

Chapter 16: Germany: Constitutional Exchange in an Emerging State during the Nineteenth Century

A. Introduction: German Decentralization and Sovereignty

The next three historical narratives are less obvious applications of the king and council model of constitutional reform. Two are cases not usually associated with gradual democratization, Germany and Japan. The other case is often considered a revolutionary state, the United States of America, although as shown in chapter 18, parliamentary democracy had substantially emerged at the colonial level well before its war of secession. These more problematic cases help to test the generality of the theory of constitutional reform developed in part I, a theory that is intended to explain more than the successful nineteenth-century democratic transitions of a few European constitutional monarchies.

The first of the difficult cases to be examined is Germany. The history of Germany in the nineteenth century is usually told with an eye on the twentieth century, a century in which German foreign policy led to two continental wars of mass destruction.³²⁷ That such a fate lay ahead was not evident to observers at the beginning of the nineteenth century, nor was it inevitable. Indeed, observers in 1800 would have been surprised by this prediction. Germany had a very weak central government in the decades before, during, and after Napoleon's invasion of the Holy Roman Empire in the late eighteenth century. The empire was less a government than a loose association of independent city-states and duchies linked by language, religion, and commerce. There was clearly a German culture during this period, but the existence of a German state was clearly debatable.

Germany's constitutional development in the late nineteenth and early twentieth centuries was marked by the formation of a new central German government, and its (partial) transition to parliamentary democracy was affected by an unusually large number of military events, as well as liberal shifts in ideology and economic development. As a consequence, this chapter differs somewhat from the previous historical narratives. It discusses more military events (although briefly) and also spends more time discussing "regional governments" than the other chapters. Many of the predictions concerning links among liberalism, industrialization, and the rise of parliament hold for

³²⁷ See Blackbourn and Eley (1984) for further analysis of how this assumption, as well as French and English comparisons that emphasize bourgeois revolutions, have led many historians astray.

the larger German duchies, such as Württemberg, Baden, Hanover, and Bavaria. Liberal influences are also evident in Prussia's development in the late eighteenth and early nineteenth centuries.³²⁸

In the German case, the nation-state formed incrementally along with its constitution. Partly as a consequence of this, much of its constitutional negotiation concerned decentralization, rather than parliamentary reform. The division of policymaking authority tended to shift from the member states toward the federal government, as civil and military codes were standardized and central government services expanded into new areas such as social insurance. A centralized government with the power to tax did not emerge in Germany until 1871, and this more centralized government was formally the result of a series of treaties among the duchies, although it was catalyzed by military events that took place in preceding decades.

Government leaders in Prussia played leading roles in the military events that led to the treaties and in the drafting of the constitutional treaties themselves. Prussia's government thus receives disproportionate attention in the first half of this chapter, as it does from most German historians. Military threats and regional politics clearly played major roles in the design of Prussia's constitution as well, although liberalism, constitutional bargaining, and institutional conservatism are also clearly evident.

The Holy Roman Empire as the First German Confederation: 962–1792

The Holy Roman Empire is said to have begun when Otto was crowned emperor by the Pope in 962. That first German confederation at its peak in 1200 included modern Germany plus large parts of Austria, Switzerland, the Netherlands, the Czech Republic, and northern Italy. The king (emperor) of that confederation was an elective office, although participation in elections were very

³²⁸ The term duchy is used below to describe a broad cross-range of small essentially independent territories that were formally parts of the Holy Roman Empire, not all of whom were ruled by the German equivalent of a Duke (herzog, landgrave, markgraf). The lesser German polities were not formally "duchies," because their territories were too small for that grand status, although they were normally ruled by a hereditary aristocratic family. The true German "duchies" were relatively large territories, such as Württemberg, Baden, Hanover, and Bavaria. A few of the late medieval duchies survive to the present-day as independent polities, as with Luxembourg, Monaco, and Liechtenstein. Dozens of much smaller German polities also existed. Other terms such as state or *länder* are also used by English historians when describing members of the various German confederacies, although such terms fail to reflect their relative importance or the hereditary nature of most of their chief executives.

limited.³²⁹ From 1438 through 1806, Habsburg family members were routinely elected to the office of Holy Roman Emperor by seven hereditary electors from relatively large and powerful duchies. Although the Habsburgs occupied the throne and did increase centralization somewhat, duchy governments were largely independent. This was very evident during the Protestant Reformation, in which large parts of the empire took the Protestant side, while others, including the Habsburgs, took the Catholic side of religious debates and engaged in warfare with each other. When these religious wars were settled in 1648, local sovereigns were “given” the authority to determine the religion of their territories.³³⁰ The treaty of Westfalia, which officially ended the war, also explicitly recognized the independence of the Netherlands and Switzerland, both of which had seceded from the empire in the previous century.

Governance in the Holy Roman Empire functioned at two levels. At the level of the central government, representatives from several hundred independent cities, duchies, and church territories met in imperial meetings at major cities in the empire, beginning with Nuremburg. These assemblies can be regarded as the parliaments of the empire (Reichtage or confederal diets). They were consulted on such matters as taxation, war and peace, marriage, and religion. The independence of the constituent states was assured by constitutional laws adopted in the sixteenth century, which implied that imperial policy effectively took the form of agreements (treaties) among the member states and imperial “advice” from the central government (rather than enforced edicts). At the local level, sovereigns met with their own assemblies of important families and organizations (*landtage*) where similar matters were discussed. These assemblies often had veto power over new taxation and normally could propose new legislation. In some cases, policymaking authority was divided between the early parliaments and sovereigns, resulting in a form of divided governance termed a *Ständestaat* (Fulbrook 1999: 26–27, Holborn 1959: 25–36).

³²⁹ The electoral college established in 1356 consisted of just seven electors, who represented the major regions of the empire, the boundaries and method of inheritance of which were codified at the same time (by the golden bull). The elections normally took place in Frankfurt, and the pope normally crowned the emperor in Aachen, although Rome was not normally part of the empire. Nuremburg was the (first) site for the confederal assembly of the empire.

³³⁰ What the English would refer to as dukes, barons, and counts were essentially independent sovereigns in the German confederation, rather than part of a well-ordered aristocratic hierarchy. German titles reflected the size of the territories ruled, rather than their position in the hierarchy. This *de facto* independence of sovereigns within the Holy Roman Empire is 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.

The highly decentralized governance of the Holy Roman Empire remains physically evident today in the very large number of small German cities and towns with royal architecture and local defense structures: medieval palaces, formal gardens, castles, and remnants of city walls. In more centralized governments, such structures tend to be concentrated around the national capital and territorial boundaries, as in England, Sweden, and France. It bears noting, however, there are relatively few “parliamentary” buildings in German old towns, which suggests that the baronial diets met relatively infrequently in government buildings designed for other purposes. In republics, such as the United Provinces of the Netherlands, public buildings and official residences in that period tend to be more modest in scale.

According to the model of parliamentary reform developed above, the tax veto power of national and duchy parliaments causes the distribution of policymaking authority to shift between the local parliament and sovereign, as relative wealth varies, as the persons involved in policy negotiations vary, as external threats vary; and as theories of the state vary. Such changes often create new gains from exchange among policymakers; because such “shocks” change the interests of those with the authority to shift policymaking authority at various policy margins. In federal and confederal systems similar opportunities to trade tax revenues for political authority may emerge with respect to the distribution of policymaking authority between central and regional governments. In both cases, constitutional bargains may be reached that involve shifts of policymaking authority in exchange for temporary or more permanent shifts in tax revenues and/or the tax base.

A variety of constitutional exchanges are evident at the duchy level in much of the Holy Roman Empire throughout most of its history. King-and-Council-based governments were commonplace, and the duchy sovereigns and their duchy assemblies (and/or councils) routinely bargained for control over public policy (Holborn 1959: 25-26). Decentralization issues were also addressed as towns negotiated for freedom from duchy regulations and taxes. During military crises authority tended to shift in favor of the central government, because the demand for central government (and royal) revenues increases at the same time that demands for central government (and royal) services increases. Conversely, during times of peace, local autonomy tends to increase for relatively wealthier provinces.

During the seventeenth and eighteenth centuries, warfare and the shifts in commerce from overland routes to the Atlantic tended to reduce the relative wealth of inland duchies relative to those on the sea coast and also tended to reduce the relative wealth of those represented in parliament relative to royal families. The economies of most noble estates and many urban trading

centers grew relatively slowly in this period, although revenues from customs and associated excise taxes increased. This tended to increase the authority of the inland dukes relative to their parliaments, and the governments of the coastal provinces relative to the central government.

In the late eighteenth century, the economic tide reversed, and parliaments increased in importance at the same time that their economic policy interests shifted in somewhat liberal direction. As a consequence, a variety of liberal economic reforms were adopted throughout the confederation, and duchy parliaments became somewhat more important parts of government. For example, in 1801 Bavaria introduced freedom of religious conscience and compulsory education, and, in 1807, ended or at least greatly reduced its internal tariffs. In 1808 the Bavarian nobility traded new taxes for greater influence over parliament. Similar economic and constitutional bargains were concluded by the Prussian government in 1810–12, partly in response to Prussia's (initial) losses to Napoleon's armies.

The Vienna Congress and the (Second) German Confederation 1815–67

Napoleon's invasion of the Holy Roman Empire in 1792 defeated a broad cross-section of German regional armies over the course of 14 years, including the Prussian army in 1806. In the territories conquered, the French induced a variety of legal and constitutional reforms. The French introduced a new civil law (the code Napoleon) and eliminated feudal privileges, which, together with the larger polities, tended to increase commerce in a large part of present-day Germany. Most small German polities were merged into larger ones, and policymaking authority was centralized in the larger duchy governments. In southern and central Germany, Napoleon also created a new federation, the Confederation of the Rhine with a somewhat more centralized government than within the Holy Roman Empire. Napoleon also caused the new federation to secede from the Holy Roman Empire, at which point Emperor Francis II (of the Austrian Habsburgs) gave up the crown, and the Empire was essentially disbanded (Holborn 1964: 371–72, 387–91).

Napoleon's good fortune in war ended with his Russian campaigns in 1812, where a very cold Russian winter defeated and decimated the French army. A few years later, the remainder of the French republic's army was dispatched by a royal alliance of the English, Prussian, Austrian, and Russian armies. Defeat of the French army produced new possibilities for constitutional exchange within and among the major and minor duchy governments of the former Holy Roman Empire.

The Vienna Congress of 1815 was held after Napoleon's defeat by the great powers. Participants at the Congress negotiated and signed a series of treaties. Although a very large number

of governments played a role in the results and signed the treaties, most of the most important negotiation was undertaken by the “council of five” major European governments. The “council of five” included Great Britain, Russia, Prussia, Austria and, surprisingly, France. After the mergers induced by Napoleon and the Vienna Congress, the number of independent German polities was reduced from more than 300 to 42. Four were independent city states and thirty eight were autonomous duchies, including five territories that formally became German kingdoms: Bavaria, Prussia, Württemberg, Hanover, and Saxony.

One of the Vienna Congress’ geographic decisions and one of its constitutional decisions are especially important for German constitutional history. First, Prussia, as one of the great powers, gained new territory along the Rhine (including Cologne), which significantly increased its population and economic resources, and moved its economic and political center of gravity toward the West. Second, the Vienna conference established a new German confederation (Deutscher Bund), loosely based on the old Holy Roman Empire, but with a weak federal president, rather than a weak king or emperor (kaiser). The German committee at the Vienna Congress included Austria, Bavaria, Hanover, Prussia, and Württemberg. Negotiations took nearly a year, and the final draft was proposed by Baron Wessenburg (Nicolson 1946: 196-99).³³¹

Article 2 of the treaty founding the new confederation states that the aim of the confederation is to maintain “the *external and domestic security* of Germany and the independence and inviolability of the individual German states.” The new confederal diet, consequently, represented duchies, rather than German citizens, and was organized in a manner that tended to assure the independence of its member states, as had been true of the Holy Roman Empire. The new confederal government, like the old, also lacked significant power to raise taxes, although it was charged with the defense of Germany from internal and external enemies (Renzsch 1989; Fulbrook 1999: 101). Each of the member states selected a representative for the new confederal diet, who acted as an ambassador, rather than as an independent representative to a German assembly. There was no German citizenship at this time.

Austria was to appoint the president of the council and diet (article 5), which gave the Austrian chancellor Metternich (and Austria’s Habsburg family) considerable influence in the confederal

³³¹ Representatives from many other German duchies were also present in Vienna and were consulted regarding the constitutional architecture of the new German confederation. For example, Saxony (which lost 40 percent of its territory to Prussia), Hesse-Darmstadt, Luxemburg, and Holstein were also included in the final round of negotiations. Representatives of the major free cities were also admitted (Nicolson 1946: 197–9).

government through its subsequent agenda control in the council and diet. The new German confederal government met in Frankfurt. The council was a relatively smaller “sub-diet,” analogous to the college of electors within the Holy Roman Empire, in which 11 member states had one vote each, while the smaller states were grouped into six clusters that each shared a vote (for a total of 17 votes). There was also a larger confederal diet (with a total of 69 votes) that also used a weighted voting system to make policy decisions. The largest states had four votes each, while the other members had one or two votes (for a total of 69). Policy decisions in the diet required two thirds majorities (Ogg 1918: 195-6).

The decision rules of the diet reflected the fact that treaties require a broad consensus to be implemented. The interests of all the duchy rulers had to be taken into account if the confederal treaty was to be accepted by the member states. German politics in the first half of the nineteenth century, consequently, remained very decentralized. Armies were controlled and staffed by the duchy governments, and only small fraction of total government expenditures within the confederation’s territory was controlled by central government decisions. Austria’s relatively large influence in the new confederal government reflected the active role that its ministers (especially prince Metternich) played in the Vienna negotiations, rather than its force of arms.

B. German Confederation’s Member States and Liberalism: 1815–67

The duchy governments remained largely based on the king and council template, and many duchy parliaments retained their medieval veto power over taxation, as was true, for example, of the kingdoms of Bavaria and Württemberg. Several duchy parliaments, however, had given up most of their veto power over budgets and legislation in the previous century or so. For example, Prussia retained its royal council and regional parliaments, but the Prussian king had escaped from parliament’s veto power through tax reforms in 1653 and 1667, which increased standing tax revenues and allowed the king of Prussia to maintain an army even during times of peace (Fulbrook 1999: 77).

Several new duchy constitutions were developed after 1815, partly to adjust existing duchy procedures for the new territories governed, partly to reestablish local policymaking procedures after Napoleon’s defeat, and partly because the confederal treaty adopted in Vienna required the members to adopt a written constitution (article 13). Most member states, consequently, had written

constitutions from early in the nineteenth century, which satisfied a major constitutional demand by liberals in Germany, as in other parts of Europe.³³²

To the extent that the constitutions adopted in the years 1800–20 were more liberal than the procedures they replaced. Military threats had increased the bargaining power of parliament and the interests represented in parliament had changed in a manner that reinforced the case for liberal economic reforms. These factors were reinforced by liberal provisions of the confederal constitution, which included provisions for all citizens to be able enter the civil service (rather than only nobles), freedom for all citizens to migrate and purchase land within the confederation, and equal rights for Christian churches (Holborn 1964: 446). Greater openness would have somewhat constrained local government decisions.

After Napoleon, external threats were taken more seriously, which provided an additional rationale for reducing trade barriers that discouraged industrialization. In these circumstances, new taxes could also be traded for new legislative authority, as in Bavaria in 1808 and Prussia during 1810–15. Both political and economic liberalism had also begun to be accepted within some royal families and advisory councils and is said to have produced a few enlightened duchy rulers who pushed for liberal reforms for ideological reasons as well as economic and military ones. Liberal arguments were also, of course, used to support other military, economic and political interests as well, which suggests liberals were active in German politics at both national and duchy levels.

Baden's constitution of 1818 included a lower chamber of parliament elected under wealth-based suffrage. Bavaria's constitution of 1818 included a bicameral parliament with a noble chamber and an elected chamber selected largely on the basis of wealth-based suffrage, although an eighth of the seats were reserved for noble landlords and another eighth of the seats for the clergy. Württemberg's constitution of 1819 included a unicameral parliament representing the three estates (church, town, and country) that had considerable legislative and veto power, which was a common pattern for the other duchies in that period (Möckel 1979: 261–65, Ogg 1918: 275–81).

The four city states (Hamburg, Lübeck, Bremen, and Frankfurt) had republican governments based on a mayor and council format. Three of the city-states had bicameral parliaments. The second was directly elected via wealth-based suffrage. Members of the first chamber were elected by the second and served as the city's ruling council, although both chambers had authority over legislation and taxes. A mayor (*burgomeister*) would in turn be selected by the ruling council as its

³³² The requirement for written constitutions was clearly a compromise with German and Austrian liberals at the meetings in Vienna.

chairman. The city councils had control over executive and administrative appointments and played central roles in determining public policies (Moraw 1989: 117, Ogg 1918: 280-1).

Liberal constitutional reforms also took place after the territorial and confederal adjustments were made. In 1831 Saxony replaced an estates-based parliament with a two-chamber parliament; one chamber represented the old estates and the other towns and rural areas. The second chamber was elected through direct elections under wealth-based suffrage. Hanover adopted a relatively liberal constitution in 1833. There is also evidence of liberal influences in Bavarian constitutional developments, although liberals were somewhat more successful in the second half of the century. In mid century, liberal political coalitions often affected duchy and confederal German policies (Ogg 1918: 275–81).

Although liberals clearly affected many institutional details institutional conservatism was clearly evident in the duchy constitutions throughout the nineteenth century. The old political institutions had worked reasonably well for a long time, especially for the sovereign and nobles who were directly involved in writing new laws. Institution-induced interests and the rationality of institutional conservatism do not change very much as the size of one's territory changes. These conservative interests were buttressed by the central government's new responsibility for defending aristocratic forms of the king-and-council governance. The old duchy institutions were largely restored, adapted to their new territories, and modernized, rather than rewritten whole cloth (Caldwell 1997: 17; Schmitt 1983: 19–21).

Political Liberalism in Germany at the Turn of the Century

As in other parts of Europe, there was a significant body of political and economic liberal thought in late eighteenth and early nineteenth century Germany. As usual, there was no unique liberal position, but rather a broad range of arguments, persons, and organizations that supported reforms that would increase equality before the law, and/or support more open politics and markets. For example, Immanuel Kant's 1793 essay "On the Relationship of Theory to Practice in Political Right (Against Hobbes)" provides a statement of liberal principles of political economy that places him as a moderate within the liberal spectrum of his time. Kant argued that a civil state is based on popular sovereignty, civic equality, and liberty:

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 were the core beliefs of political liberals throughout the West. On the other hand, Kant, like Hobbes, grants the sovereign a monopoly on legitimate coercion and so 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. Although more liberal than appreciated outside of Germany, Prussia was not a liberal state at the time that Kant wrote (nor was France or England at the time Hobbes wrote a century earlier). In proclaiming limited sovereignty for his own sovereign or arguing in favor of a citizen's 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 those associated with treason. Even an important philosopher knows when to curb his pen.³³³

The political writing of Kant's colleague Von Humboldt published posthumously in 1851 appears to be somewhat less inhibited in its advice to sovereigns. Von Humboldt was a very successful member of a recently elevated noble family. He had served as a government official, was active in the founding of the University for Berlin, and had been involved in constitutional negotiations at the Congress of Vienna. His critique of Kant is natural rights based and argues that the sovereign's main duty is to promote liberty, human development, and happiness:

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.

³³³ Kant's *Critique of Pure Reason* is sometimes used to classify him as conservative or anti-Enlightenment scholar. This classification, however, appears to use today's political spectrum (or at least that of the late nineteenth century), rather than the spectrum of liberalism that existed in 1800. In the eighteenth and nineteenth centuries, liberals generally criticized the existing aristocratic order, which was largely based on family privilege and status, and pressed for reforms that broadened opportunities.

Kant's critique of reason 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 its conclusions. To place excessive confidence in the power of reason is itself irrational and often tends toward illiberal ideas and institutions (Hayek 1989).

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 [1792/1851] *The Limits of State Action*)

Von Humboldt arranged to have the *Limits of State Action* published after his death (1835), and so its publication occurred several decades after it was written.

Despite of the difficulty of organizing demonstrations in favor of constitutional reform in the German Confederation, there were occasionally large illegal demonstrations favoring liberal reform. For example, in 1832, 25,000 persons assembled at the Hambach Festival for music and making political speeches favoring popular sovereignty, freedom of the press, and republican forms of government (Fulbrook 1999: 109).

There is also evidence that German conservatives gradually adopted more liberal points of view as, for example, is suggested by the manifesto of the Prussian Free Conservative Party in 1867:

Absolutism has a glorious history in Prussia. Nowhere else in the entire world has this system of governance left a more indelible monument than in this state: the accomplishment of absolute monarchical power. But **the time of absolutism is past**. Today, it would destroy what it once brought into existence with creative force. Our people, like all civilized nations of this age, do not just need a **rightful share** in the **determination of their destiny** for their own satisfaction; the monarchy itself requires the cooperation of the people in order to fulfill its lofty mission. Only the crown of a free nation is due our monarch; **his throne rests most securely on the will of free men**.

Liberal Economic Reforms in the Early Nineteenth Century

Overall, more economic reforms were adopted than political ones during the first half of the nineteenth century. . Liberal economic reforms, in contrast to political reform, are more likely to advance the interests of political elites. Economic reforms create new investment opportunities for the industrial aristocracy, whose members were well represented in regional parliaments, because of tax-based suffrage laws and noble representation. Nonetheless, economic reforms often have political consequences. For example, increasing freedom for the serfs and other farm laborers tended to weakened the landed aristocracy by reducing their local authority and their income from farming, at least in the short run. Reducing the monopoly power of guilds and town monopoly privileges weakened older urban centers relative to new ones and the rural countryside. Moreover,

liberal economic reforms, as opposed to political reforms, can be easily reversed by the coalitions who adopted them if they don't work out as expected.

Partly because of such considerations, liberal economic reforms were widely adopted in the late eighteenth and early nineteenth centuries. For example, Prussia ended serfdom in 1807, reduced the tax preferences of nobles in 1810 and many aspects of the feudal estate in 1811, and ended internal tariffs in 1818. In 1828 Bavaria and Württemberg created a customs union and the states of Saxony, Hanover, and Brunswick created a commercial union. In 1833 a new customs union (*Zollverein*) was created and joined by most of the member states of the confederation (Fulbrook 1999: 112–3). The customs union did not eliminate all intra-Germany trade barriers, but substantially reduced those barriers relative to those confronting nonmembers and, thereby, helped create an integrated German market in which economies of scale in production and greater specialization could take place.

In mid-century a number of regional and national groups devoted to liberal economic reforms emerged. For example, in 1846 a German Free Trade Union was formed in Berlin by a group of businessmen led by John Prince Smith. By 1851 some 30 societies were affiliated with Smith's Central Association for Free Trade based in Berlin. Gatherings of proponents of free trade also occurred in Frankfurt in 1857 and in Gotha in 1858, where free traders and leaders of the cooperative movement founded a new Economic Congress, which remained an active lobby for free trade and other regulatory reforms for two decades. Proponents of free trade were also directly represented in national and regional parliaments, as in 1870 when Smith himself was elected to the lower chamber of the Prussian parliament (Henderson 1950). As a consequence of the activities of these groups, a broad range of German tariffs were reduced during the middle of the nineteenth century.

A variety of investments in transport infrastructure advocated by liberals were also undertaken. For example, the first railroad (between Nuremberg and Furth) was established in 1835, followed by many others, including one between Leipzig and Dresden in 1837. New roads were built and old roads were paved. Canal networks were extended and steamboats began to operate on the Rhine (Fulbrook 1999: 113–14).

It bears noting that support for liberal economic reforms is often largely pragmatic. That is to say, one does not have to become a political liberal to accept the economic case for ending medieval protections and promoting industrialization. In the sphere of economic policy, as Olson (1993) argues, sovereigns (and their officials) have an interest in promoting economic growth—as long as it does not place their sovereignty at risk. Indeed, many economic liberals argued that national security

required economic liberalization. Nonetheless, there is evidence that economic liberals contributed to the economic policy debates and often drafted the reforms.

On the **same** [liberal] **principle** is to be explained the Edict of September 14th, 1811, which abolished the old prohibitions against the division of landed estates. On the **same principle** hereditary serfdom was abolished, and an effort made to regulate all forced services. On the **same principle** all trades were thrown open, all **monopolies of sale at particular mills and inns were abolished**, and “all props of idleness,” as Hardenberg puts it, done away. The guarantee for the new birth of the State [of Prussia] was sought, **not in the artificial protection of the economically unfit, but in the development of the powers of the fit**. That policy has borne the most splendid fruits (Bretano 1894: 76-77).

Censorship Limits Public Support for Liberal Political Reform

The efforts of political liberals, however, were less successful, in part because debate on constitutional issues was limited by a variety of censorship and public assembly laws. The members of the confederal diet in Frankfurt represented, first of all, the political and economic interests of the sovereigns of their respective duchies. To curtail popular demonstrations favoring liberal political reforms, the confederal diet adopted a series of national laws beginning with the Karlsbad Decrees of 1819, which forbade political gatherings, strengthened censorship, and discouraged the provincial diets from exercising “too much” power. The Karlsbad Decrees of 1819, for example, included the following provision:

Every Confederal state is answerable – not only to the parties directly offended, but also to the whole of the Confederation – for the published writings appearing under its supervision, hence for all [publications] included under the main provision of § 1, **insofar as the dignity or security of other Confederal states is thereby injured, [or] the constitution or administration of the same attacked**.

The central government had little ability to enforce such laws, because the member states were essentially sovereign entities, but the new laws provided duchy governments with a convenient rationale for suppressing ideas and groups that threatened their political and economic interests.

Historians often attribute these repressive policies to Metternich, who presided over the Confederal assembly for three decades. However, it seems clear that censorship was one of the few areas in which the duchy leaders could find agreement. Local enforcement of the confederal laws varied somewhat. For example, Baden assured somewhat greater freedom of the press than in other duchies through its implementing legislation (Fletscher 1980). But, in general, the censorship laws

and related strategies to reduce press autonomy were well enforced and had a lasting effect on political developments in nineteenth-century Germany.³³⁴

During the first half of the nineteenth century, political censorship was reinforced by remaining internal trade barriers. Fetscher (1980: 379) notes, for example, that trade barriers prevented newspapers from realizing economies of scale. The price of the *Seeblatter* doubled as the newspaper left its town of publication (Konstanz) for other parts of Baden, and it doubled again as it crossed state boundaries. “Increases of 500–600 percent were not uncommon when several state borders had to be crossed.”

Political censorship varied somewhat through time within both the confederation and empire. Censorship is, for example, evident in the number of political books and pamphlets published in Germany. Harris (1987: 441) estimates that less than 1 percent of published pamphlets and books in Germany during 1848–71 can be classified as political, and much of what was published was done so anonymously. A freedom of the press law was finally enacted in 1874, but even then the effects of press freedom were reduced by Bismarck’s use of the Guelph Fund, which was used to hire and bribe newspapers to support government policies and officials and to oppose political opponents and their arguments.³³⁵

Liberal political ideas did not vanish from the minds of liberals with time to think about politics, nor did constitutional issues totally vanish from public discussion and demonstrations, as in Hanover in 1837 and Baden in 1837–44. The German censorship laws simply forced most liberal political and constitutional discussions underground, as side discussions in organizations created for other purposes, and at informal gatherings. Freedom of speech was increasingly available to members of the regional and federal parliaments, which allowed relatively far-reaching debates on political reforms to take place through the publication of speeches made in national and duchy parliaments. And, of course, it was also possible to smuggle books and newspapers into Germany that were printed elsewhere.

Publications supporting economic reform did not directly violate censorship law in the same manner, because they did not

³³⁴ Similar laws were, of course, also adopted in other countries in the early nineteenth century to suppress demonstrations for constitutional reform, including England, as noted above.

³³⁵ Censorship at the national level was greatly reduced in 1874, although editors could be tried for publishing controversial material. The censorship that remained was largely targeted at socialists for the rest of the century, even after the Social Democratic Party regained its status as a legal organization in 1890.

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 the 1840 censorship ordinance, from Fetscher 1980: 385)

Efforts to lobby for economic reforms could be done in public through small organized groups, at universities, and in newspapers without violating prohibitions on political gatherings and political publications. Open support for greater parliamentary power or extended suffrage, however, would clearly violate such laws.

Political parties could thus be organized and campaigns for elective office on liberal economic policies and German nationalism could be undertaken. Liberal politicians and groups could publicly support economic and some political reforms, such as German unification, which did not threaten the confederal government or directly undermine specific duchy governments. And, many economic and political liberals were elected to the state parliaments on such platforms.

Indeed, many liberals believed that centralization would induce liberalization of the duchy governments, in part because of their successes in 1833, 1867, and 1871 and so promoted German nationalism as a strategy for reform. Liberals often rose to high posts in government, as had Von Humboldt in its first half and Eugen Richter in the second half of the nineteenth century (Raico 1990).

A Digression on the Rationality of Civil Disobedience

Confederal censorship and laws governing association tended to reduce public debates about constitutional reform, because they create risks (expected penalties) for the expression of one's true opinions. Kuran (1989) notes that the need for public expression and risk aversion varies among persons within every community. Consequently, the individuals that speak out and times when this occurs also tend to vary a good deal among people and places. He also notes that the personal risk associated with the public expression of "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 can be generated through a snowball effect as successively less intense and/or more risk-averse proponents of change join others who are already voicing dissent. Unlawful and other risky private beliefs are publicly expressed only when the risks from doing so are small.

Kuran's theory, in conjunction with German censorship, provides a good explanation for the reform demonstrations in Hanover and Baden and for the broad range of large more or less peaceful demonstrations undertaken between 1847 and 1849. In 1847 and 1848, a very large number of persons in Germany (and throughout Europe) turned out for large-scale, largely peaceful (although

illegal) demonstrations favoring liberal political reforms of various sorts. In two countries, considerable violence—as opposed to civil disobedience—occurred. Violence emerged in Vienna and the eastern parts of the Austrian empire, which induced Metternich to resign (at the Diet’s request) and leave for safer ground in London. It also induced the aging Habsburg monarch to support constitutional reform. Violence also occurred in France, where a moderate king abdicated out of fear of a new French Revolution, which paradoxically led to a less constitutional form of government (that of Napoleon III). Outside of France and Austria, however, reform demonstrations were more or less peaceful, although outspoken and clearly far larger than had previously observed. Such public assemblies were “revolutionary” in the sense that they were illegal and novel in most places, although they were not revolutionary in the sense of being large-scale, violent, armed rebellions.

The demonstrations in Germany in 1848, as in most other countries, had many themes, but according to most historians, liberal ones dominated their constitutional proposals. Demonstrators pressed for governance via rule of law, a written constitution, and expanded parliamentary powers (restoration of estate powers) and suffrage. “Radical” liberals insisted on universal suffrage, expansions of education, greater poor relief, and redistribution of wealth through land reform. Some groups, it should be acknowledged, also lobbied against economic liberalism: against external free trade and for a restoration of the old internal trade barriers.

In the political circumstances of 1848, it was not clear to duchy rulers whether what they observed was a precursor to revolution and overthrow, or simply evidence of broad support for constitutional and economic reforms. Most had never seen significant public dissent before, because such assemblies and their sponsoring organizations were illegal, and because of the personal advantages of law-following behavior when such laws are well enforced. In response to the demonstrations, the duchies often replaced a few cabinet ministers with liberal leaders from their parliaments. Serious, high-level discussion of reforms was accepted by most demonstrators as success, and most demonstrators headed home to await reforms. Others who continued their civil disobedience, however, were forcibly dispersed—with many deaths in Prussia.

Constitutional Convention in Frankfurt: May 1848–89

The most important discussion of German constitutional reforms took place in Frankfurt, where the confederal diet authorized a constitutional convention to meet and to propose reforms. Representatives to the constitutional convention were to be elected, and suffrage for representation at the constitutional was based on wealth or tax payments, as was the case for the duchy elections

for their lower chambers. Turnout was small, and the result was an assembly composed largely of upper- and middle-class liberals. The constitutional convention had the power to propose reforms, but not to adopt them (Fulbrook 1999: 119).

The participants, nonetheless, 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 new German crown was offered to the king of Prussia in late spring by the convention. Other territorial issues were also addressed, but less successfully. For example, whether Germany should include the Polish parts of Prussia or the German-speaking parts of Denmark and Austria was never really settled. These involved religious as well as geopolitical divisions, and stable compromises could not be found. Other issues also remained unsettled.

Although the conference itself was an important constitutional event for Germany because it was the first directly elected body for Germany as a whole, the constitutional conference ended in May with little effect on confederal governance. The king of Prussia refused the constitutional bargain offered, and without Prussian support, little could be achieved at the confederal level. In the end, it proved 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 liberal duchy cabinets appointed in 1848, however, were able to press directly for policy and constitutional reforms within their duchies, and several parliaments regained or enhanced their medieval rights of veto over taxation and legislation.

C. The Prussian Constitution of 1850

The most important of the duchy constitutional reforms was adopted in Prussia, where the constitution of 1848 replaced a traditional estates-based assembly that had been worked out during the 1840s, but only used in 1847. In 1850 the 1848 constitution was further modified, although not entirely in a liberal direction. In all three cases, Prussia's constitutional reforms were drafted with the king's support and subject to a royal veto. However, the constitutional reforms also had to be acceptable to those represented in the existing parliament, especially liberals, given the recent protests. The 1850 constitution thus included a large number of liberal constitutional features, although they were implemented in a manner that successfully protected preexisting political interests (Caldwell 1997: 17).

The reformed constitutional monarchy included a bicameral parliament with veto power on taxes and legislation (Caldwell 1997: 16–17). With respect to tax authority, it could be said that Prussia's new constitution approximately restored its medieval tax constitution. Regarding the organization of parliament, however, there were significant innovations. The upper chamber for the most part represented the interests of the ancient estates. It was made up of noble heads of household, city, and university representatives, church officials, and assorted lifetime appointments by the king. The new lower chamber was directly elected through essentially universal male suffrage, as insisted on by the radical liberals during the mid-century. The Prussian suffrage law was the most liberal in Europe at the time.

However, the link between votes and representation was far less liberal and unusually effective at preserving the preexisting distribution of political authority within Prussia. Suffrage law determines which individual interests are represented by determining who can vote, whereas the distribution of seats among those elected determines the relative influence of the interests represented. The link between suffrage and representation is jointly determined by suffrage law and apportionment of seats among electoral districts.

In other parts of Europe, the right to vote was determined by minimum tax payments, as it was in most German duchies that held elections. Normally, somewhat less than 10 percent of adult males had the right to vote in the early nineteenth century Europe. In the Prussian constitution of 1850, however, *it was representation, rather than suffrage that was determined by tax payments*. The wealthiest taxpayers, who paid one-third 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 elected the last third (Fullbrook 1999: 126; Ogg 1918: 257–60).³³⁶ This economic class-based system of representation made it possible for the king of Prussia and the aristocracy to accept essentially universal male suffrage without ceding significant political authority to the poor or middle class. Suval (1985: 233) reports that in 1888, after nearly four decades of industrialization, 3.6 percent of the electorate determined the first third of the seats, 10.8 percent the second third, and 85.6 percent cast votes for the last third.³³⁷

³³⁶ A similar three-class representation system was also used in most municipal elections within Prussia. In some 4,000 municipalities one or two persons would have controlled one third of the seats in the municipal assemblies (Ogg 1918: 259).

³³⁷ Participation also tended to be smaller in elections for seats in the poorest third (14–30 percent) than for seats in the wealthiest third (40–60 percent), as might be predicted by rational-choice models of electoral turnout. See Kock (1984: 382) for a table of eligibility and participation in earlier Prussian elections.

The liberal cast of the 1850 Prussian constitution was not an accident, nor a fraud, but a well-crafted compromise among conservatives, pragmatists, and liberal leaders. The radical liberals and early Social Democrats were pleased to have suffrage extended to the working class. Moderate liberals were generally in favor of less than universal suffrage at this point, but would be well represented in the middle third of the elected chamber. On the other hand, the upper chamber and the wealth-based allocation of representatives in the second protected the interests of those who had determined public policy in Prussia under its previous constitutions. Cabinet ministers were answerable to parliament, but only for constitutional infractions. The king retained control of the army and foreign policy.

The architecture of Prussia's new constitution turned out to be important for the future of Europe, not because it was widely copied, but because the new Prussian government played an important role in German and European history for the next 70 years. As a consequence, the interests represented in the Prussian government, perhaps magnified by the unusually talented individuals who held senior posts, exercised considerable influence over German public policy during the second half of the nineteenth century and into the twentieth century.

Constitutional bargaining in Prussia continued for most of that period, as liberals pressed for greater authority for the elected chamber and greater parliamentary control over ministers at the same time that many conservatives favored weakening the elected chamber. However, relatively few reforms were accepted, and there was no clear liberal trend to those reforms until early in the twentieth century. This was in part because the constitution of Prussia already satisfied many liberal design criteria. It was also, of course, because the first chamber advanced the interests of those previously represented in Prussian government, who had little interest in reform.

The Prussian constitution was formally a law adopted by the sovereign, as true in most constitutional monarchies at that time. This usually created a variety of legal and practical issues about whether a king could simply revoke a constitution, which enhanced his government's bargaining power with the parliament. Members evidently feared that if they pressed the king too hard, he would simply revoke the constitution.³³⁸

³³⁸ Threats to do so were often made by kings during the late nineteenth century, although not carried out. In long-standing parliamentary systems, institutional conservatism tended to make such threats less creditable. The plausibility of such threats also diminished as the bargaining position of parliament increased in the nineteenth century.

D. German Unification and a New Federal Constitution, 1866–71

The creation of a new German central government did not emerge immediately after the 1848 constitutional conference, as might have been predicted by revolutionary-threat theories of constitutional reform, nor did it emerge from a series of peaceful reforms of the existing confederal constitution, as might have been predicted by the theories of part I of this volume. The sovereigns of the German duchies had long preferred decentralized authority to centralized control and continued to do so. As a consequence, their representatives at the confederal diet never agreed to substantial constitutional reforms, most of which would have produced greater centralization of policymaking authority. Rather, a new more centralized Germany emerged in response to military threats inside and outside the confederation.

The German confederation's procedures and policies continued more or less as they had before 1848, with relatively few policy decisions being made by its central government.

There was, however, increasing geopolitical tension between Austria and Prussia, the two largest and most powerful of the member states. In 1866 a disagreement over the governance of a largely German-speaking duchy taken from Denmark in 1864 further polarized the confederation and led to a brief Austro-Prussian war. The military aspects of that war (and most others) are beyond the scope of this volume, except insofar as they affect constitutional developments.³³⁹ In this case, by effectively ending the confederation established in Vienna, the seven-week-long Austro-Prussian war of 1866 indirectly led to a new much more centralized form of German government.

Prussia unexpectedly won the war with Austria and enlarged its territory by annexing several of the defeated Austrian allies in the north. The duchies of Hanover, Hesse-Kassel, Frankfurt, and Nassau became parts of Prussia, as did the formerly Danish duchy of Schleswig-Holstein. This made Prussia by far the largest of the German polities. Prussian territory after the war included most of present-day Northern Germany and part of present-day Poland. Prussia's victory over Austria also implied that Prussia was militarily the strongest member of the German confederation.

The remaining northern duchies were encouraged to leave the old confederation and join a new northern German confederation. A draft of a constitution for the new Northern Confederation was proposed by the Prussian government, and negotiations were undertaken among the potential members. Membership in the new confederation was voluntary, but constitutional negotiations and

³³⁹ See Bueno De Mesquita (1990) for a rational choice and statistical analysis of the Austro-Prussian war.

internal deliberations regarding membership were undertaken in the shadow of the recent Prussian annexations.

The Constitution of the Northern Confederation: 1866–71

To be adopted, the constitutional treaty had to account for the interests of potential member states. In addition to advancing the interests of their rulers, the proposal would also need support in their parliaments. Partly for this reason, the proposed federal constitution of the Northern Confederation was loosely based on the proposals of the Frankfurt convention, and it satisfied a number of liberal design criteria for constitutional monarchies. The architecture of the new constitution, however, was designed with Prussian, rather than liberal, interests first in mind.

The new government would consist of a sovereign king (initially referred to as the president of the federation), a ministry appointed by the king, and a bicameral legislature. The king (who would come from Prussia) retained control of military and foreign policy. The king appointed the ministry without parliamentary review, although the chancellor was subject to parliamentary oversight (although he did not require its support). 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 the new federal council was similar to the diet of the German confederacy that it replaced. Voting in the federal council was also based on weighted voting. Council votes would be weighted roughly by population. Prussia, however, held 17 of 43 votes in the elected chamber.³⁴⁰ Most other member states had only one or two votes (Rentszsch 1989: 20–21).

The second chamber (*Reichstag*) was new and of greater interest to liberals. It was directly elected in single-member districts by essentially universal male suffrage and had veto power on taxes and legislation, although no formal power to initiate or amend legislation or budgets. (Men older than 25 years old who were not on poor relief or in bankruptcy could vote.) The electoral districts reflected historic community boundaries within the member states, and most districts initially represented about 100,000 voters (Suval 1985: 228). Of the 297 elected representatives, 235 were from Prussia,

³⁴⁰ Prussia included 20 million of 25 million of the confederation's residents after its expansion, and, thus, Prussia was in this sense *underrepresented* in the Bundesrat (Koch 1984: 110). Except for Prussia, the voting weights simply continued those of the German Confederation. This was also the case for the southern duchies when they joined in 1871, with the exception of Bavaria, which received 6 votes (Ogg 1918: 217-8).

23 from Saxony, and 3 from Hesse with similar or lesser numbers for the rest of the small duchies. Secret ballots were used, and voters could cast votes only in a single district.³⁴¹ Electoral competition was clearly evident in the large number of groups that obtained seats and in the subsequent emergence of national political organizations.

Although the new constitution satisfied many liberal criteria for governance, Prussia's control of the executive branch and its large representation in both chambers of parliament effectively made the Northern Confederation an extension of the Prussian government. It had a Prussian king, who was inclined to appoint Prussian ministers to senior posts in the confederal government. Wilhelm I appointed Bismarck to be chancellor and selected only Prussians as cabinet ministers (as the executive expanded). Prussia's representation in the federal chamber allowed it to effectively control the federal council. Even in the elected chamber, Prussia was likely to be decisive because of its relatively large population, although a broader range of opinions were represented in that chamber than in the rest of the government.

Prussian influence in the Northern Confederation would have tended to be disproportionate to that of the other states in any case, because Prussia was by far the largest of the northern signatory states and had by far the most powerful army. It was also far larger and more powerful than the southern duchies that remained outside the new federation until 1871. The particular Prussian interests that would be advanced were largely determined by its 1850 constitution, which gave a relatively narrow cross-section of wealthy Prussians decisive control of both chambers of the Prussian parliament.

Bismarck's proposed constitution for a Northern Confederation was sent to a popularly elected constitutional convention at about the same time that Prussia formally withdrew from the German Confederation in June 1866. In August a treaty of confederation was laid before the remaining northern duchies and independent cities. Liberals secured significant economic and procedural changes, including the right of the elected chamber to call the chancellor before it to defend government policy and veto power over the entire budget, as opposed to just the domestic budget (Hudson 1891, Koch 1984: 106–10, Feuchtwanger 2002: 152–57).

Formal procedures of ratification took place in the new member states, and the result was ratified by the new confederal parliament (Hudson 1891). Prussian approval was assured by the

³⁴¹ An English translation of the Electoral Law for the Reichstag of the North German Confederation (May 1869) is available from the *German History in Documents and Images* project.

recent military victory over Austria, which increased Bismarck's popular and royal support and, thereby, parliament's inclination to accept Bismarck's proposed constitution.³⁴²

The extent to which the implicit threat of further annexation was decisive for the other member states can be assessed by examining the constitution itself, which is less one sided than one might expect. Bismarck had clearly designed the constitution to secure support within the Prussian parliament and assent by potential members. Nonetheless, his proposed draft was rejected and significant amendments were incorporated during the first meetings of the confederal parliament in 1867. Liberal members of the new 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)

In the years that followed, the right to publish Reichstag speeches allowed public debate to take place on many controversial issues, in spite of continued censorship of books, newspapers, and universities. It seems clear that the constitutional "reservation price" of the new confederal members (and their rulers and political parties) was taken into account by Wilhelm I, Bismarck, and by those charged with writing and revising the constitution for the new confederation.

Laws guaranteeing freedom of movement within the confederation were adopted in 1867. Equal civil rights, specifically those related to political office and participation, were extended to members of all religious groups in 1869. A common internal market emerged.

The 1871 Federal Constitution of the German Empire

The Northern Confederation's constitution formed the foundation for Germany's future constitutional development, because the southern duchies joined the Northern Confederation a few years later. German unification was widely supported among nearly all groups, including the left-of-center liberals, progressives, and moderate socialists. Access to northern markets was also of

³⁴² It is interesting to note that the Prussian parliament opposed the war. Consequently, budgets for the war with Austria were not approved by the parliament, as required under the 1850 constitution. Instead, Bismarck used money appropriated for other purposes to fund the war and began efforts to sell national railroads. His success in the war, however, produced ex post support for his Danish and Austrian policies and also divided the liberals in the elected chamber. This in combination with a few concessions to moderate liberals allowed his military budgets to be approved retroactively in 1867 (Stern 1977: 20–95).

interest to southern industrialists and bankers. The militant policies of Napoleon III had also increased the apparent gains from affiliation with a larger more powerful polity. Together these interests were sufficient to induce the southern states to sign similar treaties with the Northern Confederation in 1871. New treaties of association were negotiated, and the results were codified in a slightly amended constitutional treaty in 1871. In this manner, a new federal German state (with 25 states) became a reality, rather than a dream of nationalists.³⁴³

The 1871 federal constitution of Germany was based on that of the Northern Confederation, which was in many respects among the more liberal ones in force in Europe at the time. The federal chamber, the Bundesrat, as in the Northern Confederation, consisted of representatives of the member states (duchy and free city) and were appointed by those governments. A (roughly) population-weighted voting system based on the voting weights in the Confederation was used in the Bundesrat; Prussia again had the most votes (17 of a total of 58), Bavaria the second most (6), and the rest of the duchies and cities between 1 and 4 votes each. Because duchies were normally ruled by king-dominated forms of the king and council template, the Bundesrat tended to be populated by nobles, although it was not formally a noble chamber. (The fact that no salaries were paid to members of either chamber also tended to limit members to relatively wealthy persons, although no wealth restrictions were included.) The Bundesrat was self-calling in that a request by one-third of its members required the king (kaiser) to call it into session.

The elected second chamber, the Reichstag, was selected on the basis of unusually broad suffrage using a secret ballot, and the distribution of votes among the duchies was based on population, rather than wealth or class, as in Prussia. National suffrage was not only broader than most of the duchy parliaments, it was broader than most of Europe in 1871. Electoral districts initially included about 100,000 voters each. The Reichstag had veto power over budgets and legislation. The Reichstag was also self-calling, and if dismissed by the king, new elections had to be

³⁴³ The Prussian king served as its president and hereditary ruler of the Northern Confederation, rather than its “king” (or kaiser). The executive office of the Northern Confederation was not a royal one, to which local rulers owed fealty. That changed in 1871 when the southern duchies joined. However, obtaining the new title required some negotiation. For example, the Bavarian king received a cash side payment in compensation for transferring some of his authority to the emperor. There were also some special provisions for Bavarian autonomy (Koch 1984: 108–12, and 119–21).

The title emperor was necessary because several of the duchies were ruled by kings. The German Confederation was renamed the German Empire (Deutsches Reich, rather than Norddeutscher Bund) by the 1871 constitution, after the elevation of the Prussian king to emperor (kaiser). The term king is used in the text to maintain consistency.

held within 60 days and a new meeting held within 90 days. Ministers could be called for questions, but could not be formally sanctioned by the Reichstag, except for constitutional violations. Criticism from this chamber, nonetheless, often induced ministers to resign, as in 1867, 1869, and 1872.

All laws were formally royal proclamations, but new laws had to be approved by both chambers of the parliament and countersigned by the chancellor. The German chancellor and Germany's military and foreign policy, however, were largely beyond the control of parliament. This division of executive and legislative authority was important, because the main responsibility of the central government was initially national defense, foreign affairs, and the promotion of internal free trade (Mork 1971: 67–68; Stern 1977: ch. 9; Koch 1984: 122–27, Ogg 1918: 217–24).

The constitution also included provisions for German citizenship, a national currency, railroad development, and government finance (via indirect taxation). It also standardized commercial and military law and specified that all persons were subject to seven years in the army, including three years of active duty.

Amendments to the constitution were possible, but required a three-quarters supermajority in each chamber. Constitutional reforms could be blocked by 14 (of 58) votes in the Bundesrat, which gave Prussia veto power on constitutional reforms, because it had 17 votes. Constitutional reforms favored by Prussia, however, required supermajorities of the weighted votes from the other duchies in the Bundesrat and also a majority in the Reichstag. The difficulty of formally amending the federal constitution locked in the core policymaking procedures and fiscal constraints of the central government, and some aspects of its military organization. Changes in the representation of either chamber were very unlikely to occur, nor was it likely that ministerial responsibility could be formally introduced. Constitutional stability was reinforced by the stability of Prussian elite interests and Bismarck's ingenuity at forming majority coalitions during the next two decades.³⁴⁴

German Politics

The federal government's pan-German policies and national assembly created incentives for new German political organizations to be formed. For example, it was at the first meetings of the Northern Confederation's Reichstag that national political parties began to take shape, for example,

³⁴⁴ An English translation of the constitution of 1871 is available from the *German History in Documents and Images Project*.

the National Liberal Party was established on February 27, 1867. A Catholic Center Party formed in 1871, a Social Democratic Party was formed in 1875, and a Conservative party in 1876 (Blackbourn 1998: 264–69).³⁴⁵ The early political parties were often loose affiliations of regional organizations that were prone to disagreements on specific policies, especially those with different regional effects. German liberals, for example, had already become divided about Bismarck's constitution for the Northern Confederation, and divisions among right, center, and left liberals continued through the rest of the nineteenth century.

Disciplined national political parties did not emerge for some time, as loose alliances of fellow travelers on the right, middle, and left, frequently formed, divided, and reformed during the next several decades (Mork 1971: 64; Koch 1984: 140–47; Schonhardt-Bailey 1998). This reduced subsequent liberal influence on policy and constitutional developments in the federation, in that many of the provisions on which they might have agreed were already incorporated in the constitution.

Absence of Constitutional Reform during the Bismarck Era

Bismarck's constitution proved durable and relatively stable. During the late nineteenth century, kings in other parts of Europe began to give up their formal powers of appointment and control of foreign affairs in negotiations with parliament on budgetary matters. This did not appear to happen in the new federal government of Germany, partly because of the particular alignment of interests within Prussia, partly because of the stability of the Prussian constitution, and partly because of Bismarck's extraordinary ability to use divisions in the Reichstag to create temporary majority coalitions in Prussia and the federation (often by exploiting fears associated with imaginary international and internal crises). Consequently, the elected chamber was rarely able to use its power of the purse to secure greater authority.

The king, his chancellor, his ministry, and the rulers in other duchies had very similar views on how to advance their interests and how this should be done, which reduced opportunities for constitutional reform. In Bismarck's words:

³⁴⁵ The Social Democratic party was banned during 1878–90, although its members were able to stand for election to the Reichstag and were elected (Blackbourn 1998: 412–13). Previous to this campaign against the socialists, Bismarck had launched a campaign against the Catholics, especially the Jesuits, who were banned from Germany. Some 1,800 Catholic priests were jailed or exiled during that earlier campaign. While Social Democrats were banned, some 1,500 persons were imprisoned (Blackbourn 1998: 262–63).

We would **have succumbed to a parliamentary rule in the past 17 years**, if the princes [duchy rulers] **had not stood firmly by the Reich** ... the opposition in the parliament would be much reinforced if the present solidarity of the Bundesrat came to an end and Bavarians and Saxons made common cause with Richter and Windtorse. It is therefore the right policy for your highness [Wilhelm II] to address yourself in the first place to your princely cousins. (Letter from Bismarck to Wilhelm II just before his accession in 1888, quoted in Feuchtwanger 2002: 241)

The absence of constitutional reforms does not imply that the elected chamber failed to exercise influence on policy, nor that influence could not potentially be used in constitutional bargaining. Partisan influence is evident in economic legislation of direct interest to liberals and in a variety of other matters, including military ones. For example, internal and external tariffs were reduced during the period in which liberal coalitions were important for Bismarck, even though these were important revenue sources. As the free trade coalition splintered and lost confidence in the merits of free trade (or acquired economic interests that trumped their ideological inclinations), tariffs rose.

Schonhardt-Bailey's (1998) statistical analysis of role-call voting in the Reichstag demonstrates that economic and partisan interests affected votes on tariff policies. Tariffs increased in 1879, diminished in 1891–94, and subsequently increased again in 1902. Most, but not all, liberals, progressives, and Social Democrats opposed the tariff increases favored by conservatives and grain farmers (who were most affected by agricultural imports from the United States and Russia).

It was normally effective politics, rather than institutional design or coercive threats, that allowed Bismarck to have his way in the Reichstag. Although liberals were often members of “his” majority coalitions, many “anti-liberal” restrictions were also adopted by the Reichstag by more or less conservative coalitions. For example, a substantial weakening of the Reichstag's veto power on the military budget was engineered by Bismarck, who persuaded a majority of its members to accept a seven-year budget cycle for defense appropriations (about 90 percent of the central government's budget at that time), rather than face new elections in 1874 on the “wrong side” of the national defense issue (Mork 1971: 70–73, Feuchtwanger 2002: 187–88).³⁴⁶ Restrictions on political participation were accepted in 1878, when the Social Democratic Party was temporarily banned from politics.

This political ingenuity is also evident in Bismarck's last major reform, the social security program passed in 1889 with the encouragement of the new King Wilhelm II. As a master at

³⁴⁶ Feuchtwanger (2002: 188) notes that “Bismarck was not sorry to see a compromise emerging, for a perpetual [military] budget would have weakened his position against the generals and made him that much less indispensable, as the only man who could manage the Reichstag.”

building majority coalitions by exploiting national security concerns, Bismarck naturally used a national security argument to support federal old-age 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 most liberals and Social Democrats with the support of Catholic centrists and nationalist conservatives.³⁴⁷ The new social security program in combination with national health and disability insurance adopted in 1883 and 1884 created the most extensive liberal welfare program in Europe at that time, although they were modest programs by today's standards.

The durability of the basic structure of Bismarck's social welfare program with its "pay-as-you-go" financing made it quasi-constitutional in nature, and it is one of the few parts of Bismarck's constitution that survives to the present in Germany and elsewhere.³⁴⁸

Constitutional Bargaining after Bismarck: 1890–1918

Industrialization tends to increase the relative wealth of parliament and transforms the potential tax base, which often 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 by accepting the seven-year military budget cycle, and so opportunities to expand its control over public policy were relatively rare. However, as the scope of other central government activities increased, its remaining

³⁴⁷ 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. (Fulbrook 1999: 133–34, Koch 1984: 384–85). The left-of-center parties, however, evidently voted against their own constituents' interests in an effort to keep a unifying issue for future campaigns (Riminger 1968: 414–15).

³⁴⁸ This is not to say that Bismarck's only long-term impact was on social welfare programs. His constitutional innovations continued to be important factors in German politics for the next four decades and also, indirectly, in Japan. Also, his aggressive mode of domestic politics tended to promote polarization, which made constitutional compromise more difficult. In Richter's (1890) words: "... existing confessional differences were exacerbated, on the one hand, through the battle over church policy, carried out by way of the police and criminal regulations, and on the other hand, through the chancellor's attitude toward the development of the anti-Semitic movement. The rampant growth of interest parties, striving ruthlessly to exploit state authority at the expense of the general good, can be attributed to the policy of protective tariffs and to the kind of agitation for protective tariffs that the chancellor personally called for and fueled. The incitement of the parties against each other, the suspicions cast upon people's patriotism, and the denial of patriotism to any political dissident all result from a press corrupted by the Guelph Fund." (*Freisinnige Zeitung*, no. 68, March 20, 1890)

power of the purse increased in importance. Consequently, the models developed in part I imply that there should be evidence of a gradual shift in authority to the parliament, especially after 1890, given the rapid industrialization that took place in Germany between 1870 and 1910.

After the death of King Wilhelm I at the age of 91 in 1888 and the departure of Chancellor Bismarck at the age of 75 in 1890, the nearly invisible shift of policymaking authority from the king to parliament that had occurred during Bismarck's tenure of office, became more apparent.³⁴⁹ Bismarck had been very effective at assembling coalitions within parliament to pass his budgets and other legislation. In the post-1890 period, the chancellor's term of office was much shorter than before in large part because they could not replicate Bismarck's coalition politics. For example, Chancellor Caprivi's term lasted only from 1891 to 1894, and his resignation was in part induced by a failure to obtain Reichstag approval for an army reform bill in 1892. Chancellor Hohenlohe's government lasted a bit longer, six years (1894–1900) in part because he was more successful at building coalitions in the Reichstag (*Sammlungspolitik*). However, following a number of crises, Hohenlohe retired in 1900. Bülow remained in office for nine years, from 1900 to 1909. However, budget deficits increased as conservatives refused to raise taxes to support Wilhelm II's military buildup. Bülow subsequently resigned in 1909 when his coalition fell apart over fiscal reform. His successor, Holleweg, also struggled to find a stable coalition of support for expanding military expenditures. In 1912 the Social Democrats became the largest block in the Reichstag, which made pro-government coalitions even more difficult to assemble (Fulbrook 1999: 142–43).

The turnover of chancellors in 1890–1912 suggests that Bismarck's success came from effective coalition-building strategies that his successors lacked. Indeed, it could be argued that Germany's entry into World War I was partially a method of circumventing parliament—in that the sovereign continued to have control of military and foreign policy during emergencies.

That liberal influence was still present in the Reichstag is evident in a number of policy reforms adopted. Coalitions of economic liberals and progressives in the German parliament, often supported by Wilhelm II and the Social Democrats, were able to press for significant economic reforms that eliminated remaining feudal and mercantilist restrictions, abolished usury laws, established a legal basis for corporations, reduced restrictions on the free practice of crafts, removed restrictions on travel within Germany, and reformed the judiciary. Freedom of parliamentary debate

³⁴⁹ There was a short reign between Wilhelm I and Wilhelm II by Friedrich III in 1888, but Friedrich died within a year of his accession to office. Wilhelm II was the son of Friedrich III who was the son of Wilhelm I. 1888 is, for that reason, sometime referred to as the year of three emperors, as the German sovereign passed from father to son to grandson.

and freedom of the press were broadened. Numerous proposals were also made for constitutional and electoral reform in the first decade of the twentieth century at both the central and duchy levels of government. There were proposals for proportional representation, ministerial responsibility, and women's suffrage, although nearly all were rejected. Members of the parliament were, however, paid salaries following a 1906 amendment to the constitution.

Overall, there is considerable evidence of increased parliamentary authority, or at least majoritarian intransigence, in the period after Wilhelm I's death and Bismarck's retirement. 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)

The Final Steps to Parliamentary Democracy: 1918–20

In the German case, popular suffrage came well before parliamentary supremacy in contrast to most other countries analyzed in this book.

The final step to German parliamentary democracy required a substantial increase in parliament's authority over public policy, rather than suffrage expansion. An increase in parliament's authority does not necessarily require ideological support, as tends to be the case for suffrage reform. An effective prime minister or chancellor simply needs reliable majorities in parliament to advance his (and the king's) agenda, whatever that agenda might be.

Wilhelm II, however, was evidently not willing to accept ministers from the Reichstag's majority parties, and no ingenious liberal managed to find a proposal that secured mutual gains for both the king and three-quarters of the national parliament until the desperate times toward the end of World War I in 1918.

Reform proposals were somewhat more successful in the duchies. For example, suffrage was liberalized in Bavaria, Baden, Hesse, and Württemberg by reducing or eliminating wealth restrictions for suffrage and changing from indirect to direct representation. Weighted voting was introduced in Hamburg and Hesse as part of the price of extended suffrage. In Saxony, suffrage was expanded, although a wealth-weighted representation system was introduced (Suval 1985: 232–33, 240; Blackbourn 1998: 409–10). In Prussia itself, significant reforms of local government were adopted, which reduced noble (Junker) hereditary rights, with the support of the Wilhelm II, who elevated a

sufficient number of distinguished liberals for local government reforms to be approved in the noble chamber (Mork 1971: 67–68).

Constitutional negotiation at the national level continued through World War I, and significant reforms were finally accepted by the king toward the end of the war, although it is not clear whether a constitutional bargain was entirely concluded or not.

In late 1918 the conservative war cabinet resigned, and a new moderate chancellor was selected (and ratified by a parliamentary vote). 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 accepted by Wilhelm II in October. However, parliament also insisted that Wilhelm II abdicate in favor of one of his sons, but he refused. Nonetheless, the October reforms were very popular among liberals and Social Democrats, who organized rallies and speeches to celebrate their success throughout Germany (Fulbrook 1999: 157; Orlow 2008: 95–96).

Unfortunately, as constitutional negotiations were being finalized, the king left Berlin to consult with his loyal generals. This was regarded as an act of bad faith and called into question whether the constitutional reforms accepted in October would be implemented. A constitutional coup was feared by reformers.

Partly because of Wilhelm II's apparent failure to abide by his constitutional bargain, Germany underwent an even more radical series of reforms in the next few weeks. The king's trip to his generals helped to excite large-scale republican demonstrations by the moderate and far left throughout Germany. Local rulers accepted republican demands and resigned their offices, beginning with the king of Bavaria on November 7. In the following two days, most other duchy rulers abdicated in favor of their parliaments, although the duchy bureaucracies remained largely in place. Wilhelm II subsequently abdicated from Germany's imperial office on November 9, although he did not formally give up his Prussian sovereign until November 28 (Orlow 2008: 106–107).

Chancellor von Baden resigned on November 9, after transferring his office to the Social Democratic leader of the Reichstag, the largest party in the Reichstag, in a somewhat extra-constitutional manner. Parliament was not in session at the time and so could not provide the new chancellor with the vote of confidence required by the October reforms (Orlow 2008: 106).

The new government called for a constitutional convention. Representatives to the National Assembly were elected in January of 1919, and members of a Committee of the States were appointed by *länder* governments. The government formed by the new National Assembly was a

center-left coalition of Social Democrat, Liberal, and Center Party members under the leadership of the Social Democrat Friedrich Ebert.

The constitutional convention took place in the small city of Weimar. There, a new republican constitution was negotiated, revised, and finally approved on August 11.

The first drafts of the Weimar constitution had been prepared before the elections for the constitutional assembly. Hugo Preuss, a left liberal, had been given the task of writing a constitution the previous November. The draft constitution was subsequently discussed at length within the provisional government, by members of the Reichstag, and by a few distinguished scholars, such as Max Weber. The early drafts were subsequently revised in negotiations at Weimar, where among other changes, the office of president was strengthened. Approval, under the new constitutional regime, required majorities in the National Assembly, the Committee of the States, and the government (Kolb 2004: 17–19).

The Weimar constitution was not simply imposed on Germany by a revolutionary government, nor invented whole cloth, although much of it was new. It had to obtain support from the national and *länder* parliaments, and it was written and revised with that support in mind.

Its general architecture reflected institutional conservatism, in that it was largely based on the template of Bismarck's federal constitution, although it included a much stronger Reichstag, a weaker federal council (the Bundesrat was replaced by a Reichrat), and an elected president, rather than a king or hereditary president. The electoral basis of the Reichstag was changed in two ways: proportional representation was introduced and suffrage was extended for the first time to women.

Although elected with a fixed term, the president had essentially royal powers during emergencies. He could appoint ministers, dissolve parliament, call new elections and national referenda, and rule by emergency decrees during times of crisis. The cabinet was responsible to parliament, and could serve only with continued majority support.

The federal chamber's authority on policy was reduced to a level similar to that of the House of Lords in England at that time; it could delay, but not veto, legislation. The *länder* governments represented in that chamber retained considerable local fiscal and regulatory authority, although the central government had somewhat greater powers to tax than before. The central government's power of taxation included direct taxes, such as the income tax for the first time. (As in many other countries, the central government's authority to use income taxation for revenues was created at the same time that other constitutional reforms were adopted as part of a constitutional bargain.)

By the end of 1919, Germany was finally a parliamentary democracy, although a republic, rather than a kingdom.³⁵⁰ The formal transition was largely constitutional and lawful, although governance in Germany was neither peaceful nor orderly during the period in which constitutional reforms were negotiated, nor entirely so in the years that followed.

The Weimar Republic survived as a parliamentary democracy for only 14 years, after which it was captured and then effectively overthrown by the National Socialist German Worker's Party in early 1933–4. Whether that party's success was an inevitable event or a matter of bad luck, as believed by this author, is beyond the scope of this book. It seems clear, however, that the lack of continuity in political institutions and leadership at the national and *länder* levels, together with significant errors in the Weimar constitution contributed to the failure of the new German republic. These, together with the breakdown of law and order associated with the radicalization of German politics, paradoxically allowed Hitler to argue for and obtain emergency powers for his chancellorship in 1934, and subsequently to end competitive politics and constitutional governance in Germany for more than a decade.³⁵¹

Hitler's use of the Weimar Republic's provisions for emergency power (after 1934), demonstrates how quickly supra-constitutional authority can reverse a century of liberal progress.

³⁵⁰ The Weimar Constitution begins with: "The German people, united in its tribes and inspired with the will to renew and strengthen its Reich in liberty and justice, to serve peace inward and outward and to promote social progress, has adopted this constitution."

³⁵¹ Hitler was appointed to the post of chancellor in January 1933 as the leader of the largest party in the Reichstag, having overtaken the Social Democrats in the 1932 elections. Emergency legislation was adopted in February, reducing freedom of the press and assembly, and new elections were quickly held, which increased the number of seats held by Hitler's coalition in the Reichstag. A temporary "enabling law" was passed in March by two-thirds supermajority in the Reichstag, as required for constitutional amendments. Articles 1–3 of the "law for the recovery of the people and the Reich from suffering" formally allowed the government to adopt new laws through unconstitutional procedures. (English translations of the title and details of the act vary somewhat.) For example, the act explicitly allows the Reich government to adopt fiscal policies without parliamentary review (Koch 1984: 306–11).

In 1934, following the death of President Hindenburg, the posts of chancellor and president were formally merged, instead of holding new elections for president as required under the constitution. The creation a new executive position, Führer, was a major constitutional reform, although it was adopted without formally amending the constitution. Hitler was appointed to the new position which combined executive authority with emergency powers. The enabling act, perhaps surprisingly, was renewed by the Reichstag in 1937, as required by the time limit included in the act. It was the unconstitutional merger of the Presidency and the Chancellorship that effectively ended the Weimar Republic.

E. Conclusions and Overview

Overall, the German transition is largely consistent with the models developed in part I. Internal liberal and economic pressures were sufficient to end feudalism, produce broad suffrage at the national level, and relatively liberal trade regimes internally and externally. Economic life changed and became more urban, commercial, and industrial. Although military events were unusually important factors as catalysts for constitutional development, the constitutions adopted were negotiated by the persons holding senior government positions. There were clear constitutional trades and compromises. The importance of parliamentary majorities tended to increase as national budgets increased and more disciplined national parties emerged, especially in the two decades before World War I. Parliament's veto power over taxation allowed it to influence legislation and negotiate for greater authority over public policy. Civil liberties were expanded. Party competition and a relatively free press emerged at the end of the nineteenth century.

Liberal pressures for constitutional reform prior to 1850 were sufficient to obtain very broad suffrage, but the effects of that suffrage on public policy were diminished constitutional features put in place by able conservatives and maintained through political maneuvering and tough amendment procedures.

The written constitutions of the national and duchy governments were quite stable during the second half of the nineteenth century. Parliamentary dominance never completely emerged within Bismarck's version of the king and council template (or if it did so, it was only for part of October 1918), although constitutional negotiations produced several significant reforms of duchy governments. In this, the German case is the converse of the British case and further supports the hypothesis that changes in parliamentary control and in the breadth of suffrage are largely independent phenomena. Although the federal constitutions included many liberal design ideas, they were not sufficient to generate constitutional gains to trade in the nineteenth century.

As a consequence of the interests of Prussian elites and the federation's demanding amendment procedures, very little authority shifted from the king to the parliament until late in World War I. Only in 1918 were significant reforms adopted, and these were substantially revised in 1919 after the collapse of the German state in late 1918. This is not to say that the constitutional framework was static. There were minor reforms of parliamentary procedures, and significant quasi-constitutional legislation was adopted. Moreover, a few duchies adopted liberal electoral and procedural reforms in the decade before World War I.

After the abdication of the duchy and federal kings at the end of World War I, the reforms adopted at Weimar, perhaps surprisingly, reflected institutional conservatism and constitutional bargaining that were very similar to that which preceded the adoption of proportional representation and women's suffrage in other European countries. The German reforms, however, were in many respects more radical, and they were adopted during a very unsettled period, which was in turn followed by another with a good deal of unlawful behavior.

The demise of the Weimar Republic provides further evidence of the difficulty of governing in unsettled periods and also of the difficulty of designing major constitutional reforms that advance liberal aims in the long run. Twentieth-century world history might have been quite different had Wilhelm II engaged in a bit of constitutional bargaining with his parliament a decade or two earlier.³⁵²

³⁵² It is interesting to note that with the death of Hitler in 1945, the Weimar constitution more or less returned to force, as the enabling acts expired and the offices of chancellor and president became separate. To the extent that there was a German government after 1945, it was based on the Weimar constitution, which was quickly revised to avoid its failures (Koch 1984:315-7, 340-3). English translations of the "new" constitution for Western Germany and that of the Weimar Republic suggest a significant overlap in both its bicameral architecture and in much of its language, although the various emergency powers provisions (i.e. Article 48) were eliminated.