Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court, 1876–1914

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In the epilogue to his authoritative 1957 intellectual history, *The German Idea of Freedom*, Leonard Krieger concluded his exploration of German political thought from the Reformation to the Second Empire by excoriating the German liberal middle class, and especially the National Liberal Party, for its compromise with the authoritarian state and the landed aristocracy. He singled out for particular scorn the *Rechtsstaat* theory of Rudolf Gneist:

> Rudolf Gneist's doctrine of the Rechtsstaat, from which all oppositional elements had now been removed, set the tone for the adaptation of the old liberal political ideal to cover the legal reality of the new national state . . . The concept of *Rechtsstaat*, that barometer of 19th-century liberalism, was no longer defined in terms of a state which permitted to the individual rights apart from the state. It became now simply the kind of state whose power was articulated in legal modes of action — that is, in measures which conformed to general rules.[1]

In an important essay a decade later, Otto Pflanze likewise criticized the liberal middle class for conceiving of even the principle of ministerial responsibility in juridical rather than political terms, thereby showing "the limitations of their understanding of the constitutional systems of western Europe and America which they thought to emulate."[2] These two assessments, particularly

Earlier versions of this essay were presented to the Annual Meeting of the American Society for Legal History, the Comparative Legal History Seminar at the University of Chicago, and the Faculty Workshop Series at the School of Law at Case Western Reserve University. I wish to thank the participants in those sessions for their helpful comments and suggestions. I also wish to recognize and thank the Deutscher Akademischer Austauschdienst for a Study Visit Grant that supported the research upon which the paper is based.

1. Leonard Krieger, *The German Idea of Freedom: History of a Political Tradition from the Reformation to 1871* (Chicago, 1957), 356–58, 458–60, quotation from 460. Krieger endorses and extends the earlier critique of Gneist's *Rechtsstaat* doctrine found in Heinrich Heffter, *Die deutsche Selbstverwaltung im 19. Jahrhundert: Geschichte der Ideen und Institutionen* (Stuttgart, 1950), 372–403, 623–53.

2. Otto Pflanze, "Juridical and Political Responsibility in Nineteenth-Century Germany," in *The*

that of Krieger, cemented a dominant postwar scholarly consensus in the United States that the Prussian, and hence German, *Rechtsstaat* of the Second Empire fell far short of the protections included in the Anglo-American rule of law, leading in large part to Germany's disastrous history in the twentieth century.

In sharp contrast, postwar legal and constitutional historians in Germany *celebrated* the nineteenth-century establishment of the *Rechtsstaat* as a great achievement for human liberty, and Ernst Rudolf Huber singled out for fulsome praise one specific institution: "The unfolding of the principle of the *Rechtsstaat* was perfected in Germany by the creation of the new system of administrative law courts [*Verwaltungsgerichtsbarkeit*]."[3] Although this legal-constitutional scholarship accommodated a spectrum of interpretations of the rule of law in Prussia, all authors agreed that the legal system created significant space for individuals to exercise their rights.[4]

A recent generation of social historians of Germany has also found much to praise in the rule of law in Prussia. Hans-Ulrich Wehler makes a delphic concession in his influential interpretive social history of the German Empire

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Responsibility of Power: Historical Essays in Honor of Hajo Holborn, ed. Leonard Krieger and Fritz Stern, (Garden City, N.Y., 1967), 162–82, quotation from 180.

3. Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte seit 1789*, 8 vols. (Stuttgart, 1978–91), 3: 985.

4. Celebratory postwar assessments of the importance of the administrative law court system by legal historians include Erich Apel, "Die Entwicklung des Rechtsschutzes in der preussischen Verwaltung" (Dr. jur. diss., University of Marburg, 1961), 96; Ludwig Frege, "Der Status des preussischen Oberverwaltungsgerichtes und die Standhaftigkeit seiner Rechtsprechung auf politischem Gebiet," in *Staatsbürger und Staatsgewalt: Verwaltungsrecht und Verwaltungsgerichtsbarkeit in Geschichte und Gegenwart: Jubiläumsschrift zum hundertjährigen Bestehen der deutschen Verwaltungsgerichtsbarkeit und zum zehnjährigen Bestehen des Bundesverwaltungsgerichts*, ed.Helmut R. Külz and Richard Naumann, 2 vols. (Karlsruhe, 1963), 1:131–55; Georg-Christoph von Unruh, *Verwaltungsgerichtsbarkeit im Verfassungsstaat: Probleme und Entwicklung* (Herford, 1984); and Stephan Felix Pauly, *Organisation, Geschichte und Praxis der Gesetzesauslegung des (königlich) Preussischen Oberverwaltungsgerichtes 1875–1933* (Frankfurt am Main, 1987), 17. For more critical treatments, see Jürgen Gliss, *Die Entwicklung der deutschen Verwaltungsgerichtsbarkeit bis zur Bundesverwaltungsgerichtsordnung — unter besonderer Berücksichtigung der Grundpositionen von Bähr und Gneist*, (Dr. jur. diss., University of Frankfurt am Main., 1962 [Gelnhausen, 1962]), 69–75; Hans-Jürgen Wichardt, "Die Rechtsprechug des Königlich-Preussischen Oberverwaltungsgerichts zur Vereins- und Versammlungsfreiheit in der Zeit von 1875 bis 1914: Ein Beitrag zur Entwicklung des materiellen Rechtsstaates in Deutschland," (Dr. jur. diss, University of Kiel, 1976), 128; and Ulrich Stump, *Preussische Verwaltungsgerichtsbarkeit 1875–1914: Verfassung — Verfahren — Zuständigkeit* (Berlin, 1980), 303–5. Useful surveys of administrative law and the system of administrative law courts are: Conrad Bornhak, *Preussisches Staatsrecht*, 3 vols. (Freiburg im Breisgau, 1888–90), 2 (1889): 397–497; Wichard von Bredow, "Kritische Beiträge zur Verwaltungsgerichtsbarkeit in Preussen" (Dr. jur. diss., University of Königsberg, 1922); Joachim von Elbe, *Die Verwaltungsgerichtsbarkeit nach den Gesetzen der deutschen Länder* (Berlin, 1926); Peter Badura, *Das Verwaltungsrecht des liberalen Rechtsstaates: Methodische Überlegungen zur Entstehung des wissenschaftlichen Verwaltungsrechts* (Göttingen, 1967); Axel Görlitz, *Verwaltungsgerichtsbarkeit in Deutschland* (Neuwied and Berlin, 1970); and Wolfgang Rüfner, "Die Entwicklung der Verwaltungsgerichtsbarkeit," in *Deutsche Verwaltungsgeschichte*, ed.Kurt G. A. Jeserich, Hans Pohl, and Georg-Christoph von Unruh, 6 vols. (Stuttgart, 1984), vol. 3, *Das Deutsche Reich bis zum Ende der Monarchie*, 909–30.

between 1871 and 1918, writing, in the middle of a section devoted to "class justice":

> It is . . . difficult not to be impressed by the strict legality with which the Prussian [Supreme] Administrative Law Court, adhering to the letter of the constitution, placed limits on the authorities' chicanery at the time of the "nationalities" struggle.[5]

Yet Wehler develops this observation no further, nor does he return to it in his subsequent survey published twenty years later.[6] Thomas Nipperdey, too, was impressed:

> Among the lasting liberal successes of the 1870s in Prussia must be numbered the establishment of legal controls over the authoritarian state [Obrigkeitsstaat] . . . Catholics, Social Democrats, Danes, and Poles came to enjoy the protection of minorities which the jurisprudence of the Supreme Administrative Law Court created against police intrusions into the rights of free assembly and association . . .[7]

As these assessments by Wehler and Nipperdey suggest, social historians since the mid-1980s have directed their attention to the importance of law and of legal and judicial structures for understanding the relationship of the German middle class to the Prussian state.[8] Nevertheless, the examination of Prussian legal institutions by historians outside the legal faculties remains fairly new, and the parallel discourses of social and legal historians all too often remain true to the geometrical metaphor and fail to intersect.[9]

5. Hans-Ulrich Wehler, *Das deutsche Kaiserreich 1871–1918*, 5th ed. (Göttingen, 1983), 132; the translation here is taken from *The German Empire 1871–1918*, trans. Kim Traynor (Leamington Spa, 1985), 128.

6. See the disappointing silence on this issue in the third volume of the magisterial Hans-Ulrich Wehler, *Deutsche Gesellschaftsgeschichte*, 4 vols. (Munich, 1987–), vol. 3, *Von der "Deutschen Doppelrevolution" bis zum Beginn des Ersten Weltkrieges 1849–1914* (1995), 857–64.

7. Thomas Nipperdey, *Deutsche Geschichte 1866–1918*, 2 vols. (Munich, 1990–92), vol. 2, *Machtstaat vor der Demokratie*, 119. Nipperdey cautions, however: "Of course, one must not exaggerate this court's liberality and friendliness to the citizen."

8. See for example David Blackbourn, "The Discreet Charm of the Bourgeoisie: Reappraising German History in the Nineteenth Century," in idem and Geoff Eley, *The Peculiarities of German History* (Oxford, 1984), 157–292, 190–95; and Michael John, *Politics and the Law in Late Nineteenth-Century Germany: The Origins of the Civil Code* (Oxford, 1989). See also the essays in the section on "Bürgerliche Gesellschaft und bürgerliches Recht," in *Bürgertum im 19. Jahrhundert: Deutschland im europäischen Vergleich*, ed. Jürgen Kocka, 3 vols. (Munich, 1988), 1: 301–468. Especially important to this essay is Regina Ogorek, "Individueller Rechtsschutz gegenüber der Staatsgewalt: Zur Entwicklung der Verwaltungsgerichtsbarkeit im 19. Jahrhundert," in ibid., 1: 372–405.

9. Two excellent recent works, one each by a legal and social historian, are Thomas Ormond, *Richterwürde und Regierungstreue: Dienstrecht, politische Betätigung und Disziplinierung der Richter in Preussen, Baden und Hessen 1866–1918* (Frankfurt am Main, 1994), and, Christina von Hodenberg, *Die Partei der Unparteiischen: Der Liberalismus der preussischen Richterschaft 1815–1848/49* (Göttingen, 1996).

This essay does not propose to explore once again the comprehensive high intellectual history of the Prussian *Rechtsstaat* so exhaustively traced by Krieger. Instead, by scrutinizing the structure and practice of the Prussian Supreme Administrative Law Court from 1876 to 1914, its aim is to test both his very critical account and the diametrically-opposed adulation heaped upon the *Rechtsstaat* by many legal historians. It seeks to trace more precisely the contours of the rule of law in Prussia by weaving together two separate strands of scholarship that have hitherto had little influence upon each other, to describe briefly the intellectual currents that led to the creation of an administrative law court system in Prussia and the structure that emerged, and to explore a few examples of the jurisprudence of the Supreme Administrative Law Court. It will argue that the Supreme Administrative Law Court formalized a meaningful rule of law in Prussia that provided greater protection for individual rights than Krieger's cramped and stunted assessment imagined. This rule of law combined the concerns for the rights of property and for the procedural conception of justice that bind together legal thought and the ideology of the liberal middle class with the judicial/legal conception of how to control arbitrary administrative actions. Therefore, while the Prussian rule of law was real and meaningful, like that elsewhere in Europe, in Britain, and in the United States, it also embodied the fundamental limitations of bourgeois rule of law ideology.

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Before moving to the substantive discussion, a brief comment is required on the definition and historiography of the concepts of the rule of law and the *Rechtsstaat*, and their relation to each other.[10] Traditionally, the dominant interpretations have sought always to *distinguish* between the two concepts, sometimes to the advantage of one, sometimes the other. Some conservative German scholars found the *Rechtsstaat* superior to the rule of law. The majority of historians and jurists, however, most influentially Krieger, Pflanze, and Ernst-Wolfgang Böckenförde, traced the history of the *Rechtsstaat* in the nineteenth century as the gradual hollowing out of the initially robust *Rechtsstaat* of the southwestern theorists of the 1830s, over the caesuras of 1849 and 1867, to a weak and purely formal, strictly positivist conception during the Second Empire, which failed to offer the array of protections for individual liberties provided by the rule of law.[11]

10. A useful exploration of the relationship of the rule of law and the *Rechtsstaat* by an American legal scholar is Harold J. Berman, "The Rule of Law and the Law-Based State with Special Reference to the Soviet Union," in *Toward the "Rule of Law" in Russia? Political and Legal Reform in the Transition Period*, ed. Donald D. Barry (Armonk, N.Y., 1992), 43–60.

11. Ernst-Wolfgang Böckenförde, "The Origin and Development of the Concept of the *Rechtsstaat*," in idem, *State, Society and Liberty: Studies in Political Theory and Constitutional Law*, trans. J. A. Underwood (New York, 1991), 47–70.

But increasingly historians and legal scholars recognize that the two concepts are essentially the same. The most influential nineteenth-century theorist of the rule of law in England, Albert Venn Dicey, devoted fully half of his *Introduction to the Study of the Law of the Constitution* to an exposition of the rule of law, arguing that the English genius was that the constitution itself flowed from the rule of "regular" law.[12] Thus, he viewed the rule of law as superior and *prior to* the constitution itself. Dicey's rule of law had three facets: first, the absolute supremacy of regular law as opposed to prerogative or arbitrary (or even broadly discretionary) power; second, equality before the law, specifically the equal subjection of all persons, even state administrative officials, to the jurisdiction of ordinary tribunals; and third, that constitutions are not the source but the consequence of individual rights defined and enforced by courts of private law.[13] Thus, the rule of law for Dicey derived from ordinary courts having jurisdiction to review the legality of acts, rather than from any constitutional provisions. While Krieger and others criticized the German *Rechtsstaat* for abandoning constitutional ambitions for political control of, or codetermination with, the monarch, the laundry list of its characteristic elements would ring familiar to Dicey. Institutional separation of powers among the three branches of government; constitutional guarantees of fundamental rights; strict legality of every exercise of state power; freedom from arbitrary state action; proportionality of the means employed by the state to accomplish legitimate ends; and the comprehensive judicial control of every state action that affects the subjective rights of a citizen; all these find their highest protection in the separation of judicial from administrative authority, the guarantee to the citizen of his or her "statutory judge" to hear a case, and judicial independence and freedom from instruction by the administration.[14] After 1850, German thought conceived of the *Rechtsstaat* as the "state of well-ordered administrative law," including the availability of meaningful review of all administrative actions in judicial form.[15] This essay therefore treats the rule of law and the *Rechtsstaat* as homologous, if not interchangeable, while remaining aware of the contentious nature of that position in much prior scholarship.[16]

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12. Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London, 1915; reprint ed., Indianapolis, 1982; 1st ed., London, 1885), chap. IV: "The Rule of Law: Its Nature and General Applications," 107–22.

13. Ibid., 120–21; the clearest commentary on this aspect of Dicey's rule of law is Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Chapel Hill, 1980), 78–90.

14. Ernst Holthöfer, *Ein deutscher Weg zu moderner und rechtsstaatlicher Gerichtsverfassung: Das Beispiel Württemberg* (Stuttgart, 1997), 27.

15. Michael Stolleis, "Rechtsstaat," in *Handwörterbuch zur Deutschen Rechtsgeschichte*, ed. Adalbert Erler, et al., 5 vols. (Berlin, 1971–98), 5: cols. 367–75, col. 372.

16. Anglo-American scholars consistently note the problems associated with attaching any precise meaning to the concept of the rule of law. Joseph Raz, "The Rule of Law and Its Virtue," in

In the middle of the nineteenth century, lawyers and state officials in Germany grappled with the question of how to protect the rights of the individual against abuses by government officials. There was a long prehistory to this struggle, for ever since Montesquieu the doctrine of the separation of powers has presented constitutional theorists with a dilemma.[17] To whom should the citizen complain if he or she believed his or her rights had been violated; who would decide the issue, and what procedure would be followed? Administrative acts are part of the executive function of government. Review of their legality by courts of ordinary jurisdiction can be seen as establishing the supremacy of the judiciary over the executive. Moreover, the sharp continental distinction between private and public law reinforced neo-absolutist political arguments against judicial review of administrative acts, for the purview of courts of ordinary jurisdiction was strictly private law.[18] Yet the other option, review of the legality of administrative acts by higher administrative officials, renders the executive branch judge in its own case, a breach of fundamental notions of procedural fairness. The problem was how to establish a system for review of administrative acts that protected both the separation of powers and principles of procedural fairness and impartiality of decision-making.

By the last third of the nineteenth century, German constitutional theorists possessed three theoretical-legal models of how to provide for the procedural protection of individuals against illegal administrative acts.[19] The oldest heark-

idem, *The Authority of Law* (Oxford, 1979), 210–29; and Ronald A. Cass, *The Rule of Law in America* (Baltimore, 2001), 3–19. Noting that difficulty, and the rather limited nature of the concept, others differ from Böckenförde and other Germans and equate the rule of law and the *Rechtsstaat*. D. Neil MacCormick, "Der Rechtsstaat und die rule of law," *Juristen Zeitung* 39 (1984): 65–70.

17. For the eighteenth-century story leading up to the Prussian reform era, see Edgar Loening, *Gerichte und Verwaltungsbehörden in Brandenburg-Preussen: Ein Beitrag zur Preussischen Rechts- und Verfassungsgeschichte* (Halle, 1914), 30–147. See also the accounts in the Nazi-era, Schmitt-influenced Albrecht Wagner, *Der Kampf der Justiz gegen die Verwaltung in Preussen, dargelegt an der rechtsgeschichtlichen Entwicklung des Konfliktsgesetzes von 1854* (Hamburg, 1936), 49–101, and, more reliably, Heffter, *Die deutsche Selbstverwaltung*, 11–321.

18. A general introduction to this characteristic of European civil law is John Henry Merryman, *The Civil Law Tradition: An Introduction of the Legal Systems of Western Europe and Latin America*, 2d ed. (Stanford, 1985), 85–90, 133–41. See also R. C. van Caenegem, *An Historical Introduction to Private Law* (Cambridge, 1992).

19. Erich J. C. Hahn, *Rudolf von Gneist, 1816–1895: Ein politischer Jurist in der Bismarckzeit* (Frankfurt am Main, 1995), 135–43, provides an insightful discussion of the tensions between the ideals of *Administrativjustiz*, the *Justizstaat*, and the *Rechtsstaat*. Much the same treatment can be found in idem, "Rudolf von Gneist (1816–1895): The Political Ideas and Political Activity of a Prussian Liberal in the Bismarck Period," (Ph.D. diss., Yale University, 1971), 144–48. The celebratory schema as one of a triumphal march from the tutelary *Polizeistaat* to the apogee of protection of individual rights, the *Rechtsstaat*, through these three stages, is explicit in Walter Jellinek, *Verwaltungsrecht*, 2d ed. (Berlin, 1929), 75–92; and Martin Sellmann, "Der Weg zur neuzeitlichen Verwaltungsgerichtsbarkeit: Ihre Vorstufen und dogmatischen Grundlagen," in *Staatsbürger und Staatsgewalt*, ed. Külz and Naumann, 1: 25–86. For one of many examples of scholarship that posits this tripartite classification, see Jellinek, *Verwaltungsrecht*, 76–79.

ened back to the supreme judicial jurisdiction of the courts of the Holy Roman Empire (*Reichskammergericht* and *Reichshofrat*) and envisioned review of sovereign executive acts by judges of courts of ordinary jurisdiction (*Justizstaat*). The term *Justizstaat*, when contrasted with the term *Rechtsstaat*, suggests a state in which administration and sovereignty were subordinated to the judiciary rather than to the law itself, and thus many considered *Justizstaat* theory to violate widespread notions of the proper distribution of authority in a well-balanced separation-of-powers governmental scheme.[20] Obviously, judges inclined toward a favorable view of the *Justizstaat*, while administrative officials viewed it dimly.

The second alternative was purely internal administrative review of administrative actions. Under the absolutist monarchies of the eighteenth century like Prussia, subjects who felt their rights violated could lodge their complaint against an administrative official with his superior, and the line of appeal lay entirely within the bureaucracy.[21] By the mid-nineteenth century, middle-class liberals and most judges rejected this system of so-called administrative justice (*Administrativjustiz*) as insufficient protection for individual rights, while administrative officials favored it. As discussed below, opinion of theorists initially trended away from internal review toward reforms to implement review by courts of ordinary jurisdiction before Gneist offered yet another alternative.[22]

Throughout the eighteenth century in Prussia, the judiciary had struggled against the administration to attain independence from interference in its internal workings by the executive and the administration. Famously in the case of the miller Arnold in 1773–1780, Prussian judges withstood efforts by Frederick the Great to intervene in a matter of civil law to ensure what he viewed as a just outcome.[23] One result of Frederick's great legal reform project, which

20. For a brief discussion of separation-of-powers theory in the context of the history of the Prussian judiciary, and of the establishment of the independence of the Prussian judiciary in eighteenth and nineteenth century legal reforms, see Kenneth F. Ledford, "Judicial Independence and Political Representation: Prussian Judges as Parliamentary Deputies, 1848–1913," *Law and Social Inquiry* 25 (2000): 1049–75.

21. Otto Hintze, "Preussens Entwicklung zum Rechtsstaat," in idem, *Gesammelte Abhandlungen zur Staats-, Rechts- und Sozialgeschichte Preussens*, ed. and intro. by Gerhard Oestreich, 2d. ed, 3 vols. (Göttingen, 1962), vol. 3, *Regierung und Verwaltung*, 97–163, esp. 99–123. See also Apel, *Entwicklung des Rechtsschutzes*, 5–22. Wolfgang Rüfner, *Verwaltungsrechtsschutz in Preussen von 1749–1842* (Bonn, 1962), 117–20, argues that Prussia had already evolved into a *Justizstaat* in the late eighteenth century through the increasing supervision of the administration by the judiciary; see also Hahn, *Rudolf von Gneist*, 137.

22. Stump, *Preussische Verwaltungsgerichtsbarkeit*, 21–22, and von Unruh, *Verwaltungsgerichtsbarkeit*, 18.

23. Malte Diesselhorst, *Die Prozesse des Müllers Arnold und das Eingreifen Friedrichs des Grossen* (Göttingen, 1984). An incisive recent analysis in English not only explains in accessible detail the complicated facts of this case but also explores some shortcomings of the ways in which legal and other historians have interpreted it as a watershed on the road to the rule of law; David M. Luebke,

culminated after his death in the General Court Ordinance (*Allgemeine Gerichtsordnung*) of 1793 and the General Law Code (*Allgemeines Landrecht*) of 1794, was to establish clearly the independence of the judiciary from the administration and exclusive judicial jurisdiction over matters of private civil law and criminal law. Reformers before 1848 viewed judges as the best guardians of individual rights against administrative abuse, regardless of separation of powers hesitations, and thus tended to favor the *Justizstaat*.[24]

The French Revolution of 1789 introduced an entirely different system of administrative jurisdiction, the *droit administratif*. Special bureaucratic tribunals, composed of state officials, reviewed citizen complaints about violations of their rights by government officials. These tribunals differed from internal administrative review because they were separate bodies within the administrative bureaucracy. The *conseil d'état*, dominated by the legislative branch, served as tribunal of final appeal. Although the French system prevailed in parts of western and southern Germany for years, many nineteenth-century German liberals agreed with Dicey's decisive rejection of the French model of *droit administratif* as the very embodiment of the tyranny of the bureaucracy and the legislative branch.[25]

The conviction that administrative justice provided insufficient guarantees for individual rights, and that review by courts of ordinary jurisdiction was preferable, despite its own set of problems, expressed itself in Article 182 of the Constitution of the German Empire adopted by the German National Assembly in Frankfurt in 1849, which provided that: "Justice under the auspices of the administration shall cease; courts are to decide in all matters of violations of the law."[26] The failure of the revolution of 1848/49 to implement that constitution led to a sharp retreat to the system of internal bureaucratic review of administrative actions in most German states, particularly in Prussia.

In 1864, Otto Bähr, a judge of the supreme court of appeal of the Electorate of Hesse, looked back to the ideals of the German National Assembly in calling for review of administrative acts by courts of ordinary jurisdiction, despite the separation of powers objection. He argued that if this proved politically impossible, independent "courts of public law," separate from courts of ordinary jurisdiction, could be established in order to protect the dignity of the

"Frederick the Great and the Celebrated Case of the Millers Arnold (1770–1779): A Reappraisal," *Central European History* 32, no. 4 (1999): 379–408.

24. Ogorek, "Individueller Rechtsschutz," 391–95.

25. See Dicey, *Law of the Constitution*, 213–67, who goes to great pains to distinguish the English rule of law from French *droit administratif* and denounces the latter scathingly. Rudolf von Gneist, extensively and favorably cited by Dicey in this passage, also found in the French system a tyranny of the legislative branch so typical of France since the revolution of 1789. Rudolf Gneist, *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland*, 2d ed., (Berlin, 1879), 158–90.

26. The quotation is taken from the text of the 1849 constitution found in Elmar M. Hucko, ed., *The Democratic Tradition: Four German Constitutions* (Oxford, 1987), 79–117, 113.

executive.[27] As a citizen of the Electorate of Hesse, scene of a particularly nasty constitutional struggle between the ruler and the parliament during the 1850s, Bähr believed that the law was the "stable element" of civic life, and that courts, staffed by independent and courageous judges, meant more to the guarantee of individual freedom than ministers responsible to the legislature.[28]

In arguing for judicial review of administrative acts along the lines of English procedure, Bähr entered the realm that Rudolf Gneist considered his own.[29] Professor of public law at Berlin, long-time National Liberal member of the Prussian House of Delegates and the Imperial Reichstag, and a founder of the Social Policy Association (*Verein für Sozialpolitik*), Gneist had devoted his academic career to a study of English institutions.[30] He deeply believed that the key to creation of a vital participatory political life in Prussia lay in the inclusion of volunteer lay notables in local administration, along the model of the eighteenth-century English justice of the peace. His admiration for English institutions, however, did not extend to the system of review of administrative acts by courts of ordinary jurisdiction, which Dicey so lavishly praised as one of the cornerstones of the rule of law. In 1872, Gneist proposed a third kind of structure for review of the legality of administrative acts, a system of mixed administrative law courts. After a long attack on the French *droit administratif* as the "negation of the rule of law," Gneist outlined a different kind of hierarchy of administrative law courts, composed in the lower and intermediate instances of mixed panels of state officials and volunteer lay notables.[31] At the final appellate level, he proposed a court composed of equal numbers of administrative officials and judges from courts of ordinary jurisdiction. Gneist argued that this reform of administrative jurisdiction was a necessary part of the general reform of the administrative structure of Prussia that was then pending before the *Landtag* and that it would avoid the problems of both judicial and administrative supremacy. Many interpreters viewed his proposals, amplified in an expanded second edition of his book in 1879, as decisive in creating the administrative law court system that prevailed in Prussia until 1918.[32]

27. Otto Bähr, *Der Rechtsstaat: Eine publicistische Skizze* (Kassel, 1864), 69–71. See also the discussion at Stump, *Preussische Verwaltungsgerichtsbarkeit*, 22–23.

28. This system of review of administrative actions by courts of ordinary jurisdiction has been called a "constitution substitute," (*Verfassungsersatz*). Eduard Kern, *Geschichte des Gerichtsverfassungsrechts* (Munich, 1954), 73, citing the work of Bähr.

29. For an example of scholars who consider Gneist the "father of the administrative law courts," see von Unruh, *Verwaltungsgerichtsbarkeit*, 7–9.

30. Numerous historians have pointed out how profoundly Gneist misunderstood the English institutions that he purported to analyze for application to Prussian circumstances. See Charles E. McClelland, *The German Historians and England: A Study in Nineteenth-Century Views* (Cambridge, UK 1971), 129–58, esp. 135–44; Hahn, "Rudolf von Gneist (1816–1895)," 198–210; and Pflanze, "Juridical and Political Responsibility," 162–82, 180 3 n. 39.

31. Gneist, *Der Rechtsstaat* (1879), 291.

32. Not all observers accept Gneist's patrimony of the system; see Heffter, *Die deutsche Selbstver-*

Between 1872 and 1883, the Prussian parliament passed a series of laws that reformed the governance of local administration and created a system of administrative law courts whose object was to protect the rights of the individual against abuses by government administration.[33] The State Administrative Law (*Landesverwaltungsgesetz*) of 1883 extended to the whole of the kingdom the jurisdiction of administrative law courts first created by statute in 1875 and by a jurisdictional law of 1876. The laws provided that administrative decisions would be reviewed, upon complaint by a citizen that his or her rights had been violated, by a three-tiered system of administrative law courts. The courts of initial jurisdiction in the countryside, called the county committee (Kreisausschuss), consisted of the chief local administrative official (Landrat), and six lay members elected by the county diet. In cities, it consisted of the mayor and four members of the city council and was called the city committee (Stadtausschuss).[34] This court of initial jurisdiction would conduct hearings and render judgments in cases involving decisions by administrative authorities. The next level, which heard appeals from the first instance, was called the district administrative law court (Bezirksverwaltungsgericht), one in each government district (Regierungsbezirk) in Prussia. It consisted of the provincial governor, two lifetime appointees, one from the bureaucracy and one from the judiciary, and four lay members elected by the provincial parliament. At the top of the pyramid stood the Supreme Administrative Law Court (*Oberverwaltungsgericht*), composed of equal numbers of judges trained as administrative officials and as judges in courts of ordinary jurisdiction.

The law that created the Supreme Administrative Law Court contained the full panoply of guarantees of the independence of members of that court: the king appointed the judges for life, upon proposal by the Ministry of State (the Prussian cabinet). Judges were subject to no administrative discipline and could only be removed from office by plenary decision of the Supreme

waltung, 640–41, and Hahn, "Rudolf von Gneist (1816–1895)," 188, who accuse Gneist of self-promotion in the second edition of his *Rechtsstaat*. Credit for the actual drafting of the statutes lies with Paul Persius, an official within the Ministry of the Interior and the first president of the Oberverwaltungsgericht. Hans Egidi, "Paul Persius, der Schöpfer der Preussischen Verwaltungsgerichtsbarkeit," in *Aus 100 Jahren Verwaltungsgerichtsbarkeit*, ed. Martin Baring, 2d ed. (Cologne, 1963), 18–40, 33–34.

33. For the debates surrounding the enactment of the administrative reforms, see Ewald Meister, "Der Kampf der Konservativen und Liberalen um die Begründung der Selbstverwaltung und der Verwaltungsgerichtsbarkeit in Kreis und Provinz bei der Gneistschen Verwaltungsreform" (Dr. jur. diss., Westfälische Wilhelmsuniversität Münster, 1929). The Prussian constitutions of 1849 and 1850 provided long lists of individual rights in articles 3–42, which, despite notable restrictions such as limitations upon political associations, provided the primary basis for individual citizens to assert before administrative law courts limits on the administrative discretion of governmental officials. Preussische revidierte Verfassung vom 31.1.1850, in Ernst Rudolf Huber, *Dokumente zur deutschen Verfassungsgeschichte*, 3 vols. (Stuttgart, 1961), 1:401–14.

34. Gliss, *Entwicklung der deutschen Verwaltungsgerichtsbarkeit*, 18–20, and Jeserich, Pohl, and von Unruh, *Deutsche Verwaltungsgeschichte*, 3: 922–26.

Administrative Law Court itself, and then only for "dishonorable behavior" or final sentencing to imprisonment for more than one year after conviction of a crime. Even arrest for suspicion of criminal activity could result only in provisional suspension from office, *without* loss of pay, and then only after a plenary decision of the court.[35] Indeed, the principal history of the court concludes after painstaking examination of the position of its members relative to both the Prussian judiciary and the Prussian administrative bureaucracy that in both rank and salary, judges of the Supreme Administrative Law Court commanded enough pay and prestige to ensure their meaningful independence.[36] Nonetheless, over the misgivings of many, for administrative and budgetary purposes, the court lay within the structure of the Ministry of the Interior, the chief administrative and law enforcement bureaucracy.[37]

The jurisdiction of the Prussian Administrative Law Courts derived from two sources. First, a jurisdictional statute enumerated a long list of specific instances in which a citizen could seek review of an adverse administrative decision in the lower administrative law courts.[38] Examples included enforcement of school regulations, rules for maintenance of dikes and roads, business regulations, fire and construction codes, and rulings involving residency and citizenship. Second, the State Administrative Law of 1883 contained a "general clause" that permitted review of *any* police (meaning government) order by the

35. "Gesetz betreffend die Verfassung der Verwaltungsgerichte und das Verwaltungsstreitverfahren vom 3. Juli 1875," *Gesetz-Sammlung für die königlichen Preussischen Staaten* (Berlin, 1806–) (hereafter "G.S.") (1875), 375–92, as revised by that of 2 August 1880 in G.S. (1880), 328–48. The requirement that half the judges be trained as administrators and half as judges appears in both versions at § 17; lifetime appointment at § 18; and self-discipline at §§ 20–25.

36. Stump, *Preussische Verwaltungsgerichtsbarkeit 1875–1914*, 107–12.

37. In the eyes of many twentieth-century interpreters, this fact alone calls into question the true independence of the entire administrative law court structure, including the Supreme Administrative Law Court. Frege, "Der Status des preussischen Oberverwaltungsgerichtes," 132–36, takes great pains to persuade that the Supreme Administrative Law Court was really a "central authority" in Prussia, subordinate *only* to the Ministry of State. Yet, from its very early days, the court found itself limited in its institutional independence from the Ministry of the Interior. In 1875 that ministry won acquiescence from the Ministry of State of its assertion of titular jurisdiction over the court. See the long memorandum, Minister des Innern to Staatsministerium, 21 October 1875, found in Geheimes Staatsarchiv Preussischer Kulturbesitz (hereafter GStA PK), I. HA, Rep. 84a (B), Nr. 685: Akta des Justiz-Ministeriums betreffend: Die Verwaltungsgerichte. Bd. II: 1875–1883, 35, acquiesced to unanimously by the Staatsministerium, Sitzungs-Protokoll des Staatsministeriums, 31 October 1875, ibid., 44. The 1880 revision to the 1875 statute placed intermediate administrative law court judges under the disciplinary provisions of the disciplinary law for *non*-judicial officials, which provided far less disciplinary autonomy than provided for judges in courts of ordinary jurisdiction; § 16a. Finally, in 1882 the Minister of Interior successfully asserted that he, *not* the President of the Supreme Administrative Law Court, was the responsible authority for evaluating the performance of lower administrative law court judges and proposing them for honors and titles. Sitzungs-Protokoll des Staatsministeriums, 8 November 1882, GStA PK, I. HA, Rep. 84a (B), 176.

38. See the Zuständigkeitsgesetz of 1883, G.S. (1883), 237, reprinted in Hugo Reichelt, *Verwaltungsgesetzbuch für Preussen* (Berlin, 1914), 88–112.

Supreme Administrative Law Court, after exhausting administrative appeals.[39] Access to the administrative law courts thus was generous.

The Prussian Supreme Administrative Law Court grew rapidly in personnel and acquired a remarkable caseload. From its initial staff of seven judges, five of whom were part-time, the court expanded to fifty-four full-time judges by 1909.[40] Table 1 displays the background of judges of that court categorized by the branch (administration or judiciary) in which they received their training, the branch in which they last worked before appointment to the Supreme Administrative Law Court, and a tally of the branch in which appointees had *no* previous experience at the time of their appointment; this information is further categorized both by time period in the history of the court and by rank on the court itself, distinguishing among the presidents, the senate presidents (leaders of panels with subject-matter jurisdiction over particular cases), and the other judges of the court. As Table 1 shows, however, the requirement that the court be composed of equal numbers of judges qualified for judicial and administrative service proved somewhat illusory. Relatively few (only 21) of the 118 judges who served on the court prior to World War I had spent their whole careers in judicial service.[41] The largest group, in fact, began their professional training in the judicial service and then switched career paths into administration, from the allegedly more liberal, and definitely more independent, judiciary into the service most often of the Ministry of the Interior. Indeed, most newly-appointed judges of the Supreme Administrative Law Court came directly from the ranks of the general administration, some of whom had had prior experience on the district administrative law courts. Advancement to the supervisory positions of senate president and president of the court came almost entirely from within the ranks of sitting members. More new appointees lacked any career experience in the regular judiciary. No judge from the courts of ordinary jurisdiction served as president of the court, and only one-quarter of senate presidents possessed a career background in the judiciary. Certainly, the Supreme Administrative Law Court never represented in its personnel the tyranny of the judiciary over the executive.

39. *Landesverwaltungsgesetz*, §127; after exhausting administrative remedies up to the level of the provincial governor (Regierungspräsident or Oberpräsident), appeal lay to the Supreme Administrative Law Court "for complaints against police orders [*Verfügungen*] of the local or county police."

40. Paul Jesse, "50 Jahre Oberverwaltungsgericht," in *Verwaltungsrechtliche Abhandlungen: Festgabe zur Feier des fünfzigjährigen Bestehens des Preussischen Oberverwaltungsgerichts, 20. November 1875–1925*, Heinrich Triepel ed. (Berlin, 1925), 1–28, 1–3.

41. The total number of judges, 118, is less than the sum of all presidents, senate presidents, and judges, because some senate presidents and presidents were appointed from the ranks of the judges of the court.

TABLE 1: *Career Background of Judges of Supreme Administrative Law Court, 1875–1914*

A. Training.

	Administration			Judiciary			TOTAL		
	Pres.	*Sen.Pr.*	*Jdg*	*Pres.*	*Sen.Pr.*	*Jdg*	*Pres.*	*Sen.Pr.*	*Jdg*
1875–1890	1	0	6	0	3	19	1	3	25
1891–1900	0	2	4	0	5	35	0	7	39
1901–1914	1	2	15	3	9	29	4	11	44
TOTAL	**2**	**4**	**25**	**3**	**17**	**83**	**5**	**21**	**108**

B. Last Position before Appointment.

	Administration			Judiciary			Prior Ad Ct Exp		
	Pres	*Sen.Pr.*	*Jdg*	*Pres.*	*Sen.Pr.*	*Jdg*	*Pres.*	*Sen.Pr.*	*Jdg*
1875–1890	1	1	13	0	0	4	0	2	8
1891–1900	0	1	20	0	0	9	0	6	10
1901–1914	4	1	29	0	0	5	1	10	10
TOTAL	**5**	**3**	**62**	**0**	**0**	**18**	**1**	**18**	**28**

C. No Prior Experience in Branch.

	Administration			Judiciary			Admin. Court		
	Pres.	*Sen.Pr.*	*Jdg*	*Pres.*	*Sen.Pr.*	*Jdg*	*Pres.*	*Sen.Pr.*	*Jdg*
1875–1890	0	0	4	1	0	6	1	1	16
1891–1900	0	1	9	0	2	3	0	1	27
1901–1914	0	3	4	1	2	16	3	1	32
TOTAL	**0**	**4**	**17**	**2**	**4**	**25**	**4**	**3**	**75**

SOURCE: Geheimes Staatsarchiv Preussischer Kulturbesitz, I. HA, Rep. 90 (B): Preussisches Staatsministerium, Nr. 928: Spezial Akten betreffend: Die Senatspräsidenten bei dem Oberverwaltungs-gericht und die Ober-Verwaltungsgerichts-Räthe. Bd. 1: 1875–1892; Nr. 929: Ibid. Bd. 2: 1893–1927, and Werner Petermann, "Die Mitglieder des Preussischen Oberverwaltungsgerichts 1875–1942," in Friedrich Benninghoven and Cécile Lowenthal-Hensel, eds., *Neue Forschungen zur Brandenburg-Preussischen Geschichte*, Bd. 1, Veröffentlichungen aus den Archiven Preussischer Kulturbesitz, vol. 14 (Cologne, 1979), 173–228.

TABLE 2: *Caseload in Supreme Administrative Law Court, 1876–1913*

YEAR	New Cases	Police Orders	Income Tax Appeals
1876	153	23	
1877	750	55	
1879	832	48	
1880	899	54	
1881	705	32	
1882	453	19	
1883	461	8	
1884	560	12	
1885	601	14	
1886	672	43	
1887	867	46	
1888	880	38	

Table 2 (*cont.*)

YEAR	New Cases	Police Orders	Income Tax Appeals
1889	1,001	52	
1890	1,134	52	
1891	1,134	66	
1892	4,939	59	3,834
1893	15,447	60	14,124
1894	15,188	93	12,951
1895	12,332	63	10,115
1896	17,290	70	14,716
1897	10,312	89	8,223
1898	10,323	104	8,136
1899	8,643	100	6,714
1900	9,405	82	7,541
1901	8,575	113	6,606
1902	9,149	112	7,146
1903	10,325	102	8,130
1904	9,766	112	7,532
1905	8,830	107	6,529
1906	10,567	132	8,010
1907	6,962	102	4,293
1908	5,672	111	3,083
1909	6,895	78	3,245
1910	7,575	90	4,116
1911	7,495	69	4,024
1912	8,434	104	4,545
1913	8,487	75	4,226

SOURCE: *Entscheidungen des Königlich Preussischen Oberverwaltungsgerichts*, vols. 3–53 (Berlin: Carl Heymann, 1876–1909); Geheimes Staatsarchiv Preussischer Kulturbesitz, I. HA, Rep. 77 (M), Ministerium des Innern, Tit. 541, Nr. 11, vol. 1: Acta betr. die Jahres-Geschäftsübersichten des Oberverwaltungsgerichts, 23. Februar 1886 bis 12. April 1907, and vol. 2: Ibid., 7. Februar 1908 bis 31. Dezember 1927.

Out of this statutory framework emerged a lively and energetic jurisprudence between 1875 and 1914. Table 2 shows the rapid growth of caseload of the Supreme Administrative Law Court, rising from 750 cases in the first full year of operation, 1877, to a peak of 17,290 in 1896 before retreating thereafter. Two points need to be made. First, the dramatic increase in caseload beginning in 1892 resulted from the enactment of an income tax reform in Prussia in June 1891, which provided for direct appeal of a decision by an appellate taxation panel to the Supreme Administrative Law Court.[42] As the number of income

42. Einkommensteuergesetz vom 24. Juni 1891, G.S. (1891), 175–204, § 44. For an interpretation of the context and impact of this reform, see Peter Greim-Kuczewski, *Die preussische Klassen- und Einkommensteuergesetzgebung im 19. Jahrhundert: Eine Untersuchung über die Entwicklungsgeschichte der formellen Veranlagungsvorschriften* (Cologne, 1990).

tax cases proves, Prussian citizens clearly showed no shyness in asserting their rights against the tax authorities of the state. For purposes of this essay's discussion of the court's jurisprudence of individual rights, however, the data regarding "Police Orders" (polizeiliche Verfügungen) is the more pertinent information, and Table 2 shows a relatively stable proportion of such cases to the total number of nontax cases.

From this caseload, German legal historians place great emphasis on and take great pride in some of the notable steps that the Supreme Administrative Law Court took to create a genuine jurisprudence of individual rights. An important procedural ruling in the early years of the court widened the scope of its action. The "Kreuzberg" case, decided in 1882, interpreted the power of the police narrowly, ruling that they might act only insofar as they were expressly permitted by statute, rather than take whatever action was not expressly prohibited to them by law.[43] In this case, city officials sought to enforce an ordinance, promulgated in 1879, which prohibited construction of any building that would block the view of the recently completed (1878) national monument, celebrating the German victory over Napoleon in the War of Liberation in 1813–1814. A property owner twice sought permits to build four-story apartment buildings on adjoining lots in this rapidly developing and very attractive "villa quarter" of the expanding national capital. In the first instance, involving lot 4 on a certain street, government officials denied the permit based upon the ordinance of 1879; the owner challenged the ruling in the administrative law courts, which ruled in his favor in the lower instance and which the Supreme Administrative Law Court upheld on appeal in an unreported decision. When the owner applied for a construction permit for lot 5 two years later, the authorities, despite the earlier ruling, denied the application again, so the owner once again sought relief in the administrative law courts. This time, the police pleaded a broader statutory authority for their action: specific and general police powers under the *Allgemeines Landrecht*. The owner pleaded the rights of property, both under Article 9 of the Prussian Constitution of 1850 and § 65, Titel 8, Theil I of the semiconstitutional *Allgemeines Landrecht*.[44] The Supreme Administrative Law Court again reversed the action of the Berlin authorities and permitted the landowner to develop his property as he saw fit, ruling that the government could only act to prevent a danger to public safety, but not to

43. Entscheidungen des königlich-preussischen Oberverwaltungsgerichts, 9 (1882),353. See the discussion in von Unruh, *Verwaltungsgerichtsbarkeit*, 60–61.

44. Article 9 of the Constitution of 1850 provided: "Property is inviolable. It can be limited or seized only on the basis of the public good, as determined by prior proceedings or in emergency cases at least preliminary determination of compensation, and if compensated according to law." The pertinent passage in the ALR, § 65, Tit. 8, Th. I, provides: "As a general matter [*in der Regel*], every property owner is fully entitled [*wohl befugt*] to construct buildings on his real property or to make alterations to his buildings."

impose its own aesthetic judgment. The court based its decision on an expansive reading of property rights under both the constitution and the *Allgemeines Landrecht*. It also expressly interpreted Article 106 of the constitution, which granted to courts the power to review the legal validity of royal ordinances, to grant such power to the administrative law courts as well.[45] This expansive interpretation of the general jurisdictional clause by the court became, in the view of many commentators, "the pillar of the rule of law, the principle of an administration subject to law."[46] This decision and subsequent ones based upon it carved out a wide sphere for judicial review of administrative actions that restricted the rights of property.

Commentators also proudly cite three additional series of cases to show the solicitude of the Supreme Administrative Law Court for the individual rights of citizens. A string of cases that stretched from 1876 to 1914 protected the Polish minority in eastern Prussia against discriminatory actions by police authorities because of the use of Polish in public assemblies.[47] In its very first volume of reported decisions, the court invalidated the dissolution of a meeting of parishioners in a Polish-speaking Catholic parish near Stargardt in West Prussia when the leaders refused a police request to speak only in German, rejecting the argument advanced by the Minister of the Interior that Article 29 of the Prussian Constitution, which guaranteed the right of peaceful assembly, applied only to Germans.[48] Similarly, between 1897 and 1913, the court set aside an assortment of police prohibitions or dissolutions of public assemblies because Polish would be spoken; police requirements that a German translation be provided for a play performed in Polish (1898 and 1909); police prohibition of a bakery sign displaying the Polish given name "Zygmunt" instead of the German "Sigismund" (1906), and of another business sign employing the Polish spelling "Szulc" instead of the German "Schultz" (1902); and the ban on the meeting of a Polish "Sokol" gymnastic association (ruling that the meeting was to practice a gymnastic exhibition rather than to engage in political agitation (1907); and on the use of wooden lances as part of gymnastic exercises by another "Sokol" (1914).[49] Legal historians praise this whole body of jurispru-

45. Entscheidungen des königlich-preussischen Oberverwaltungsgerichts 9 (1882), 353, 363–66. Article 106 provided: "Laws and ordinances are binding if they have been promulgated in the form prescribed by law. Review of the legal validity of properly promulgated royal ordinances lies not with the authorities but rather with the courts."

46. For a recent embrace of the importance of the "Kreuzberg case," see the catalog of the exhibit mounted by the Geheimes Staatsarchiv preussischer Kulturbesitz in 1994, Iselin Gundermann, ed., *Allgemeines Landrecht für die preussischen Staaten 1794* (Berlin, 1994), 112.

47. von Unruh, *Verwaltungsgerichtsbarkeit*, 58–59, esp. cases cited in note 76.

48. Entscheidungen des königlich-preussischen Oberverwaltungsgerichts 1 (1876), 347–60.

49. Many of these cases are discussed in Frege, "Der Status des preussischen Oberverwaltungsgerichtes," 137–39. Their citations are: Entscheidungen des königlich-preussischen Oberverwaltungsgerichts 32 (1898), 406–13; 53 (1909), 250–55; 47 (1906), 337–43; 39 (1902), 403–9; 49 (1907), 419–25; 66 (1914), 323–26.

dence as proof of a meaningful protection of individual liberties, and these cases form the basis for more critical social historians' favorable assessment of the Prussian Supreme Administrative Law Court.

The second string of cases used to argue that the Supreme Administrative Law Court protected individual rights involved Social Democratic activities. After the lapse of the Anti-Socialist Law in 1890, police fell back upon their general duty to protect public order and safety in order to harass the Social Democrats.[50] In a number of instances, however, the Supreme Administrative Law Court thwarted the police. In a case decided in 1891, the court invalidated a police prohibition on unfurling and waving a red flag at a meeting in a closed room. Just a year after the lapse of the Anti-Socialist Law, the court ruled that the mere fact that a red flag was a symbol of Social Democracy and that its display might encourage those present to engage in acts in promotion of Social Democracy was insufficient in itself to justify the prohibition. Given the then-current state of legislation, the police had to treat Social Democratic assemblies or demonstrations the same as any other political parties.[51] Similarly, in order to prohibit the members of a free (Socialist) trade union from marching through the streets of their city, the police must prove more than a generalized suspicion that such a parade would endanger public safety. They had to adduce "concrete facts" that led to such a conclusion, and the mere suggestion by police that political opposition between members of the trade union and the rural population, combined with alcohol consumption, could lead to disorder was insufficient.[52]

In addition, legal historians use a series of cases from the 1890s involving Gerhart Hauptmann's agitational play, *The Weavers*, to highlight the commitment

50. For the manifold legal methods of police harassment to which the Social Democrats were subject between 1878 and 1890, especially the particularly repressive years of 1886–1887, see Vernon L. Lidtke, *The Outlawed Party: Social Democracy in Germany 1878–1890* (Princeton, 1966), 241–62. For an examination of the narrower issue of official harassment of the Social Democratic press *after* the lapse of the Anti-Socialist Law, see Alex Hall, *Scandal, Sensation and Social Democracy: The SPD Press and Wilhelmine Germany 1890–1914* (New York, 1977), 53; while Hall deals primarily with police use of the criminal law, he mentions in passing what Social Democrats perceived as the hostility of the Supreme Administrative Court, although he pursues no general analysis of that court's jurisprudence.

51. Entscheidungen des königlich-preussischen Oberverwaltungsgerichts, 21 (1891), 400–11. The cases are discussed at length at Frege, "Der Status des preussischen Oberverwaltungsgerichts," 139–40.

52. Entscheidungen des königlich-preussischen Oberverwaltungsgerichts, 56 (1911), 318–21. Mystifyingly, Frege completely misreads two other cases, 56 (1911), 308–21 and 63 (1913), 279–87, in which the Supreme Administrative Law Court upholds the police decision to prohibit Social Democratic public meetings because they might incite violence either from unnamed "regime-loyal workers" who might be angry because of a Social Democratic boycott of several local pubs in the first case or from members of veterans' associations who planned a competing parade in the other (in the latter case, police banned *both* parades). In both cases, the court upheld police action that allowed the "national" side to silence the Socialists by means of a "heckler's veto."

of the Supreme Administrative Law Court to constitutional freedoms. In 1892, the Deutsches Theater in Berlin applied to the police for permission to produce the play, whose sympathetic treatment of the Silesian weavers' revolt of 1844 amounted to a call for revolution and justification of the murder of exploitative capitalists. The police refused permission, and Hauptmann lodged his appeal with the Supreme Administrative Law Court. That court set aside the police prohibition, ruling that the police could not rely upon the faint possibility that the play's performance could lead to a disturbance of public order; their burden was much higher, to show "an actual, near, impending danger ['eine wirklich drohende nahe Gefahr']." The court reasoned that, given the typical audience in the Deutsches Theater in Berlin, composed of members of social groups that did not tend to engage in acts of violence or other disturbances of public order, no such danger existed, despite the inflammatory nature of the play. Although police officials in other parts of Prussia also banned the play, the Supreme Administrative Law Court overturned the bans in a series of cases.[53]

This body of case law clearly suggests that the Supreme Administrative Law Court restricted arbitrary acts of the bureaucracy more independently than Krieger conceded. Yet the celebratory accounts ignore decisions that upheld police powers in all of these kinds of cases, often employing the technical logic loved only by lawyers. While it is true that the court protected the right of Polish-speaking Prussians to use that language in public meetings and in commercial relations generally undisturbed, it set limits to the Poles' insistence upon using their native language in all relations with the Prussian state. The court consistently upheld police insistence that when Polish private associations filed their by-laws with authorities in accordance with the law, they also file the mandatory German translation.[54] It also gave police great leeway to monitor or dissolve political rallies in the Polish-speaking provinces of the kingdom, whether held on behalf of the Catholic Center Party or the Polish Party.[55] Finally, it firmly allocated the power to determine the language in which religious instruction would be given in public schools to the school authorities rather than to the church, meaning that Catholic religious instruction in Posen could be held in German rather than Polish, despite the Catholic Church's preference for Polish.[56]

53. Frege, "Der Status des preussischen Oberverwaltungsgerichts," 140–44; see also Martin Pagenkopf, *Das preussische OVG und Hauptmanns "Weber": Ein Nachtrag zum 125. Geburtstag von Gerhart Hauptmann* (Bonn, 1988), 56–70, which reproduces the judgments of the Supreme Administrative Law Court (89–124).

54. Entscheidungen des königlich-preussischen Oberverwaltungsgerichts, 44 (1904), 427–32, 432–33, and 60 (1912), 334–39.

55. Ibid., 56 (1911), 321–29 (*Zentrum*) and 66 (1914), 338–41 (Polish Party).

56. Ibid., 50 (1908), 176–87.

Similarly, the Supreme Administrative Law Court regularly upheld police prohibitions of Social Democratic political meetings at which women would be present, in violation of the law on political associations. It prohibited such a meeting at which speakers used English and Danish as well as German. And it permitted police oversight of the annual May Day rally.[57] The court also upheld theater censorship, ruling in 1896 that the Freie Volksbühne could not escape oversight by declaring itself a membership association, which forced it to reconfigure its legal identity. This action kept it out of trouble until 1913 when the court again upheld police action to censor its repertoire.[58] The court even reasoned that none of the guarantees of Article 27 of the Prussian Constitution providing that "every Prussian has the right to express his opinion freely by word, writing, print, and pictorial representation" and that "censorship may not be introduced; every other limitation on freedom of the press may only be imposed through legislation," prevented the police from prohibiting a play, for the freedom of the press has nothing to do with theatrical presentations.[59]

Finally, the decisions of the Supreme Administrative Law Court make clear that some issues of national security, or at least national security as perceived by the police authorities, trumped virtually all constitutional rights to property and individual liberty. The thorny problem of the Danish population of northern Schleswig resulted in a series of cases that upheld police power in almost every regard. In 1903, the court refused to overturn a police order that required a Danish-speaking wheelwright in northern Schleswig, who had painted his barn in the Danish national colors of a white background with broad red stripes around it and diagonally through it, to repaint it in some other color within three days, because this use of his property amounted to a political demonstration subject to police oversight. Likewise, in 1910, the court ruled that a decree issued by the Prussian military governor of Schleswig in 1866 still prohibited the printing and distribution of a songbook containing Danish patriotic songs and upheld police action to prevent such publication. Only when the police in Schleswig overreached and argued that a Christian "free parish" (a congregation that did not belong to the state church) in Schleswig needed special permission to erect a church building did the court find against the authorities, holding that the same rules about constructing a church building prevailed there as in the rest of Prussia.[60]

57. Ibid., 34 (1899), 439–46; 61 (1913), 238–44; 57 (1911), 333–37; and 60 (1912), 352–56.

58. Ibid., 29 (1896), 429–38 and 61 (1913), 230–38.

59. Ibid., 24 (1893), 311–16.

60. Ibid., 41 (1903), 432–37; 54 (1910), 391–98; and 37 (1901), 439–48. For a general account of the special circumstances that prevailed in northern Schleswig, see Lothar Blatt, *Die rechtliche Behandlung der dänischen Minderheit in Schleswig-Holstein von 1866 bis 1914* (Husum, 1980). The jurisdiction of the State Administrative Law, and thus of the Supreme Administrative Law Court, was not extended to Schleswig until 1889.

The jurisprudence of the Prussian Supreme Administrative Law Court thus fell within clearly defined limits. As the court of final appeal, it intervened only *after* the police acted, meaning that the exercise of rights had already been abridged and that the court found the abridgement illegal only after the fact. The citizen remained subject to the arbitrary action of the police, with all of the actual and symbolic violence that those relations entailed.[61] Moreover, the Supreme Administrative Law Court only addressed administrative (public law) acts of the authorities; it remained possible for officials to apply the criminal law differentially and even tendentiously, based upon political considerations.[62] Regardless of how effective the ultimate protection given to individual rights by the supervision of the administration by the Supreme Administrative Law Court was, Prussian citizens remained vulnerable to the immediate effects of arbitrary actions of officials high and low.

★ ★ ★

The system of administrative law courts set up between 1875 and 1883 and the jurisprudence of the Supreme Administrative Law Court expressed the juridical, procedural conception of governmental responsibility and of the rule of law that Krieger, Pflanze, and other historians have identified.[63] Thwarted in their efforts to create a parliamentary system of government, German liberals shifted their vision of the responsibility of government ministers from the political — the need to create a workable majority in parliament — to the juridical — the maintenance of political officials within the boundaries of the law through the threat of judicial proceedings against them. Paradoxically, by setting up a new system of supervision of government administrative action located in a novel system of independent courts of special jurisdiction, liberals in the Reichstag legitimated state action and immunized it against criticism by providing for control by means of judicial review rather than political contest.[64] They removed the debate over control of arbitrary state action that infringed upon individual rights from the political arena and transferred it to litigation and to the judicial arena. The jurisprudence of the Prussian Supreme Administrative Law Court, indeed its very existence, therefore further depoliti-

61. For a discussion of actual and symbolic violence as the basis of relations between the police and the lower classes in Prussian cities, see Alf Lüdtke, *Police and State in Prussia, 1815–1850* (New York, 1989).

62. See Eleanor L. Turk, "The Berlin Socialist Trials of 1896: An Examination of Civil Liberty in Wilhelmian Germany," *Central European History* 19, no. 4 (1986): 323–42.

63. Besides Krieger and Pflanze, see the overview by Guido de Ruggiero, *The History of European Liberalism*, trans. R. G. Collingwood (Oxford, 1927), 251–64. Erich Hahn, "Ministerial Responsibility and Impeachment in Prussia 1848–1863," *Central European History* 10, no. 1 (1977): 3–27, discusses the profoundly juridical liberal conception of the state in the period preceding the one considered in this essay.

64. Ogorek, "Individueller Rechtsschutz," 404–5.

cized the argument over control of state action in Prussia. Yet it firmly established in Prussia the principle and reality of the rule of law.

Further, the highly formal and procedural system of protection of the rights of the individual created by the Prussian administrative law reforms of 1875–1883, even considering this lively and surprisingly expansive administrative law jurisprudence, was less than met the eye. Beyond its vulnerability to the strongly formalist notions of German positivist legal theory, it shared the weakness of the procedural liberal conception of the rule of law.[65] Although conservatives viewed the Supreme Administrative Law Court as an unalloyed victory of judicial power (and hence liberalism) over the administration (and hence conservatism), and liberals considered it a final victory of transition from an old-style conception of the rule of law dating from the eighteenth century to a newer conception with review by independent courts of special jurisdiction, neither interpretation was precisely correct.[66] In reality, the reform of Prussian administrative law and administrative law courts were a victory of the formal juridical vision of liberalism, whose fixation on process shared much with conservatism, uniting figures as diverse as Friedrich Julius Stahl and Albert Venn Dicey.[67]

Attention to the structure, practice, and jurisprudence of the administrative law courts of Prussia permits scholars to explore the tensions and balance between the protection of individual constitutional rights and the formalism of legal thought and middle-class culture, not only in Germany, but throughout Europe and the United States. Use of social history techniques to link judicial decisions to social tensions and political struggle transcends legal history's focus upon doctrine and enriches our understanding of what the administrative law courts meant. For example, the "balancing" of the Supreme Administrative Law Court by drawing half of its members from the administration and half from the supposedly more liberal judiciary meant less than it appeared to because of the "lawyers' monopoly" on qualification for higher administrative service; both administrators and judges received the same training and acculturation at the universities, and their stops during the *Referendariat* also were very similar. Table 1 also shows the predominant influence of experience in the general administration upon far more than half of the judges who sat on the court in

65. I have developed this idea of the procedural nature of the liberal conception of the *Rechtsstaat* further in Kenneth F. Ledford, "Lawyers, Liberalism, and Procedure: The German Imperial Justice Laws of 1877–79," *Central European History* 26, no. 2 (1993): 165–93; see also idem, *From General Estate to Special Interest: German Lawyers 1878–1933* (Cambridge, 1996), 12–20.

66. For the conservative lament, see Wagner, *Der Kampf der Justiz gegen die Verwaltung*, 146–64; for the liberal satisfaction, see Hintze, "Preussens Entwicklung zum Rechtsstaat," 160–61.

67. Friedrich Julius Stahl, *Die Philosophie des Rechts*, 3rd ed., 3 vols. in 2 (Heidelberg, 1856), vol. 2, *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung*, 137, and Dicey, *Law of the Constitution*, 187.

the prewar period. At the same time, recent study of the changing composition of the judiciary in courts of ordinary jurisdiction, especially after 1879, has revealed less in the way of direct political control and tutelage of judicial appointees than previously assumed. The relative independence of the Supreme Administrative Law Court, therefore, surprises less now than it might have earlier.

This essay thus has sought to employ a close study of the composition and jurisprudence of the Supreme Administrative Law Court to show how Krieger and the rule of law pessimists on the one hand, and the legal history celebrators of the rule of law on the other, both fall short of a nuanced account of what the administrative law court reforms in Prussia actually accomplished. The Prussian Supreme Administrative Law Court provided a lively and capacious stage for Prussian citizens to vindicate their individual rights, but it also showed the limits of the rule of law. Especially protective of the rights of property, spacious enough to include Poles and Social Democrats, but capable at the same time of interpreting general statutes closely, even quixotically, and of also imposing limits to the full exercise of rights by Poles, Danes, and Social Democrats, the court's jurisprudence remained within the professional limits of the legal formalism that is the very embodiment of the rule of law. The Prussian Supreme Administrative Law Court indeed brought into being a meaningful rule of law in Germany. But as both successful and disappointed litigants learned, the rule of law itself is a more ambiguous, more limited, more formalist phenomenon than either the celebratory legal scholars or pessimistic intellectual historians have conceived.

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