

Chapter 13: Germany: Constitutional Exchange in an Emerging State during the 19th Century

1. Introduction

The first three historical cases, England, Sweden and the Netherlands, were natural applications of the "king and council" model. All were constitutional monarchies in 1815, and all remain constitutional monarchies today. Other similar analyses can be constructed for Belgium, Denmark, and Norway.

The next three historical narratives are not ones for which the application of the king and council will seem as natural. Two are cases not usually associated with gradual democratization, Germany and Japan, and one is not normally thought of as a country at all, namely the colonial province of Virginia. These less obvious applications help to test the generality of the component parts of the theory: (i) that the gradual shift from royal to parliamentary occur because of opportunities for constitutional exchange that arise because of Parliament's power of the purse, (ii) that the shift to democracy tends to require ideological support within parliament itself, not simply broad support outside of parliament, and (iii) that bargains tend to be incremental and shaped by existing institutions for reform and the interests of those bargaining over the reforms.

The German case is difficult for several reasons. First, German's history in the 19th century is not a continuous history of a more or less single institution evolving over the course. Indeed, it could be argued that there was in fact no such thing as "Germany" in 1815, but rather a subcontinent of independent states that shared more or less the same language and similar religions and little else. Germany emerged as a nation state in the 19th century, and this process combined numerous military enterprises with significant revisions to country wide processes of collective decision making. And, as such, they were not always completely lawful reforms of preexisting institutions, as in the "easy" cases examined above. None the less, Germany did transform both its economic constitution and its political constitution in a liberal

direction during the course of the Century, and these transformation were often gradual matters of small negotiated changes in law. It is in these areas of reform that the model best applies, and for this reason that it history is examined with an eye toward episodes of constitutional exchange generated by shifts in economic interests and ideology.

Second, the history of Germany in the 19th century is usually told with an eye on the 20th century, a century in which German foreign policy lead to two continental wars of mass destruction. This tends to induce historians to ignore the major liberal reforms of institutions, and instead focus on anti-liberal tendencies of many of its leading political figures, which tends to assume that the forces of institutional conservatism in the early part of the century were the same as the new nationalist conservatism that emerged towards the end.¹⁶⁵ That the first half of the twentieth century would be dominated by Germany's foreign policy clearly could not evident to observers at the beginning of the 19th century, nor given the path of institutional reform would have seemed likely towards the end of the century.

Indeed, observers in 1815 would have been surprised by this prediction. There was only a very loose confederation of duchies and city states in the decades before, during, and after Napoleon's invasion of the Holy Roman Empire. Even mid-century it could be said that there was a German culture, but not really a nation state.¹⁶⁶

On the other hand, the king and council template for governance was present at both confederal and local levels for much of German's history, and a good deal of constitutional exchange took place over the course of its history.

German Decentralization and Sovereignty, the Holy Roman Empire: 962 - 1792

Germany is said to have emerged from the Holy Roman Empire which subsequently included the center of medieval Europe, stretching from Rome to the Baltic. This empire was neither roman nor a true empire. It began in 962 when King Otto was crowned emperor by the Pope in Rome, and expanded gradually northward through marriage and conquest. The empire at its peak included modern Germany plus parts of France, Switzerland, Austria, the Czech republic, and northern Italy. Although

¹⁶⁵ See Blackbourn and Eley (1984) for a very thoughtful analysis of how this assumption and French and English comparisons that emphasize bourgeois revolutions have lead many historians astray.

¹⁶⁶ I use the term duchy to refer to a broad cross range of small "kingdoms." Contemporary independent duchies include Luxembourg, Monaco, and Liechtenstein. Other terms such as state or lander are also used when describing members of the various German confederacies.

the territory covered was sufficiently large to count as an "empire," the word empire also suggests strong centralized governance, as in the Roman and British Empires. This aspect of the term Empire, however, rarely characterized the empire. For the most part, the Empire was a very loose confederation of independent relatively small territories ruled by hereditary sovereigns and their councils.

Some consolidation of policy making authority occurred in the 13th century when the Habsburg family became rulers of much of Austria and gradually acquired significant territories in Germany. The office of Kaiser or king was an elective office, based on the votes of seven hereditary electors from relatively large and powerful duchies. None the less, Habsburg family members were routinely elected to the office of Holy Roman Emperor from 1438 through 1806. In spite of this continuity in office and their dominance of imperial governance, the Habsburgs were never able to create a nation state with a strong central government, although they clearly had significant influence over much of Germany, particularly in the family duchies.

The Protestant reformation is one of many cases that demonstrates the Holy Roman Empire's lack of central rule. Indeed, the Protestant reformation can be regarded as a continuation of efforts by local leaders to resist centralization by the Habsburgs by other means.

In the first half of the 16th century, Luther and Calvin's doctrines became widely read among literate classes and widely heard by regular church goers at the unorthodox churches. In response, there was a sustained effort by the Catholic Church aided by many of Europe's most prominent families (and their armies) to suppress the use of these radical religious ideas. In response, there was a more or less equally great effort by the lesser families to resist this effort at centralization. After a hundred years of major and minor wars across much of Europe, a settlement was finally reached in 1648. The Peace of Westfalia in effect affirmed German decentralization. It allowed local sovereigns to determine the religion and laws of their territories, adjusted territories at the margin, and affirmed the independent status of the Netherlands and Switzerland.

For most of its last three and a half centuries, the empire's governance functioned as a weak confederation. At the level of the empire, assemblies of representatives from the hundreds of independent cities, duchies, and church territories met in an imperial meetings at major cities in the empire (*Reichtage*). These assemblies

included great festivals as well as parliaments. The parliament's business, included such matters as taxation, war and peace, marriage, and religion.

The independence of the states, which was assured by constitutional laws adopted in the sixteenth and seventeenth centuries, implied that imperial policy effectively took the form of agreements (treaties of the member states) and advice (edicts) from the diet and Kaiser. At the local level, sovereigns also met with assemblies of members of important families and organizations in duchy assemblies (*landtage*) where similar matters were discussed for the territory at hand. Normally, the duchy assemblies had power over taxation and legislation. In many cases, policy making authority was divided between these early parliaments and their sovereigns, resulting in a form of joint governance termed a *Ständestaat* (Fulbrook 1999: 26-27).

The highly decentralized governance of the "empire" remains physically evident today in the very large number of small German cities and towns with royal architecture: medieval and early modern palaces, formal gardens, and castles. In more centralized governments, these would have been concentrated at and around the national capital, as in England, Sweden, and France. In republics, public buildings and official residences tend to be much more modest in scale, except perhaps in capital cities or great commercial centers. On the other hand, the German cities include relatively few "parliamentary" buildings, which suggests that the duchy diets met relatively infrequently in government buildings designed for multiple purposes.

Napoleon, the Vienna Congress and the Founding of the German Confederation: 1792-1815

The invasion of Napoleon in 1792 ended the first German empire. He did so both by defeating duchy armies and by merging many of the German territories into larger duchies, centralizing political authority, and introducing his new civil law (the code Napoleon). In the south, he created a new federation, the Confederation of the Rhine, which was somewhat more centralized than the Empire had been, in large part because of its support by the French army. After nearly two decades, Napoleon was dispatched by a royal alliance of the English, Prussian, Austrian, and Russian armies. The subsequent Vienna conference of 1815 rearranged a good deal of the territory of Germany, although it accepted much that Napoleon had done in that regard. It also established a new German confederal government (*Deutscher Bund*) loosely based on the old empire, but without a Kaiser.

The new German confederation also accepted the independence of the remaining duchies and city states. There was, for example no German citizenship. It had a weak central government organized as an assembly of duchy representatives (ambassadors), with a president rather than a king or Kaiser. The confederal government lacked significant power to raise taxes or to support an army, although it was charged with the defense of Germany from both internal and external enemies (Renzsch, 1989; Fulbrook 1999: 101). German governance in 1815, consequently, remained for the most part a collection of independent sovereign duchies and city states.

Although, the territorial rulers had the powers of a hereditary monarch, most were not formally "kings," because their territories were too small for that status. However, what the English would refer to as dukes, barons, and counts were formally independent sovereigns rather than part of a well-ordered aristocratic hierarchy. And, most had functioned as essentially autonomous sovereigns during most of the period of the old Holy Roman Empire.¹⁶⁷

As a consequence, the first half of this chapter differs from the other historical narratives in that it discusses a general tendencies among several dozen independent German-speaking duchies to adopt political reforms rather than the political and economic developments of a single nation state. (Discussing "Germany" in this period is much like discussing "Africa" today. Based on the number of independent sovereigns it was a subcontinent rather than a nation state.) It is interesting to find that many of the predicted links between liberalism, industrialization and the rise of parliament hold for these duchies, particularly in Württemberg, Baden, Hanover, and Bavaria.

A single nation state did emerge in Germany in 1871 as the result of treaties between the duchies, signed in part because of military threats from Prussia and Napoleon III. The constitution adopted for the new empire (sometimes referred to as the second Reich or empire) gave the Prussian political elite considerable control over public policies in the new nation state of Germany, and it is for this reason that most histories of Germany in the 18th and 19th century focus on Prussian developments rather than those of the other sovereign states. There is evidence, however, that the new constitution was not unilaterally imposed by Prussia, but was significantly influenced by bargaining among the states that joined.

The new national government relied upon the king and council template, with a Kaiser (king or emperor) and a parliament that included a chamber (the *Reichstag*) elected using universal suffrage. Once formed, the evolution of governance in the new German state paralleled those of the other industrializing kingdoms of this time. Parliaments and elections both gradually became more important. However, the particular "Prussian-weighted" form of the king and council template adopted in 1871 and its early adoption of universal male suffrage reduced somewhat the opportunities for constitutional exchange.

2. Confederal Governance: 1815-1867

After the mergers of Napoleon and the Vienna Congress, there were four independent city states and thirty four autonomous duchies, including five kingdoms, Bavaria, Prussia, Württemberg, Hanover, and Saxony. The new German confederal government met in Frankfurt under the presidency of Austrian's foreign minister, Metternich. Each sovereign selected a representative for the confederal diet, who acted as his ambassador to the diet, rather than as an independent representative in a diet assembly. Although Metternich exercised considerable agenda control within the confederal diet, relatively few decisions were made, in part because the regional interests of the northern southern states rarely were similar. A rare exception was found in their agreement to suppress liberal tendencies within the confederation, through censorship and criminal sanctions. On such matters, the 35 sovereigns had common interests. (An additional duchy was included in 1817.)

Politics, thus, remained very decentralized within the confederation. Most duchy parliaments retained their pre-Napoleon veto power over taxation and legislation, as was true of the kingdoms of Bavaria and Württemberg. On the other hand, many duchy parliaments had previously given up most of their veto power over budgets and legislation during the seventeenth and eighteenth centuries. For example, this was the case in Prussia. Prussia retained its council and regional parliaments, but the king had escaped from their veto power through a major tax reform in 1667 adopted during a time of war (Fulbrook 1999: 77).

The city state members generally used a mayor and council format for public policy decisions, in which the councils tended to be organized into sub-councils

¹⁶⁷ This practical independence of sovereigns within the Holy Roman Empire is, after all, what made the Protestant reformation in Germany possible. The local sovereigns simply ignored the Kaiser's (Charles II's) spirited defense of the catholic church, and countered his military efforts to impose (restore) order with their own military efforts to resist Charles II's efforts to centralize authority.

(estates) of nobles, guilds, and churches, controlled by a handful of powerful families. Some city governments included elected chambers, based on limited suffrage. Most city councils had veto power over taxation and played important roles in determining public policies (Moraw 1989:117). A few of the duchies had written constitutions and most towns also had city charter and/or founding documents.

Several new constitutions were adopted by duchies after 1815, in part as a means of reestablishing local autonomy after the French departed. For example, new constitutions were adopted by Baden and Bavaria in 1818. Baden's constitution included a lower chamber of parliament elected under wealth based suffrage. Württemberg's constitution of 1820 included a single chamber, three estate (church, town, and country) parliament with considerable legislative and veto power. Bavaria's constitution included a bicameral parliament with a noble chamber and an elected chamber based formed largely on the basis of wealth based suffrage, from which 1/8 of the seats were reserved for noble landlords and another 1/8 of the seats for the clergy (Möckel 1979: 261-65).

On the whole, the duchy constitutions were conservative in the sense that they were based upon long-standing medieval institutional arrangements, although leavened to some extent with new protection for private property and election rules.

Constitutional Reform and Conservatism

According to the model of parliamentary reform developed above, the tax veto power of parliament implies that political power tends to shift towards parliament when member wealth increases relative to that of the sovereign, and tends to shift away from parliament during times when its wealth falls relative to that of the king and when benefits of royal authority increased, as is often true during times of military crisis. During the seventeenth century and eighteenth centuries, warfare and the shift in commerce from overland routes to the Atlantic tended to reduce the relative wealth of those represented in parliament. This partially explains why the seventeenth and eighteenth century parliaments of many of the German duchies parliaments had become weaker branches of government. The economies of both noble estates and many urban trading centers grew relatively slowly in this period.

On the other hand, in the late eighteenth century, the economic tide reversed, and parliaments had begun to increase in importance. For example, the Bavarian

nobility traded its tax privileges for greater influence over parliament in 1808. A similar constitutional bargain was evidently concluded by the Prussian nobility in 1810.

The bargaining model of constitutional evolution also suggests that changes in both the normative and positive parts of ideology may also affect the course of public policy, the balance of power within government, and the methods through which its members are selected. This was also evident in the decades before, during, and after Napoleon's exit. After Napoleon, as in Bavaria, outside threats and fiscal problems enhanced the bargaining power of those in parliament. The creation of new constitutions in the years after the Vienna Congress also reflected what Buchanan refers to as constitutional moments: the governance of new territories had to be incorporated into existing institutions, which would have necessitated adjustment to representation in the parliaments and in the local governments of the new territories.

Overall, institutional conservatism was more evident in the new constitutions than liberalism. The preexisting constitutions, naturally, reflected the interests and ideologies of the preexisting political elites of the sovereign territories. These interests did not usually change as larger territories were formed through aggregation. Moreover, the old institutions had worked reasonably well, especially for the sovereign and nobles, for a long time. Thus, for the most part, constitutional reforms tended to affirm and clarified preexisting procedures of governance rather than create new procedures whole cloth. After the French retreat, the old institutions were largely restored and refurbished although significant changes in territory and civil law remained (Caldwell 1997:17; Schmitt 1983: 19-21).

To the extent that the constitutions adopted in the years between 1815-20 were more liberal than the procedures they replaced, this was at least partly because of economic and military crises that increased the bargaining power of parliament, and the success of liberalism which had begun to be accepted within some royal families and advisory councils, producing a few "enlightened" kings.

Liberal arguments could also be used to advance other economic and political interests as well as ideological ones. For example, both liberalism and the political interests of those with authority within the central governments of the regional governments could be advanced by ending many long-standing feudal practices. Reducing the monopoly power of guild and local elites weakened urban centers as organizations for opposing centralized authority. Increasing freedom for the serfs and

other farm laborers weakened the landed aristocracy by reducing their income from farming, at least in the short run.

The absence of radically new constitutions provides evidence that bargaining among those with the authority to adopt reforms, rather than revolution, determined the details of the new constitutions. It did not imply that liberal ideas (or enlightenment ideas) were not present in Germany. Both the presence and the effects of liberal arguments were clearly evident in Germany during the late 18th century and throughout the 19th century, and liberal political parties were often determined German political and economic policies.

Economic Liberalism and Economic Growth

There is a good deal of evidence that economic liberals and their ideas had significant influence over public policy formation in the German confederation, and, perhaps more so at the level of duchy governance. Liberal economic theories could be accepted even by sovereigns, in contrast to liberal political ideas. If the new theories that supported more open markets were believed, it is clear that such reforms could advance the interests of political elites, and so were more likely to be adopted.

Liberal economic reforms could produce new tax revenues for sovereigns, reducing their need for parliamentary consultations. Economic reforms also tend to open up investment opportunities for the wealthiest members of every state, whose members are normally well represented in parliament. Moreover, liberal economic reforms could easily be reversed by the person who adopted them.

As a consequence, many economic reforms were adopted throughout the confederation, partly out of narrow self-interest and partly because liberal ideas were becoming broadly accepted. For example, in 1801 Bavaria introduced freedom of religious conscious, in 1801 compulsory education, and 1807 ended or at least greatly reduced its internal tariffs. Prussia ended serfdom in 1807, reduced the tax preferences of nobles in 1810, and ended internal tariffs in 1818 (Prussia consisted of several duchies under common rule). In 1828 Bavaria and Württemberg created a customs union. And in the same year, the states of Saxon, Hanover and Brunswick created a commercial union. In 1833, a new customs-union (*Zollverein*) was created and joined by

most of Germany (Fulbrook 1999:112-3). The custom's union did not eliminate all intra-Germany trade barriers, but had the effect of creating a German economy.¹⁶⁸

In 1835, the first rail road (between Nuremberg and Furth) was established, followed by many others including one between Leipzig and Dresden in 1837. New roads were build and old roads were paved. Canal networks were extended and steam boats began to operate on the Rhine (Fulbrook 1999: 113-4). As economic theory predicts, an expanded market allows previously unrealized gains from trade to be realized, increases specialization, and generally increases prosperity.

"Now for the first time the exertions of the commercial classes during the eighteenth century brought forth ample fruit, and Germany regained the financial ability to undertake large commercial enterprises. Important industries flourished and traffic was increased many-fold, while the middle class gained a clearer perception of the influence of foreign and domestic policies on economic conditions." *New Advent Encyclopedia*.

The fact that efforts to press for economic reform were successful, suggests that politically active groups favoring liberal policies had directly or indirectly persuaded those with the authority to adopt liberal economic policies. In some cases, the relevant economic interests would have been directly represented within the duchy parliaments and royal advisors. In the sphere of economic policy, sovereigns, as Olson (1993) argues, have an encompassing interest—as long as their sovereignty is not at risk. Liberal economic theories, together with the observed experience of countries that had already liberalized their internal markets, made the liberal case for economic policy reform persuasive.

German Liberalism at the Turn of the Century

As evidence of the existence of German political liberalism, a few late eighteenth century quotes from Kant and Humboldt are included below. Kant's 1793 essay "On the Relationship of Theory to Practice in Political Right (Against Hobbes)" provides a very clear statement of liberal principals of political economy, which clearly places him with the liberals, and clearly to the left of Hobbes, whose theory of the state based on popular sovereignty became one of the main strands of liberal political theory.¹⁶⁹

According to Kant:

¹⁶⁸ Fetscher (1980: 379) reports, for example, that trade barriers prevented news papers from realizing economies of scale. For example the price of the Seeblatter cost doubled as it left its town of publication (Konstanz) for other parts of Baden, and doubled again as it crossed state boundaries. "Increases of 500-600 percent were not uncommon when several state borders had to be crossed."

¹⁶⁹ Although Kant's *Critique of Pure Reason* is often used to classify him as conservative or anti-enlightment scholar, this confuses modern politics with nineteenth century politics. In the eighteenth and

The civil state, regarded purely as a lawful state, is based on the following a priori principles: the freedom of every member of society as a human being, the equality of each with all the others as a subject, the independence of each member of a commonwealth as a citizen.

No one can compel [a person] to be happy in accordance with his conception of the welfare of others, for each may seek happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else within a workable general law--i.e. he must accord to others the same right as he enjoys himself.

These are, of course, the core beliefs of all political liberals. On the other hand, Kant, like Hobbes, places the sovereign above the law and does not accept citizen's right of rebellion.

For he alone is not a member of the commonwealth, but its creator or preserver, and he alone is authorized to coerce others without being subject to any coercive law himself.

Whether Kant believed the latter was compatible with the former is not totally obvious. Germany was not, of course a liberal state at the time he wrote (nor was France or England at the time Hobbes wrote). In proclaiming limited sovereignty for his own sovereign or arguing in favor of the right to rebel when a sovereign violates the "a priori principles of a civil state," Kant would have been liable for state sanctions up to and including treason. Even an important philosopher knows when to curb his pen.

The writing of Kant's colleague Von Humboldt appears to be less inhibited, but Von Humboldt arranged to have his work on political theory published after his death, which occurred many years after his work was penned.

A State, then, has one of two ends in view; it designs either to promote happiness, or simply to prevent evil; and in this latter case, the evil which arises from natural causes, or that which springs from man's disregard for his neighbor's rights. ...

If even to behold a people breaking their fetters asunder, in the full consciousness of their rights as men and citizens, is a beautiful and ennobling spectacle ...

It must be still more fair, and full of uplifting hope, to witness a prince himself unloosing the bonds of thralldom and granting freedom to his people,—nor this as the mere bounty of his gracious condescension, but as the discharge of his first and most indispensable duty. Von Humboldt (1792) *The Limits of State Action*.

Von Humboldt supports both the revolts of repressed groups and also efforts by enlightened kings to reduce repression throughout their kingdoms.

Confederal Censorship Laws

Censorship laws and laws against public assembly discouraged popular demonstrations throughout German were among the first confederation rules adopted (the Karlsbad Decrees of 1819). These laws were not opposed to all reform movements, but targeted liberal and radical political reforms. Consequently, efforts to press for economic reforms could be done in public through small organized groups, universities, and newspapers without running a foul of the prohibitions on political gatherings and political publications. Publications supporting economic reform do not directly violate censorship law, because they do not:

threaten or violate the integrity of the German Confederation, the integrity and security of the individual confederate states, ... the maintenance of freedom and inner peace of Germany ... or aim at a democratic alteration of the Bund (Paragraph 10 of 1840 censorship instructions, from Fetscher 1980: 385).

Open support for greater parliamentary power or extended suffrage would clearly violate such laws

Although censorship laws inhibited public discussions--as they did elsewhere in Europe—political liberals remained active in Germany in the early nineteenth century, perhaps as much or more so than in England. For example, in 1832, 25,000 persons assembled at the Hambach Festival for music making and political speeches favoring

nineteenth centuries liberals generally criticized the existing aristocratic order, which based on family privilege and status, and pressed for reforms that broadened opportunities. Methodologically, academic liberals relied upon reason—and often rather dry prose—rather than theology, historical precedent, or deference to scholars of the distant past to make their arguments. Conservatives of that time period often criticized reason, but usually for theological and deferential reasons, after all "god knows best." However, Kant's critique is not theological or historical, but rather a carefully crafted rational argument that attempts to demonstrate that reason has limits. The methodology of the critique is "liberal" as are many of the conclusions.

popular sovereignty, freedom of the press, and republican forms of government (Fulbrook 1999, 109).

Such a large gathering did not, of course, pass unnoticed., and once again the confederal diet (the *Bundesversammlung*) could agree on new policies. Such republican ideas as well as large popular assemblies in support of them were clearly not in the interest of duchy sovereigns, whose interests were well represented in the diet. The confederal assembly, thus, adopted a new series of national laws (which strengthened the Karlsbad Decrees) during the next few years that forbid large popular gatherings, imposed stronger censorship, and discouraged the provincial diets from exercising too much power..

The central government, itself, had little ability to enforce such laws, because the member states were sovereign entities, but the new laws provided local sovereigns with a convenient rationale for suppressing ideas and groups that threatened their political and economic interests.¹⁷⁰ The new laws, consequently, were well enforced, and had a lasting effect on political developments in Germany.

Political parties could be organized and campaign for elective office on economic policies and nationalism, and many such liberals were elected to the state parliaments on such platforms. Liberal groups that favored both economic and political reforms could discuss both types of reform in private, but could only support economic reforms in public. The censorship laws thereby pressed a good deal of political discussion "under ground," as side discussions in organizations created for other purposes, and at informal gatherings.

Such thoughts did not vanish from the minds of those with time to think about politics, but they did largely disappear from public discussion and print. They did not totally vanish from public, as in Hanover in 1837 and Baden from 1837-44, but for the most part constitutional debate remained a private matter discussed informally or secretly.

Interest Group Support for Liberal Political Reform, 1848

Kuran (1989) notes that such private beliefs tend to become publicly expressed when the risks from doing so diminishes. Given that the need for public expression and risk aversion varies within every community, who speaks out and when also tends to vary a good deal. He also argues that the risk associated with the public expression of such "private truths" tends to fall as the number of people expressing similar beliefs in public increases. In this way, a sudden wave of public demonstrations—or a revolution—may be generated through a snowball effect of successively less intense and/or more risk averse proponents of change join others who are already voicing dissent. Kuran's theory, in conjunction with German censorship law, provides a good explanation for the "revolution of 1848" within the German states.

In the period between 1847 and 1849, a very large number of places in Europe turned out for large scale demonstrations favoring political reforms of various sorts. In a few places, violence—as opposed to unlawful behavior—resulted. For example, in France, a moderate king abdicated out of fear of a new French revolution. Metternich resigned and left for safer ground and the aging monarch proposed a new constitution as violence emerged in Vienna and eastern parts of the Austrian empire. Outside of France and Austria, however, demonstrations were relatively peaceful, although outspoken and clearly far larger than previously observed. Such public assemblies were "revolutionary" in the sense that they were illegal in most places, and rule following behavior was the norm rather than the exception for the largely middle class folks participating in them, but they were not revolutionary in the sense of large scale armed rebellion.

The demonstrations in Germany had many themes; but by most accounts, liberal themes dominated. Demonstrators pressed for constitutional governance, an expanded influence of public policy through parliament (restoration of estate powers), expanded suffrage. "Radicals" insisted on universal suffrage, education reform, expanded poor relief, and redistribution of wealth. Others lobbied against free trade and for a restoration of the old trade barriers.

¹⁷⁰ In spite of the weakness of the central government and the sovereignty of the member states, historians normally attribute these repressive policies to Metternich, foreign minister and chancellor of Austria, who presided over the early meetings of the Confederal assembly. Metternich, of course, had been one of the principal architects of the confederation itself during the Vienna conference. Such laws were not unique to Germany. Similar laws were passed to suppress demonstrations in support of liberal political reforms in other countries, including England, as noted above. Local enforcement of the confederal laws varied significantly, as for example, Baden assured somewhat greater freedom of the press than in other duchies through its implementing legislation (Fletscher, 1980).

In the political circumstances of 1848, it was not clear to state rulers whether what they observed was truly a precursor to revolution or simply the release of bottled up political dissent. After all, many had never seen public dissent, because of the success of laws designed to curtail such opinions. In an effort to diffuse tensions, sovereigns often appointed liberal leaders from their duchy parliaments to their cabinets and official discussions of major constitutional reforms were undertaken both at regional and national levels. The confederal diet authorized a Germany-wide conference, a pre-parliament, to discuss further reforms (*Catholic Encyclopedia*, 66). These tactics proved successful, and most demonstrators headed home to await reforms. The demonstrators who remained were forcibly dispersed—with many deaths in Prussia—but no civil war emerged in Germany.

Constitutional Negotiations in 1848-49

Suffrage for representation at the constitutional conference to be held in Frankfurt was based on wealth or tax payments as the case for the duchy lower chambers. Turnout was small, and the result was an assembly composed of largely upper and middle class liberals (Fulbrook 1999:119). The conference, itself was important, because it was the first elected body for Germany as a whole. The results were less than hoped for. The conference met from May 18, 1848 through the spring of 1849.

The elected participants had the power to propose reforms rather than to adopt them. They none the less, engaged in serious discussion and constitutional negotiation. A doctrine of fundamental rights was published on December 28. A rough agreement for a constitutional monarchy for Germany with an elected parliament and ministry responsible to parliament emerged early in 1849, and the German crown offered to the King of Prussia in late Spring. Whether Germany would include the Polish parts of Prussia, Austria, or the German speaking parts of Denmark were never really settled. These involved religious as well as geopolitical divisions, and stable compromises could not be found. Other issues also remained unsettled. The King of Prussia refused the

constitutional bargain offered, and so the conference ended in May with little effect on Confederal governance.¹⁷¹

In the end, it was far easier to agree that constitutional reform is necessary than to agree on specific changes, even within a single political movement (Fulbrook 1999: 120-21). The Frankfurt convention provided important German-wide discussions about constitutional reforms and unification, although little in the way of constitutional reforms.

The Prussian Constitution of 1850

The liberal ministers within duchy governments, in contrast to the Frankfurt constitutional conference, could directly press for policy and constitutional reforms. And in many cases, new written constitutions were drafted and old constitutions revised. In many cases, liberal reforms simply meant that parliaments regained or enhanced their medieval rights of veto over taxation and legislation. In other cases, significant changes were made to the procedures through which public policies were adopted, as in Prussia. Prussia's new constitution was drafted under the king's instruction and adopted in 1850.¹⁷²

The Prussian constitution is of some interest as an effort to construct a relatively liberal constitutional design, that successfully protects preexisting political interests. The new Prussian constitution was based on royal sovereignty rather than popular sovereignty, as most constitutions were in Europe at this time. The king retained control of the army and foreign policy. Cabinet ministers were answerable to parliament, but only for constitutional infractions. The reformed monarchy included a bicameral parliament with veto power over taxes and legislation (Caldwell 1997: 16-17). The upper chamber represented noble interests. Thus, it could be said that Prussia's new constitution largely return to old medieval forms.

None the less, by the standards of mid-century Europe, the new constitution was a liberal document. The new lower chamber was elected through universal suffrage, as insisted on by liberals, which made Prussia among the first to adopt broad suffrage rights in Europe. However, the link between votes and representation was unusually

¹⁷¹ For example, censorship remained tight. This is evident in the number of overtly political books and pamphlets published during this time. Harris (1987: 441) suggests that less than 1 percent of published pamphlets and books in Germany during the 1848-1871 period can be classified as political, even though much of what was published was done so anonymously.

¹⁷² The constitution of 1850 replaced a somewhat more liberal one adopted in 1848, which in turn had replaced a traditional estates-based assembly that had been worked out during the 1840's but only used in 1847. Sovereignty in all three cases lie with the king, Frederick Wilhelm IV, and the constitutions were, as commonly the case in this period, formally promises of the crown (Caldwell 1997:17).

effective at protecting preexisting interests. In most mid-century constitutions, the link between suffrage and representation was jointly determined by suffrage law and apportionment of seats among electoral districts. Suffrage law determined which individual interests would be represented by determining who got to vote, while the distribution of seats among regions determined the relative importance of regional interests. The right to vote was normally determined by minimum tax payments, as it was in most German states that held elections, and normally somewhat less than 10 percent of adult males secured the right to vote. In some systems, most voters were not represented at all in "their" parliaments.

In the Prussian constitution of 1850, all voters were represented, or at least participated in selecting representatives. *Rather than suffrage, it was representation rather than suffrage that was determined by tax payments.* The wealthiest taxpayers, who paid 1/3 of Prussian direct taxes received one third of the seats, the taxpayers paying the next third of direct taxes received a third of the seats, and the remainder of tax payers received the last third (Fulbrook 1999: 126).

In this way, the King of Prussia and his advisors could accept essentially universal male suffrage without ceding power to the poor. Industrialists and nobles were well represented in the first third. Liberals were generally in favor of less universal suffrage at this point in time, but would be well represented in the middle third. The left-liberals and social democrats were pleased to have suffrage extended to the working class. Overall, the Prussian constitution of 1850 formally met and exceeded most of the institutional demands of mid-century liberals, which was not an accident, but clearly a well crafted compromise with liberal leaders. Yet the institutional implementation of liberal criteria for constitutional design clearly protected the interests of those who had previously determined public policy in Prussia..

The architecture of Prussia's new constitution turned out to be important for the future of Germany, not because it was widely copied, but because the new Prussian government became increasingly important in German and world history. Its military power allowed the Prussian government to create, or at least catalyze, the formation of the first Germany-wide central government. The interests represented in the Prussian parliament, perhaps magnified by particularly strong individual who held senior posts, exercised considerable influence over the new central government.

This influence was itself partly the effect of another new constitutional design, which built upon preexisting institutions and took account of liberal interests, but which somewhat over-weighted Prussian representation. The latter allowed the Prussian king and the wealthiest taxpayers of Prussia to dominate German policy making in the period between 1867 and World War I.

3. Unification and a New Constitution for Germany, 1866-1871

The creation of a new central government did not emerge after the 1848 constitutional conference, nor did it emerge from internal constitutional reform during the next two decades. Obviously the sovereigns of the German duchies preferred decentralized authority to any more centralized constitution considered, and thus their representatives at the confederal diet never agreed to increased centralized policy making authority. Consequently, the confederation after 1848 continued more or less as in the past, with relatively few decisions being made, although with increasing conflict between Austria and Prussia.

The confederation ended with Prussian-Austrian military conflict in 1866 over German speaking territories taken from Denmark in 1864. Prussia, unexpectedly, won the war, and enlarged its territory and made it contiguous by annexing the formerly Danish territory (Schleswig-Holstein) plus the duchies of Hanover, Hesse-Kassel, Frankfurt, and Nassau. Subsequent military threats from France (Napoleon III) together with increased support for unification lead and encouragement from Prussia, induced the southern duchies to join in 1871 (Fulbrook 1999:128). The military aspects of unification are beyond the scope of this volume, and generally wars are not central to the analysis. Wars rather than constitutional conventions normally determine the boundaries of the territories governed, although they do not often induce significant constitutional reform.

In this case, however, the Austro-Prussian war indirectly lead to a new more centralized German government based on a new constitution. Insofar as the new constitution was not imposed through force of arms, the constitutional negotiations and consequent bargaining power of the member states of the new German federation are of interest.

The Austro-Prussian war splintered the confederation. Bismarck proposed a new Northern confederation and with this in mind a proposed constitution was sent to

potential members at approximately the time of Prussia's withdrawal from the old confederation in June of 1866.

In August a formal treaty of confederation was laid before the remaining northern duchies and independent cities. Sixteen states signed the treaty in Berlin on August 18, who were joined shortly by the rest of those "invited" to join. The signatory states ratified the treaty, adopted the requisite common election law, and sent their representatives to the new Reichstag in January of 1867 to engage in constitutional negotiations.

The work was quickly done, and the "final" constitution was completed in February and ratified by the member state governments, who passed new duchy laws that incorporated the relevant provisions of the Confederal constitution into their own state constitutions (Hudson 1891).

Constitutional Negotiations under Bismarck: 1866-90

Although, procedures of negotiation, amendment and ratification were clearly proper, the recent Prussian military victories and annexation of significant duchies, may have influenced the state governments to accept the treaty of confederation and its constitution as a face-saving method of surrender. The extent to which this is an accurate assessment or not can be determined by examining the constitution itself to determine the extent to which it was completely one-sided or not.

The proposed constitution of the Northern Confederation consisted of a sovereign king (Kaiser or emperor) a ministry, and a bicameral legislature. The king (who would come from Prussia) retained control over the military and foreign policy. The king also appointed the ministry, without parliamentary review, although the chancellor was subject to parliamentary oversight. The members of the federal council (*Bundesrat*) were appointed by member state governments, and had the power to initiate and veto all legislation. In this it was similar to the diet of the German confederacy that it replaced. The second chamber (*Reichstag*) was a new directly elected chamber with veto power over taxes and legislation but no formal power to initiate or amend legislation or budgets. The proposal was clearly included provisions for the prosuffrage groups, including most liberals, in the various member states, and also provisions that protected the interests of member state sovereigns.

Elections were to be based on essentially universal male suffrage by secret ballot, based on the 1849 suffrage law of Prussia. Voting in the federal council would be

weighted roughly by population, which given Prussia's recent expansion of territory, gave its appointed representative 17 of 58 votes in the chamber. No other member had more than 6 votes, and most had only 1 or 2 votes (Renszsch 1989:20-1).

It was this somewhat overweighing of Prussian voting rights in the federal chamber together with the absence of reapportionment in Prussia after the annexations that allowed its wealthy industrialists and landholders effective control of the federal council. And it was through the king's power to appoint ministers—given the king's inclinations to select only Prussians as ministers—that Prussia dominated the government, itself. However, Prussian influence would in any case have tended to be disproportionate to that of the other states, because Prussia was by far the largest of the Northern signatory states. And, it was far larger than the southern states who remained outside the new confederation until 1871. It is important to note that the proposed constitution was not entirely a "take or leave" offer worked out by Prussian political leaders and presented to the other northern states.

Significant amendments were incorporated by the first Reichstag in 1867. For example liberal members of the constitutional sessions of the Reichstag lobbied for and secured amendments that broadened and strengthened the powers and privileges of parliament:

Reichstag members were granted legal immunity, the press was guaranteed the right to report Reichstag speeches regardless of content, ... time tables for elections following a dissolution were accepted, ... Reichstag ratification of certain types of treaties and ... real power over federal taxing and spending were adopted (Mork 1971:65-66).

It was the right to publish Reichstag speeches that allowed public debate to take place on many controversial issues, in spite of continued censorship of books, newspapers, and universities. These early successes suggest that the Reichstag was not entirely powerless as often maintained. Moreover, the elections for the Reichstag were reasonably fair and competitive. This was evident in the large number of groups that obtained seats. It was at the first meetings of the Reichstag that national political parties began to take shape, as for example, the National Liberal party was established in February 27, 1867.

The program of German unification, if not Bismarck's constitution, was widely supported among nearly all groups, including the left of center liberals, progressives,

and socialists. In 1871, the southern states signed similar treaties with the Northern Confederation--with some special provisions for Bavarian independence--and the German state became a reality rather than a dream of nationalists of all stripes. Overall, the new federal constitution was similar to many others in Europe at the time, apart from the role of the Prussian state government.

Liberals were already divided in their support or opposition to Bismarck's constitution, at the party's inception, and soon splintered, which clearly reduced their subsequent influence (Mork, 1971: 64).

Constitutional Bargaining in the Bismarckian Second Reich

By 1871, many kings had begun to relinquish their formal powers of appointment and control over foreign affairs in negotiations with parliament over budgetary matters. This did not happen in the new Confederal Constitution, in large part because of the particular alignment of interests within Prussia. The King, his chancellor, his ministry, and Prussia's wealthiest tax payers shared both an encompassing interest in advancing elite Prussian interests and had very similar views about how this could and should be done. Moreover, the Reichstag had traded a good deal of its veto power away in 1874.

This is not to say that opportunities for constitutional exchange did not exist under the 1871 constitutional arrangements and interests represented in the government, but it is to say reforms would generally have to advance Prussian interests to be adopted.

For example, economic liberals were able to pass significant economic reforms that eliminated remaining feudal and mercantilist restrictions, abolish usury laws, establish a legal basis for corporations, reduce restrictions on the free practice of crafts, to remove restrictions on travel within Germany, and reform the judiciary. Freedoms of parliamentary debate and freedom of the press were broadened. In Prussia, itself, significant reforms of local government which reduced noble (Junker) hereditary rights were adopted with support of the King, who created sufficient number of new peers that it could be passed in the Noble chamber. And, although, ministers could not

formally be sanctioned by the Reichstag, the criticism from this chamber often led to ministerial resignations as in 1867, 1869, and 1872 (Mork 1971: 67-8).

Many "anti-liberal" restrictions were also adopted by the new Reichstag, often with support of liberal party members. For example, Liberals accepted a substantial weakening the Reichstag's veto power over the military budget by accepting a 7 year budget cycle (about 90% of the central government's budget) in rather than face new elections in 1874, which they feared losing over the "national defense" issue (Mork 1971: 70-73). Here it was "hard ball" and effective politics, more than institutional design or coercive threats that allowed Bismarck to get his way with the Reichstag, as was often the case.

This could also be said of Bismarck's last major reform, the social security program passed in 1889, with the encouragement of the new King Wilhelm II.¹⁷³ As a master of political argumentation centered on national security, he naturally used a national security argument to support state pensions: "I will consider it a great advantage when we have 700,000 small pensioners drawing their annuities from the state, especially if they belong to those classes who otherwise do not have much to lose by an upheaval and erroneously believe that they can actually gain much by it" (quote taken from Riminger 1968: 414). Bismarck carried the day in the *Reichstag* over the objections of liberals and socialists with the support of catholic centrists and nationalist conservatives. (In this case, the left of center parties evidently voted against their own constituent interests as a means of keeping a unifying issue for future campaigns; Riminger 1968: 414-415.)¹⁷⁴

The new social security program was, of course, by today's standards a modest program, but the durability of the basic structure of Bismarck's social welfare program with its "pay as you go provision" made it quasi-constitutional in nature. Indeed it is one of the few parts of the Bismarck's constitution program that survives to the present, and it is certainly its most widely copied provision.

¹⁷³ There was a short reign between Wilhelm I and II by Frederick III in 1888, but Frederick died within a year of office. Wilhelm II was the son of Frederick III who was the son of Wilhelm I.

¹⁷⁴ Although universal suffrage allowed social democrats to run for office, socialists were generally blocked from political assemblies, and did not have many votes within the Reichstag at this time in any case. (Fulbrook 1999: 133-4).

*Constitutional Exchange in the Second Reich after
Bismarck*

The model of constitutional exchange developed above implies that industrialization tends to increase the relative wealth of parliament and transform the potential tax base. This allows parliament to use its power of the purse to expand its role in policy formation. The Reichstag had traded much of its veto power away in 1874, and so expansion of its control over public policy was unlikely. However, as the scope of other central government activities increased, its remaining power of the purse increases in importance. The adoptions of social security and Bismarck's departure suggests that there should be evidence of a gradual shift in authority to the parliament after 1890, given the rapid industrialization that took place in Germany between 1870 and 1910.

Such shifts in authority do not in principle require ideological support, as argued for suffrage reform. An effective prime minister or chancellor needs reliable majorities in parliament to advance his (and the king's) agenda, whatever that agenda might be. (Recall that in the German case, popular suffrage came well before Parliamentary supremacy in contrast to the other countries analyzed in historical narratives, so it is parliament's authority rather than suffrage expansion that is required to complete the shift to parliamentary democracy.) In Fulbrook's words:

Wilhelmine Germany was characterized by rapid industrialization, by the steady rise of the SPD, symbolizing increasing social confrontation, by unstable parliamentary political alliances, with increasingly important pressure group politics. (1999: 137)

It was not, however, until the death of the King Wilhelm I at the age of 91 in 1888 and the departure of Bismarck at the age of 75 in 1890, and the weakening of the "rye and iron" Prussian alignment of interests that shifts of authority from the crown to parliament became obvious

A general increase in the importance of parliament seems clear in the post 1890 period. Chancellor terms of office were much shorter than before. As for example, Caprivi's term lasted only from 1891-94, and his resignation was in part induced by a failure to obtain Reichstag approval for a army reform bill in 1892. The Hohenlohe government lasted a bit longer, from 1894-1900, in part because it was more successful at building coalitions in the Reichstag (Sammlungspolitik). However, following a

number of crises, Hohenlohe retired in 1900. Bülow remained in office a bit longer, from 1900-1909. However, budget deficits increased as conservatives refused to raise taxes to support his aggressive military build up. He subsequently resigned in 1909 when his coalition fell apart over fiscal reform. Bülow's successor, Holleweg also struggled to find a stable coalition of support for the expanding military expenditures. In 1912, the social democrats (SPD) became the largest block in the Reichstag, which made coalition politics even more difficult (Fulbrook 1999: 142-143).

The turn over of chancellors in the 1890-1912 period suggests that the importance of parliamentary majorities had increased substantially in the 1890-1912 period (or alternatively, that Bismarck's success came from effective coalition building talents that his successors lacked). Indeed, it could be argued that Germany's entry into W.W.I was partially a method of circumventing parliament—insofar as the crown continued to have control over the military and foreign policy during emergencies.

*The End of the Second Reich and the Final Steps to
Parliamentary Democracy*

In many other constitutional systems, fiscal crises like that of Germany were resolved by replacing royal ministers with ministers chosen from major parties. This allows majorities to be assembled in parliament and legislation to be passed. Evidently, this obvious solution was not possible in Germany in 1900, that a more flexible and insightful king and Reichstag leadership might have been able to realize.

After the Great War began, the increasingly strident party divisions within Parliament (between nationalists, Catholics, liberals and social democrats) made such bargains difficult to obtain. This may reflect chance elements of persons who found themselves in places of power in Germany—proud inflexible men—or it may have been the case that such bargains were more difficult to make in the Reichstag than in other monarchies because universal suffrage made the German party structures more complex with less in common.

In any case, the final steps to parliamentary democracy were not realized prior to the war, although clearly it was considered. Subsequently, a terrible war was fought and lost. Towards the end of the war, in 1918, the obvious compromise was offered. The new chancellor, Prince Max von Baden proposed constitutional reforms including the reform of suffrage (ending the three class system of Prussia), ministerial responsibility

to parliament, and control of the armed services by civilian government. These were all accepted by the Wilhelm II. However, parliament insisted that he abdicate in favor of one of his sons, but he refused (Fulbrook 1999: 157). Even at this late date, the necessary constitutional consensus again eluded negotiators.

As the German war effort collapsed, governance throughout Germany collapsed as well. The king finally abdicated, and the new chancellor resigned after transferring his office to the social democratic leader of the Reichstag (in a somewhat extra-constitutional manner). A new constitutional convention was called for, its members elected and a constitutional convention took place in Weimar. There, a new republican constitution was negotiated, written, and approved.

The new Weimar republic replaced the king with a directly elected president with a seven year term of office and almost royal powers to appoint ministers, to dissolve parliament, call new elections and national referenda, and to rule by emergency decrees during times of crisis. Universal suffrage for men and women was also adopted along with proportional representation. The cabinet was responsible to government. The lander retained considerable local discretion. Germany was a finally a full parliamentary democracy, albeit now a republic rather than a kingdom.