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ARTICLE

Legal Counterrevolution: Property and Judicial Power in the Weimar Republic

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This article offers a new account of the rise of judicial power in modern Germany. Strong judicial control of the government is often associated with the constitutional ethos that emerged in post-war West Germany as a reaction to Nazi rule. This article locates the origins of German judicialization in the political struggles of the Weimar era. It shows how the assumption of a power to judicial review by Germany's highest court, the Reichsgericht, was the product of the successful cooperation of the judiciary with conservative political parties on the issue of property rights in the young republic. These were at the centre of two controversies examined in the article: the expropriation of princes of former ruling houses and the consequences of the hyperinflation of 1923. In both cases the Reichsgericht used an understanding of property as an inalienable right to radically reinterpret Germany's first democratic constitution, which had in fact granted the legislature extensive power to modify property relations. This suited the judiciary's own objective of assuming stronger controls over legislative action and bolstered the political position of conservative forces in Weimar politics. What emerged was a supra-positive constitutionalism that sought to supersede the written constitution. These political realities were an essential context for theoretical debates on the extent and limits of judicial power between theorists such as Carl Schmitt, Hans Kelsen, Hermann Heller, Franz Neumann, and Ernst Fraenkel. An examination of the complex interaction of parliamentary, judicial, and popular politics concerning the issue of property reveals that German judicial empowerment amounted to an attempt to rewrite the Weimar Constitution and limit the scope of Germany's democratic revolution.

Introduction

In his 1930 essay *Rechtsstaat oder Diktatur* (Rule of Law or Dictatorship) the German legal theorist Hermann Heller noted the "immense expansion in power" which judges had "conquered" since the foundation of the Weimar Republic.[1] Heller was referring to the backdoor introduction of judicial review of parliamentary legislation in a 1925 ruling by Germany's highest court. This ruling was the decisive, though far from the only, step taken towards the establishment of a new

[1]Hermann Heller, *Rechtsstaat oder Diktatur?* (Tübingen, 1930), 9, my translation. For an English version of the text translated by Ellen Kennedy see also Hermann Heller, "Rechtsstaat or Dictatorship?", *Economy and Society* 16/1 (1987), 127–42.

conception of judicial power in Germany: one that rested on a reinterpretation of basic rights as conceived by the Weimar Constitution of 1919 and a new methodological liberalism. Where the dominant mode of judicial methodology in the pre-1918 German Empire (*Kaiserreich*) had asserted a strict positivism, in the Weimar Republic German judges discovered the attractions of a freer, less rigid conception of the law.[2] At the same time as German jurisprudence became more creative in its methods and more eclectic in its deductions, German jurists rediscovered the *Rechtsstaat*—not merely as the "rule of law," but rather as a distinct system of legality, which could be seen as prior to and apart from the democratic mode of government introduced under the Weimar Constitution of 1919.[3]

This article reconstructs the political and intellectual context of the 1925 Reichsgericht ruling and the expansion of judicial power in the Weimar Republic. It focuses on the curious connection between debates about the role of the judiciary and the nature of property rights in the postrevolutionary state, in Weimar legal scholarship as well as in actual case law. The article focuses on two distinct yet interconnected political problems which both found their way to the Reichsgericht: the expropriation of the former royal houses of the *Kaiserreich*, and the consequences of the hyperinflation of 1923 for property rights and contract law. Both cases, this article shows, served to limit the capacity of democratic politics to structure property relations in the new state—something that had been explicitly permitted by the Weimar Constitution of 1919. Both cases also acted as a gateway for the introduction of a new kind of legal order in the young democratic state: one in which the judiciary claimed the right both to review parliamentary legislation and to be considered in its design and negotiation. This new legal order sought to process political problems via judicial means in a novel fashion. Jurisprudence became an integral part of Weimar politics, with lasting consequences for both the law and democracy.

Property, judicialization and the *Rechtsstaat*

The assumption of a power of judicial review by the Weimar Reichsgericht can be seen as a model case of "judicialization," understood as a recourse to "judicial means for addressing core moral predicaments, public policy questions, and

[2]The so called *Weimarer Methodenstreit* has long been documented on the level of juridical argument, particularly between the positivist Vienna school and the anti-positive camp of Heinrich Triepel, Carl Schmitt, Erich Kaufmann, Rudolf Smend, and others. However, its concrete effects on judicial decision making on the level of constitutional law are much less studied. See the seminal work of Michael Stolleis, *Der Methodenstreit der Weimarer Staatsrechtslehre: Ein abgeschlossenes Kapitel der Wissenschaftsgeschichte?* (Stuttgart, 2001), as well as several newer publications: Christoph Möllers, "Der Methodenstreit als politischer Generationenkonflikt: Ein Angebot zur Deutung der Weimarer Staatsrechtslehre," *Der Staat* 43 (2004), 399–423, Kathrin Groh, *Demokratische Staatsrechtslehrer in der Weimarer Republik: Von der konstitutionellen Staatslehre zur Theorie des modernen demokratischen Verfassungsstaats* (Tübingen, 2010).

[3]David Dyzenhaus, "The Concept of the Rule-of-Law State in Carl Schmitt's Verfassungslehre," in Jens Meierheinrich and Oliver Simons, eds., *The Oxford Handbook of Carl Schmitt* (Oxford, 2015), 491–509; and Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, III: Staats- und Verwaltungswissenschaft in Republik und Diktatur, 1914–1945* (Munich, 1999), 330–38.

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political controversies."[4] Historical accounts of judicialization in Europe tend to focus on the post-Second World War era, when new constitutions enshrined judicial power through the introduction of distinct constitutional courts, basic rights, and constitutional complaint procedures.[5] Judicialization is then understood as a reaction to a distinct experience of democratic vulnerability in the interwar period. On this account, judicial "encasement" of democracy was established, at least initially, as a safeguard against totalitarianism and authoritarian rule.[6] This view has some plausibility when it comes to the ideological justification and self-understanding of postwar states. In terms of a history of the judiciary in democratic states, however, it conflates rhetoric with fact.[7] The roots of a judicialized politics in Germany lay significantly earlier, in the interwar period. It was not a reaction to the preexisting weakness of Weimar democracy, but a significant contributor to its dysfunction.

Aside from this question of periodization, the Weimar case also complicates a notion popular in current political theory and critical legal studies: a clear opposition of democratic politics enshrined in parliamentary political action, and an activist and poorly legitimated judiciary.[8] As the following will show, this was clearly one way of understanding the issue at the time. Yet, as the debate over the legal consequences of Weimar hyperinflation demonstrates, one reason why the courts acted was that there was no possibility for them *not* to act. The paralysis of a legislature faced with the competing demands of outside pressure groups, party politics, and statecraft created a power vacuum, absent which the judiciary's dramatic self-empowerment would have been impossible.[9] It is in this context that we first encounter an alliance which has since become common in modern politics but which is frequently neglected in democratic theory: between political pressure groups, often organizing not unsubstantial parts of the population, and a highly politicized judiciary.

As this suggests, Weimar judicialization is also remarkable because it was so transparently a site of political struggle. After 1945 the language employed to further strengthen judicial power in postwar West Germany was decisively apolitical.[10] It served to occlude the potential power-political consequences of the introduction

[4]Ran Hirschl, "The Judicialisation of Politics," in Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington, eds., *The Oxford Handbook of Law and Politics* (Oxford, 2008), 119–41, at 119.

[5]See, for example, Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge, 2005).

[6]See on this historicization Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA, 2004), 32–6.

[7]Vanberg cites Konrad Adenauer's famous remark during the West German Constitutional Convention: "Dictatorship is not necessarily dictatorship by a single person. There is also dictatorship by a parliamentary majority. And we want protection against such dictatorship in the form of a constitutional court." Verhandlungen des Parlamentarischen Rates, second session, 25, cited in Vanberg, *The Politics of Constitutional Review*, i.

[8]See, for example, Bernd Rüthers, *Die heimliche Revolution vom Rechtsstaat zum Richterstaat* (Tübingen, 2016); Samuel Moyn, *Christian Human Rights* (Philadelphia, 2015).

[9]A similar argument is advanced in this detailed study of politics in the inflation era: Thomas Raithel, *Das schwierige Spiel des Parlamentarismus: Deutscher Reichstag und französische Chambre des députés in den Inflationskrisen der 1920er Jahre* (Munich, 2005).

[10]See, for example, Gustav Radbruch, "Gesetzliches Recht und übergesetzliches Recht," *Süddeutsche Juristen-Zeitung* 1/5 (1946), 105–8.

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of constitutional review and the principle of an "objective order of values" which was to make Germany's constitutional court into the "guardian of the constitution."[11] Weimar judicialization, by contrast, was shaped by an intense and open struggle over the scope and limits of democratic politics, the role of parliament, and the very nature of legitimacy in the new constitutional order.[12] This struggle was directly and openly informed by a clash of material interests over the status of property rights, as the new state struggled with the enduring consequences of war and revolution. In the 1920s, despite the real popular uprising which had produced republican government, democratic legitimacy was even more brittle than it was after 1945. After the adoption of the Weimar Constitution of 1919, the nature and limits of German democracy remained undetermined. In certain aspects, the Weimar Constitution had instituted a fairly traditional liberal democracy. Democratic models, for example, which sought to amend the parliamentary system with a continuation of the revolutionary workers' and soldiers' councils, had been rejected.[13] Nevertheless, there were antagonistic elements embedded in the constitution which awaited clear definition, through either legislative action or new traditions of jurisprudence. German social democracy had gained republican government and proportional representation in the legislature. It had also placed a new set of rights in the constitution which, according to social-democratic lawyers such as Otto Kirchheimer and Franz Neumann, went beyond the tradition of negative rights, binding any government under the new constitution to a progressive transformation of the social and economic spheres.[14] Throughout the 1920s, these advocates of a more radical break with the old order, especially when it came to the structure of the economy, remained vocal—not least because Article 153 of the Weimar Constitution held open the possibility of expropriation for the common good.

This new understanding of rights, however, was never actually put into practice. Rather, as this article shows, the idea of a radical change in the property order of postrevolutionary Germany served as a justification for those who sought to

[11]See on this term and its institutionalization Oliver Lembcke, *Hüter der Verfassung: Eine institutionentheoretische Studie zur Autorität des Bundesverfassungsgerichts* (Tübingen, 2007); as well as, on the Weimar debate, Lars Vinx, "Introduction," in Vinx, ed., *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge, 2015), 1–21.

[12]David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford, 1997); and Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (Durham, NC, 1997).

[13]Most notably, of course, through the suppression of the Munich Soviet Republic in 1919. See Eberhard Kolb, *Deutschland 1918–1933: Eine Geschichte der Weimarer Republik* (Munich, 2010). On the Weimar constitutional compromise see Marcus Llanque, "Der Weimarer Linksliberalismus und das Problem politischer Verbindlichkeit: Volksgemeinschaft, demokratische Nation und Staatsgesinnung bei Theodor Heuss, Hugo Preuß und Friedrich Meinecke," in Anselm Doering-Manteuffel and Jörn Leonhard, eds., *Liberalismus im 20. Jahrhundert* (Stuttgart, 2015), 157–82.

[14]See Franz Neumann, "Die soziale Bedeutung der Grundrechte in der Weimarer Verfassung" (1930), in Alfons Söllner, ed., *Wirtschaft, Staat, Demokratie: Aufsätze 1930–1954* (Frankfurt am Main, 1978), 57–75; and particularly Otto Kirchheimer, *Die Grenzen der Enteignung: Ein Beitrag zur Entwicklungsgeschichte des Enteignungsinstituts und zur Auslegung des Art. 153 der Weimarer Reichsverfassung* (1930) (Berlin, 2016); for an English version see Otto Kirchheimer and Franz Neumann, *The Rule of Law under Siege: Selected Essays*, ed. William E. Scheuermann (Berkeley, 1996).

safeguard their rights against what they saw as the dangers of democratic politics, even where the plans and projects of governments and political parties remained modest. The constitution itself, and particularly the basic rights guaranteed in it, became a point of sharp contention between different factions in Weimar politics and the legal profession. In the end, this conflict was to be decided in favor of those who were able to reinterpret rights and constitutionality as something distinct from the positive law of the Weimar Constitution.

In recovering the social and ideological processes behind the empowerment of the Weimar judiciary, this article ultimately seeks to examine the delicate issue of law and revolution. Property, as a legal–constitutional problem as well as a political and even ethical question, serves to illuminate the challenge of upending a political order while maintaining jurisprudential continuity. Revolution is, of course, understood as the most radical possible rupture that can occur in politics. However, in twentieth-century Germany, with an elaborate legal system in place, the attempt to reshape political order remained ultimately at the mercy of judicial elites. The new republic left the *Kaiserreich*'s criminal-law code as well as the Bürgerliches Gesetzbuch (Civil Code) intact. Even if the Weimar Republic's founders had taken inspiration from the French Revolution and promulgated new law codes, they would have been faced with the problem of jurisdiction, which still relied on the continuity (imagined or otherwise) of a legal tradition, its key concepts, and, crucially, its personnel. Whilst this article raises some questions about the faithfulness with which such a tradition was applied when it came to the question of property, it nevertheless shows how powerful the idea of a distinct legal tradition could be in limiting the extent of constitutional—that is, in this case, revolutionary—law.

In highlighting the consequences of what could effectively be called the German Reich's legal continuity with itself stretching from monarchy to republic, this article addresses a long-standing debate in German political theory and constitutional history. In contention with Jürgen Habermas, theorists like Bernd Rüthers and Ingeborg Maus have long argued that the *Rechtsstaat*—Germany's specific understanding of the rule-of-law state—is a principle ultimately inimical to the practice of democracy.[15] This article's findings would seem to be in agreement with that. In the Weimar period at least the idea of the *Rechtsstaat* was clearly used to delegitimize constitutional law which had been democratically derived in the aftermath of the German revolution. But the case of property in the Weimar Republic goes further. It asks at what level of law pre- or supra-positive legal concepts like that of the *Rechtsstaat* entered into the debates on the status of constitutional law and basic rights legislation. In this way, the article seeks to establish to what extent the democratic revolution was actually able to successfully structure the reality of Weimar-era politics and where the continuity of the old judicial and administrative structure limited the scope of democratic decision making. In untangling the relationship between law and democracy in the historical moment it becomes clearer that it was not any specific legal principle but its antidemocratic application which was at issue here. Contemporary theorists like Hermann Heller sought to

[15]Ingeborg Maus, "Entwicklung und Funktionswandel des bürgerlichen Rechtsstaats," in Mehdi Tohidipur, ed., *Der bürgerliche Rechtsstaat* (Frankfurt am Main, 1978), 13–81.

bring the *Rechtsstaat* tradition in alignment with democracy.[16] Franz Neumann and Otto Kirchheimer sought to make sense of the new democratic constitutionalism and its novel conception of rights.[17] It was not that it could not be thought, but rather that it would not be attempted.

Princely property before the Reichsgericht

Article 153 of the 1919 Weimar Constitution had given social democrats reason to hope that the new constitutional order could be a vessel for a progressive socialization of property in the new state. While it stipulated a right to individual property, it also stated that such a right's "content and boundaries" would be regulated by further legislation. The following paragraph then stated the conditions for expropriation. Expropriation could be carried out for "the common good" and "on a legal basis." An "appropriate compensation" was required unless "an imperial law stipulated otherwise." In its last paragraph the constitutional article clearly laid out the ethos which was to govern the institution of property in the new republic: "Property confers duties. Its use shall at the same time be in the service of the common good."[18]

The debates about this article in the National Constituent Assembly charged with agreeing the German *Reich*'s new republican constitution in 1919 had been surprisingly uncontroversial. Only the left-wing USPD (Independent Social Democratic Party of Germany) fundamentally opposed any constitutionally guaranteed right to property. All parties recognized the need for the legal tool of expropriation. In a widely noted speech the minister of finance, Eugen Schiffer of the liberal DDP (German Democratic Party), had already in February 1919 declared that "our property, our labor power and everything we have, will from now on be regarded as an office which we administer in the service of the community." In this sense, he argued, property would "no longer be simply a private matter."[19] The main area of controversy in the negotiations unfolded over the question whether there should be an absolute requirement for compensation in such cases where the *Reich* (central government) would expropriate property from the *Länder* (states). An amendment which would have safeguarded against legal expropriation without compensation was proposed—with an eye to the property of the Catholic Church—by the Catholic Centre Party. Arguably, such an amendment would have kept the right to property within the old *Kaiserreich* tradition.

[16]Heller, *Rechtsstaat oder Diktatur?*.

[17]Otto Kirchheimer, "Legalität und Legalität" (1932), in Kirchheimer, *Politische Herrschaft: Fünf Beiträge zur Lehre vom Staat* (Frankfurt am Main, 1967); as well as again Neumann, "Die soziale Bedeutung der Grundrechte."

[18]See "Die Verfassung des Deutschen Reichs vom 11. August 1919," in Ernst Rudolf Huber, ed., *Dokumente zur deutschen Verfassungsgeschichte*, vol. 4, *Deutsche Verfassungsdokumente 1919–1933* (Stuttgart, 1992), 151–79. For a somewhat flawed English version see "The Constitution of the German Reich, August 11, 1919," translation of Document 2050-PS, Office of US Chief of Counsel, at Cornell Library's Digital Archive, https://digital.library.cornell.edu/catalog/nur01840.

[19]See Protocols of the National Assembly: Nationalversammlung, 8. Sitzung, Sonnabend, den 15 Februar 1919, 98–9, cited from Bayerische Staatsbibliothek, *Verhandlungen des Reichstages*, vol. 328 (Berlin, 1920), 1919–20.

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However, a majority of deputies rejected this change to the proposed formulation of Article 153.[20]

The relative unanimity with which the founders of the new state had changed the legal parameters for expropriation was not reflected in the legal profession. Some acknowledged the new status of property and expropriation. The constitutional-law professor Walter Jellinek, for example, stated in his 1928 textbook on administrative law that under the new constitution expropriation "no longer require[d] a distinct administrative act" and therefore could be simply "executed through a law regarding either a general issue or a specific case." This was, as Jellinek expressed it, certainly not particularly *rechtsstaatlich*, but since the constitution had in no way elevated "Montesquieu's thought to the level of constitutional principle," it was not illegal.[21] Jellinek explicitly acknowledged here the revolutionary break in the law, its new normative direction. At the same time he maintained his methodological commitment to a strict positivism which kept him in contact with the mainstream of *Kaiserreich* jurisprudence.

On the other side of the argument Carl Schmitt upheld the abstract principle of the *Rechtsstaat* explicitly against the text of the Weimar Constitution.[22] Abstract prepositive principles now were able to supersede the positive constitutional text. The debate over the right to property became, in this way, the lynchpin for a radical reevaluation of methods. Where the so-called Free Law School had set out to challenge the strictures of *Kaiserreich* jurisprudence, its principles of a freer and value-based interpretation of the law were now mobilized against the new democratic state. In his *Eigentum und Reichsverfassung* (Property and Constitution) (1923) the leading scholar of property law in the Weimar Republic, Martin Wolff, argued that the Weimar Constitution significantly extended the right to property through its Article 153. In contrast to Gerhard Anschütz, who had interpreted the article in the tradition of similar clauses known in the *Kaiserreich*,[23] Wolff contended that in "contrast to older constitutions such as the Prussian one," which merely aimed at protecting "the private realm from 'administrative despotism'," the Weimar Constitution could serve additionally to shield against the "legislator's lust for confiscation."[24]

These legal–theoretical debates would come to a head in the dispute over a concrete issue—the status of property belonging to the formerly ruling houses. Despite the constitution's clarity on expropriation, this remained one key unsolved problem for the new republic's property order. Austria's Constituent National Assembly had passed the Habsburgergesetz (Habsburg Law) in 1919, which declared "the republic of Austria the proprietor" of all property belonging to the formerly ruling house

[20]See Protocols of the National Assembly: Nationalversammlung, 62. Sitzung, Montag, den 21. Juli 1919, 1756–9.

[21]Walter Jellinek, *Verwaltungsrecht* (Berlin, 1928), 395.

[22]On the theoretical dispute on different conceptions of property in Weimar political thought see Max Klein, "Der unbestimmte Ort des Eigentums: Ein theoretischer Zugang zum ambivalenten Verhältnis von Enteignung und demokratischer [*sic*] Rechtsstaat," *Politische Vierteljahresschrift* 63 (2022), 25–51.

[23]Gerhard Anschütz, *Die Verfassung des Deutschen Reiches vom 11. August 1919. Ein Kommentar für Wissenschaft und Praxis* (1921) (Berlin, 1933), 704.

[24]Martin Wolff, "Reichsverfassung und Eigentum," in *Festgabe der Berliner Juristischen Fakultät für Wilhelm Kahl zum Doktorjubiläum am 19. April 1923* (Tübingen, 1923), 3–30, at 21.

which was not "verifiably private property."[25] In Germany, however, only the free state of Sachsen-Gotha had managed to pass a similar law in 1919 before the Weimar Constitution came into force. The law was passed in July 1919 by the Council of the People's Delegates, a legislative assembly in which the Independent Social Democrats (USPD) held an absolute majority.[26] Overall, this meant that the status of properties owned, for example, by the family of the Hohenzollern who had ruled both Prussia and the empire remained unclear. Large estates remained in the hands of an aristocratic elite which had supposedly been ousted from power.

In the years after the revolution, attempts had been made to use the right to property as foregrounded by Wolff to retrieve these properties and make them fully private possessions of the families in question. In 1925 a newly conservative coalition in Berlin, consisting of the German National Peoples' Party (DNVP), the German Peoples' Party (DVP), the Catholic Centre Party, and the Bavarian People's Party, sought to resolve the issue by asking the Reichsgericht to nullify the Sachsen-Gotha law—the only law which had explicitly expropriated the princes and declared their possessions not to have been covered by any protections for private property. The case in front of the Reichsgericht, then, exemplified the central question in contention in the property issue: what was the status of the right to property? Was it an absolute or a qualified right? But it also highlighted the complicated nature of the Weimar Republic's legal continuity and political discontinuity: how could former monarchical rulers be transformed into private citizens? And, crucially, which parts of their persona could be transferred into the postrevolutionary world?

The Reichsgericht ruled in favor of the central government, and against the land of Thuringia representing Sachsen-Gotha. In so doing, it followed the new understanding of property as an unlimited, basic right advanced by scholars like Schmitt and Wolff. The Reichsgericht used several argumentative strategies to come to this result. While it maintained that some technicalities in the law's formulation had invalidated it from the beginning, it also provided several arguments for striking down the law on more material grounds. The problem of private property, expropriation, and the possible protections through the Weimar Constitution's basic rights were at the heart of these debates. This, of course, was by no means self-evident. For Article 153 to be applicable in this case, the property in the possession of formerly ruling houses first had to be interpreted as private property. As the later minister of justice, Johann Viktor Bredt (Party of the German Middle Classes), observed at the time, the idea of dividing such property into merely two categories, private and public, completely ignored the complex dual function of the German princely houses before the advent of republican government. The most significant part of property, the crown property or *Kronvermögen*, belonged to any ruler merely in his function as ruler. After a revolution that person ceased to exist and their alter ego, the private individual, could not claim rights and privileges

[25]See Habsburgergesetz, StGBl. Nr. 209/1919.

[26]See Gesetz über die Einziehung des Gothaischen Hausfideikommiß, des Lichtenberger Fideikommiß, des Ernst-Albert-Fideikommiß, der Schmalkaldener Forsten und des Hausallods vom 31. Juli 1919 (Gesetzsammlung für den Staat Gotha 1919, No. 35, 105).

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belonging to their former role as a matter of course. Bredt urged politicians and jurists alike to "recognize that we have to close a loophole in the law before we can approach a decision."[27] The Reichsgericht argued more simplistically. On the basis of the registry of deeds, it argued, it was clear that the property belonged to the duke's family. Where things remained more complex, as in the case of entailed estates (*Fideikomiss*), the court deduced *ex negativo*. If the state of Thuringia had had any credible claims to the property, it argued, "it would have been its task to pursue these" at some point prior to the expropriation of 1919. Since it had not done so, it had had no reason to claim that property for itself after the revolution.[28]

The line of argument chosen by the Reichsgericht represented a common way of dealing with the legal problems arising from the concurrence of continuity and discontinuity in the aftermath of the German Revolution. The Weimar legal profession papered over the radical consequences of the constitutional break of 1918–19 by claiming—as Gerhard Anschütz had done in his commentary on the Weimar Constitution—that "the constitution has changed but the state has remained."[29] Declaring princely property to be simply private property, the Reichsgericht confirmed the minister of the interior's view that the entire law constituted an illegal expropriation. The court took note to specifically cite Martin Wolff's view, according to which Article 153 specifically protected against legislative as well as administrative overreach.[30] The Gotha law, it argued, was not consistent with imperial legislation and was therefore null and void. In one fell swoop the court resolved the complex issues pertaining to the question of property under the new constitutional order. This represented one first step towards the establishment of the right to property as an absolute right. It also displayed the emergence of a new coalition between the Reichsgericht and conservative forces in the Reichstag, setting up the left, particularly the faltering SPD, to seek remedies in extra-parliamentary politics.

Princely property before the people—and Carl Schmitt

The Reichsgericht ruling had some very direct political consequences. The smaller German states in particular had been preemptively denied an important source of possible income. The centralization of the German fiscal state after 1918 had already limited their tax-raising capacities, while inflation had increased the relative value of the lands held by the former princes.[31] The pressure to resolve the issue of princely estates through new legislation from the Reich—the only avenue open after the Reichsgericht ruling—was immense. Both SPD and DDP politicians had been preparing legislation which sought to strike a compromise between the interests of

[27]Johann Viktor Bredt, "Die Fürstenabfindung," *Juristische Rundschau* 2/11 (1926), 485–89, at 489.

[28]Beschluss des Reichsgerichts vom 18. Juni 1925 VII B 3/23 und VI B4/24 (RGZ 111, 123–4).

[29]Anschütz "Die Verfassung des Deutschen Reiches," 1.

[30]RGZ 111, 130.

[31]See Rainer Stentzel, "Zum Verhältnis von Recht und Politik in der Weimarer Republik: Der Streit um die sogenannte Fürstenenteignung," *Der Staat* 39 (2000), 275–97, at 277; as well as Ulrich Schüren, *Der Volksentscheid zur Fürstenenteignung 1926: Die Vermögensauseinandersetzung mit den depossedierten Landesherren als Problem der deutschen Innenpolitik unter besonderer Berücksichtigung der Verhältnisse in Preussen* (Düsseldorf, 1978).

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the *Länder* governments and those of the formerly ruling houses. However, when, in January 1926, it became clear that the SPD would yet again be forced into opposition, the party declared its support for Communist proposals to make the issue of the expropriation of princes without compensation the subject of a national referendum.

As was to be expected, conservative forces argued forcefully against the proposal to expropriate the princes. In its official statement the DNVP called property "sacrosanct." The proposed legislation represented a "cowardly raid" against the "defenceless princes." It warned that soon "universal expropriation" would be the order of the day.[32] The Catholic bishop Sigismund Felix von Ow-Felldorf admonished that participation in the referendum would amount to a "sin against God's seventh commandment."[33] The Lutheran Church argued that the referendum's "complete and utter disenfranchisement of fellow German citizens" amounted to a "clear and unequivocal contradiction of the Gospel's basic tenets."[34]

In an opinion on both the Social Democratic and the Communist proposals for an expropriation law commissioned by the DNVP—in a neat illustration of the overlap between conservative judicial and parliamentary politics—Carl Schmitt built on the ideas first proposed by Martin Wolff. Schmitt recognized that the problem of establishing the private or public character of the assets in question was in fact a difficult one. But he simply concluded that precisely because of this difficulty it was necessary, at all costs, to avoid what he viewed as a potential violation of Article 153 of the Weimar Constitution.[35] For Schmitt it was beyond discussion that Article 153 "constrained" not only the administration but also the legislature, on the level both of the *Länder* and of the *Reich*.[36] Property, as far as it was potentially private, could not legally be expropriated through direct legislation.[37]

Why was it so important for Schmitt to prove that the expropriation proposal amounted to a breach of the constitution or, in any case, a contradiction of the provisions laid out in Article 153? Schmitt and the DNVP knew why: a referendum on legislation which was understood to breech the constitutional order was possible in Weimar. However, the threshold of votes required to change the constitution was almost unobtainable. The Reich's conservative government ultimately followed president Paul von Hindenburg's request to classify the referendum on Schmitt's terms: as a referendum to change the constitution. Instead of a simple majority of voters, the referendum now required the assent of over 50 percent of the entire population: something that would ultimately ensure its failure.[38]

[32]Official DNVP statement cited in Schüren, *Der Volksentscheid zur Fürstenenteignung*, 206.

[33]*Donau-Zeitung*, 9 March 1926, cited in Thomas Kluck, *Protestantismus und Protest in der Weimarer Republik: Die Auseinandersetzungen um Fürstenenteignung und Aufwertung im Spiegel des deutschen Protestantismus* (Frankfurt am Main, 1996), 48.

[34]See Kluck, *Protestantismus und Protest in der Weimarer Republik*, 107.

[35]Carl Schmitt, *Gutachten über den kommunistischen und sozialdemokratischen Gesetzentwurf zur Fürstenenteignung* (Bonn, 1926), 25.

[36]Ibid., 17.

[37]Ibid.

[38]Otmar Jung, "Zur Problematik des Beteiligungsquorums," in Lars P. Feld, Peter M. Huber, Otmar Jung, Christian Welzel, and Fabian Wittreck, eds., *Jahrbuch für direkte Demokratie 2009* (Berlin, 2009), 40–65, at 56.

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Schmitt's opinion on the expropriation proposals did not merely, however, endorse the conservative government's manipulation of the Weimar Republic's rules concerning referendum quora. It mobilized the idea of the *Rechtsstaat*, a nineteenth-century legal idea which had been of marginal importance in negotiations about the new constitution, in an entirely novel way: as a higher organizational principle which bound legislature and jurisdiction beyond what the text of the constitution actually stated. In his opinion on the expropriation of the princes, Schmitt used this figure of thought in various configurations. Since it excluded princely property from ordinary legal procedure, the SPD's draft for an expropriation law violated a basic principle inherent in the *Rechtsstaat* idea: the independence of the judiciary and the judge. This, according to Schmitt, was a consequence of the manner in which the SPD's law denied the princes legal recourse against expropriation—despite, of course, the fact that Article 153 of the constitution explicitly allowed for this in asserting that expropriation without compensation was legitimate if required by an imperial law. Turning to nineteenth-century legal scholarship in preference to the text of the current constitution, Schmitt sought to show how the exclusion of particular cases from ordinary legal procedure "had always appeared monstrous to the bourgeois sensitivity of *Rechtsstaatlichkeit*."[39] What remained undiscussed, in this view, was the fact that nineteenth-century legal theory had also envisioned the legislator as an unelected ruler, from whose dictates the ordinary citizen might indeed need protection through the courts. With the advent of the democratic republic, this situation had changed: legislature and executive were now accountable to the citizenry. In a typical sleight of hand, Schmitt deployed the distrust of arbitrary power inherent in the older liberal tradition against the action of a democratically elected legislature.

Furthermore, just as the princely property was not just private property, the heads of formerly ruling houses were not simply citizens. Schmitt, however, dismissed this argument, advanced by many politicians of the time, by claiming that the expropriation question was ultimately not a legal but a political matter. Schmitt cited the assurances by the member of parliament Walther Schücking (DDP) demanding the legislator to act decisively in order to avoid losing any more court cases, calling them "an espousal of dictatorial politics."[40] The *Rechtsstaat* enabled Schmitt to hold up a standard of liberal government which made democratic legislation on the whole seem suspicious. His utilization of ideas drawn from the liberal thought of a pre-democratic era exemplified the contradictions which lay at the bottom of the idea of legal continuity between the *Kaiserreich* and the Weimar Republic.

Despite its obvious inconsistencies, Schmitt further expanded his argument on the *Rechtsstaat*'s prepositive character in his famous *Verfassungslehre* of 1928. With this text, he established basic rights as absolute rights in German constitutional thought. In a *Rechtsstaat*, Schmitt argued here, "basic rights were only such rights which are in force before and above the state." Such rights were "not given by the state but merely recognized by it."[41] Legislation could not regulate

[39]Schmitt, "Gutachten," 19.

[40]Ibid., 25.

[41]Carl Schmitt, *Verfassungslehre* (Berlin, 1928), 163.

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the extent of basic rights, as it had attempted in the case of the expropriation of princes. "Religious freedom, personal freedom, property and the freedom of speech" existed in a *Rechtsstaat* "before the state." They did not, Schmitt argued, "receive their content from any laws" or "within the restraints of any laws." Rather, they designated "the fundamentally uncontrollable space of individual freedom" which itself provided the justification for the existence of the state.[42] This was perhaps an intensification of the liberal tradition of the *Rechtsstaat*, but it was ultimately a permissible interpretation. However, as the expropriation issue showed, Schmitt's understanding of basic rights was not mere theory. By treating not just "personal freedom," but also property, as an inalienable, pre-political right—something on which the nineteenth-century liberal tradition had been, at the very least, divided—Schmitt sought to systematize the basis for a legal practice which had created enormous problems for the actual politics of Weimar Germany.

As Franz Neumann, Schmitt's student and most astute critic, observed in an article on basic rights in 1930, Schmitt's understanding of the Weimar Constitution calcified it to the point of being unable to contain or process the divergent economic interests within it. Neumann argued precisely that the constitution should be understood as an advancement from liberal conceptions of statehood such as the *Rechtsstaat*. If, he wrote, constitutionally guaranteed basic rights were "sacrosanct," then the Weimar Constitution had to be understood as a liberal constitution. As such it would indeed merely aim to "safeguard the interests of the property-owning classes." Such an understanding of the constitution would ultimately, Neumann warned, "force another revolution."[43]

Historians disagree whether the expropriation referendum was a key moment of positive democratic mobilization in the brief history of the first German republic or whether it exemplified the early failure of parliamentary politics and the dangerous emergence of coalitions between democratic and nondemocratic parties—the SPD and the Communist Party on the one side, liberals, conservatives, and monarchists on the other.[44] In their sidelining of the judiciary, however, such assessments fail to give sufficient notice to the manner in which the political right had already coalesced with the Reichsgericht before the referendum. This alliance, which served to weaken both opposition parties in parliament and the regional government of Thuringia, foreshadowed a fateful pattern of Weimar politics in the subsequent years.

Inflation and the law

The political theorist Ernst Fraenkel, then a practicing lawyer, argued in his contemporary analysis of Weimar judicialization that the self-empowerment of the Reichsgericht and its strong defence of the right to property had to be understood

[42]Ibid., 22.

[43]Neumann, "Die soziale Bedeutung der Grundrechte," 78.

[44]On this see Peter Longerich, *Deutschland 1918–1933: Die Weimarer Republik: Handbuch zur Geschichte* (Hannover, 1995), 240; as well as Otmar Jung, *Volksgesetzgebung: Die "Weimarer Erfahrungen" aus dem Fall der Vermögensauseinandersetzungen zwischen Freistaaten und ehemaligen Fürsten* (Hamburg, 1996).

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as a form of "class justice."[45] Nevertheless, the Weimar judiciary's zeal to defend the princes' right to property may still need further explanation. After all, even on Fraenkel's terms, it was by no means self-evident that middle-class civil servants and academics would so wholesomely champion the privileges of the nobility. Indeed, in the course of the referendum campaign it had become clear that it was not only Communists and Social Democrats who supported the idea of an expropriation of the princes. Voters from the Catholic Centre Party as well as the liberal DDP joined the cause.[46] The entwinement of judicial self-empowerment and the property question in this era, then, can only be understood with reference to another political-economic problem that had already attracted the attention of the Reichsgericht in the years leading up to their politically controversial 1925 judgment on the expropriation of princes. This was the question of "appreciation" (*Aufwertung*).

Since the First World War, inflation and then hyperinflation had eaten up those assets on which a significant part of the middle classes relied.[47] In response to this, middle-class citizens had organized in various organizations such as the Sparerbund ("savers' union") demanding the appreciation of debts, loans and bonds according to their pre-inflation value in order to restore rentier incomes. Intensifying pressure from such groups put the government in a difficult position. On the one hand several parties, particularly on the centre right and the right, sought to benefit from positioning themselves on the side of those who felt they had been effectively expropriated. Indeed, amongst many politicians there was a sense of the true injustice of this, as John Maynard Keynes put it, "euthanasia of the rentier,"[48] particularly because it hit the property-owning middle class hardest. As the foreign minister, Gustav Stresemann (DVP), told the cabinet in 1923, it was "intolerable that precisely those sections of the population which in the past have been the bulwark of the state should now by force of law be reduced to proletarian status."[49] On the other hand, appreciation was hardly affordable and had socially regressive tendencies. As the SPD member of parliament Paul Hertz argued in a speech to the Reichstag, the revaluation of assets and contracts would overwhelm the public purse and necessarily lead to tax increases, not least because the state itself was a significant debtor.[50]

With the political parties yet undecided and the government hesitant to act,[51] it was the courts that sought to bring the issue to a resolution. The question of appreciation provides a particularly clear illustration of the gap between positivist and supra-positive principles of jurisprudence in Weimar: appreciation required a

[45]Ernst Fraenkel, "Zur Soziologie der Klassenjustiz" (1927), in Fraenkel, *Zur Soziologie der Klassenjustiz und Aufsätze zur Verfassungskrise 1931–32* (Darmstadt, 1968), 1–41.

[46]Schüren, *Der Volksentscheid zur Fürstenenteignung*, 133.

[47]See Heinrich August Winkler, *Mittelstand, Demokratie und Nationalsozialismus: Die politische Entwicklung von Handwerk und Kleinhandel in der Weimarer Republik* (Cologne, 1972), 28.

[48]John Maynard Keynes, *General Theory of Employment, Interest and Money* (London, 1936), 375.

[49]Bundesarchiv Koblenz, R 43 I, Mr. 1390, f. 219, cited in David B. Southern, "The Revaluation Question in the Weimar Republic," *Journal of Modern History* 51/1 (1979), D1029–D1054, at D1033.

[50]Paul Hertz, "Rede des Abgeordneten Dr. Hertz," in Hertz, *Sozialdemokratie und Aufwertung* (Berlin, 1924), 6–13, at 9.

[51]See Southern, "The Revaluation Question," D1042.

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decision to ignore the face value of assets and contracts, rendered worthless by inflation, and to revalue ("appreciate") them in line with an ineffable, higher principle of "fairness" that the measure's proponents struggled to define. Already in March 1923, the Oberlandesgericht Darmstadt (the highest court in the state of Hesse) had made one decisive step in the direction of appreciation. In two cases the court upended the nominalist orthodoxy on the issue, declaring that "the legal provisions, which make the paper mark means of legal payment … do not intend the expropriation without compensation and unjustified redistribution of wealth which must inevitably attend their literal application."[52] The leading judge in this case, Georg Best, would go on to become a prominent political figure running on the issue of appreciation for the German National People's Party in 1924 and later founding his own party the for "people's justice and appreciation."[53]

In November 1923 the Reichsgericht followed suit. In a case about a mortgage on a piece of land in the former German colony of South West Africa, the court invoked paragraph 242 of the 1896 German Civil Code, the so-called good-faith law (*Treu und Glauben*), to establish the appreciation of debts in legal practise. The creditor in this case had not accepted payment in the depreciated reichsmark in 1920 and was now being sued to release the debtor from his obligations and accept payment. The court sided with the creditor, arguing that he ought to be paid in a sum corresponding to the original value of the mortgage. The "juridical possibility of appreciation" now "needed to be acknowledged," argued the court.[54] The principle of good faith took precedence over the prevailing currency laws. Because the legislator, when making these laws, could not have foreseen a depreciation of currency "such as has become reality after the unhappy end of the world war," the legislation now needed to be amended with reference to the overriding principle of good faith.[55] Furthermore, the court cited a tendency in recent legislation to move away from the principle that "one mark equals one mark" and its own evolution on the issue of property law.[56] The fact that this juridical revaluation of the issue of currency had only been taking place in the very recent past and "under the influence of an ever greater depreciation of money" was, the Reichsgericht argued, "immaterial": "Incorrect legal opinions from the year 1920 cannot have any bearing on a case now."[57]

With this the court brought the appreciation question back to the forefront of the Weimar political debate. The decision, and particularly the argument on the basis of the good-faith principle, created a potential precedent for any creditor who had received payment for loans in depreciated currency. As the professor of law Arthur Nußbaum noted at the time, "As a result of this view of the Reichsgericht, the political authorities are finding themselves faced by millions upon millions of legal claims which have been confirmed as inalienable by the Reichsgericht … Nothing could have a more inflammatory effect upon the

[52]*Juristische Wochenschrift* 52 (1923), 522–4, cited in Southern, "The Revaluation Question," D1034–5.
[53]See www.reichstag-abgeordnetendatenbank.de/select.html?pnd=129915238.
[54]Urteile des Reichsgerichts, V. Zivilsenats, 28 Nov. 1923, V31/23, RGZ 107, 78–94, at 87.
[55]Urteile des Reichsgerichts, V. Zivilsenats, 28 Nov. 1923, V31/23, RGZ 107, 88.
[56]Ibid.
[57]Ibid., 87.

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population than this."[58] The Reichsgericht had proven its ability to create facts to which the government and parliament could merely respond. Complex political-economic calculations concerning the consequences of appreciation for exports, the budget, and currency stability in a highly volatile period of Weimar politics had been pushed aside by baldly asserted viewpoints on the justice and injustice of property relations. Furthermore, the position of the Reichsgericht, despite the fact that there were some in the cabinet who favored a moderate policy of appreciation, exposed the government's own difficult relationship with the issue at hand. Just as in the case of the expropriation of the princes, the German Reich as a major debtor to its own citizens was clearly on the side of the defeated party. In this way the court's populism further estranged the middle classes from their elected officials.[59]

Appreciation and judicial review

The increasing tension between the government, the legislature, and an ever more emboldened judiciary became clear when the judges at the Reichsgericht pushed their position on appreciation even further. In January 1924 the association of judges at the Reichsgericht published a letter to the German chancellor, Wilhelm Marx, demanding that the government abstain from any legal measure which "would forbid the appreciation either of mortgages or other monetary claims." This was all the more surprising as the minister of justice had only the previous day written to the chancellor in support of the Reichsgericht's decision on appreciation.[60] The government, it seems, had no intention of undoing the court ruling through legislative action. Referring to the Reichsgericht's decision on the issue, the association of judges declared appreciation to be a "necessity." "If the highest court in the Reich" had come to such a decision, it argued, it was to be expected "that its opinion would not be toppled by a dictate from the legislator."[61] The association of judges pointed again to the principle of good faith as the legal and moral basis for appreciation. It was an "idea outside any single law," "outside any single positive legal determination," yet no "legal order deserving the name" could "persist without this precept." When good faith was "imperiously demanding" a certain outcome, it was not to be "thwarted by the legislator's dictum." Such an action would be, the letter contended, "unbearable in a *Rechtsstaat*." As in Schmitt's opinion on the expropriation of the princes, the *Rechtsstaat* served here as a description not of the actual legal order but of a preconceived fixed ideal, a higher perspective from which the legislature's action could be deemed unjust.

Furthermore, the Reichsgericht*s* judges warned the chancellor against a perception which had, according to them, already formed in the press, namely that the

[58]Arthur Nußbaum, *Die Bilanz der Aufwertungstheorie* (Tübingen, 1929), 4, cited in Southern, "The Revaluation Question," D1036.

[59]On this see Winkler, *Mittelstand, Demokratie und Nationalsozialismus*; as well as Gerald D. Feldman, *Iron and Steel in the German Inflation 1916–1923* (Princeton, 1977).

[60]Der Reichminister der Justiz an den Reichskanzler, 7. Januar 1924, in Akten der Reichskanzlei, R 43 I/2454, Bl. 50–54 Umdruck.

[61]Der Richterverein beim Reichsgericht an den Reichskanzler, Leipzig, 8 Jan. 1924, in Akten der Reichskanzlei, R 43 I/2454, Bl. 81f.

government's critical attitude towards appreciation was "strongly influenced by selfish motives." Therefore a law against appreciation would, the letter argued, severely harm the "reputation of the government" and offend the "people's sense of justice." Lastly, the association of the judges offered the thought that a measure outlawing appreciation might itself be a violation of the principle of good faith or an "unconstitutional expropriation." The judges therefore warned ominously of the "serious danger" that "such a judicial assessment would be adopted even by the highest court," meaning that the court would side against any legislative measure taken against appreciation.[62]

In actual fact the cabinet had been split on the issue. The minister of justice, Erich Emminger (Bavarian People's Party), argued for an appreciation of 10 percent with reference to the prewar gold standard, whereas the minister of finance, David Fischer, and the labor minister, Heinrich Brauns (Centre Party) cautioned against such a measure. All agreed, however, that the uncertainty created by the judgment needed to be remedied by new legislation clarifying the issue directly.[63] In February 1924 the government pronounced the Third Tax Emergency Decree, which created a complex schema for appreciation in specific cases, drawing strong criticism from both the proponents and the opponents of appreciation. In 1925 the government then further amended the legislation on the issue, passing the Aufwertungsgesetz (appreciation law), which the Reichsgericht then judged constitutional in the same year.[64] The court had succeeded in pushing the government in its direction, and significantly limiting the scope within which the legislature could operate.

As was to be expected, the statement of the association of judges at the Reichsgericht was not well received. Even in the Ministry of Justice, the undersecretary noted in a letter to the minister that the statement was a testimony to the "misapprehension of the duties of a judge." The courts should understand "that their task is in searching and finding positive law." The Reichsgericht's "aspiration to be considered when making future legislation" was, he concluded, "untenable and unbearable."[65] Indeed, it was clear that the judges' intervention went far beyond the issue of appreciation. The judges' warning to deem any measure against appreciation unconstitutional or even to measure it against the moral yardstick of good faith pointed towards an entirely new self-conception of the judiciary vis-à-vis parliament and the government. This was, as Michael Stolleis has argued, "an open declaration of war by the judiciary against the politicians." With it, "judicial review had become an official right."[66] It was, then, not surprising that when the Reichsgericht officially claimed this power for itself, in its 1925 ruling on the new appreciation law, it did not even provide a justification, pronouncing, "Since the Weimar Constitution does not contain any prescription according to which the decision about the constitutionality of imperial laws is removed from the courts

[62]Der Richterverein beim Reichsgericht an den Reichskanzler, Leipzig, 8 Jan. 1924, in Akten der Reichskanzlei, R 43 I/2454, Bl. 81f.

[63]See Akten der Reichskanzlei, Die Kabinette Marx I/II, vol. 1, Nr. 30: Kabinettssitzung vom 17. Dezember 1923.

[64]See Southern, "The Revaluation Question," D 1044.

[65]Ibid.

[66]Michael Stolleis, "Judicial, Administrative, and Constitutional Review in the Weimar Republic," *Ratio Juris* 16/2 (2003), 266–80, at 273.

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… therefore, the right and the duty of the judge to review the constitutionality of imperial laws must be recognized."[67]

With this the Reichsgericht summarily ended a complex debate which had been occupying the German legal profession at least since the *Kaiserreich*.[68] There had been administrative review since the nineteenth century,[69] and judicial review of laws from a lower level was common and even demanded by the Weimar Constitution, as the case of the expropriation of princes showed. A review which would adjudicate a law's constitutionality on material grounds, however, had not yet been accepted. With its introduction, the Reichsgericht sought to transform the entire architecture of the Weimar Constitution in a manner that had been foregrounded by its jurisdiction on basic rights and appreciation. Democratic lawmaking, only introduced a mere six years earlier, was to be checked and limited within bounds defined by the judiciary.[70]

It is clear, from both the cabinet protocols and the parliamentary debates dealing with the questions of princely expropriation and appreciation, that the distrust of democratic politics that underpinned the judges' will to power was unwarranted. The spectre of a fundamental redistribution of wealth existed more in the heads of some conservative jurists than it did in the political programs of SPD, DDP, and Centre Party politicians. The courts nonetheless succeeded in limiting the latitude of political action, and created significant legal uncertainty which further eroded the legitimacy of the fragile democratic state. As Gustav Radbruch had warned in 1925, "After an ineffable convulsion, our new state wrestles for authority. Does one believe to strengthen such authority, if one does not only part state authority but split it? When one exposes the legislature to be denounced by the judiciary?"[71]

From property to judicial power

While the Reichsgericht was gearing up to assume the role of constitutional court, Weimar legal theory kept pondering the possible benefits and downsides of judicial review. In 1922, at the first conference of the association of constitutional lawyers under the new democratic regime, Heidelberg law professor Richard Thoma argued that there were no fully convincing legal arguments proving the necessity or superfluity of judicial review.[72] Whereas Hans Kelsen had proposed the view that judicial review was simply a matter of course in a modern democratic state,[73] scholars like Gerhard Anschütz and Walter Jellinek, by contrast, had denied a right to judicial

[67]*RGZ* 111, 323.

[68]See Bernd J. Hartmann, "Das richterliche Prüfungsrecht unter Weimarer Reichsverfassung," *Jahrbuch der Juristischen Zeitgeschichte* 8 (2006–7), 154–73.

[69]Stolleis, "Judicial Administrative, and Constitutional Review," 267–8.

[70]See also Hauke Brunkhorst, "Der lange Schatten des Staatswillenspositivismus: Parlamentarismus zwischen Untertanenrepräsentation und Volkssouveränität," *Leviathan* 31/3 (2003), 362–81, at 362.

[71]Gustav Radbruch, "Richterliches Prüfungsrecht?", *Die Justiz* 1 (1925), 12–16, at 14–15.

[72]Richard Thoma, "Richterliches Prüfungsrecht," *Archiv des öffentlichen Rechts*, NF 43/4 (1922), 267–86.

[73]It is often forgotten that Kelsen's views referred more specifically to the Austrian case and did not straightforwardly map on to the German situation as Thoma suggested in his contribution. See Thoma, "Richterliches Prüfungsrecht," 272.

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review as long as it was not explicitly established in the constitution. In their view, the legality and constitutionality of any law were guaranteed through the constitutionally determined procedure through which it was passed. In a system based on popular sovereignty no further examination could be necessary or, in fact, legitimate.

With this Anschütz and Jellinek proposed a new distinct constitutionalism for the Weimar Republic which differed particularly from that of the United States, where the Supreme Court had seized the right to judicial review already in 1803. In a 1921 article Walter Jellinek posited that judicial review in the United States was a logical consequence of its specific constitutional order which explicitly appointed a *pouvoir constituant*.[74] This view was also supported by the Weimar Constitution's key architect, Hugo Preuss. In an interview with American journalists in 1925 he explained that the Weimar Constitution aimed to keep the process for changing and amending the constitution relatively open to ensure its flexibility and democratic legitimacy. Comparing specifically the US and Weimar constitutions, he argued that the "old constitutions" had "made a sharp distinction between *le pouvoir constituant* and *le pouvoir constitué*." To Preuss this seemed like an outmoded understanding of the function of constitutions, explaining, "today we feel that this distinction is no longer valid; *le pouvoir constituant* is always there."[75]

The distinction between old and new constitutional orders, however, did not find the approval of Richard Thoma, who quipped that it amounted to an "invalid" and merely "conceptual jurisprudence."[76] Thoma regarded the argument that the question of judicial review remained ultimately political more favorably, citing Heinrich Triepel's famous statement that judicial review was "if not the only, then at least the most important protection of civil liberties from a power-hungry parliament in a parliamentary republic."[77] However, Thoma did not neglect to point out the self-serving logic underlying Triepel's argument. It would seem, he summarized, "that the entire idea of many federal laws openly or clandestinely injuring the constitution, against which the courts must always stand guard, belongs more in the realm of spectres than realities."[78]

Whilst the constitutional lawyers were still debating, the judges at the Reichsgericht were creating facts. This was also necessary because the realities on the ground were somewhat messier than an abstract debate about judicial review would make it seem. As Anschütz and Jellinek had pointed out, the Weimar Constitution had not created a constitutional court with direct judicial review. It was through the jurisdiction of the Reich's highest court on the constitutional status of basic rights, specifically the right to property, that judicial review was established.

[74]Walter Jellinek, "Richterliches Prüfungsrecht," *Deutsche Juristen-Zeitschrift*, 1921, 753.

[75]Frederick F. Blachley and Miriam E. Oatman, "Hugo Preuss Talks on the Weimar Costitution," *Southwestern Political and Social Science Quarterly* 6/3 (1925), 252–5, at 255. On the debate on *pouvoir constituant* in Weimar legal thought see Monika Polzin, "Irrungen und Wirrungen um den pouvoir constituant: Das Konzept der Verfassungsidentität im deutschen Verfassungsrecht," *Der Staat* 53/1 (2014), 61–94; as well as Lucia Rubinelli, *Constituent Power: A History* (Cambridge, 2020), 103–40.

[76]Thoma, "Richterliches Prüfungsrecht," 270.

[77]Heinrich Triepel, "Der Weg der Gesetzgebung nach der neuen Reichsverfassung," *Archiv des öffentlichen Rechts* 39 (1920), 456–546, at 537.

[78]Thoma, "Richterliches Prüfungsrecht," 280.

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There was, however, a constitutional tribunal, the Staatsgerichtshof, established in Article 108 which was to adjudicate conflicts specifically between the states and the federal government. This was, as Thoma had pointed out, in keeping with German traditions—no overall judicial review, no constitutional court, but a limited special tribunal to resolve specific constitutional conflicts. The Reichsgericht's "conquest of judicial power," as Hermann Heller had described it, might perhaps have put the Staatsgerichtshof in an odd position, had it not been for the fact that the same judges served on both courts. Politically, as has been seen, they represented a distinctly antirepublican position. In a speech on the crisis of trust in the judiciary, the chairman of both courts from 1922 to 1929, Walter Simons, attacked the Association of Republican Judges founded by Hugo Sinzheimer, Ernst Frankel, and others. Social Democrats, Simons argued, could never be judges, as they preferred the class struggle to an objective understanding of justice.[79] In this way, the Reichsgericht's extension of judicial review, and its new position on basic rights as the benchmark against which the constitutionality of laws was to be measured, served to extend not only judicial power but, more importantly, also the fundamental meaning of what judicial review could mean both for the Reichsgericht and for the Staatsgerichtshof. The reinterpretation of the constitution as a set of traditional rights which had been settled along with questions of property and expropriation served to alienate the Weimar Republic from its own stated goals and perspectives on constitutional law.

Conclusion

Looking at the actual cases which led to the introduction and consolidation of judicial review and putting them in conversation with the larger concerns of a highly sophisticated theoretical debate on judicial power and constitutional law in Weimar opens up a new vista on judicialization in the interwar period. It reveals something that is often overlooked in a literature heavily focused on the theoretical chasm in constitutional law and politics between the intellectual giants Hans Kelsen and Carl Schmitt: neither Schmitt's not Kelsen's positions were ultimately decisive for the development of a German tradition of democratic constitutionalism. Of course, Schmitt got his guardian of the law in 1934. After the fall of the Thousand-Year Reich, however, he was left to contemplate the "tyranny of values" exercised by West Germany's constitutional court.[80] Hans Kelsen's vision of judicial review as clean and scientific *Normenkontrolle*, however, was also never realized. What this article on actual jurisdiction in the Weimar period has sought to show is that the origins of German constitutionalism in the democratic age lie in a much more messy and theoretically unsophisticated application of legal argument. In this, basic rights were decisive. It was the Reichsgericht's jurisdiction on property as an absolute right which enabled Weimar judges to develop a

[79]On this see Daniel Siemens, "Die 'Vertrauenskrise der Justiz' in der Weimarer Republik," in Moritz Föllmer and Rüdiger Graf, eds., *Die "Krise" der Weimarer Republik* (Frankfurt am Main, 2005), 139–63, at 154.

[80]On this see Samuel Garret Zeitlin, "Indirection and the Rhetoric of Tyranny: Carl Schmitt's *The Tyranny of Values* 1960–1967," *Modern Intellectual History* 18/2 (2020), 427–50.

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constitution apart from that which was actually established in 1919. The appeal to a higher order of values, represented in the constitution but not actually laid down in it, gave judicial review its weight as an instrument for judicial power against the spectre of Triepel's "power-hungry parliaments." Pairing the introduction of a proper constitutional court with a set of constitutionally guaranteed and inalienable rights, the Federal Republic's Grundgesetz accommodated this vision of judicial power far more easily than the Weimar Constitution had been willing to do.[81]

Contemplating the cases of the expropriation of princes and the issue of appreciation should call into question a familiar verity about the Weimar Constitution: that its construction was flawed and that this was a key reason for the ultimate failure of the republic.[82] Looking at the Reichsgericht's treatment of the constitutional text, it becomes clear that there was a real desire among German lawyers to bend the constitution to the wills of those who were meant to safeguard it. No constitution can be written in such a way as to render such reinterpretations impossible. Indeed, the Weimar case highlights the fact that constitutional framing is not sufficient—and may even be inconsequential—if democratic legitimacy is weak and the judiciary emboldened by popular support and its own sense of self-importance. It was not that the constitution did not safeguard basic rights enough to protect the rights of citizens, as has been stressed in the context of a legitimation of the stronger basic rights protections in the Grundgesetz. The Weimar Constitution's understanding of basic rights was simply antagonistic to the views and interests of those who ultimately came to interpret them: the Weimar legal profession and a significant part of the German middle classes represented by the Centre Party and the German Democratic Party (DDP). This interpretation proved far more important than the initial framing.

The interaction of Weimar politics and the judiciary thus produced a curious phenomenon: a constitutionalism without respect for the constitution. Judicialization represented not the apotheosis or "encasement" of constitutional design, but rather its undoing. The Weimar case thus invites us to call into question the tight relationship between constitutionalism and judicialization identified in recent critical legal scholarship. As a reaction to the experiences of Weimar and its lack of judicial "guardianship," the story goes, European constitutions established strong constitutional courts with the power to review legislation after 1945. As Martin Loughlin put it, "Kelsen's case for the court as guardian of the constitution has evidently prevailed, but it succeeds alongside Schmitt's claim that this must lead to a politicized judiciary exercising a politically contentious constitutional jurisdiction."[83] But perhaps a critical perspective on judicialization would do well not to invest too heavily in this simultaneity. What the Weimar

[81]Clara Maier, "The Weimar Origins of the West German *Rechtsstaat*, 1919–1969," *Historical Journal* 62/4 (2019), 1069–91.

[82]This is an important trope in German legal theory. See, for example, Hans Mommsen, "Ist die Weimarer Republik an Fehlkonstruktionen der Reichsverfassung gescheitert?", in Detlef Lehnert and Christoph Müller, eds., *Vom Untertanenverband zur Bürgergenossenschaft* (Baden-Baden, 2003), 49–57; Udo Di Fabio, *Die Weimarer Verfassung: Aufbruch und Scheitern* (Munich, 2018). Recently this view has been challenged in German legal scholarship. See particularly Horst Dreier and Christian Waldhoff, eds., *Das Wagnis der Demokratie: Eine Anatomie der Weimarer Reichsverfassung* (Munich, 2018).

[83]Martin Loughlin, *Against Constitutionalism* (Cambridge, MA, 2022), 129.

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case makes powerfully clear is that judicial empowerment preceded the introduction of constitutional courts. Weimar judges' assumption of constitutional review in 1925 happened outside the role which the constitution and, it should be stressed, the German legal tradition as it then existed had foreseen for them. For our own times, which are indeed marked by "an unprecedented amount of power [transferred] from representative institutions to judiciaries," this would mean that critical analysis should not stop at censuring the ways in which modern constitutionalism produces and sustains judicial empowerment.[84] We should instead be attentive to how specific courts and specific judges might use their powers to turn themselves "from guardians into masters of the constitution"—and the political projects that may be served by such a transformation.[85]

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[84]Hirschl, *Towards Juristocracy*, 1.
[85]Loughlin *Against Constitutionalism*, 140.

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