.161–162, 2.114–116.

point the decision of life and death of individual citizens was removed from the sphere of the state's authority (RG 1.435–436). The introduction of the right of *provocatio* with the Valerian Laws of 509 B.C., moreover, was represented in Mommsen's *Staatsrecht* and *Strafrecht* as the critical point of development from *coercitio*, the punishment imposed by the personal decision of an individual magistrate, to *iudicium*, a judgment made in criminal proceedings by magistrates charged with this one task. In short, Mommsen was convinced that *provocatio* made all the difference for the Romans between true civil government—which Mommsen believed the Republic, for all its faults, was—and the simple form of magisterial command, which preceded and followed it.¹⁴

Much in this emphasis on *provocatio* was common to the liberal thought of Mommsen's day.¹⁵ But Mommsen belonged to the vanguard in his view that the interdiction of the death penalty—which he saw as the ultimate effect of the right of *provocatio*—was a chief characteristic of the civilized state.¹⁶ In this context, one aspect of Mommsen's activities in the events of 1848 and 1849—into which he threw himself whole-heartedly—deserves brief mention. In 1849, Mommsen wrote a pamphlet commenting on the *Statement of Rights of the German People*, a strongly-worded but politically rather ineffectual document that was issued by the Frankfurter Parliament earlier in the same year. Mommsen's pamphlet gives a general image of his political leanings shortly before he wrote the *Römische Geschichte* but is especially interesting for its praise of the Parliament's categorical rejection

¹⁴RG 1.248. On the significance of the right of *provocatio* for the distinction between the citizen and non-citizen, cf. RG 1.259, where Mommsen wrote, "it became necessary to formulate plebeian rights more exactly and to distinguish the expanded citizen body from non-citizens, less because of the voting rights in the *centuria*, to which only established residents were entitled anyway, than because of the right of *provocatio*, which belonged to the member of the *plebs* but not to the foreigner residing temporarily or even permanently in Rome." The connection between the right of *provocatio*, the limitations in the use of the death penalty, and the separation of civil and military governments is restated at *Strafrecht* 991, and in an essay on the history of the death penalty in Rome (in which Mommsen explicitly linked the penalty of death with the monarchical form of government), "Die Geschichte der Todesstrafe im Römischen Staat," (1896) in *Reden und Aufsätze* 2 vols. (Berlin 1905) 1.437–448, especially 440–441.

¹⁵Mommsen himself saw something of a precedent in J. Rubino's *Untersuchungen über römische Verfassung und Geschichte* 1: *Über den Entwicklungsgang der römischen Verfassung bis zur Höhepunkt der Republik* (Kassel 1839). See his remarks in his review of Gieb's work, *Gesammelte Schriften* (above, n. 12) 3.473.

¹⁶Wilhelm von Humboldt certainly did not exclude the death penalty from the rights of the state in his famous *Ideen zu einem Versuch, die Grenzen der Wirksamkeit des Staates zu bestimmen* of 1792, which was the first and most radical statement of German liberalism. I do not know if Mommsen was directly influenced by the writings of Cesare Beccaria or Jeremy Bentham and other leaders of the movement for penal reform in the late eighteenth century, but he certainly shared many of their political convictions.

of the death penalty, which it called "the most unnatural of all penalties," while it proclaimed that "a civilized state finds its honor in the repudiation of capital punishment."¹⁷ There is here a hint of a close relationship between Mommsen's interpretations of Rome and his understanding of his own society; and the emphasis on criminal law, as the touchstone of a constitution's validity and a state's worth, is clearly crucial for that relationship. Not surprisingly this emphasis endured from the very beginning of Mommsen's career to the period of his final major work, the *Strafrecht*, and was closely connected with much that was unique to his interpretation of Roman law and history. But it is also not surprising—given such a strong emphasis—that his treatment of Roman law now seems one-sided, overly interested in portraying the history of the Roman legal system as an isolated development, and unaffected by external influences and most especially by the expanding empire. Mommsen was convinced, for example, that the notion of the Roman people's *maiestas* and of the *crimen maiestatis*, treason, originated as a guarantee of the right of tribunal intercession in the first generations of the Republic, a full two centuries before the word, *maiestas*, is first attested in second-century alliances between the Romans and the Aetolians.¹⁸

The overall plan of the *Römische Geschichte* provides an elaborate historical justification for the connections Mommsen made between the constitutional achievement of the right of *provocatio* and the foundation of the Republic and, again, between its neglect and the transition to the Principate. To be sure, Mommsen's great interest in Roman law did not lead him to merge political and constitutional history in the immediate manner of Montesquieu's *Considerations on the Greatness of the Romans and their Decline* a century earlier. Mommsen interpreted the overall course of Republican history as the direct result of a series of conflicts, some avoidable, some not, that were waged by the Patricians and the *plebs*, groups defined by disparate

¹⁷Mommsen, *Die Grundrechte des deutschen Volkes mit Belehrungen und Erläuterungen* (Neudruck der anonymen Erstausgabe von 1849) (Frankfurt 1969) 14, 27. That the anonymous commentary is the work of Mommsen is proved in Wickert's "Nachwort" to the reprint: 86–94. On the connection between the pamphlet and the RG, see K. Christ, (above, n. 7) 59, who neglects, however, the important issue of the death penalty.

¹⁸For Mommsen's early interest in an account of Roman criminal law, see Mommsen's letter (13.4.1877) to Gustav Freytag, quoted by Wickert (above, n. 5) 3.655–656. On the fundamental place of the right of *provocatio* in the *Strafrecht*, see Heinrich Ritter von Srbik's interesting remarks, *Geist und Geschichte vom deutschem Humanismus bis zur Gegenwart* 2 vols. (Munich and Salzburg 1951) 2.128. For more recent interpretations of *maiestas*, see H. G. Gundel's two studies, "Der Begriff *maiestas* im politischen Denken der Römischen Republik," *Historia* 12 (1963) 283–320, and "Der Begriff *maiestas* im Denken der Augusteischen Zeit," in *Politeia und Res Publica. Beiträge zum Verständnis von Politik, Recht und Staat in der Antike dem Andenken R. Starks gewidmet* (Wiesbaden 1969), ed. P. Steinmetz, 279–300, and R. Bauman's, *The Crimen Maiestatis in the Roman Republic and Augustan Principate* (Johannesberg 1967) 16–33.

social and economic interests. For him, the fall of the Republic was precipitated by economic conditions: the influx of cheap labor, an unimpeded accumulation of wealth in the hands of a few, the impoverishment of the landless mass. He was convinced that many of the political innovations of the early Republic, including the *tribuni plebis*, however vital for civil liberties, were mere evasions and ineffective palliatives that left the underlying economic problems untouched.¹⁹ Hence the *Römische Geschichte* did not weave the story of Rome's greatness and its decline with the single thread of Rome's original constitution, the implicit agreement between the ruler and the ruled. But, at the same time, the constitution and its reforms were far more than a mere balance sheet of the gains and losses of opposing social and political factions. They were understood in the *Römische Geschichte*, rather, as the sphere of human innovation and the sole means, in a civilized state, whereby dilemmas caused by social and economic conditions could find their solutions, and were, therefore, for Mommsen, as for all the liberals of his time, the historian's principal concern. Thus the crucial place of the constitution in the Republic's historical course: for Mommsen, the Roman constitution was to a certain point quite pliable; it might easily be bent to reflect changes in relative political strength and vicissitudes of contending groups. But if the constitution were bent past a certain fixed point, it must by necessity shatter, that is, the implicit agreement that it embodied between the people and its ministers could no longer function, and the fundamental division between sovereign power and ministerial authority had to collapse. At that point the Republican form of government ceased to function and the community abdicated its right to self-rule.

In following the history of the Republic's constitution from its foundation to its demise, the *Römische Geschichte* began with the popular sovereignty of the early Republic, a formal sovereignty that "in the ordinary course of affairs, voluntarily bound itself to its superior," and concluded with revolution, the state of affairs that arises when the course of things is no longer ordinary and the sovereignty of the people articulates itself in an unrestrained and immediate manner. The right of *provocatio*, which, for Mommsen, constituted the most conspicuous achievement of the overthrow of the Tarquinian monarchy and the foundation of the Republic, served to measure distances along this path. From the onset of the class conflict in the first generation of the Republic, the right of *provocatio* appears in the *Römische Geschichte* as the special interest of the *plebs Romana*, and the widening sphere of the right's application is made to mirror the growth of

¹⁹RG 2.276. Mommsen's perception of the fundamentally economic character of the Republic and its history is stressed by K. Christ's "Grundfragen der römischen Sozialstruktur," *Studien zur antiken Sozialgeschichte. Festschrift Friedrich Vittinghoff* (Cologne and Vienna 1980), eds. W. Eck, H. Galsterer, and H. Wolff, 197–228, at 200–204.

plebeian power: with the establishment of the *tribuni plebis* in the 490s, the court of appeals for convicted magistrates passes from the *comitia centuriata*, the assembly of the entire people, to the *concilium plebs*, the plebeian assembly, which the tribunes oversaw (RG 1.271–272); by 451 B.C., the right of *provocatio* is extended from capital cases to those involving high monetary fines (RG 1.248); in 449 B.C., the Dictator loses his power to pass sentence without appeal (RG 1.285); and, finally, with the reforms of Gaius Gracchus—which, to be sure, were never fully carried through—the right of *provocatio* was to pass to Roman soldiers who were convicted by their military commanders (RG 2.107). In Mommsen's mind, all these extensions of the right of appeal stretched the letter and spirit of the Republic's original constitution (see, for example, RG 1.272). In effect they transformed the constitutional legacy of the entire people into the insignia and weapon of a single faction within the people. Moreover, they marked, the steps of a gradual movement in which originally the *plebs*, and, toward the close of the Republic, the *populares*, who claimed to speak for it, became less willing to abide by the original conditions implied in the constitution of the Republic. For Mommsen, in other words, the lower class of Rome became increasingly less satisfied with the limitations of the formal sovereignty of the *populus Romanus*. Hence the advances made by the *plebs* until the time of the Gracchi were represented in the *Römische Geschichte* as an encroachment on the judicial and ministerial function of the *comitia* and on the ministerial function of the senate and thus a danger to the function of the entire state. In the language of Mommsen's later studies of Roman law, the *plebs* in the course of the Republic's history came gradually to the point of erecting a "state within a state."²⁰

For Mommsen, the Republican constitution was seriously impaired by these actions of Rome's lower classes. It was manifestly bent; but still it did not break. Indeed, Mommsen saw a greater threat to come from the opposing faction, that consisting of the Patricians, in the early Republic, and of the *optimates*, after the *plebs* had gained access to all political offices. In Mommsen's account of the domestic developments of the later Republic, the ruling faction within the senate answered the movement of the *plebs* from sovereignty (as the dominant portion of the *populus Romanus*) to actual power with a countermove of its own from magisterial authority to the pretension of sovereignty. The precise legal character of this countermove is clearest in Mommsen's later treatment of the senate's legislative response to the revolutionary stance of the lower classes, beginning in 133 B.C., when the senate dealt with the threat posed by Tiberius Gracchus. In the *Staatsrecht* and *Strafrecht*, this period was most notable for the innovation of the *senatus consultum ultimum*, the emergency decree that bestowed extraordi-

²⁰See especially *Abriss des römischen Staatsrechts* (Leipzig 1907) 40.

nary powers on the consuls, which Mommsen represented as the senate's response to *provocatio*, as it had evolved together with the power of the *plebs*. He was convinced that *senatus consultum ultimum*, among its other powers, allowed the consul, on whom the senate conferred it, to ignore a citizen's right to appeal. Hence it was a return to the extraordinary power of the dictatorship—with the essential difference that a dictator was generally appointed as a response to threats to the nation from outside it, while the *senatus consultum ultimum* countered dangers to the hegemony of the senate from within. For Mommsen, therefore, the *senatus consultum ultimum* was highly dangerous, for it elevated the political struggle to a new level of intensity and was an open breach of the constitution in the fundamental sense that it appropriated for the senate rights that belonged to the political organs of the entire *populus Romanus*.²¹

The *Römische Geschichte* is notorious for avoiding the language and perspective of legal history. But the work's account of the aims and logic of the senatorial majority and its leaders in the period from the reforms of Tiberius Gracchus in 133 B.C. through the conspiracy of the Catilinarians in 63 B.C.—the most famous occasion of the use of the *senatus consultum ultimum*—accords fully with the assessment of Mommsen's later judgment. In the *Römische Geschichte*, the reaction of the senate in no way ended the revolution of the Gracchi, but rather confirmed its historical course. "Restoration," Mommsen reflected at this point in his history, "is always at the same time revolution" (RG 2.125). The Gracchi had sought to extend their power beyond the constitutional limits; the senate restored order by succeeding where the Gracchi failed. Hence, the senate no longer acted as the minister of the *populus Romanus*, but became a tyrant. Of course, Mommsen conceded that it was due to the efforts of the senate that the Republic's constitution remained functional for nearly a century after the Gracchi first attempted to alter it. But from the death of Tiberius Gracchus, Mommsen was convinced, the conflict between the *populares* and the *nobiles* was destined to end in the establishment of a new monarchy. Thus Mommsen's comment on the conclusion of Sulla's government:

The re-establishment of the oligarchy had always brought with it a similarly inappropriate regime [*Missregiment*], after the overthrow of the Gracchi, as well as after that of Marius and Saturninus, but one so violent and also at the same time so weak, so corrupt and so corrupting had never before appeared. But when a government can no longer govern, it ceases to be legitimate, and whoever has the power has also the right

²¹*Staatsrecht* 3.1242, *Strafrecht* 257. In these works (although not expressly in the RG), Mommsen contends that the SCU was first issued in 133 B.C., as the senate's response to Ti. Gracchus' reelection as tribune. This contention has been disputed most recently by J. von Ungern-Sternberg, who sees no evidence that a SCU served as the legal basis for the killing of Ti. Gracchus, *Untersuchung zum Spätrepublikanischen Notstandsrecht: Senatus Consultum Ultimum und die Hostis-Erklärung* (Munich 1970) 7–15.

to overthrow it. It is unfortunately true that an incompetent and criminal regime may crush the well-being and honor of its land for a long time, before the men are found who are inclined and have the strength to turn the horrible weapons the regime itself forged against it and call forth a legitimate revolution from the moral exasperation of the most able and from the misery of the many. But if the game with the well-being of peoples may be amusing and may be played without interruption for a long time, this is nonetheless a deceptive game, that, in its own time, will consume those who play it. And no one blames the axe that is set to the tree that brings forth such fruit. This time had now come for the Roman oligarchy. The troubles in Armenia and the Pirate Wars were the immediate causes of the overthrow of Sulla's constitution and of the introduction of a revolutionary military dictatorship.²²

Mommsen, like many of his liberal contemporaries, was convinced that the ruler's ultimate task is to limit his own power and that revolution arises most often from the transgressions of legally empowered authorities.²³ For him, therefore, it was indeed a "legitimate revolution" that ended the history of the Roman Republic. Not the Gracchi or their followers, but rather the constitutionally defined powers of the state—the senate and the consuls—held ultimate responsibility for the course the revolution took, for they over-extended their power and thus rejected the constitutional foundation of their own rule. For Mommsen, moreover, the move from transgression to revolution had an immediacy in logic if not in time; for beyond the constitution, where reason and will are the principal actors, there existed a sphere of

²²RG 3.93, see also 2.95. This accounts for Mommsen's extremely critical attitude toward Cicero, who, in his eyes, naively believed he could save the Republic while at the same time violating the most basic of the Roman citizen's rights. So, for example, RG 3.191: "It was the most ridiculous touch, such as is seldom absent from an historical tragedy, that this act of the most brutal tyranny had to come about through the least composed and most fearful of all Roman statesmen, and that the 'first democratic consul' should be elected to destroy the Palladium of the old Roman communal freedom, namely the right of *provocatio*." Cicero was able, of course, to justify his action by claiming that the senate had stripped the Catilinarians of their Roman citizenship, and that, therefore, the conspirators had no right to appeal. Mommsen believed (mistakenly) that Cicero's argument was based in fact, rather than that it was an impromptu legal fiction of the orator's, but Mommsen's criticism is nonetheless quite severe. See also *Strafrecht* 256–257; and as a corrective of the view that the SCU cancelled the right of *provocatio*, see C. H. Brecht, *Perduellio: eine Studie zu ihrer begrifflichen Abgrenzung bis zum Ausgang der Republik* (Munich 1930) 205–209. On Cicero, see also *Staatsrecht* 3.1240–1241 and *Strafrecht* 173, where Cicero's act is called an "unpolitical and inhumane execution." Mommsen's dislike of Cicero (as well as his attitude toward Caesar's monarchy) was anticipated by W. Drumann in his *Geschichte Roms in seinem Übergange von der republikanischen zur monarchischen Verfassung oder Pompeius, Caesar, Cicero, und ihre Zeitgenossen* 6 vols. (1834–1844). On Mommsen's opinion of Drumann, see Christ (above, n. 7) 45–48.

²³See, for example, Johann Kasper Bluntschli's remark, in 1864, that revolution is not the fault of revolutionaries but of statesmen "who abuse their authority and damage their office" (quoted by T. Schieder, "Das Problem der Revolution im 19. Jahrhundert," *HZ* 170 [1950] 233–271, at 242, from the *Deutsches Staatswörterbuch* 8), as well as Haferkorn's analysis of the concept of revolution in the unpublished lectures of Heinrich von Sybel (above, n. 6) 198–206.

relations determined solely by natural necessity. The individual magistrate who violated the constitutional limits of his power entered this realm where neither his office nor any special privilege could protect him. So, for example, in the *Strafrecht*, Mommsen wrote that "when a magistrate pays no attention [to the right of *provocatio*] and executes someone despite it, his office does not protect him, and his action is regarded as that of a private man, hence he is punished as a murderer" (167; see also 43). In much the same way, the *Römische Geschichte* located the collapse of the Republican constitution in the establishment of a collective tyranny, which was punished by the people as though it were a mere band of criminals.

The notion—that Mommsen embraced in the *Römische Geschichte* and later—of the justifiability of revolution and the conditional right of the people to resist links him with many of his liberal contemporaries. But it was hardly new to Roman history. It had lurked in the schools of Roman law as early as Bartolus of Saxoferrato, the fourteenth-century commentator of the *Digest*, whose work Mommsen (who himself began an edition of the *Digest* shortly after completing the *Römische Geschichte*) must have known well.²⁴ Bartolus had argued that even the Principate was founded on an original agreement between the people and its ruler that defined the scope of that ruler's powers and as well the people's responsibility to obey. For the Bartolist tradition at the peak of its influence in the Reformation, as for Mommsen in the nineteenth century, the ruler's transgression of his power renders the agreement on which his rule is based invalid, and it becomes the right of the people to reform that agreement as it sees fit.²⁵

But, for Mommsen, although the revolution that began with the Gracchi was a legitimate expression of the sovereignty of the people over a state which had violated its mandate, the revolution itself was anything but a success. In his opinion, the Roman Revolution, much like the French Revolution, failed to establish a new agreement between itself, the sovereign power, and a ministerial authority.²⁶ The result, instead, was a monarchy that reserved for itself all executive and judicial powers, that is, one in which all magistrates were virtual appointees, and the right of *provocatio* no

²⁴Mommsen's edition of the *Digest* was completed in 1869 and published by the Weidmannsche Buchhandlung in 1870.

²⁵On the work and thought of Bartolus of Saxoferrato and its influence in the Reformation, see Q. Skinner, *The Foundations of Modern Political Thought* 2 vols. (Cambridge 1978) 1.62–65, 2.181–183. The continuity between the Reformation and modern notions of sovereignty is the subject of F. H. Schubert's "Volksouveränität und das Heilige Römische Reich," *HZ* 213 (1971) 91–122.

²⁶Mommsen's judgment of the French Revolution may be seen in his review of Adolphe Thier's monumental *Histoire du Consulat et de l'Empire* (1845–1862) "Thiers und die Kaiserzeit," *Preussische Jahrbücher* 1 (1858) 225–244. There he condemns the revolution as "anti-national" (242) for its failure to establish "a truly representative government" (236) and for its attempt to impose itself upon all of Europe (243–244).

longer existed. What Carl von Rotteck said of the French Revolution, that "tyranny rises forth from the womb of the revolution itself and destroys its finest fruit,"²⁷ agrees completely with Mommsen's portrayal of the end of the Roman Republic. Hence the *Römische Geschichte's* account of the Republic's final decades—conventionally, the climax of the entire history of the Republic—was dominated by the conviction that the path from the Gracchi to Caesar was a necessary one and that no other end was possible (see *RG* 2.95). As a direct consequence of this conviction, Mommsen refrained from a criticism of the Principate's institutions in his *Römische Geschichte*: Caesar was himself portrayed as an angel of necessity, who undertook the task of reforming the Roman constitution with as much mercy as it allowed (see, for example, *RG* 3.466–467).

III

So the *Römische Geschichte* included the essential ingredients of a liberal interpretation of history in narrating the development and demise of the Roman Republic. In Mommsen's hands, Rome's history came to resemble that of France at the turn of the eighteenth and nineteenth centuries: the Republic had its intransigent nobility, its frustrated attempts at reform, its revolution and revolutionaries, its Terror, and of course its Napoleon, who brought the revolution to an abrupt close at the cost of all of its most valuable gains. The contemporary tone of the *Römische Geschichte* is one of its most outstanding features. In this respect, Mommsen's history was to some extent anticipated by the J. G. Droysen's *Geschichte des Hellenismus*, which adopted a teleological perspective borrowed from Hegel and iconoclastically pronounced the Hellenistic world superior to Classical Greece. But Droysen's history, although acclaimed and widely read, did not approach the popularity or influence of Mommsen's *Römische Geschichte*. The profound "realism" of the *Römische Geschichte* did not escape its original audience. Heinrich von Sybel, for example, saw and appreciated it as the work's great virtue. "A book like Mommsen's *Römische Geschichte* is no consummate work of art," he wrote in his general review of the historical scholarship of the 1850s, "Über den Stand der neuen deutschen Geschichtsschreibung" (1858), "but it contains a direction that, with a lively force, the enthusiasm of a new development, and the clarity of an irrevocable decision, aims for the ideal of a great classicism." Sybel's praise was vaguely worded, but it surely reflected the ambivalence that he and many of his fellow liberals felt toward unmediated popular political movements of the time. The appeal of the *Römische Geschichte* lay then in its indictment of Roman popular sovereignty as intractably revolutionary; and Sybel most appreciated the

²⁷C. von Rotteck, *Allgemeine Geschichte von Anfang der historischen Kenntnis bis auf unsere Zeit* 7 (Freiburg 1830) 9.14.

Römische Geschichte's negative evaluation of the Roman Republic as an historical argument in support of the distinction he and other moderate liberals of his time wished to make between popular (i.e., revolutionary) sovereignty and the sovereignty of the state.²⁸

But Sybel may well have misunderstood the *Römische Geschichte*. Mommsen had no political or historical interest in championing the notion of a state sovereignty. More importantly, his historical method and his professed intention to "force the ancients to step down from the imaginary stage, on which the mass of the audience sees them, into the real world" hardly mandated the simple application of judgments on Rome to contemporary politics.²⁹ For Mommsen, it seems that the modernization of the Roman world demanded the "historization" of the perspective of the historian and his audience. He was never reluctant to give his evaluation of the Republic's institutions as they developed and of Rome's many outstanding figures, but every judgment in the *Römische Geschichte* was carefully imbedded in an historical perspective defined by the nature and potential of the Republic, not by the exigencies of the author's contemporary political system. No assessment of the Republic ignored the uniqueness of Rome's situation or the many vicissitudes of its history and, certainly, none claimed to be final.

Thus Mommsen's assessment of revolution in the Republic. While he was convinced that the sovereignty of the Roman people led inevitably to the destruction of the Republic, he stressed that the revolutionary potential of the Roman constitution nonetheless functioned as a creative element from the beginning of the Republic's history. The right of *provocatio*, although, for Mommsen, the mainstay of Roman civil liberties, was only the most obvious example of an institution that functioned through the ability of *populus Romanus* to voice its own interests; that is, through its sovereignty. The potential for revolution was, in fact, treated by Mommsen as a primary ingredient of the entire set of constitutional reforms of the Republic's first generation, to which the Roman citizen owed his political freedom. The office of the *tribuni plebis*, in particular, was represented as the direct result

²⁸H. von Sybel (above, n. 2) 1.364. The work clearly was intended as an apology for the brand of political history that was developed by German liberals on the foundation of the critical historical tradition and in opposition to Ranke and his conservative compatriots. Hence Sybel's pronouncement that "what is new (in the recent German historical writing) lies altogether in the author's altered stance toward the state" (*ibid.*). Among the liberals of the 1840s and 1850s, J. G. Droysen was the greatest spokesman (see, for example, his lectures on historical method, published since his death as the *Historik* [Stuttgart and Bad Cannstatt 1977], ed. P. Leyh) and one of the most avid practitioners (see his *Geschichte der preussischen Politik* 14 vols. [Leipzig 1855–1886]) of this new genre of historical writing.

²⁹So Mommsen in a letter to Wilhelm Henzen, quoted by Wickert, (above, n. 5) 3.628. On the perspective of Mommsen's judgments in the *Römische Geschichte*, see A. Heuss, *Theodor Mommsen und das 19. Jahrhundert* (Kiel 1956) 73–74.

of revolution, and the tribunes' power, even after it had become an accepted part of the constitution—as the *Römische Geschichte* intimated and the *Staatsrecht* formulated expressly—remained in equal measure legitimate and revolutionary:

No nation carried through the task of constitutional reform with such consummate courage as the Roman nation in the struggle of the *plebs* for equality; but no nation articulated the work of revolution—however much this theoretically and practically split the state's organization—in the form of a lasting institution, as the Romans did in the Plebeian institutions. (*Staatsrecht* 3.143–144)

In the *Strafrecht*, Mommsen carried this notion of an institutionalized potential for revolution one step further. There he stated that “Roman criminal law does not recognize the overthrow of the constitution as treason [*perduellio*]; the attempt to change the existing constitution is in itself legal, although a violation of the law may occur in the means that are employed.” Mommsen supported this striking statement by drawing on the common claim of Republican legal theorists that every citizen in the Republic had the right and the duty “to destroy, without prior proceedings, any man who is striving for, or who has already achieved monarchical power.”³⁰ Paradoxically, for Mommsen, the Republic secured itself against revolution with revolution; or, in the careful terminology of his later legal studies, the constitution of the Republic was itself a “formal revolution” (*Strafrecht* 551, 937).

These remarks on the revolutionary aspects of the Republic, scattered throughout the *Römische Geschichte*, the *Staatsrecht*, and the *Strafrecht*, may be compared with Mommsen's thoroughly systematic treatment in the *Staatsrecht* of revolutionary elements in the Principate.³¹ If the constitution of the Republic incorporated potential or formal revolution, the Principate, Mommsen believed, was founded upon revolution in an active and permanent state. The Principate, in other words, was an institution that existed through the direct expression of the will of the people (usually in the form of an army's acclamation of its commanding officer) and that lasted as long as

³⁰*Strafrecht* 550–551. It is an interesting feature of Mommsen's concept of revolution that he understood revolution as a direct expression of the will of the people, and yet he believed that a revolution could be undertaken by even a single individual. Parallel to the passage in the *Strafrecht* that refers to the Roman Republic is the following, from *Staatsrecht* 2.842, on imperial succession in the Principate: “The transition of the Principate, in its essence, that is in the *imperium*, although not an act of the free self-determination of the individual citizen, is nonetheless an act that may be based either on the decree of the senate or on the acclamation of any random group of soldiers, so that, in actuality, every soldier [*jeder bewaffnete Mann*] has the right to make any other man, though not himself, an emperor.”

³¹See the entirety of the second section of *Staatsrecht* vol. 2, and the excellent study by A. Heuss, “Theodor Mommsen und die revolutionäre Struktur des römischen Kaisertums,” *ANRW* 2.1 (Berlin 1974) 77–90.

the people's will remained unchanged. There was no continuity in the Principate, therefore, because the emperor's power, although otherwise virtually limitless, did not allow him to circumvent a new appeal to the people when it came to matter of selecting a successor.³² Mommsen's evaluation of the Principate followed directly from this interpretation: "It is clear that in comparison with this institution, which raises lawlessness to a norm and conjures up its possession of highest office with violence and injustice, even the most perverted manner of fixing the succession would be a blessing for the community" (*Staatsrecht* 2.1144). But here, as in his treatment of the Republic, Mommsen linked the revolutionary character of the constitution with the freedom of the people, thus conceding a beneficial side to this revolutionary aspect of the Principate. "The Principate," Mommsen wrote at one point in the *Staatsrecht*, "is an autocracy that is tempered by a legally permanent revolution."³³ In other words, revolution served as a check upon the power of the *princeps*, just as the Republic's legalization of revolutionary activity protected its constitution against itself.

Mommsen did not, of course, continue the *Römische Geschichte* past the death of Caesar. The fourth volume, covering the Principate, was left unwritten, and the fifth volume, *Länder und Leute von Caesar bis Diocletian*, when it finally appeared in 1885, followed a format that could in no way be construed as a continuation of the original three volumes. Mommsen explained his unwillingness to continue the *Römische Geschichte* past the fall of the Republic by invoking the scarcity of reliable material. "We can understand the institutions [of the Principate] reasonably well," Mommsen wrote to Wilamowitz in 1884, "but antiquity itself did not know its historical development, and we will never guess it."³⁴ But the lack of sufficient evidence was not the entire story. There are strong intimations in the *Römische Geschichte* and the *Staatsrecht* that the institutional structure of the Principate overwhelmed and stifled its historical development; that is, the Principate absorbed revolution within itself so completely that it put an end to the dynamic struggle between constitutionally delegated authority and potentially revolutionary sovereignty, which Mommsen represented in the *Römische Geschichte* as the engine of the Republic's historical movement. Lacking a true constitution in Mommsen's liberal sense, the Principate was simply not an appropriate subject for narrative history.

³²*Staatsrecht* 2.1133–1143, and Heuss, *op. cit.* 82–83.

³³*Staatsrecht* 2.1133. In his short essay, "Der letzte Kampf der römischen Republik. Ein Bruchstück," *Hermes* 11 (1878) 90–105 (reprinted in *Gesammelte Schriften* [above, n. 12] 4.333–347) Mommsen discussed what he saw as the one single moment, immediately following the death of Nero, when the senate had the opportunity to re-establish the Republic, but lacked the necessary courage. After that, Mommsen was convinced, neither the senate nor the emperor was capable of dismembering the Principate.

³⁴Quoted by A. Wucher, *Theodor Mommsen. Geschichtsschreibung und Politik* (Göttingen 1956) 132. Cf. Heuss (above, n. 31) 82.

IV

Mommsen's account of the Principate in the *Staatsrecht* clearly recalled and relied on his analysis of the Republic. But the treatment the Principate received in the *Staatsrecht* also completed the *Römische Geschichte*. The *Staatsrecht*'s account was the final argument that the Roman Revolution was a failure and left no doubt that, in Mommsen's mind, the crisis of the Republic's last century was not preliminary to a entirely new constitutional order, but was rather a prescription for an institutionalized form of tyranny. This consistency in Mommsen's vision of the constitutional history of Rome compels us to search for an answer to the question his treatment of the Roman constitution seems always to invite, namely whether political freedom was possible in the Roman Republic without the extremes of revolution.

This was a question that Mommsen could not avoid. Not finding an answer, the reader would conclude that the author of the *Römische Geschichte* was convinced that Rome's failure was pre-determined by some higher order. Although some of Mommsen's liberal contemporaries, particularly those close to Hegel, were willing to write ancient history with the help of a *deus ex machina*, Mommsen exhibited no tendencies of this sort.³⁵ The *Römische Geschichte* shows that Mommsen had every intention of answering the question of why the institutions that brought the Roman citizen his political rights were the very same as those that brought revolution to Rome, in fact, it addressed the question at the precise moment in the narrative when the constitution's limitless potential for revolution first began to be realized: when Tiberius Gracchus presented his package of reform measures to the people (see especially *RG* 2.86–105).

Mommsen's answer, in its basic outline, was strikingly traditional: Rome grew beyond the potential of the constitution to govern it. The increasing number of potential office-holders and, more importantly, the mere size of the citizen body crippled the function of Rome's institutions.³⁶ This was very nearly what Montesquieu had written a century earlier, and it has been developed in great detail in our time.³⁷ But Mommsen's explanation is

³⁵J. G. Droysen is the best example. See his "Vorwort zur *Geschichte des Hellenismus*" (1843), included in Hübner's edition of the *Historik* (Munich 1960) 369–385, at 382. On the dramatic elements in Droysen's notions of the writing of history, see my "J. G. Droysen and the Aeschylean Hero," *CP* 79 (1984) 1–14.

³⁶Mommsen anticipated his treatment of the failure of the Gracchi at *RG* 1.783–829, where, however, in discussing the domestically quiet third century, he noted the "oncoming sickness and omens of revolution" (829) in all parts of the constitution, not alone in the character of the assemblies.

³⁷See Montesquieu, *Considerations on the Causes of the Greatness of the Romans and their Decline*, tr. D. Lowenthal (New York 1965) 91–95. Among historians of our century who have followed Mommsen's lead are Matthias Gelzer, for example, "Gemeindestaat und Reichstaat"

unique in the emphasis it places on the *comitia* and the *contiones*, which were, respectively, the *de iure* and *de facto* legislative bodies of the Republic. "The essential error of the Gracchan revolution rests in a too often forgotten situation: the makeup of the popular assemblies of its time," which consisted, Mommsen continued, "of a few hundred or thousand individuals, [who,] collected from the back alleys of the capital, deliberated and voted in the name of the citizen body."³⁸ In Mommsen's mind, these legislative bodies were devoid of all reason: they would agree to everything but they could follow through on nothing. But the problem of Rome's legislative assemblies lay not so much in the incompetence of the citizens who participated, but in the fact that these assemblies could only accommodate a small portion of the citizen body, and—this is the key point—the principle of political representation was absolutely foreign to them:

Here is the revenge of the basic shortcoming of the ancient political system, namely that it never advanced from a city to a state constitution, or, what amounts to the same thing, from the system of an original assembly to that of a parliament.³⁹

This was a development, Mommsen insisted, that Rome could hardly have made, even if the Romans had been willing to throw out their traditional constitution and begin again. The Italian insurgents, he believed, had had that very opportunity in the 90s B.C., but instead of establishing a parliamentary system—the logical choice for such an alliance—they merely adopted the constitution of the Roman Republic, and hence re-established "the communal organization, in a still more nonsensical fashion than before." It was a simple matter of fact, Mommsen was convinced, that "the thought . . . of articulating the sovereignty of the people through a representative assembly . . . is completely and entirely modern," and it is a matter of historical experience, that, lacking this principle, "the free state is a monstrosity" (RG 2.230–231).

This conviction of a fundamental disparity between the ancient and modern state underlies Mommsen's fundamentally negative assessment of the Roman Republic, and it also stands behind his startlingly positive treat-

(1924), reprinted in *Kleine Schriften* (Wiesbaden 1962) 1.232–247, and Gelzer's student, Christian Meier, *Res publica amissa* (Wiesbaden 1966) 151–166.

³⁸RG 2.94. In his *Abriss des römischen Staatsrecht* (above, n. 20) 29, 256, Mommsen made it clear that he believed that the *comitia* had not functioned with integrity since the beginning of the reign of the *nobiles*.

³⁹RG 2.94. Mommsen's remarks bear a certain resemblance to Rousseau's famous evaluation of the decline of the Republic in *Du Contrat Social* of 1762: "In its finest time, Rome saw all the crimes of tyranny revived and nearly perished because it joined legislative authority and sovereign power in the same hands" (7.2). But the differences overwhelm the similarities: Mommsen knew that the legislative competence of the assemblies was as old as or older than the Republic, and believed, in direct opposition to Rousseau, that the sovereignty of the people could and must be represented, and hence, in Rousseau's language, alienated.

ment of Julius Caesar. For Mommsen, we have noted, Caesar was an angel of mercy: at the moment of his appearance, the Republic had reached a point where it survived only to perpetuate civil war and Caesar put it to death with a minimum of human sacrifice. But the humanitarian aspects of Caesar's power and personality do not alone account for his image in the *Römische Geschichte*. More important within the historical work—and also for the understanding of Caesar throughout the nineteenth century—was Mommsen's perception of Caesar as a perfect union of monarch and democrat.⁴⁰ In a notorious passage (*RG* 3.476–477), Mommsen wrote that Caesar's monarchy was anything but a contradiction of democracy, and credit must be given to Caesar for the completion of all the best and the most sensible in the traditional program of the *populares*. Nothing else in Mommsen's history provoked the controversy of this attribution of democratic ideals to the founder of the new monarchy,⁴¹ for it clearly implied that the progressive elements in Roman history were themselves incommensurate with the Republican constitution. For Mommsen, this implication is entirely correct, but the basic fault lay not in the nature of the demands made by the Gracchi or the later generations of the *populares*, but in the fact that the Roman constitution had no adequate means to represent and articulate the sovereignty of the *populus Romanus*—except in the person of an individual invested with absolute power. Caesar did indeed realize the *Volksherrschaft* of the Roman people as well as possible; his power was the “representation of the Roman nation by its highest and most able confidant” (*RG* 3.476). Thus, for Mommsen, he succeeded where Pericles, Gaius Gracchus, and Cromwell—all potential monarchs—failed: he gave the people a full and complete authority that was mediated only through his own person. So his actions completed a revolutionary development, but they turned that development away from its natural conclusion of enduring civil war with an accompanying bloodshed and chaos, by institutionalizing direct popular sovereignty in the form of the Principate. Caesar was the best that Rome could hope for, given the inherent limitation of the ancient constitution, but

⁴⁰See the chapter in the third volume of the *RG* entitled “Die Alte Republik und die neue Monarchie,” 3.461–569. On Caesar and Caesarism, see A. Momigliano, “Per un riesame della storia dell'idea di Cesarismo,” *Secondo Contributo alla Storia degli Studi Classici* (Rome 1969) 273–282, along with his reviews of A. Heuss (above, n. 29) and A. Wucher (above, n. 34) in *Gnomon* 30 (1958) 1–6 (reprinted in Momigliano, *Secondo Contributo* [above] 421–427), and Z. Yavetz, *Julius Caesar and his Public Image* (London 1982) 10–57, each with extensive bibliography.

⁴¹Eduard Meyer's assessment of Caesar appears most poignant when it is understood as a reaction to Mommsen: “although Caesar knew how to use the program of the democrats and to entice the masses with it, in fact he was anything but an admirer of popular sovereignty, which he, as monarch, pushed aside as a thing of little worth. Rather, he was an aristocrat through and through.” *Caesars Monarchie und die Principat des Pompeius: innere Geschichte Roms von 66 bis 44 v. Chr.* (Stuttgart and Berlin 1922) 335.

the Principate was anything but a paradigm for the modern state: "the history of Caesar and of Roman Caesarism, for all its unexcelled greatness, and for all its historical necessity, is truly a more pointed indictment of modern autocracy than the hand of man could possibly write" (RG 3.477).

Mommsen's distinction of the ancient and modern state is, of course, extreme—most obviously extreme in its categorical judgment of the character and potential of the ancient city-state. It is doubtful whether Mommsen would have framed the problem of the Roman constitution as the general failing of the ancient city-state, if Aristotle's *Constitution of Athens* had been available in the middle of the century: the Aristotelean work, with its proof that the Athenian constitution in fact incorporated the principle of representation at least to some degree, suggests that Rome should not perhaps be regarded as characteristic for the ancient state.⁴² But the distinction Mommsen made between the ancient and modern state is also extreme in its conviction that a modern parliamentary system is essentially different and more fortunate than the ancient legislative body. Mommsen's optimism is understandable in the context of the 1850s, in the immediate aftermath of the Revolution of 1848 that seemed to be self-limiting and to aim not for monarchy but for parliamentary representation. But Mommsen's own long and often frustrating political involvement inside and outside of his national parliament after the Revolution of 1848 and into the time of Bismarck, if it did not temper his conviction that the parliamentary system is the sole means by which the people's sovereignty could be appropriately articulated, certainly taught him that a parliament's professed goal of developing and educating the political will of the people can easily hide the less noble intention of restricting popular political participation.⁴³

⁴²On the impact of the *Athenaion Politeia*, which was first published in 1891, see J. A. O. Larsen, *Representative Government in Greek and Roman History* (Berkeley 1955) 6, 192–193, n. 13.

⁴³Wucher (above, n. 34), and Wickert (above, n. 5) both give adequate accounts of Mommsen's political activities from 1848 on through the period of the Reichsgründung. K. Christ, in his *Von Gibbon zu Rostovtzeff* (Darmstadt 1973) 91–92, records Mommsen's bitter frustration with the "Fältnis der Nation" and lack of political interest, in 1892, after a parliamentary system had come to hold legislative force over all of Germany. In the last years of his life, Mommsen showed considerable interest in Theodor Barth's attempt to bring about a coalition of liberals and social democrats, and in this manner to rejuvenate the Liberal Party and re-solidify its relationship with the broader mass of the people. (Cf. A. Heuss [above, n. 29] 215–220.) It seems that Mommsen would not have tolerated the thought, common enough today, that representative government is more stable for the very reason that it effectively limits political participation; for Mommsen, parliamentary representation functioned to educate the people and channel them into the political system as qualified participants, not to exclude them from it. Thus Mommsen's idea of the parliamentary system is comparable to the characteristically liberal notion of *Bildung*, for which see J. J. Sheehan, *German Liberalism in the 19th Century* (Chicago 1978) 26–27.

These reflections are particularly pertinent to the difficult question of the viability of Mommsen's understanding of ancient and modern government, and the appropriateness of the concepts such as sovereignty and the delegation of power, that he and his contemporaries used to portray it—a question that lies far beyond the scope of this study. But however it is answered, Mommsen's view of the Roman constitution must be seen in connection with his intricate notion of revolution, which marks his place in the historiography of his time, and also has close connections to the history of Roman law. In the context of the *Römische Geschichte*, Mommsen's interpretation of the nature of revolution and of the difference between the ancient and modern state accounts for the work's vision of an all-embracing movement in Roman history toward a single, certain end, and also for the author's conviction that the historical crime of men like the Gracchi and Pompey was not that they threatened or weakened the Republic's constitution, but rather that they failed to replace it before "the exhaustion of the physical and spiritual forces of the nation" had set in.⁴⁴ Thus Mommsen's general attitude toward the Republic: the Roman Republic was great in its resilience and its *Bürgersinn*, and it was certainly antiquity's noblest experiment in civil liberty, but it could not make the distinction between reform and revolution or between revolution and political freedom. As a consequence, revolutionary monarchy was Rome's inevitable destiny and true political freedom—without revolution as its direct consequence—would have to wait for the modern age.⁴⁵

ALLEGHENY COLLEGE,
MEADVILLE, PENN. 16335

⁴⁴RG 1.276. On Tiberius Gracchus, see RG 2.96; on Pompey, RG 3.106 (see also B. Croke, "Mommsen's Pompey," *Quaderni di Storia* 22 [1985] 137–149). Here Mommsen recalls W. Drumann (above, n. 22) 1.iv "one must regret a nation whose ship of state only reaches the harbor of monarchy when that nation has degenerated." Altogether unlike Mommsen, however, Drumann read the history of the Roman Republic as an argument supporting the modern monarchy. That Mommsen's interpretation of popular sovereignty remained essentially the same throughout his life is indicated by his statement in *Staatsrecht* 2.1133 that "the perfection of popular sovereignty is its self-negation," which precisely reiterated his pronouncement in RG 1.276 that "tyranny is everywhere [in antiquity] the consequence of universal suffrage."

⁴⁵I wish to acknowledge with gratitude the suggestions of Howard Kaplan, James Whitman, Simon Price, Arnaldo Momigliano, Laura Gadbery, and of the referees of *Phoenix*.