The Right to Associate and the Rights of Associations:

Civil-Society Organizations in Prussia, 1794-1908

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Abstract

Civil-society organizations are thought to form an important "third sector" of society, one that plays a central role in both democratic and non-democratic regimes. Today one mark of a repressive government is its effort to suppress or limit civil-society organizations. These limitations have a long history, and existed even in relatively democratic societies. We outline a simple framework for thinking about the right to associate and the rights of associations, and illustrate it using examples from U.S. history. Then we focus on Prussia, tracing the history of limitations on association and civil-society organizations in Prussia from the late eighteenth century to the outbreak of World War I. Prussian governments restricted the right to associate, but, just as importantly, they denied to most civil-society organizations corporative legal rights such as the ability to contract in their own right. We argue that the latter rights are crucial to effective civil-society organizations, and trace the process by which Prussia (later Germany) liberalized its treatment of such groups. In a brief overview we show that similar limitations operated in France in the nineteenth century, even though France after the Revolution had a very different constitutional order. The rights demanded by civil-society groups were virtually identical to those offered to business organizations. We document the close association between the rights of business organizations and those of civil-society groups.

Was der Mensch ist, verdankt er der Vereinigung von Mensch und Mensch.[1]

In many countries today the freedom to associate is seen as a fundamental right. Civil-society groups in these countries often enjoy additional civil and political rights that make it easier for these groups to cohere and to advance an agenda. Such has not always been the case. Historically, freedom of association was not the norm in the United States or most of Europe; not even in the regimes pledged to respect the rule of law, and not even in regimes that viewed themselves as leading the charge for human liberty and the democratization of political rights. In this paper we focus on Prussia, to examine the logic of limitations on the right of association and how these limitations evolved and weakened in the latter part of the nineteenth century. Close study of particular cases is an ideal way to make progress on a question such as this, but we acknowledge the danger of implicitly generalizing from a single country's experience. To add context we offer a general framework of associational rights, illustrated by reference to American associational expansion over a similar period as our Prussian study. We also briefly consider the French experience, both on its own and for the influence it exerted over the other

[1] "People are what they are because of the ties among people." This is the first line of Gierke (1868)'s famous history of associations in German law. Gierke's title raises a problem of vocabulary and translation. In using the term *Genossenschaft*, Gierke was emphasizing the commonality of diverse institutions: cities, universities, business enterprises, mutual-aid societies, etc. German cooperatives use *Genossenschaft* as the label for their bodies, and this is probably the way most Germans understand the word today. The German usage of the terms pertaining to associations has changed since the period we discuss. Today a civil-society group is almost always called a *Verein*. In the nineteenth century, *Verein* was a more general term translated variously as "association," "club," or "society." Nipperdey (1976, Note 1) stresses that in our period actors did not attach much meaning to differences in terms for these groups. Schmalz (1955), who Nipperdey cites, argues that in the early nineteenth century the word *Verein* became the neutral and general term for associations of the type we stress here, supplanting other terms such as *Bund*.

German states that in some cases prodded Prussian developments.[2] We conclude by drawing out the connections between business law and the development of associational rights.

To start we distinguish two basic kinds of association rights. First is the right *to* associate, that is the right of persons to come together or create relations with each other. Second is the rights *of* associations: rights granted directly to associations rather than indirectly through their members, agents, promoters or other proxies. While the right to associate is arguably fundamental, even familiar when framed as peaceful assembly, to a well-functioning civil society, we argue that its assurance is far from inevitable. As an initial matter, association is distinct from assembly, itself a historically contested right. To be associated with another person is not the same as assembling with that person. The right to associate is separate and superior to the right of assembly.[3] Moreover, the right to associate, properly understood, is often incidental to other higher-order constitutional guarantees. In contemporary U.S. constitutional jurisprudence, for instance, courts have granted persons a derivative right to associate in order to secure primary rights of expression, political or religious, and privacy. None of these "primary" rights, however, are necessary for civil and political order; their existence and contemporary connection to association reveals the historically serendipitous character of the right *to* associate. Modern rights *of* associations, granted to groups currently engaged in civil and political (as opposed to commercial) activities, would be even harder for nineteenth-century observers to envision. We illustrate the contingency of both kinds of associational rights as they evolved in Prussia, from the eighteenth-century to the second half of the nineteenth century. Conveniently,

[2] Prussia was the core and dominant state in the German Empire formed in 1871. Prior to 1871, the individual German states regulated associations, although the Confederation formed in 1815 also weighed in on the question. . The federal constitution adopted in 1871 allocated responsibility for different spheres between the states and the national government. Some areas of law remained at the state level for some years after the Empire's formation. Most of the law at issue here was and remained Prussian until 1908, when the Empire adopted a common statute on association. We use "Prussia" as opposed to "Germany" advisedly. For a different German state, see Meyer (1970), who studies associational life in the city of Nürnberg, which became part of Bavaria in 1806.

[3] Assembly is but a single means—albeit an important one—through which persons may associate.

German sources tend to distinguish the right to associate (*Versammlungsrecht*) from the rights that attach to associations (*Vereinsrecht*). Thus the distinction we draw is embedded in the context we study.

Although our primary concern is civil-society associations, these associations cannot be considered in isolation from commercial associations. To be sure, associating to earn a return on labor or invested capital is clearly different, in important ways, from associating to discuss philosophical ideas or political trends, but the two gatherings raise similar issues in the eyes of the law. As we will elaborate, early restrictions on civil-society associations in Prussia presumed, in essence, that all such meetings were forbidden and a police presence was required, if not actually carried out, in any tolerated meeting. Commercial associations were spared these burdensome prohibitions and required surveillance, as that undoubtedly would have discouraged the formation of multi-owner enterprises and generally undermined business activity. Hence business organizations were often granted explicit or implicit carve-outs, and were regarded as entirely distinct from civil-society groups in many, if not most, contexts. In other contexts, however, the distinctions between civil-society associations and business organization were obscure and, we argue, this opacity helped to advance the cause of civil society. In both Prussia and France, the first civil-society groups given expanded privileges were cooperatives, no doubt due to their economic character. In still other contexts, civil-society groups pursued a strategy of legal innovation by assimilating rights first granted to business organizations. Businessmen, familiar with and accustomed to the privileges and conveniences of their business forms, were particularly effective agents of their civil-society groups.

Acquisition of *corporate* rights was key to the growth and success of civil society associations. We use “corporate” here to refer to rights belonging to the ‘body’ of a group or

society, as opposed to its members or other associates. The right simply to meet or to privately assemble is the pre-requisite for any civil society. But even granting that, a government could effectively hinder civil-society development by denying such groups additional legal rights, from restricting their public assembly to withholding a variety of conventional legal means that allow citizens to operate large, long-lived organizations. These additional rights have been fundamental to the expansion of associations that characterize American civil society.[4] Imagine the American Civil Liberties Union (ACLU) if it could not sue in its own right, or own property, or contract with staff or others. This ACLU would be little more than a debating society.[5] We stress the developments of these additional "corporate" rights because they are crucial to development of associations and their ability to play a meaningful role in civil society.[6] Prussia's historical context is particularly instructive here.

Until the early twentieth century, Prussian law explicitly restricted its citizens' right to associate. The rules changed several times, but the common thread was that authorities who deemed an assembly or association threatening could forbid it, and possibly apply criminal sanctions against those responsible for organizing it. Governments today, of course, continue to outlaw associations deemed dangerous to the public good or the constitutional order.[7] The

[4] As Skocpol observes, "[t]he vast majority of locally present voluntary groups in the industrializing United States were parts of national or regional voluntary federations." These federations are largely chartered bodies having entity status and rights. According to Skocpol, a mere 58 large voluntary associations—i.e., associations "that ever enrolled 1% percent of more of U.S. adults as 'members' (according to whatever definition of membership each group used)"—have been the organizing force behind local associational life in the U.S. (Skocpol, 2003; p. 29). It is clear that without "corporate" rights, the ability to expand and effectiveness of these associations would be greatly reduced.

[5] By "could not" we mean "could not without adopting cumbersome and expensive devices that are unnecessary to a business firm." Section four provides detailed examples.

[6] The collective rights that organizations can exercise are central to the creation of civil-society organizations that can play their "third sector" role. See discussion in the volume contributions by Bloch and Lamoreaux, and Powell and Johnson.

[7] The German government today has the explicit power to outlaw organizations that it views as threats to the constitutional order. The government has only used it against groups that *declare their goal* to be the government's overthrow. In the nineteenth century a group did not have to declare itself hostile to the constitutional order to be unable to meet.

difference with the Prussian regime in the nineteenth century was its usage of law to prevent a wide range of associations that did not so much threaten the government as seemingly annoy it.[8] Like Prussia, most European states restricted associations in the nineteenth century, which is not to suggest that associations were in and of themselves disagreeable to the state.

Every political order relies on associations. Prussia, in fact, compelled participation in certain associations. Prussian political order rested on differences among the King's subjects, differences that were often expressed through status-based organizations. Some, but not all, of these groups were based on birth, such as the nobility. Membership was determined and mandated by the state, not chosen voluntarily by individuals. The law sought to limit *voluntary* organizations, groups that were not themselves directly or indirectly creations of the state. As Nipperdey (1976, p.174) puts it, a person could join or leave these voluntary associations, and the association's members could decide to dissolve it. These groups were independent of their membership; participation was not limited to a particular class, nor could one's membership in a class be threatened by participation in an association. They existed only to meet the ends decided on by their members. Again, most European states took a similar approach. An important and informative comparison is France. Prior to the French Revolution, France looked much like Prussia (in this respect). After, France restricted the right to associate at least as strictly as Prussia. This seems puzzling at first, since even after the Bourbon restoration France remained a political order very different from that which continued in Prussia. The ideals underlying the French discomfort with societies were different from those expressed in Prussia; the divergence turns largely on differing conceptions of the state and the citizen's role in that state. Nonetheless,

[8] Prussia was in good company in restricting corporate rights to most bodies (including business firms) until the 1870; France, for example, did not introduce general incorporation until 1867, and in Russia this step came even later (Guinnane, Harris, Lamoreaux and Rosenthal 2007; Gregg 2014). The few business corporations the Prussian government did charter had to agree both to oversight (which could amount to micro-managing) and often to transfer some of the benefits of association to the government.

despite important differences in political structures and political cultures, we observe similar restrictions on associations in these two places.

We elaborate on this comparison below, briefly, with the following caveat: we will not engage deeper questions of political formation and its interpretation. For both Prussia and France, the question of association carries considerable ideological freight. A key referent for Germany is Gierke and his conception of the "*Genossenschaft*." Maitland's tendentious interpretation of Gierke creates its own problems, since there is no English translation of Gierke's (massive) work. Maitland pulled Gierke out of his intellectual and historical context; related debates on the theory of corporate personalities also tend to miss Gierke's ideological intent. It is also worth noting that none of the business- or cooperative-law discussions most relevant here even mention Gierke. The French context is even more complicated, because the right of association invokes central themes from the Revolution and the restoration, and also draws on de Tocqueville and his enthusiasm for his vision of American society. We cannot do justice to the deeper roots of these debates in this chapter. Our central aim is to describe the legal and economic character of civil associations, according to an organizing framework to which we now turn.

1. Associating and association: a framework with reference to the U.S. context

To be precise in our treatment of associations, we briefly lay out a typology based on four terms, labeled R1 through R4 for future reference:

R1) Associate (a verb). Two or more persons engaged in some joint activity or relation (e.g., they might assemble for a rally, or meet to have coffee, discuss a book, undertake some longer-term activity, or they may be associated by virtue of a marital relation, a

fraternal organization, or a political affiliation). We use the abbreviation *R1* or associate hereafter.

R2) Mere Association (a noun): An aggregate or group consisting of two or more associated persons (e.g., an unincorporated church or school or a group of persons running a going concern while sharing profits and losses, which may create an association called 'partnership'). A mere association can have its own internal organization and rules, to which its members consent, and that may be enforced by and against members, but the association itself can neither legally bind or be bound by others. We use the abbreviation *R2* or "aggregate" hereafter.

R3 Associational entity: an association recognized by law as a distinct legal entity, separate from the persons, legal or natural, who comprise it (e.g., a partnership having entity status, a club or concern that can own property, sue and be sued in its own name). We use the abbreviation *R3* or "entity" hereafter.

R4) A legal person: a legal entity, associational or otherwise, that is treated as a person in law (i.e., incorporated associations are recognized as persons for some purposes). For most purposes legal personality (entailed in R4) and entity status (present in R3) are equivalent, but occasional differences in treatment may result when an association is considered a 'person' as opposed to an 'entity'. We use the abbreviation *R4* or 'legal person" hereafter.

We do not suggest any general, one-to-one mapping between these four definitions and any particular organization or application of legal rules. Although R1 through R4 may be characterized in terms of specific rights, powers, privileges and immunities, we do not mean to

suggest that a state would grant these entitlements in any consistent manner. Controls deployed by the state are highly variable. States could and did restrict associational entitlements according to the number of people involved, and whether meetings took place indoors or outdoors. Restrictions sometimes turned on the identity of those involved. Specific prerequisites, such as mandating use of the German language, were required of certain associations. Though today the law often requires that formal associations hold annual meetings and maintain minutes of meetings and such, one must resist casual ascription of familiar mandates and entitlements to associations in different times and places. American business partnerships, for example, possess or lack entity status depending on the time and the state in which the association was formed or considered. Relatedly, today we think of limited liability as a cornerstone of business associations, but in the nineteenth century it was an uncommon aspect of firms. Even an association taking R3 and R4 may not have limited liability extended to its members and managers depending on the time, place and other considerations. These and other qualifications threaten to leave our simple framework without any traction. But when applied to a specific time and place the typology above may usefully clarify certain aspects of the civil-society landscape.

We illustrate the typology above by briefly considering the American associational context from the late-eighteenth century through the mid-nineteenth century. It is important to emphasize that our aim is not to present a full historical account of associational custom and regulation in America. For that, turn to the comprehensive account (in this volume) by Bloch and Lamoreaux on the law and development of voluntary organizations in the U.S. from 1780 to 1900.[9] Our aim here is rather to clarify and add content to the framework suggested above by

[9] Civil associations in America is a much-studied topic, from Alexis de Tocqueville's depiction of their prevalence in the early republic to Robert Putnam's portrayal of their demise and the literature spurred on by his claims of peril facing contemporary civil society. A decent review of the historical texts alone would consume the rest of these pages. [see also Theda Skocpol].

first presenting it in a perhaps more familiar context before applying it to nineteenth century Prussia. Which is not to suggest the context of associational entitlements in the U.S. is settled or commonly known. Casual observers are often surprised to learn that the U.S. Supreme Court did not recognized a distinct right of association until 1958.[10] A common myth asserts that associational rights largely existed since the founding, but in fact the greater portion of U.S. associational law were forged through battles waged during the Civil Rights movement and its immediate aftermath. Moreover, in the very recent past, doctrines concerning rights of associations have experienced extraordinary shifts, not to mention the practical innovations in the media, forms and memberships of associations. From 'virtual' associations on the Internet to newly integrated membership rolls (by race, gender, sexuality and so on), the American associational landscape today is radically different than it was in 1958 and would be unfathomable to someone in 1858 or in 1776.

What the first citizens of the U.S. understood of their rights and limits of associations may be gleaned from the nation's founding documents. These inaugural citizens belonged to various associations that predated the United States of America, of course, and numerous other associations grew out of its battle for independence from Britain.[11] From the beginning, the newly formed nation looked askance on some of these associations and sought to regulate, discourage or prohibit them. For example, the original constitutional debates critically scrutinized the Society of the Cincinnati, a hereditary association of Revolutionary War officers and their male descendants. George Washington was the association's first president. Its

[10] NAACP v. Alabama, 357 U.S. 449 (1958).

[11] From the earliest colonial settlements churches and religious groups formed the basis of civil society in America, but they were not the only associations; take, for example, the Ancient and Accepted Free Masons, founded in Boston in 1733. Skocpol observes, "In colonial America, [Arthur Schlesinger] asserts, voluntarily established associations were few and far between and typically tied to local church congregations. But the struggles of the colonists for independence from Britain taught 'men from different sections valuable lessons in practical cooperation,' and 'the adoption of the Constitution stimulated still further application of the collective principle.' " [Theda Skocpol, Diminished Democracy, 22]

membership included numerous other war heroes and founding fathers of the country. Yet notwithstanding the high regard in which the framers held Washington and other officers of the Continental Army, they passed Article I, sections 9 and 10 of the 1787 federal constitution (along with comparably restraints in many state constitutions) to express their disapproval of hereditary associations and to explicitly ban the state's participation and support of such groups. But while the federal constitution discouraged and prohibited some associations, it also encouraged and enabled others.

In 1791 associations in the U.S. received their chief enabling statute. The First Amendment of the federal Constitution (1791) implicitly recognized a right of association for the purposes of political and religious expression and expressly provided a right of assembly.[12] Some state constitutions, such as Massachusetts's (1780) and New Hampshire's (1784), preceded the federal guaranties of political and religious expression and also assured their citizens a right to assembly "in an orderly and peaceable manner" for "the common good."[13] Other state constitutions granted more liberal associational rights. Delaware's 1792 Constitution, for example, simply confers upon its citizens a right "to meet," without the restriction for "the common good,"[14] while still other states explicitly allowed their citizens to assemble for *their* own good, which

[12] The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."1791 (emphasis added).

[13] Massachusetts's 1780 Constitution (sec. XIX) states, "The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instruction to their representatives, and to request of the legislative body, by way of addresses, petitions or remonstrances, redress of the wrongs done them, and the grievances they suffer." New Hampshire's 1784 Constitution (Part I, Bill of Rights Art. XXXII) similarly observes that "The people have a right, in an orderly and peaceable manner, to assemble and consult upon the common good, give instruction to their representatives, and to request of the legislative body, by way of petition or remonstrance, redress of the wrong done them and the grievances they suffer."

[14] "Although disobedience to laws by a part of the people, upon suggestions of impolicy or injustice in them, tends by immediate effect and the influence of example, not only to engender the public welfare and safety, but also in governments of a republican form, contravenes the social principles of such governments founded on common consent for common good, yet the citizens have a right, in an orderly manner, to meet together, and to apply to persons intrusted with the powers of government for redress of grievances or other proper purposes, by remonstrance or address." Constitution of Delaware (1792) Article I, Sec. 16.

apparently was the intended (but not included) language of the federal assembly clause.[15] Permissive constitutional language aside, the practice of assembly and association did not proceed unfettered in the country's first years. As early as 1792, the primordial Congress and President began a campaign against the so-called democratic-republican societies, local political associations that convened regular meetings critical of the federal administration.[16] Their growing numbers and criticisms throughout 1793 inspired George Washington charge, in the annual presidential address to Congress in 1794, "that 'associations of men' and 'certain self-created societies' had fostered violent rebellion."[17] By linking the democratic-republic societies to the widely unpopular Whiskey Rebellion, Washington, with support from the Congress, effectively assured the demise of these 'self-created societies' within a couple years. A few years later, in 1798, Congress would pass the Sedition Act, allowing it to sanction citizens and associations it deemed too critical of the federal government. All told, American political associations faced significant state scrutiny in the last ten years of the eighteenth century.

[15] See e.g., Constitution of Kentucky (1792) Article XII, Sec. 22: "That the citizens have a right in a peaceable manner to assemble together for *their* common good, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, address, or remonstrance." (emphasis added); Constitution of Mississippi (1817) Article I, Sec. 22: "That the citizens have a right, in a peaceable manner, to assemble together, for *their* common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address, or remonstrance." (emphasis added); Constitution of Alabama (1819) Article I, Sec. 22: "The citizens have a right, in a peaceable manner, to assemble together for *their* common good, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, address, or remonstrance." (emphasis added); Constitution of Arkansas (1836) Article II, Sec. 20: "That the citizens have a right in a peaceable manner to assemble together for *their* common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address or remonstrance." (emphasis added).

[16] See Bloch and Lamoreaux in this volume (p. x) and associated references, including John L. Brooke, *Columbia Rising: Civil Life on the Upper Hudson from the Revolution to the Age of Jackson* (Chapel Hill: University of North Carolina Press, 2010); Johann N. Neem, *Creating a Nation of Joiners: Democracy and Civil Society in Early National Massachusetts* (Cambridge: Harvard University Press, 2008); Kevin Charles Butterfield, "UnBound By Law: Association and Autonomy in the Early American Republic," Ph.D. Diss, Washington University in St. Louis (August 2010).

[17] John D. Inazu, The Forgotten Freedom of Assembly, 84 Tul. L. Rev. 565, 580 (2010). "Robert Chesney suggests that '[t]he speech was widely understood at the time not as ordinary political criticism, but instead as a denial of the legality of organized and sustained political dissent."

Nineteenth century restrictions on race-based groupings marked the most prominent prohibitions on voluntary associations in the U.S., particularly in the south. Southern states restricted the number of blacks who could gather outside of the company of white observers. Free blacks associating with slaves was strictly prohibited by statute.[18] Intimate association between blacks and whites was also *de jure* proscribed, although *de facto* prevalent. These restrictions on intraracial and interracial associations fall under the associating (R1) category and were applicable to public ('outdoor') and private ('behind doors') gatherings of natural persons, especially at nighttime. Restrictions on mere aggregations, R2 in our typology, included labor-based associations of blacks, and whites too. Such association was presumptively forbidden under the English common law doctrine of criminal conspiracy. It remained illegal *per se* for laborers to associate for common purposes into the 1840s, and even then the state maintained a robust managerial position over these associations.[19]

Southern states also outlawed, limited or maintained surveillance of church-based gatherings of blacks, particularly following the 1831 Nat Turner slave rebellion. These (R2) black churches maintained a continuity beyond the one-shot assembly of multiple individuals, but they generally did not acquire legal entity status. Exceptions to this pattern include an African Methodist Episcopal (AME) Church, incorporated in Louisiana by free persons of color in 1848. Berea College, a private college incorporated in Kentucky in 1855 for the purposes of interracial educational association, also represents an uncommon case. As legal entities (R3), both the

[18] For example, South Carolina's Negro-Seamen Act of 1822 required that black sailors stay on vessels docked at local ports or else face arrest and possible enslavement. The law passed in significant part out of fear that free black sailors would stir unrest among slaves if the two groups associated. Alabama, Georgia, Louisiana, Maryland, North Carolina and Tennessee also restricted the association of free blacks and slaves.

[19] Chief Justice (of Massachusetts) Lemuel Shaw's opinion in Commonwealth v. Hunt, 45 Mass. 111 (1842), held that it was not per se illegal for workingmen to associating for common purposes . As a matter of practice a number of American jurisdictions had already taken this position, but Shaw was the first really explicit departing from the English common law of criminal conspiracy. This did not of course mean that everything that workers agreed together to do was thought to be legal -- as the robust later history of labor injunctions shows. See Tomlins (1993).

AME Church and Berea College appreciated advantages of the corporate form. But, viewed as creatures of the state, they were also subject to heightened regulation by the state. Both associational entities were effectively banned by subsequent legislative amendments.[20] The AME Church and Berea College were also legal persons (R4) and as such may have avoided certain disabilities faced by individual black Americans in associating (R1) or members of aggregate associations (R2). For example, the extent to which blacks acting as individuals or as a group were constrained in their legal capacity to sue, to contract or to acquire property for their associational ends, acting as a legal person without a race could offer some advantages.[21] On the other hand, had courts ruled that corporate legal persons (R4) possess the racial identities of their promoters or shareholders, odd as that may sound, then the entity status (R3) may have been more advantageous.[22] This very issue would confound a number of courts throughout the twentieth century (Brooks 2006), but it is suggested only to illustrate one potential implication of the difference between R3 and R4. Bearing in mind the rough distinctions between persons (R4) and entities (R3) as well as between aggregates (R2) and associating (R1), we now consider the rights and restraints on civil associations in nineteenth century Prussia.

2. Associations in Prussian history

[20] Berea College presents an especially interesting case. Fifty years after its founding, Kentucky passed a segregation law (the Day Law) aimed specifically at the college, disallowing "any [public or private] college, school or institution where persons of the white and negro races are both received as pupils." The U.S. Supreme Court denied Berea's claimed right to continue its integrationist policy by invoking the state's reserved discretion, which allowed it to amend charters through legislation. The Court suggested a different conclusion may have been reached if Berea College was not incorporated, but it limited its inquiry to "the power of a State over its own corporate creatures." Perhaps if Berea was not incorporated, the natural persons associated with the College would have had a stronger constitutional claim to voluntary interracial association. On the other hand, , Kentucky prevented voluntary association through its antimiscegenation laws, and the state would certainly have argued that application of the Day Law to natural persons "was a reasonable exercise of its police power. . . to prevent miscegenation." On the AME Church, see *African Methodist Episcopal Church v. City of New Orleans* and discussion by Inazu at 32.

[21] Discuss the Fourteenth Amendment with talks in terms of “persons”, not entities.

[22] [discuss the risk of entity piercing]. See R. Brooks, Incorporating Race.

From at least the last decades of the eighteenth century, Germany witnessed the rise and spread of associations of many types: patriotic associations, gymnastic associations, associations to advocate literacy and education, other types of "social welfare" associations, and associations simply for fellowship. At the end of the eighteenth century there were some 270 "reading societies" alone, this in a poor country with low literacy. This may puzzle, given this paper's focus on the limits placed on associations. The law (at least in Prussia) never sought to prevent all associations in all forms. Rather, the authorities explicitly focused on certain types of associations (secret, or clearly political) and certain practices (such as using the wrong language). The groups that flourished under this regime either avoided political issues, or carefully disguised the political content of their activities. As we stress in the examples to follow, enforcement depended considerably on time and place, with particular groups receiving official favor at first and then facing banishment. The overarching theme here is not universal prohibition, but the development of association only on the sufferance of the government.

Why would Prussia or any other state view civil-society organizations as a threat? Few of the organizations at issue advocated direct action such as overthrowing the State. One reason lies in Nipperdey's view, discussed above: the associations in question crossed status boundaries, and implicitly threatened the idea of organizing citizens into separate status-based or "ascriptive" groups. Sheehan (1995) adds a slightly different stress: these groups created a life outside the control of either State or Church and, as Nipperdey (1976, p.195) puts it, "challenged the State and Church's monopoly on interpretation, questioning matters that previously could not be questioned." Indirectly, such groups questioned the State's monopoly on the expectation of obedience, care for the common good, and more generally, for public matters (p.196).

In much of our period, conflict over associational rights reflected conflict between the State and the only meaningful political opposition, the Liberals. Authors such as Langewiesche (2000) and Sheehan struggle to provide cogent definitions of Liberals in this context, but one can see a core set of ideas stressing the rule of law, formal legal equality, representative institutions, and freedom of religion, expression, and association.

Hueber (1984, p.132) divides the years 1794-1908 into four periods. (1) The period 1794-1819 was characterized by a relatively permissive general code undermined by more repressive edicts. (2) That legal environment did not change much in the second period (1819-1847), but a broad flowering of associational life reflected the complicated relationship between law and the outcomes. Many political thinkers stressed free expression as a fundamental right, and included association as part of expression. In the more liberal German states (such as Baden), these ideas led to brief periods of relaxed rules on association. (3) Associational rights played an important role in the struggles of the revolutionary period (1848-9). Had the Frankfurt constitution survived, Germans would have enjoyed freedom to associate rivaling the U.S. or the U.K at the time. (4) The post-revolutionary period began with a severe reaction that ignored some of the constitutional guarantees agreed upon during the 1848-49, but for the rest of the nineteenth century the legal framework slowly liberalized. The 1908 Reich Act on association extended Prussia's by-then relatively permissive treatment of association to the entire country.

In our terms, then, until the end of the nineteenth century, Prussians had almost no R1 or R2 rights, and anything related to R3 or R4 required a grant of privilege to a specific organization. At the end of the nineteenth century, the legal situation changed considerably. Germans (as Prussians were by then) had some R1 and R2 rights, and could establish organizations with some of the R3 and R4 rights afforded to the most sophisticated business

firms. Changes in the right to associate took place throughout the nineteenth century, and the final major legislation of our period (in 1908) was still fairly restrictive. Extension of R3 and R4 rights, on the other hand, did not come until the end of the nineteenth century. Only with the Weimar Constitution (1919) did Germans acquire as fundamental rights the ability to associate and to create associations.

Before 1819

Until the late eighteenth century, most German states (like most "old regime" states) severely restricted both R1 and R2 rights. Tillman (1976, p. 5) refers to these regimes as "police states;" associations by general default were forbidden. The first important change came with Fredrick the Great's 1794 Law code for Prussia (*Das Allgemeine Landrecht für die Preußischen Staaten*, hereafter ALR).[23] The ALR explicitly granted R1 and R2 rights, although the code still allowed the authorities to suspend or restrict these rights if they thought order demanded it. Thus the ALR represents in principle a great liberalization in the right to association. The ALR also provides a basic framework for associations. The code defines an association (*Gesellschaft*) as the combination of several members of the State for a common end (II(6), §1). Such associations are either "permitted" (*erlaubt*) or "not permitted." An association was permitted so long as its purpose was consistent with the common good (*gemeinen Wohl*) (II(6), §2). The code does not precisely define the common good or its opposite; it just says that groups whose purpose or activities violate the "calm, security, and order" are not tolerated. The government also had the

[23] Fredrick died in 1786, but the Code was his project. The ALR deals with matters that were later treated separately in civil, commercial, and criminal codes. Parts of Prussia used French civil law in the period 1815-1900. While different in important respects, the French code was similar to the ALR for the issues discussed here, and in any case, the relevant Prussian law was increasingly outside the code.

right to forbid associations that were in principle allowed, if such groups disguised their intentions or took a form that was dangerous.

The AL II(6) §11-21 also defines the rights of permitted associations (*erlaubte Privatgesellschaften*). Permitted associations could write rules binding the members of the association, but these agreements had no effect on third parties. Although the code does not put it this way, these provisions amount to saying that the organization's rules operate as enforceable contracts among its members, but as far as third parties are concerned, the group was identical to its membership. In our terms, permitted associations had only R1 and R2 rights.

The ALR's liberality did not long survive in practice. Prussia's involvement in war with revolutionary France led to occupation of considerable Prussia territory, and even before occupation, Prussian authorities had good reason to fear French influence, especially in its western territories. A Prussian Royal edict issued 20 October 1798 forbad all secret and political organizations that aimed to change either the constitutional order or the administration. This edict reflected fear of disloyalty and French influence. But it competed with another instinct: that toleration of associations might foster German patriotism and a stronger allegiance to the state. This general view reached as high as the upper reaches of the Prussian ministry, where Freiherr von Stein and others promoted greater participation in public affairs as a way of cementing the relationship between the King's subjects and his state.[24] Stein succeeded in establishing representative bodies in cities. (He failed to extend those bodies to the national level.) The idea behind promoting representative bodies was to promote stronger allegiance to the state, but Stein's critics saw representative bodies as threatening the King's absolutist legitimacy.

[24] This is the "Stein" of the Stein-Hardenberg reforms, a series of political and economic reforms initiated in Prussia during the first decades of the nineteenth century. See Duchhard (2007).

Prussia's resurgence and ultimate victory over French forces in the "War of Liberation" (1813) rested in some measure on widespread patriotic feelings, fostered in part by the type of associations viewed with considerable suspicion just a few years earlier. For a while, Prussian reformers held sway, and they thought freedom of association could help them achieve the political reforms they wanted. Hueber (1984, p.117) notes that Prussian officials learned not to apply their restrictive law, particularly against patriotic associations that held out the Prussian King as their ideal monarch. Another edict issued 6 January 1816 repealed the 1798 edicts' provisions (Tillmann 1976, pp.5-6), in effect restoring the conditional right to associate found in the ALR. In lifting earlier restrictions, the edict referred explicitly to the role such associations had played in liberating Prussia from Napoleon.

1819-1848

This liberality did not last. Most German states, Prussia included, renewed or strengthened their limits on association starting in 1819. The German *Bund's* 1819 Carlsbad Decrees also renewed press censorship and efforts to suppress voluntary associations. The new stance reflected the defeat of Prussia's most important reformers, along with continued fear that revolutionary ideas would spread from France. "The participatory energies which had once been seen as a necessary source of state power were now condemned as the source of unrest and revolution." (Sheehan 1995, p.9). The Prussia state's urgency in repressing many of these groups illustrates the threat it perceived in such organizations; many of them were patriotic, anti-French associations that viewed themselves as bulwarks of the State. A notable example is the *Burschenschaften* first formed in 1815. Composed entirely of male university students, many of whom were veterans of the military campaign against Napoleon, the *Burschenschaften* saw

themselves as enthusiastic German patriots. Their meetings and festivals honored key moments in German history in general and the struggle against Napoleon in particular, but the Carlsbad decrees outlawed them. Various permutations of the group continued to work in secret, but they were ruthlessly suppressed as part of the reaction following the 1848-49 revolution. This history seems a little odd for a group whose motto was "honor, freedom, and fatherland" (*Ehre, Freiheit, Vaterland*). Some parts of the *Burschenschaft* agenda caused discomfort to the Prussian crown; for example, there were calls for Germany to be a single constitutional monarchy. Even though the selected monarch would most likely be a Hohenzollern, the Prussian royal house rejected any of idea of national unification based on popular movements.[25] But the *Burschenschaft* example reflects more importantly the fundamental discomfort with voluntary associations: the Prussians suppressed organizations that held among their central tenets patriotism and enthusiasm for the Prussian royal house.

Even groups that were less explicitly committed to political change could run afoul of the restrictions. The "circle" (*Kreis*) was a type of informal group of like-minded people who would meet to discuss politics and related issues. Sperber (1991, p.94) emphasizes the Kreis's limitations as a source of political transformation; inherently local, these groups recruited based on prior connections, and so had little capacity to become the basis of anything important. One well-known circle consisted of Prussian Army officers; because the group was secret, and recruited members via family and other connections, it could never form the basis for opposition to the State or even a rethinking of the issues that bothered these officers. The first gymnastic societies (*Turnvereine*) were patriotic, paramilitary groups that arose as part of the movement opposed to Napoleon. Although loudly committed to the Prussian monarchy, they were

[25] *Burschenschaften* exist today as student groups whose political leanings are if anything conservative. The connection between the modern organization and the associations discussed in the text is tenuous.

suppressed at the time of the Carlsbad Decrees as being "too active and threatening" as Sperber (1991, p.94) puts it. The gymnasts re-emerged in the 1840s, adopting a more explicitly political coloring, with both left- and right-wing associations of gymnasts. When the revolution broke out, gymnasts were to be found on both sides of the conflict. This later history might validate the Prussian authorities' suspicion that the gymnasts were more interested in politics than exercise, but it also illustrates that the nature of a group's views was not the problem.

The offense ascribed to the *Burschenschaften*, some "circles," and some gymnasts was simply presuming to discuss affair of State, even if only to support the King. The underlying idea was that subjects had no right to play any role in the State's affairs, whether alone or in groups. Nipperdey (1976, p. 199) quotes Nassau's minister Ibell as expressing the idea in brutal form: "It is both unreasonable and illegal to convince or persuade private persons that they, alone or in combination with others, can participate in Germany's great national affairs."[26] Not all agreed; Baden legalized political associations in 1829, only to be overruled on July 5 of 1832, when the German *Bund* issued wide-reaching rules concerning censorship and associations. This decree (§2) forbad all organizations with political goals and organizations whose goals could be used for political purposes, and also (§3) regulated festivals and in particular forbad political addresses at festivals.[27]

Yet once again even the most draconian implementation of these restrictions on association did not rule out all organizations. Sperber (1984, pp.30-35) discusses two with wide

[26] „Es ist eine ebenso unvernünftige als gesetzwidrige Idee, wenn Privatpersonen glauben mögen berufen oder ermächt zu sein, einzeln oder auch in Verbindung mit anderen selbständig oder unmittelbar so jetzt als künftig zu den großen Nationalangelegenheiten Deutschlands mitzuwirken."

[27] § 2 "Alle Vereine, welche politische Zwecke haben, oder unter anderm Namen zu politischen Zwecken benutzt werdern, sind in sämmtlichen Bundestaaten zu verbieten und ist gegen deren Urheber und die Theilnehmer an denselben mit angemessener Strafe vorzuschreiten." 3 refers to irregular festivals ("Außerordentliche Volksversammlungen und Volksfeste"), that is, those not associated with particular days of the year. Source: Zweiter Bundesbeschluß "über Maßregeln zur Aufrechthaltung der gesetzlichen Ruhe und Ordnung im Deutschen Bunde."

appeal: lay brotherhoods and "sharpshooter's" clubs (*Schützenvereine*). The lay organizations, usually named for a saint, had a variety of roles, including praying for the deceased and some mutual aid. These organizations were very old by the early nineteenth century. A variant had emerged during the late eighteenth century, one that served similar goals but was more secular, sometimes even mixing Catholics and Protestants in the same group. The sharpshooters also claim a very old lineage, but the many such clubs that existed in the early nineteenth century reflected the transformation of older, confessional organizations into a secular body that existed primarily to organize festivals and, as the name suggests, shooting contests.

Government opposition to such organizations seems hard to fathom; what is the harm in praying for the dead or, for the sharpshooters, marching around in odd uniforms? (Today one could imagine a government fearing groups organized around guns and marksmanship, but this was not, at least overtly, the concern about the sharpshooters.) Part of the answer lies in the danger that even these harmless-sounding groups could erupt into political discussion or expression. Sperber notes that two lay brotherhoods took the name of local Masonic Lodges, suggesting openness to sinister ideological influences. In 1847, the invitation to a Düsseldorf sharpshooter's contest contained veiled political commentary that most contemporaries would understand. More generally, a wide variety of ostensibly apolitical groups increasingly took on a political coloring. Organizations such as singing clubs and other recreational associations sometimes concealed what was really a political association. Robert Blum (later executed for his role in the 1848/49 revolution) used the Leipzig *Schillerfest* of 1841 as cover for a Liberal agenda. Even the Chambers of Commerce (*Handelskammern*) (which in Germany have a quasi-official status) could become forums for political discussion.

Concern about a different type of association may be easier to understand, and often formed a pretext for harassing the harmless groups. The most overtly revolutionary individuals in pre-revolutionary Germany had largely emigrated, and if they continued their activities they did so from abroad. The groups they formed in exile became famous after Marx and Engels transformed one of them into the Communist league, but there were many such groups operating secret cells all over Prussia. On more than one occasion the police would infiltrate and break up a cell operating in Prussia, using the group's (forbidden) existence to suggest broader international conspiracies. France's 1830 July revolution gave those claims some credibility; the violent introduction of a constitutional monarchy in France terrified more than one German ruling house. Sperber and others, however, doubt the claim of conspiracies involving ties between German Liberals and radicals, and the 1848/49 Revolution in Germany provides little evidence of radical influence on those leading the opposition to the current order.

Revolution

The 1840s began with an economic upswing, one that corresponded with the creation of a large number of new corporations. Corporations required individual charters, but in 1843 the government had adopted a corporation law that provided standard rules for all corporations. At the same time a sharpening of social problems and a relatively lax enforcement of laws on association also led to a boom in new associations: some were new versions of old groups, like the gymnasts, while others reflected the variety of concerns the developing economy provoked. There were associations to promote education for poor children, to build hospitals, and for a broad array of efforts to help the working classes. It was a "period of associations" (Nipperdey 1976, p.176).

The decade ended, however, with a combination of economic crisis and political opposition culminating in the revolution of 1848/49. Freedom from censorship and associational rights were high on the list of goals for many at the Frankfurt Parliament. The Constituent National Assembly's constitution drafted in 1849 (the so-called "Pauls Church" constitution) never came into force because it was rejected by the Prussian and other governments. But its "Bill of Rights" (Section VI) indicates what Liberals of the era wanted. Article VIII (§161 - §163) gave all Germans the right to assemble without permission of the authorities, and decreed that public meetings could only be forbidden if a cause of immediate danger (*dringender Gefahr*) to public order and security. It goes on to say that all Germans have the right to create associations. Both provisions even apply to military, so long as the associations do not interfere with military discipline.[28]

Reaction and slow liberalization

The Prussian constitution promulgated on 31 January 1850 promised a return to the associational freedom guaranteed by the ALR.[29] §29 declared that Prussians had the right to meet without permission of the authorities, so long as such meetings were indoors and the participants were unarmed. Outdoor meetings still required prior permission. This amounts to a partial R1 right. The constitution further granted Prussians the right to create associations (*Verein*) (§30), so long as these groups' purposes were not forbidden by the criminal law. In our terms, these would be organizations with at most R2 rights. R3 and R4 rights still required specific government charters. But the R2 guarantee was not absolute; the same clause gave the government the right to forbid or limit political organizations. The government also reserved the

[28] Reichs-Gesetz-Blatt 1849.
[29] Hardtwig and Hinze (1997, pp. 347-357) reprints the relevant clauses.

right to regulate, via legislation, how these rights would work. The government could decide itself whether to withhold or extend R3 and R4 rights (§31).

In any case, even these provisions meant little in the reaction that followed the revolutions. The Prussian granted the 1850 constitution under considerable pressure. Royal edicts and legislation (passed by an assembly elected with a reactionary three-class voting system) quickly backtracked on the relatively liberal guarantees of freedom of expression and association. Legislation enacted on 11 March 1850 so restricted the rights of association as to make the constitutional guarantee meaningless. The law described a class of rules that applied only to groups that intended to discuss public affairs (*öffentliche Angelegenheiten*). Such groups needed to inform the police at least twenty-four hours in advance of any meeting. The group's leaders had to provide its articles of association and a list of members to the police at least three days before coming into being. The police had the right to send to these meetings up to two police officers or other persons (§4).[30] And the authorities could immediately end any meeting that had not been properly registered, where speakers called for illegal actions, or where attendees were armed. Groups that deal with public affairs could not have as members women, school-aged children, or apprentices. The restrictions on public meetings were even more detailed and punitive (see Koch 1862, pp. 521-540).

The 1850 law also forbad "associations of associations." These provisions were common to repressive acts in Germany at the time, and warrant some discussion. The law sought to restrict association to those who could physically meet, which meant, given incomes and the transportation technology of the day, that associations would be small and necessarily parochial. If an association could become part of a larger, umbrella organization, then the regime risked the

[30] Such observers had to wear their uniforms if police officers, or other identifying signs if not police. So the intention was not to send spies.

possibility of mass movements. Even worse, if a Prussian association could be part of a larger, international association, then radical émigrés might find a back door into Prussian life. Later these restrictions would be used against the labor movement, but in the 1850s the fear was far more a resurgence of the pan-German, liberal ideas that informed the Frankfurt parliament.

To appreciate how limited these rights really were, we need to consider the broad language the law used. Some topics clearly do not qualify as "public affairs," and these would presumably include the affairs of a business firm. But it is easy to see why Prussian authorities felt they had the right to interfere with virtually any other organization. The ALR's references to "common good" and the like open even more doors, as we shall see. Knowing the statutes of course does not tell us much about practice on the ground, and only practice on the ground led to civil-society institutions. This observation cuts two ways. The notions of order and common good left room for officials to suppress bodies they found simply inconvenient. Yet long before it was any kind of democracy, Prussia had clear, professional administrative hierarchies, and generally adhered to the rule of law. The authorities who restricted or forbad associations might eventually have to justify their actions to a superior.

The Reich's 1871 constitution gave it the right to regulate associations, but for the first few decades of its existence the Reich left the matter to the states. The conflict with the Liberals largely ended by 1871, but Bismarck's political repertoire included attacks on associational rights for other, disfavored groups. Bismarck's conflict with the Catholic Church (the "*Kulturkampf*") that intensified starting in 1871 relied heavily on the association laws. In 1872 a group of leading Catholics had formed what they hoped would become a national organization capable of defending the freedom to practice their religion. Formally called the "Association of German Catholics" (*Verein der deutschen Katholiken*), the group came to be called the Mainz

Association because it was founded in that Hessian city, in part to avoid Prussian laws on association (Sperber 1984, p.211). Soon after its creation the Mainz Association came under attack from the state, and in 1876 the Prussian Supreme Court ruled it had violated the association laws and ordered it disbanded (p. 214). Bismarck's later "anti-Socialist" laws (1878-1890) worked partly by denying R1 and R2 rights to groups associated with the Social Democratic Party. Efforts to combat Polish national aspirations in Prussia's eastern provinces also drew on these tactics.

Conflict with the labor movement illustrates another the way associational rights remained problematic. The majority of German trade-unionists belonged to unions affiliated with the Social Democratic Party (according to Prager (1904, p.287), about 2/3 of the 1.3 million union members counted in 1903). Restrictions on unions and strikes in Prussia had been lifted in 1869 (extended to the Reich in 1871), but unions as associations remained potentially subject to the laws of association in the various German states until the 1908 Act discussed below. Lujo Brentano quipped that the result was a situation where workers had the right to form unions but were punished for doing so.[31] The legal details are complex, not least because the supreme court (*Reichsgericht*) had tried unsuccessfully to resolve the conflict. There were two general problems. First, although Germany had one law on unions, it had 26 different state-level laws governing associations. Second, while strict application of those state laws might leave unions in the clear, some of the unions' activities were plausibly "political" and so gave conservative officials a pretext for treating the unions as an association subject to their limitations. For unions to operate successfully in a large country, they had to undertake activities that might bring them afoul of the law. Just to take one issue, unions had good reason to try to combine in regional and

[31] The quotation appears in many sources, but none cite an original. Wilberg (1906, p.1) begins his text with it. Wildberg is a brief account of the way the law of association constrained the German union movement at the time he wrote.

national groupings. Yet the association law could be construed to forbid one association to belong to another.

Formal end to restrictions on R1 and R2 rights came with a Reich Act (19 April 1908) on the right to meet and to form associations. This Act over-rode both earlier edicts and all State law, thus creating a single, uniform set of rules for the entire country. Romen (1916, p.11-12) stress this uniformity and the end of conflicts between Reich and state-level law as the new measure's great achievement. The 1908 Act marked a significant liberalization in some ways. Most notably, women could now participate in meetings and associations devoted to public affairs. The government's justification for this innovation stressed changes in the economic and social role of women; many women held positions formerly held only by men, the government stressed, and many women were economically independent and so had a right to participate in the affairs that affected their lives. Women could still not vote, but the government's defense of the law did not make that connection.[32] By extending the relatively liberal Prussian approach to some more conservative states, the 1908 Act also brought new associational freedom to some areas. The 1908 Act retains many features of the 1850 legislation discussed above, including the requirement for police notice of meetings. These limitations would not pass from German law until the Weimer Republic. Even the 1908 Act (§7) required that public meetings be conducted in German. The authorities could issue a waiver if they wanted, but the law gave the authorities the right to force Poles to hold meetings in a language many could not understand.

Corporate rights for civil-society organizations

The 1908 Act concerned R1 and R2 rights only. Put differently, the Act dealt with associations as a matter of *public* law; by removing or limiting most restrictions on associations,

[32] Entwurf eines Vereinsgetzes, "Begründung," especially pp. 22-23.

the new law made associations possible, but did not touch on R3 and R4 rights. Developments in the R3 and R4 rights of associations also came relatively late, and cannot be discussed separately from developments in company law. The 1861 *Allgemeine Deutsche Handelsgesetzbuch* (hereafter ADHGB) created a distinct business code that extended to (nearly) all the German states. While it did not require general incorporation, the ADHGB allowed states to choose that option (although only a handful of states did so). Most German states retained the concession system for establishing business corporations. The ALR treats business firms (*Handlungsgesellschaften*) differently from the permitted associations discussed above. But they have something in common with the permitted association: in II(6) §22-24, the code reserves the right for the Government to extend additional rights to associations, whether business or "privileged association." The "privilege" in this phrase refers to additional rights beyond R2. The Prussian State could and did charter special business corporations, for example, and extend them R3 and R4 rights. As noted above, in 1843 Prussia even adopted a statute to standardardize the corporations formed under this concession system. But distrust of the corporate form meant that prior to the adoption of general incorporation, few new firms were created with these rights. Similarly, the Crown sometimes chartered a body for a specific charitable or cultural end, endowing it with R3 and R4 rights. For our purpose, the important feature of this aspect of the legal regime is the idiosyncratic nature of such charters. Clearly the organizations involved, whether business or civil-society, had to be advancing the government's goals and had to share some of the benefits of their organization with the government. Corporate grants for business firms, for example, usually involved implicit or explicit transfers to the State. And it is hard to imagine business people on bad terms with the government being granted a special charter.

An important liberalization in company law took place in 1870, when Germany as a whole allowed general incorporation for business firms for the first time. The ADHGB introduced another innovation that was more immediately important. After providing basic information to a public business registry, a partnership acquired important R3 rights. According to the ADHGB's partnership rules, "The firm can, under its own name, acquire rights and contract responsibilities, acquire ownership and other rights in land, sue and be sued in court." [33] A next, important step came with the creation of the *Gesellschaft mit beschränkter Haftung* (GmbH) in 1892. The government intended the GmbH as a business form, and the vast majority of GmbHs were in fact for-profit ventures. But the law explicitly stated that the GmbH could be used for any legal purpose, and from the start, a small number of civil-society organizations took advantage of the GmbH form. The GmbH (§13) can sue and be sued, contract and own property, etc, and it its owners all had limited liability. This new legal form afforded groups all the R4 rights of a corporation.[34]

The final development in our period came with the introduction of the first all-German civil code (*Bürgerliches Gesetzbuch*, BGB) in 1900. The BGB (§21-§79) created a new "registered association" that comes into being by entry in a new association registry and adhering to certain norms. The registered association gave to any civil-society group organized in that way full R3 rights; they could sue and be sued, contract in their own name, and were subject to

[33] The ADHGB implicitly created two types of business organizations: those covered by the ADHGB, which are the firms discussed in the text, and those that remain under the ALR or other civil law in regions that did not use the ALR. The ADHGB rules applied to both ordinary and limited partnerships. The implicit contrast is to the situation obtaining before 1861 in Germany, or in the United States or Britain at the time. The ADHGB did not make partnerships full legal persons; for example, a partnership's existence was tied to specific individual members.

[34] The GmbH differs from a corporation in important ways; see Guinnane, Harris, Lamoreaux and Rosenthal (2007) for discussion. For civil-society groups, an important feature of the GmbH is the rule that requires a notarial act for transfer of ownership shares. If the group made ownership in the GmbH synonymous with membership in the organization, a changing membership could be quite expensive. The 1884 Corporations Act also allows the corporation for any legal purpose. Few civil-society organizations took advantage of the 1884 Act for this purpose, presumably because the 1884 Act also required large minimum shareholdings and expensive governance and oversight provisions.

bankruptcy proceedings.[35] The system worked similarly to the registration system for business firms or cooperatives, and in fact the new registered association had the same minimum membership, seven, as the cooperatives. An *eingetragene Verein* registered in a special public registry of such bodies, listing its officers and some other information. Most civil-society groups today take the form of a registered association. But the form is elastic, and some professional and even industry groups organize this way. For-profit firms can organize an association to represent their interests politically, and so long as that lobbying group does not earn profits, it can be organized as an *eingetragene Verein.*[36]

The civil code deals with private-law matters only. In the period 1900-1908, that is, after the new BGB but before the new Reich Act of 1908, permitted associations could acquire considerable R3 and R4 rights, but the remaining public-law limitations on associations meant that some associations remained forbidden. The BGB's §61 explicitly allows local authorities to object to registration of an association that is forbidden under the public-law restrictions on associations. After 1908, however, such objections could only reflect the Reich's more liberal association law.

3. Germany's cooperatives

We now turn to a single, important example that illustrates the issues we have discuss here. The first modern German cooperatives were formed starting in the 1840s, with a second, more rural branch taking off in the 1860s. By 1914 there were some twenty thousand cooperatives across Germany. Estimates put cooperative membership in the millions, and since many non-

[35] The entity is called *eingetragene Verein* in German and abbreviated e.V. Some English texts refer to it as an "incorporated association," which conveys the impression that it is more like a US not-for-profit corporation than it really is. We use the clumsy "registered association" because it seems more accurate.
[36] §22 allows the German state where the association is located to grant this status to for-profit groups, as well.

members dealt with cooperatives, the cooperatives featured as important enterprises in the lives of many more. Most cooperatives were eventually organized under the Reich law of 1889, which we discuss below. This law allowed a cooperative to take form for any purpose related to advancing member economic interests. The most numerous cooperatives were credit cooperatives, but there were also consumer cooperatives, cooperatives for purchasing inputs and marketing products (especially in rural areas), and a few production cooperatives. The (itself often ideological) historiography has often focused on the political motivations of the consumer cooperatives, which often had strong ties to Social Democratic and other labor organizations. This focus understates the size and diversity of German cooperation. Fairbairn has stressed that German cooperatives had far more members than did the Social Democratic Party; as mass movements go, cooperation might have been less revolutionary in intent but it involved far more Germans.

The most famous early cooperative leader, Hermann Schulze-Delitzsch, was also a leading Liberal figure. As a member of the first elected Prussian parliament, he was among those prosecuted for voting to refuse the taxes the government wished (the literature calls this incident the 1849 *Steuerverweigerungsprozess*). Prussian officials at first viewed his cooperatives as extensions of his political agenda, and used the association law to frustrate their development. By the time the rural cooperatives started to develop in the 1860s, the State was less hostile. Friedrich Raiffeisen, the man most associated with the rural cooperatives, received modest government support for his organizational activities. By the end of the nineteenth century the Prussian government had set up a new banking institution intended to foster further growth in the cooperative movement.[37] In the early years, however, officials used the association laws to

[37] For more than you ever wanted to know about German cooperatives, see Guinnane's publications listed in the reference list.

harass the cooperatives. Under the ALR, a cooperative was at best a permitted association, which left the groups vulnerable to officials who might construe the cooperative's leaders, or goals, as a threat to order. A cooperative, like any other group, could always apply for special corporate rights, but Schulze-Delitzsch rejected this approach. He recognized that corporate rights would give the government legal grounds for extensive "oversight and interference."[38] He usually stressed such oversight as contrary to the cooperative's purpose, which was to develop a class of experienced, self-reliant small businesspeople, farmers, and others. But in other statements he noted that corporative rights, even if granted, would open the door to interference from the cooperative's political enemies.

Several cooperative histories recount the problems Schulze-Delitzsch and his colleagues faced because of the association laws. The two original credit cooperatives, in Delitzsch and Eilenburger, both in Prussian Saxony, at first enjoyed the good fortune to have as the local county commissioner (*Landrat)* the sympathetic von Pfannenberg. But Pfannenberg was soon replaced by von Rauchhaupt, whom Ruhmer (1937, p.227) calls "a fanatical opponent of German credit cooperatives." The cooperative leaders thought that von Rauchhaupt's opposition to the credit cooperatives was really just opposition to Schulze-Delitzsch and other Liberals.[39] Other officials used their power and the cooperatives' legal status to pursue similar ends, although we know less of those incidents.

[38] „Sodann ist aber auch die Aufsicht und Einmischung eines Regierungsbeamten in die Vereinsgeschäfte überaus hemmend und lästig, wie sie von Erteilung der Korporationsrechte untrennbar ist" From Schulze-Delitzsch's address to the Congress of Economists, quoted in Thorwart (1909, p.369). In the period prior to the adoption of general incorporation in 1870, Prussia and other German states used a variety of means to regulate and control the corporations they chartered. One approach was to insist that a state official act as a corporation's commisioner (*Kommissar*).

[39] Ruhmer (1937, pp.227-8) quotes von Rauchhaupt as claiming that the two cooperatives were led by the politically most dangerous persons ("*politisch gefährlichsten Persönlichkeiten*"). He also claimed the cooperatives were just a vehicle for the two political leaders to assemble funds for their political activities.

Von Rauchhaupt attacked the cooperatives as both illegal and dangerous to the public. His legal argument relies on two different features of the ALR and later legislation on association. He denied the cooperatives' status as "permitted associations." The cooperatives had been approved as associations of artisans, he argued, but they also included wage-laborers, farmers, and others. Thus the cooperatives had violated the terms on which they are formed (*ultra vires*) and approved as "permitted." When one cooperative leader applied for corporate status for his group, the county commission denied the request. This led von Rauchhaupt to demand that the regional government in Merseburg dissolve the cooperative entirely. The regional government rejected von Rauchhaupt's demand as without legal basis. Von Rauchhaupt then appealed to the governor (*Oberpräsident*) of the Prussian province of Saxony. This time Rauchhaupt stressed the ALR's criterion for tolerating private bodies: he argued that because the cooperative harmed the public good, the government could forbid it. In March of 1857 the provincial government rejected that claim, which in effect gave the Eilenburg cooperative the status of a permitted association.

Von Rauchhaupt's argument that the cooperatives did actual harm might have been a pretext, but it illustrates the fragility of groups that can be suppressed on the grounds that they harm the public good. His claim rested on two undeniable facts. The credit cooperatives charged interest rates that Rauchhaupt estimated as 11-12 percent per annum. The local *Sparkasse* (a state-back savings bank) was charging 5 percent. The "harm" the cooperatives were doing was charging apparently exorbitant interest rates. These rates were typical of the early days of the Schulze-Delitzsch credit cooperatives, and apparently much lower than the costs of credit from moneylenders. (We do not know enough about *Sparkassen* lending practices, but the literature suggests that most cooperative borrowers would be turned away from the *Sparkasse*.) Von

Rauchhaupt's second argument concerned the unlimited liability then required for cooperative members, which was a consequence of the ALR's rules and the lack of a corporate charter. He noted that this set-up meant very poor people risked losing all of their assets should the cooperative be unable to satisfy its debts. He also seemed to think unlimited liability was a form of communism, an odd claim given that most businesses at the time had unlimited liability.[40]

Setting aside its role in organizational myth, this struggle illustrates the problems facing civil-society organizations in the period. Von Rauchhaupt's complaints that the organization had tricked the government about its membership might have been easy to overcome by re-stating cooperative membership. But the claim about harm raises a different issue; the ALR allowed the government to ban any organizations that were harmful. Close attention to subsequent history might convince us that an eleven percent interest rate is better than the only alternative, which was a moneylender charging a much greater percentage, and that unlimited liability posed little risk for poor people with nothing to lose and little hope of economic improvement without the cooperative. But von Rauchhaupt's stated position is not ludicrous. Consider the following thought experiment: if we described a lender charging 12 percent to academics today, how many would sympathize with von Rauchhaupt's view that they are dangerous?

The authorities' power to use the police power to forbid, harass, or control cooperatives is a constant theme in the cooperative accounts of the 1850s. Some German states were worse than Prussia, with Saxony apparently winning the dubious distinction of being most hostile to cooperatives. In some cases the authorities did not try to shut down the cooperative, they just wanted to micro-manage it. Schulze-Delitzsch complained that in another case of protracted

[40] This account of von Rauchhaupt and his opposition to the Delitzsch and Eilenburg cooperatives is based on Ruhmer's account (1937, pp. 227-239). The basic outlines here agree with references in the writings of Schulze-Delitzsch and his allies, and Ruhmer bases much of his version on von Rauchhaupt's own reports from the official archives.

conflict (involving the Eisleben cooperative), the authorities asserted the right to approve every single loan![41]

This government harassment ceased only when a changing political environment made the Liberals part of the government's coalition. The change in the political atmosphere meant that by the early 1860s, the cooperatives had effective R1 and R2 rights. But Schulze-Delitzsch and his colleagues had long thought that cooperatives suffered as well from a lack of R3 rights. They began to use their new political positions (as members of the Prussian *Landtag*) to push for a special enabling law for cooperatives. The effort yielded fruit in 1867. The historiography of cooperative law has stressed the issue of limited liability, which was indeed contentious at a later point. But in the 1860s all stressed the cooperative's lack of entity status. Under the ALR, a group like a cooperative was just a collection of individuals in some agreement, R2.. As the ALR puts it, "Such associations do not constitute legal persons in relation to others, and as such cannot contract in the society's name for land or capital."[42] This status forced the cooperative to use expensive and imperfect work-arounds to achieve what would be easy for a group with R3 rights. Consider the specific example of a member taking a loan from a credit cooperative. After 1867, the cooperative could (through its officers) contract with the borrower *as the cooperative*. Before 1867, the cooperative lacked any status with respect to third parties (including a borrower). Cooperatives operating before 1867 had to adopt one or more stratagems to deal with this impediment. All entailed significant costs. A cooperative could have all members sign a particular contract. Contracts set up this way were really between the third party and each

[41] This is part of his defense of his first draft of a cooperative law. Quoted in Thorwart (1909, pp.369-370).
[42] Quoting more extensively: , „§12 Bei Handlungen, woraus Rechte und Verbindlichkeiten gegen Andere entstehen, werden sie nur als Theilnehmer eines gemeinsamen Rechts, oder einer gemeinsamen Verbindlichkeit betrachtet. §13 Dergleichen Gesellschaften stellen im Verhältnisse gegen Andere, außer ihnen, keine moralische Person vor, und können daher auch, als solche, weder Grundstücke, noch Capitalien auf den Namen der Gesellschaft erwerben. § Unter sich aber haben dergleichen Gesellschaften, so lange sie bestehen, die inneren Rechte der Corporationen und Gemeinen" (Band III, Titel 6).

member (signatory) and not with the cooperative *per se*. This cumbersome mechanism was apparently rarely used. The sources stress other methods. Sometimes the cooperative's treasurer contracted in his own name (Crüger 1894, p. 395). The approach worked well if the treasurer's position did not turn over frequently, but clearly put a burden on the treasurer and required trust in his probity. More commonly, it appears that cooperative members gave their power of attorney (*Bevollmächtigung*) for relevant business to the cooperative's leadership (Crüger 1894, p.394). Establishing the power of attorney required either a notarized document or personal appearance in front of an official, both of which could be costly.[43]

These legal and practical disabilities were not limited to cooperatives; it attached to any association or enterprise that did not acquire a special charter. Many small businesses were viewed by the ALR in the same way as the cooperatives. But two features of the cooperatives made this legal problem more serious than for most businesses. Business partnerships rarely had more than three or four members. Cooperatives, on the other hand, often had more than 100 members, and some had several hundred as early as the mid-1860s. With these numbers it was easy for a single power of attorney to be invalid, and a single invalid power of attorney could force a cooperative to re-initiate a legal action to, for example, recover a debt. In addition, by their nature cooperatives had a constantly-changing membership. Every time someone joined or left a cooperative, the institution had to incur the legal costs mentioned above, and every change in membership raised the possibility of defective documents.

The ADHGB had introduced a new principle into German law, recognizing the legal rights of entities such as partnerships that were not full legal persons (Joël (1890, p.420)). Because these partnerships had limited but important rights to act collectively, they were clearly

[43] The distinction we make warrants stress. The cooperatives found ways to operate without R3 rights. But this does not amount to saying those methods did not entail significant costs.

R3 groups in our terms. Schulze-Delitzsch's contribution was to apply this principle to cooperatives. The 1867 cooperatives Act simply extended that approach to cooperatives. The Act created a public registry of cooperatives (*Genossenschaftsregister*) that paralleled the register of firms used to track partnerships and corporations. Cooperatives that took advantage of the 1867 law had to register and to keep their membership lists up-to-date. In return, they acquired the R3 rights that applied to business partnerships under the ADHGB.

The 1867 Act initially applied only to Prussia, but was extended to the North German Confederation in 1868. Most other federal states also accepted the Prussia law after 1871, with Bavaria delaying acceptance to 1873 and Saxony to 1874 (Joël 1890, p.421). The 1867 Act gave cooperatives most of the R3 rights they had sought. The Act also settled the question of whether cooperatives could be harassed under the law related to association: bodies that had their own special Act were doubtless "permitted." The interesting feature of the 1867 Act is its connection to the business code. Schulze-Delitzsch never raised the idea of making cooperatives part of the code. This would not have been absurd; while cooperatives in some countries (such as the United Kingdom) have their own distinctive enabling statutes, in most countries the law treats cooperatives as a special kind of corporation. Such had been the case in Saxony and Bavaria. Schulze-Delitzsch's reliance on the AHDGB for the provisions on partnerships illustrates two important points. First, the R3 and R4 rights civil-society groups need are virtually the same as those business firms need. Second, while Schulze-Delitzsch did not want the corporate status that could bring state oversight, he saw the value of tying his cooperatives to the business law, making them more secure from ideological enemies.

Within a few years efforts were underway to pass a new law at the Reich level. Much of the debate over new proposals took place *within* the cooperative movement; even those seeking

to introduce features most resisted by cooperatives did so in the spirit of what they thought would enhance the movement's viability. The 1889 Reich cooperatives Act introduced three changes. First, it allowed cooperatives to be members of each other, thus legalizing the practices of regional cooperative "Centrals." Note how similar this organization is to what is common in the business world, where business firms own other firms. Second, the Act required external auditing for all cooperatives. This requirement preceded mandatory external auditing for banks or business firms, and thus is striking on its own for going beyond any such provision for business firms. Finally, and most notably, the 1889 Act allows cooperatives to organize with either unlimited or limited liability. Subsequent discussions of the 1889 Act have focused heavily on this feature, probably exaggerating its immediate impact. Few cooperatives took advantage of the limited-liability form at first. But it means that cooperatives could acquire one common corporate entitlement, limited liability, that was at the time strictly limited for business firms.

This sketch of the cooperatives and their encounters with the several aspects of association law illustrates an important and general feature of the entire issue. The law never sought to repress all associations. When the cooperatives did not fit with the prevailing political trends, some officials used the law of association to harass them. With a changing political environment that harassment ceased, and by the end of the nineteenth century many German governments offered (modest) direct and indirect subsidies to cooperatives. This pattern can be found throughout the nineteenth century, as Nipperdey (1994, p.267-8) observes: at the same time as the law allowed governments to restrict or outlay associations, the same governments supported a range of educational and mutual-assistance organizations. The nineteenth century was the century of associations, as Nipperdey puts it; most Germans belonged to at least one, and

many Germans belonged to several. But only those the government thought conducive to its own ends.[44]

4. France: a brief comparison

Were the restrictions we discuss a Prussian, or German peculiarity? They were not, and to make this point concrete we turn to a brief comparison with France. This comparison does not carry with it the suggestion that France and Prussia were alike in any simple sense; rather, we use it to indicate the common themes in associational rights present even in quite different societies. The Revolution introduced basic democratic precepts and institutional forms that subsequent regimes at first severely limited, but never fully abolished. The restored Bourbon monarchy (1814/15-1830) tolerated an advisory parliament, and its successor, the so-called July Monarchy (1830-1848) limited the crown's power while expanding the franchise. By the third Republic (1870-1940), France enjoyed core democratic institutions that have endured: universal (at first, manhood) suffrage, ministerial responsibility, etc. Prussia, on the other hand, retained a three-class parliamentary voting system until the Weimar Republic (1918). The Reich introduced universal manhood suffrage with its foundation in 1871, but both Prussia and the Reich retained a parliamentary system in which the ministers were responsible to the King/Emperor, rather than to the parliament. Political historians debate how "democratic" this system was, but Germany clearly did not enjoy the same political culture and institutions as France until the 1918. For all the political differences between France and Prussia in the nineteenth century, both regimes share a common skepticism about civil associations and repressed them with equal vigor. The

[44] "Das Jahrhundert wird das Jahrhundert der Vereine, jeder steht – oft mehrfach – in ihrem Netzwerk." (Nipperdey 1994, p.267)

final removal of the most severe restrictions in France took place not long before the Reich's 1908 Act.

We briefly review the French historical experience to demonstrate that comparable restrictions on civil-society institutions existed in regimes other than absolute monarchies (as Prussia was until the 1850s) or limitedly democratic states. This account focuses on the law rather than the ideational underpinnings. We recognize that in the French case the restrictions on association reflect a particular conception of democracy that arose during and survived the Revolution. We can understand at least the basics of this conception by considering Rousseau's notion of the "general will." France under the Ancien Régime was at once an absolutist state and a society riven with groups that claimed special privileges: by virtue of birth, or occupation, or the king's favor. Democracy was to overcome the expression of these particular interests in favor of the general will. Rousseau argued that associations between the citizen and the state (which he called "sociétés partielles") could only frustrate the development of the general will; they could advance their member's interests, but not assist their members in shaping the general will.[45]

Unease with associations had a more pragmatic basis, as well. The various French governments saw in political associations a sort of counter to the State that menaced the State's functioning and even legitimacy.[46] Even those who had been members of such associations came to oppose them once in power. Clubs were a useful tool in the struggle to overthrow a regime, but dangerous to the new constitutional order established in its place (Jaume, p.77). This pragmatic opposition to associations sounds much like the Carlsbad decrees and other efforts to suppress opposition in Germany.

[45] See Rousseau (1865, p.45).
[46] Jaume, p. 75: "…les divers gouvernements redoutent dans l'association à caractère politique une forme de pouvoir (ou de contre-pouvoir), d'organisation, et d'unité d'opinion, qui menacerait le fontionnement et même la *légitimité* de l'Etat."

Under the *ancien régime*, in fact, the French authorities limited association in ways similar to those we described above for Prussia in the early nineteenth. These limitations were part of a broad strategy of controlling speech and potential political opposition, just as in Prussia. The two histories diverge with the Revolution. The Revolutionary government enacted strong, systematic restrictions on association. The *loi Le Chapelier* of Jun 14, 1791 declared "n'est permis à personne d'inspirer aux citoyens un intérêt intermédiaire, de les séparer de la chose publique par un esprit de coopération." This act followed soon after the "Allarde decree" of March 1791. Together the two decrees outlawed a broad group of bodies that had played important roles in pre-Revolutionary society, or that threatened the democracy the revolutionaries wanted to develop. The decrees forbad combinations for the benefit of economic interests ("corporations"): no guilds, no other worker combinations, no organizations to benefit particular business or professional interests. These bodies and the benefits they enjoyed had constituted a primary target during the first days of challenges to the Ancien Régime, as they reflected a political economy that privileged a group of insiders against everyone else. The Allard decree in particular aimed to create an entirely free market in labor, one that would depart radically from earlier French experience as well as from much of the rest of Continental Europe. The decrees also forbad other associations, especially those with political intent or overtones. These associations (many but not all were called "Clubs") violated the core idea in Rousseau's conception of liberty: a body intended to discuss ideas and then present a common front to the rest of society can only frustrate expression of the general will.

Thus both Prussia and France ended up with similar legislation on associations, but for dramatically different reasons. At some level post-Revolutionary France distrusted all associations; with some exceptions, the post-1815 regimes did not allow re-creation of the bodies

suppressed by the Revolution, and at the same time they forbad new, voluntary groups. Prussian society was largely *based* on the older associations France outlawed. The particular critique that drove much French opposition to associations, the feeling that they were part of a system of conferring benefits on specific people, had little resonance in Prussia. Much discussion of course concerned which people should receive which benefits, but with the exception of the Liberals, few Prussians in the early nineteenth century saw much wrong with giving special privileges to those of a particular background or connection to the Crown.

One more difference warrants stress. In the early nineteenth century French effort to control associations focused on worker's groups, "syndicats" and related bodies similar to trade-unions. Some of this concern reflected placing the interests of employers over employees, but the focus on workers also betrays some unease with the "mob." Prussia and most other German states did not abolish guilds until the 1840s and later, and one would have to squint hard to detect an urban proletariat or labor movement until the 1850s at least. Prussian conflict over associations did not shift to workers until later, as noted above.

The French monarchy's restoration in 1814/15 did not lead to change in the association law. Even the more liberal regime brought in by the 1830 Revolution made no difference. The relevant provisions from the 1810 penal code appear in the1832 version:

> No association of more than twenty persons, whose object is to meet every day, or on certain set days, to deal with religious, literary, political, or other matters, may form without the agreement of the Government, and under the conditions the public authority chooses to impose on the society.[47]

§292 states that any group that meets in defiance of this restriction, or that fails to adhere to the conditions imposed on it by the authorities, will be dissolved and its leaders fined. §294 requires

[47] §291. "Nulle association de plus de vingt personnes, dont le but sera de se réunir tous les jours, ou á certains jours marqués, pour s'occuper d'objets religieux, littéraires, politiques ou autres, ne pourra se former qu'avec l'agrément du Gouvernement, et sous les conditions qu'il plaira à l'autorité publique d'imposer à la société."

that individuals cannot host a meeting of such an association without permission of the municipal authorities, *even if the group in question is authorized*. And §293 holds the leaders responsible for the groups' actions: "If by addresses, exhortations, invocations or prayers, in any language, or by reading, signs, publication or distribution of any writings…" there are crimes or offenses,[48] then the leaders of this group will be punished both for the crimes of the groups' members, and face additional punishment as leaders. The members will also be punished for their individual conduct.

These provisions limit R1 and R2 rights. And they are remarkably similar to the Prussian law quoted above. The July monarchy (1830) was France's first constitutional government and usually considered liberal by the standards of earlier governments as well as the day. But it still made it a crime to meet in groups of any size.

France relaxed these restrictions in several steps. The 1848 constitution guaranteed freedom of association but this was withdrawn a year later. The *loi Ollivier* (25 May 1864) made it possible for workers to organize and to strike under certain conditions. The more important *loi Waldeck-Rousseau* (21 March 1884) abrogated *le Chapelier* and permitted the creation of groups that existed to advance the economic conditions of people following similar occupations ("syndicats"). This change led to both labor unions and cooperatives. The only government role for these groups was a publicity requirement (they had to deposit their articles of association with the local authority, and keep the authorities apprised of their leadership.) §2 says explicitly "even if more than 20 persons," so it is written with the §291-4 of the penal code in mind. §3 stresses that the 1884 act only applies to groups whose purpose is to "defend the economic interests" of members who come from a narrowly-defined occupational group.

[48] The French text refers to both crimes and "délits," less serious offenses.

The 1884 law was written to apply to economic bodies such as cooperatives, and not to relax restrictions of groups of a possibly political nature.. Ronsanvallon (2006, pp.280-292) stresses the implications of this feature: the 1884 law priviledged *one* kind of association, *one* reason for combining with other citizens. Some contemporary opposition to the 1884 measure focused on just this fact; participants in the parliamentary debate noted that it amounted to a departure from the principle of equality before the law and a reintroduction of the privileges for specific groups that the Revolutionary decrees had sought to erase. The 1884 law's supporters carved out this exception by limiting the scope of syndicats recognized this way to defending their members' economic interests: that is, no politics. [49]

Restrictions on association were gradually relaxed in the last decades of the nineteenth century. The association law of 1901 introduced both freedom of association and (R1 and R2 rights) and some R3 rights for associations that adhered to certain norms. French associations under the law of 1901 had to have two members, and could not have as their aim anything contrary to "good morals" or France's republican form of government. If the association provide basic information on its leaders and aims to the local prefecture, then it enjoyed the R3 rights of acting in its own name for legal purposes. Thus the 1901 French law's effect was similar to the combination of the German BGB's registered association provisions and the Reich 1908 Act on associations.[50]

Even before the 1901 associations law, France no more suppressed all associations than did the Prussians. Jaume's title is especially apt; associations existed, but under threat, thus having "une liberté en suffrance." Sometimes the French state explicitly tolerated or even encouraged associations. Especially under Louis Napolean, France saw the flowering of

[49] "Les syndicats professionnels ont exclusivement pour object l'étude et la defense des intérêts économiques, industriels, commerciaux et agricoles" (§3).
[50] Andrieu et al reprints the text of the law of 1901, pp.701-705.

voluntary, mutual insurance associations. Rosanvallon notes a similar expansion in the case of the chambers of commerce. At some level one could see them as one of the "corporations" that affronted the Revolution. Yet Napoleon re-introduced them in 1802. And here we see more wiggle room; not only was it implausible that the chambers of commerce would host opposition to the State, they were more organs of the State than autonomous bodies representing particular interests. (p.389). Rosanvallon notes that as the French government became more and more concerned with hygiene over the nineteenth century, it began to draw upon bodies of experts constituted as associations to advise and help shape policy (p.391). State resistance and fear of associations had its limits in France, as well.

5. Conclusion: Business firms as an exception?

We conclude by drawing out a theme running through our accounts, particularly in Prussia and in France. This theme concerns both the exceptional treatment of business associations during the most restrictive periods, and the way developments of R3 and R4 rights first extended to cooperatives and other civil-society groups with economic purposes. This should surprise. Seven people meeting to discuss business were seven people meeting. Why would anxious government authorities automatically assume the seven conveners were not a threat? Why not insist they provide prior notice of their meetings and enforce other provisions of the laws discussed above? The exceptions granted to business associations are all the more surprising when we consider that some of the leading opposition figures were business people: a standard "Manchester" liberal in the 1840s was no less offensive to official thought than a radical bent on workers' rights. Governments had no reservations about regulating or restricting broad areas of economic life, and were unapologetic about limiting the right to form business enterprises of specific types, most notably corporations. Granting business firms automatic

waivers on the laws of association seems like offering a license to some committed opponents of the regime. Why did privileges for associational business interest develop in this way?

We can think of several reasons. First, even States hostile to free enterprise and bolstered by elites whose economic interests were threatened by the development of modern industry (and Prussia in 1800 surely counts as such) recognized the importance of tax revenue and employment for citizens. To the extent economic development required multi-owner business enterprises, tolerating association for this purpose was a necessary evil. Second, as worrisome as business-oriented Liberals may have been to the regime, they were less of a threat than the real or imagined revolutionaries seeking to overthrow the government. Take, for example, David Hansemann (1790-1864), a leading Rhineland businessman and Liberal politician. On occasion Hansemann deeply annoyed Prussian officials, but he had little interest in the State's undoing. Official attention was better focused on those more radical.[51] Third, in many ways the interests of the state and businesses were largely aligned. Following the post-revolutionary reactions of the early 1850s, the business community (and the Liberals) had been brought into a larger consensus about the future of the Prussian and then German state, and there was little danger of conflict in which the business community would oppose the State. The cooperatives benefitted indirectly from this political realignment. More generally, by the 1860s many Germans were concerned about the effects of industrialization in creating a class of people uprooted from rural life and suffering from poverty, illness, and lack of education. This "social question" in Germany sometimes evoked genuine sympathy for those left behind by economic development, but in

[51] While an explicit focus on left-wing and labor groups did not develop until after the 1848/49 revolutions, a subtext in much concern about groups earlier in the nineteenth century centered and the allegedly wild character of large public gatherings of working-class people. This fear can be seen in the distinction between indoor and outdoor meetings, and has something to do with the suppression of the gymnasts. Even the *Burschenschaften,* whose members hardly counted as working-class, promoted displays with an enthusiasm that could seem excessive, even if just expressions of respect for the King.

many cases the social question reflected a concern working-class movements could coalesce around and grow if Germany's leaders did not find some way to reform the harshest features of the new society. Here cooperatives and other economic bodies could be seen (and quite clearly *were* seen) as part of a bulwark against revolution. It may be that German governments worried about association *per se*, because free association threatened the State's assignment of persons to classes and ranks. The exception for business association suggests a willingness to overlook the deeper threat if the association helped to advance the State's goals.

References

Law

Allgemeines Landrecht für die Preußischen Staaten. Berlin: Nauck. 1825 (Unveränderter Abdruck der Ausgabe von 1821).

Allgemeines Deutsches Handelsgesetzbuch von 1861 [reprinted 1973]. Darmstardt: Scientia Verlag Aalen.

Brooks, Richard R.W., 2006, "Incorporating Race," Columbia Law Review 106:2023

Bürgerliches Gesetzbuch nebst Einführungsgesetz. Vom 18. August 1896. Berlin: Guttentag, 1909.

Entwurf eines Vereinsgesetzes, 1908. *Verhandlungen des Reichstages* XII. Legislatureperiode, I. Session. Anlagen zu den Stenographischen Berichten Nr. 471 bis 526. Bd 243. Berlin : Sittenfeld, 1908. No. 482.

Loi relativea la création des syndicats professionnels (du 21 mars 1884).

Nouveau Code Pénal. (1832) Dijon: Victor Lagier.

Other references

Andrieu, Claire, Gilles Le Béguec et Danielle Tartakowsky, 2001. *Associations et champ politique : La loi de 1901 à l'épreuve du siècle*. Paris : Publications de la Sorbonne.

Ruth H. Bloch and Naomi R. Lamoreaux, "Legal Constraints on the Development of Voluntary Organizations in the United States, 1780-1900"

Des Cilleuls, Alfred 1898. Project de la loi sur la liberté de'association. Paris: Imprimerie Nationale.

Gierke, Otto, 1868. *Rechtsgeschichte der deutschen Genossenschaft*. Berlin: Weidmann.

Gregg, Amanda, 2014. „Factory Productivity and the Concession System of Incorporation in Late Imperial Russia, 1894-1908." Working paper.

Guinnane, Timothy W., 2001. "Cooperatives as Information Machines: German Rural Credit Cooperatives, 1883-1914." *Journal of Economic History* 61(2): 366-389.

Guinnane, Timothy W., 2012. “State Support for the German Cooperative Movement, 1860-1914.” *Central European History* 45(2): 208-232

Guinnane, Timothy W., 2013. “Creating a new legal form: the GmbH.” Working paper.

Guinnane, Timothy W., Ron Harris, Naomi Lamoreaux, and Jean-Laurent Rosenthal, 2007. “Putting the Corporation in its Place.”*Enterprise and Society* 8(3): 687-729, 2007.

Guinnane, Timothy W. and Susana Martínez Rodríguez, 2011. “Cooperatives before cooperative law: business law and cooperatives in Spain, 1869-1931.” (with). *Revista de Historia Económica-Journal of Iberian and Latin American Economic History,* 29(1): 67-93.

Harris, Ron, 2006. „The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business.“ *Washington and Lee Law Review* 63.

Hartwig, Wolfgang, and Helmut Hinze, 1997. *Deutsche Geschichte in Quellen und Darstellung. Band 7: Vom Deutschen Bund zum Kaiserreich 1815-1871*. Stuttgart: Reclam.

Koch, Christian Friedrich, 1862. *Allgemeines Landrecht für die preußischen Staaten* , 3rd edition. Volume II. Berlin 1862. Accessed from: http://dlib-pr.mpier.mpg.de/m/kleioc/0010/exec/bigpage/%22129324_00000531.gif

Hueber, Anton, 1984. „Das Vereinsrecht im Deutschland des 19. Jahrhunderts.“ *Historische Zeitschrift* (*Beiheift*) 9:115-132.

Jaune, Lucien, 2001. „Une liberté en souffrance: l’association au XIX^{e} siècle. In Andrieu et al 2001, pp. 75-100.

Joël, Max, 1890. „Erlauterung“ für „Das Gesetz betreffend die Erwerbs- und Wirthschaftsgenossenschaften vom 1. Mai 1889. *Annalen des Deutschen Reichs für Gesetzgebung, Verwaltung und Statistik*

Langewiesche, Dieter, 2000. *Liberalism in Germany*. (translated by Christiane Banerji). Princeton: Princeton University Press.

Meyer, Georg, 1883. *Lehrbuch des deutschen Verwaltungsrechtes*. Theil I. Leipzig: Duncker & Humblot.

Meyer, Wolfgang, 1970. *Das Vereinswesen der Stadt Nürnberg im 19. Jahrhundert*. Nürnberg: Stadtarchiv Nürnberg.

Nipperdey, Thomas, 1976 „Verein als soziale Struktur in Deutschland: im späten 18. und frühen 19. Jahrhundert. Eine Fallstudie zur Moderisierung I.“ In *Gesellschaft, Kultur, Theorie: Gesammelte Aufsätze zur neueren Geschichte*. Göttingen: Vandenhoeck & Ruprecht.

Nipperdey, Thomas, 1994. *Deutsche Geschicht 1800-1866: Bürgerwelt und starker Staat*. Munich: Beck.

Walter W. Powell and Victoria Johnson, "Organizational Emergence and Social Poisedness: From Civil Order to Professional Philanthropy in Nineteenth-Century New York City"

Prager, Max, 1904. „Grenzen der Gewerkschaftsbewegung." *Archiv für Sozialwissenschaft und Sozialpolitik* XX: 229-300.

Romen, Antonius, 1916. Das Vereinsgesetz vom 19. April 1908. Berlin: Guttentag.

Rosanvallon, Pierre,2004. *Le modéle politique français: la société civile contre le jacobinisme de 1789 à nos jours*. Paris: Éditions du Seuil.

Rousseau, Jean-Jacques, 1865. *Du contrat social ou prinipes du droit politique*. 2nd edition. Paris: Bureaux de la Publications.

Ruhmer, Otto, 1937. *Entstehungsgeschichte des deutschen Genossenschaftswesens: Die ersten deutschen Genossenschaften*. Hamburg: Krögers Buchdruckerei und Verlag.

Schulze-Delitzsch, Hermann, and Fr. Schneider, 1863. „Die gegenwärtige Lage der deutschen Genossenschaftsbewegung und der sie betreffenden Gesetzgebung. *Der Arbeiterfreund* 1: 41-58.

Sheehan, James J., 1995. *German Liberalism in the Nineteenth Century*. Atlantic Highlands: Humanities Press.

Skocpol, Theda, 2003, *Diminished Democracy: From Membership to Management in American Civic Life*. Norman, OK:

Sperber, Jonathan, 1984. *Popular Catholicism in Nineteenth-Century Germany*. Princeton: Princeton University Press.

Sperber, Jonathan, 1991. *Rhineland Radicals: the Democratic Movement and the Revolution of 1848-1849*. Princeton: Princeton University Press.

Thorwart, F., Editor., 1909. *Hermann Schulze-Delitzsch's Schriften und Reden*. Volume I. Berlin.

__, 1910. *Hermann Schulze-Delitzsch's Schriften und Reden*. Volume II. Berlin.

__, 1913. *Hermann Schulze-Delitzsch's Schriften und Reden*. Volume V. Berlin.

Tillmann, Hans, 1976. *Staat und Vereinigungsfreheit im 19. Jahrhundert – Von der Paulskirche zum Reichsvereingesetz 1908*. Dissertation, University of Gießen.

Tomlins, Christopher L., 1993, Law, Labor, and Ideology in the Early American Republic, Cambridge: Cambridge University Press.

Verfassung des deutschen Reichs. Reichs-Gesetz-Blatt 16, 28 April 1849.

Verhandlungen des Reichstages. XII. Legislaturperiode. I. Session. Band 243: Anlagen zu den Stenographischen Berichten. Berlin 1908.

Vormbaum, Thomas, 1976. *Die Rechtsfähigkeit der Vereine im 19. Jahrhundert: Ein Beitrag zur Entstehungsgeschichte des BGB*. Berlin: De Grutter.

Wiberg, Alfred, 1906. *Das öffentliche Vereinsrecht und die Gewerkschaftsbewegung*. Leipzig: Noske.