

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.²⁶⁵ 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 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

²⁶⁵ 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.

predictions concerning links among liberalism, industrialization, and the rise of parliament hold for 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.²⁶⁶

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 centralization, 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 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.

B. Setting the Stage: the Holy Roman Empire as the First German Confederation

The Holy Roman Empire is said to have begun when Otto was crowned emperor by the Pope in 962. At its peak in 1200, the first German confederation 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 limited. The electoral college established in 1356 consisted of just seven electors, who represented

²⁶⁶ 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.

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.²⁶⁷

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 participated in imperial meetings at major cities in the empire, beginning with Nuremburg. These imperial assemblies can be regarded as the parliaments of the Holy Roman Empire (Reichtage or confederal diets). They were consulted on such matters as taxation, war and peace, marriage, and religion. The independence of the duchies 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 duch parliaments and sovereigns, resulting in a form of divided governance termed a *Ständestaat* (Fulbrook 1990: 26–27, Holborn 1959: 25–36).

As in the previous cases, the tax veto power of national diets, duchy estates, and town councils caused the distribution of policymaking authority to shift between the relevant sovereigns and parliaments as fiscal circumstances varied and as interests in authority were affected by relative wealth, emergencies, and as theories of the state. Major changes in fiscal circumstances and demands for authority often created new gains from exchange among policymakers. In federal and confederal systems, opportunities to trade tax revenues for political authority may also emerge with respect to the distribution of policymaking authority between central and regional governments. For example,

²⁶⁷ 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 support for the Catholic Church and countered his military efforts to impose (restore) order with their own military efforts to resist Habsburg efforts to centralize authority. The thirty years war combined religious and decentralization conflicts into a single bloody war throughout much of Europe.

large towns and cities often negotiated for and received freedom from duchy regulations and taxes (Holborn 1959: 25-26).

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.

From 1438 through 1806, Habsburg family members were routinely elected to the office of Holy Roman Emperor by seven hereditary electors. This hereditary claim to the throne allowed the Habsburgs to increase centralization somewhat, but the duchy and city governments resisted those efforts and remained largely independent. This was very evident during the Protestant Reformation, during which large parts of the empire took the Protestant side, while others, including the Habsburg territories, took the Catholic side of religious debates and engaged in warfare with each other. When the end to the religious wars were negotiated in 1648, local sovereigns formally received the authority to determine the religion of their territories. (The treaty of Westphalia also explicitly recognized the independence of the Netherlands and Switzerland, both of which had seceded from the empire in the previous century.)

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. Several duchy parliaments gave up much of their veto power over budgets and legislation. For example, the Prussian parliament gave up much of its effective 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 1990:77).

In the late eighteenth century, the economic tide reversed, and parliaments increased in importance at the same time that their policy interests shifted in a somewhat liberal direction. 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 constitutional bargains with parliament were

concluded by the Prussian government in 1810–12, partly as a consequence of Prussia's (initial) losses to Napoleon's armies.

The highly decentralized governance of the first German confederation 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, the public buildings and official residences from that period tend to be more modest in scale.

Decentralization in the German confederation was substantially reduced, although not eliminated, during the nineteenth century as consequences of warfare, treaty negotiations, and constitutional bargaining.

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

Napoleon's invasion of the Holy Roman Empire in 1792 defeated a series of German regional armies over the course of 14 years, including the Prussian army and Austrian armies in 1805–6. With his army defeated and reduced, in 1806, Emperor Francis II (of the Austrian Habsburgs) gave up leadership of the Holy Roman Empire, and the empire-confederation was essentially disbanded (Holborn 1964: 371–72, 387–91).

In the territories conquered, the French induced a variety of legal and constitutional reforms. Smaller autonomous states were merged into larger ones with more centralized policymaking authority. In southern and central Germany, Napoleon also created a new federation, the Confederation of the Rhine, with a somewhat more centralized government than that of the former Holy Roman Empire. A new civil law (the code Napoleon) was introduced that eliminated some feudal privileges. Many of these steps tended to increase commerce. They reduced the number of borders at which tariffs could be collected, and somewhat simplified commercial law and reduced other internal trade barriers. Napoleon also induced the Confederation of the Rhine to secede from what remained of the Holy Roman Empire.

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 army was dispatched by a royal alliance of the English, Prussian, Austrian, and Russian armies. Defeat of Napoleon's army produced new possibilities for constitutional exchange within and among the major and minor duchy governments of the former Holy Roman Empire. Many of the institutions and theories of duchy governance and security had changed during the Napoleonic era.

In 1815, a congress of major and minor participants in the Napoleonic wars was held in Vienna. Although a very large number of governments played a role in the results and signed the treaties negotiated there, 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. Several of the Vienna Congress' geographic decisions and one of its constitutional decisions are especially important for German constitutional history.

First, the Congress merged many of the smaller polities of the old Holy Roman Empire into new larger ones. In many cases, it simply accepted mergers worked out by Napoleon. 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. Second, 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.

Third, and most important constitutionally, the Vienna conference established a new German confederation (Deutscher Bund), loosely based on the old Holy Roman Empire. Its constitution was negotiated by the German committee of the Vienna Congress. The leading members of the committee were Austria, Bavaria, Hanover, Prussia, and Württemberg.²⁶⁸ Negotiations took nearly a year, and the final draft was proposed by Baron Wessenburg (a member of the Austrian delegation) and accepted by the committee (Nicolson 1946: 196-99). The negotiations and constitutional bargains accepted reflected the fact that the new constitution required the support of all the major duchies and kingdoms to be implemented.

²⁶⁸ Representatives from many other German duchies were also present in Vienna and were consulted regarding the constitutional architecture of the new German confederation. Representatives from 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).

The new government consisted of a confederal diet, council of state, and prime minister. Each of the member states selected a representative to the 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. The confederal diet used a weighted voting system to make 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 new confederal government, like the old, lacked significant power to raise taxes, although it was charged with the defense of Germany from internal and external enemies (Renzsch 1989; Fulbrook 1990: 101).

In addition to the diet, there was a council of state. The council was a relatively small “sub-diet,” analogous to the college of electors within the Holy Roman Empire. Eleven of the largest duchies had one vote each. Smaller states were grouped into six clusters that each shared a vote (for a total of 17 votes). Austria was entitled to appoint the president of the council and diet (article 5), which gave Austria’s Habsburg family and its chancellor, prince Metternich, additional influence insofar as the diet president had significant agenda control. Metternich is often regarded to be the chief architect of the confederation’s policy. The new German confederal government met in Frankfurt, Germany.

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.” 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 played in the Vienna negotiations, rather than force of arms.

The Constitutions of the Member States: 1815–67

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).²⁶⁹ Many others were reformed or had been reformed in

²⁶⁹ The requirement for written constitutions was clearly a compromise with German and Austrian liberals at the meetings in Vienna.

the period just before Napoleon's defeat. In both cases, the results reflected the interests of those participating in the constitutional negotiations.

During the late eighteenth and early nineteenth centuries, liberal political and economic theories were accepted by many in Germany, including university students and nobles that sat on royal advisory councils. Liberal theories and arguments were thus evident in constitutional and policy debates inside duchy parliaments. A few "enlightened" duchy rulers also pushed for liberal reforms in parliament using ideological, economic, and military arguments. After Napoleon, external threats were also taken more seriously, which provided an additional rationales for reducing internal trade barriers that discouraged industrialization. In these circumstances, new taxes could be traded for new legislative authority, as in Bavaria in 1808 and Prussia during 1810–15.

These pre-Vienna Congress factors were reinforced by liberal provisions of the confederal constitution, which included provisions for all citizens to be able to 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 (reduced exit costs) would also have somewhat constrained duchy and local government decisions. As a consequence, the reforms of duchy constitutions in the early nineteenth century tended to be in liberal directions.

For example, 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 veto power over new taxes and legislation. Such relatively strong, although far from dominant, parliaments were fairly common for the German 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. Their second chambers were 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 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 slowed after 1819 as consequence of confederal decisions in Karlsbad, which reduced freedom of press and curtailed liberalism at German universities. However, modestly liberal constitutional reforms continued to be adopted. For example, in 1831 Saxony replaced an estates-based parliament with a two-chamber parliament; one chamber represented the old estates and the other was directly elected using wealth-based suffrage. Hanover adopted a relatively liberal constitution in 1833. There is also evidence of liberal influences in Bavarian constitutional developments. In mid century, liberal political coalitions often affected duchy and confederal German policies (Ogg 1918: 275–81).

This is not to say that liberals dominated constitutional or policy debates, but to say that the outcomes negotiated in duchy parliaments were affected by their interests. Conservatism was also clearly evident in the duchy constitutions throughout the nineteenth century. The old political institutions were not replaced by liberal ones, but although a few liberal reforms were introduced. In cases in which relatively large liberal reforms were introduced, the details often protected the interest of those involved in negotiations, as wealth-based suffrage tended to protect the interests of those already in government at the same time that liberal ideas about the proper method of choosing government officials were adopted. 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 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).

D. Liberalism in Nineteenth Century Germany

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 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.²⁷⁰

The political writing of Kant's colleague Von Humboldt 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 Prussian minister and diplomat, was active in the founding of the

²⁷⁰ 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, which in 1800 would place him along side of such late-eighteenth century moderate liberals as Edmund Burke. 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).

University for Berlin, and had been involved in constitutional negotiations at the Congress of Vienna.

Von Humboldt's 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.

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). It was published until 1851, many decades after it was written (in the 1790s).

Liberals often rose to high posts in government, as had Von Humboldt in the first half and Eugen Richter in the second half of the nineteenth century (Raico 1990). Despite the difficulty of publishing books and editorials, or organizing demonstrations in favor of constitutional reform after the Karlsbad decrees of 1819, 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 1990: 109).

There is also evidence that German conservatives gradually adopted more liberal theories of government 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

Economic liberals were generally more successful than their political counterparts in Germany during the nineteenth century, because it tends to be easier to build coalitions favoring internal and external trade liberalization than for constitutional reform. Trade liberalization tends to advance the interests of those who expect to invest in or work for the larger economic enterprises that larger markets permit. By increasing the tax base, manufacturing expertise, and rates of technological innovation, industrialization also makes possible larger, better equipped armies and navies. Liberal economic reforms also can be more easily reversed than constitutional reforms if they don't work out as expected. Moreover, economic liberals were less affected by the Karlsbad decrees, as discussed in the next subsection, than political liberals.

The success of economic liberals is evident in a wide variety of reforms adopted during the late eighteenth and nineteenth centuries. For example, Prussia ended serfdom in 1807, reduced the tax preferences of nobles in 1810 and ended many aspects of the feudal estate in 1811. It ended internal tariffs in 1818. In 1828 Bavaria and Württemberg created a customs union. 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 German confederation (Fulbrook 1990: 112–3). The customs union did not eliminate all intra-confederation trade barriers, but substantially reduced those barriers.

By mid-century, a number of politically active regional and national groups lobbied for liberal economic reforms. 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. A similar gathering took place in Gotha in 1858, where free traders and leaders of the cooperative movement founded a new Economic Congress, which lobbied 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. Public investments in transport infrastructure that were 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 1990: 113–14). Such reforms allowed a more integrated German market to emerge as commercial organizations and trading networks expanded to take advantage of economies of scale in production and greater specialization.

As noted above, support for liberal economic reforms is often 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)

Although support for liberal economic reform tends to differ somewhat from that for liberal political reforms, economic reforms often have political consequences. Increasing freedom for the serfs and other farm laborers tends to weakened the landed aristocracy by reducing their local authority and their income from farming. Reducing the monopoly power of guilds and privileged towns weakens old urban centers relative to new ones. Reducing tariffs makes other taxes and parliamentary majorities more critical for funding government programs. Industrialization tends to produce a broad middle class that in the nineteenth century tended to support political liberalization and politically active liberal groups.

Censorship Limits Public Support for Liberal Political Reforms

The efforts of political liberals in Germany, however, were less successful than those of economic liberals, 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 Council and Diet 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 (Fletcher 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.²⁷¹

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.”

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 to hire reporters and support

²⁷¹ 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.

newspapers that reported favorably on government policies and officials and opposed Bismarck's political opponents and their arguments.²⁷²

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. Parliamentary debates, however, were largely free from censorship, 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.

In general, supporters of economic liberalization could more easily organize and disseminate their arguments, because publications supporting economic reform did not directly violate censorship law. They did not

threaten or violate the integrity of the German Confederation, the integrity and security of the individual confederate states, the maintenance of freedom and inner peace of Germany, **or aim at a democratic alteration of the Bund.** (paragraph 10 of 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.

Political parties could be organized and campaigns for elective office on liberal economic policies. Liberal politicians and groups could publicly support liberal economic reforms, but only 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. Open support for greater parliamentary power or extended suffrage, however, would clearly have violated censorship and other confederal laws.

Indeed, a subset of liberals believed that political centralization would induce liberalization of the duchy governments, because of their successes in 1833, 1867, and 1871 and so evidently promoted German nationalism as a strategy for liberal reform.

²⁷² 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.

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, as discussed in chapter 7. Kuran's (1989) more dynamic analysis 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 argues 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 plausible explanation for the reform demonstrations in Hanover and Baden. They also provides an explanation for the demonstrations in support for constitutional reform that took place between 1847 and 1849, when large number of persons in Germany (and in many other parts of Europe) turned out for large-scale demonstrations favoring liberal political reforms of various sorts. Outside of France and Austria, the 1848 demonstrations were more or less peaceful, although larger than had previously been experienced. 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.²⁷³

The demonstrations in Germany in 1848, as in most other countries, favored a variety of economic and political reforms, but liberal ones dominated their constitutional proposals according to most historians. Demonstrators pressed for governance via rule of law, written constitutions, and expanded parliamentary powers (restoration of estate powers) and broader 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

²⁷³ In Austria and France, 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).

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.

A Constitutional Convention in Frankfurt: May 1848–49

The most important of the high-level discussion in Germany took place in Frankfurt, where the confederal diet authorized a constitutional convention to meet and to propose reforms of the confederal constitution. Representatives to the constitutional convention were elected, although qualifications for suffrage included wealth or tax payment thresholds, 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 1990: 119).

The participants engaged in serious discussions and constitutional negotiations. 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. A 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 and cultural divisions as well as geopolitical issues, and stable compromises could not be found. Many other issues also remained unsettled.

Unfortunately, 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 1990: 120–21). 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. If large scale demonstrations were always sufficient to induce reforms, the confederal government would surely have been revised, but, this was clearly not the case.

The duchy cabinets appointed in 1848, however, were able to bargain directly with other policy makers for liberal policy and constitutional reforms. Such negotiations often produced constitutional bargains that included liberal reforms. For example, several duchy parliaments regained or enhanced their medieval rights of veto over taxation and legislation.

E. 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 over 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. Cabinet ministers were answerable to parliament, but only for constitutional infractions. The king retained control of the army and foreign policy.

Prussian qualification for suffrage were the most liberal in Europe at the time. However, the manner in which representation was determined from the votes cast was far less liberal and

unusually effective at preserving the preexisting distribution of political authority within Prussia. In other parts of Europe, the right to vote was determined by minimum tax payments, as also the case in most German duchies that held elections in 1850. 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 (Fulbrook 1990: 126; Ogg 1918: 257–60).²⁷⁴

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. A supermajority of the elected seats were determined by a small minority of German voters. Suval (1985: 233) reports, for example, 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 determined the last third.²⁷⁵

The liberal cast of the 1850 Prussian constitution was not an accident, nor a fraud. It was not written to adopt the demands of those engaged in the demonstrations, as might have been expected by revolutionary theories of constitutional reform, but negotiated among persons already holding offices in the Prussian government. The negotiations included conservatives, pragmatists, and liberals, but the balance of interests at the table naturally favored conservatives (e. g., those opposed to political liberalization). The interests of those who had determined public policy in Prussia under its previous constitutions expected to control the upper chamber and the top-third of the second chamber. Moderate liberals were generally in favor of less than universal suffrage at this point, but expected to be well represented in the middle third of the elected chamber. Radical liberals and early social democrats were pleased to have suffrage extended to the working class and expected to be well represented in the lower third of the elected chamber.

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

²⁷⁴ A similar three-class representation system was also used in most municipal elections within Prussia. In some 4,000 municipalities one or two persons controlled one third of the seats in the municipal assemblies (Ogg 1918: 259).

²⁷⁵ 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 Koch (1984: 382) for a table of eligibility and participation in earlier Prussian elections.

bargaining power with the parliament. Members evidently feared that if they pressed the king too hard, he would simply revoke the constitution.²⁷⁶

Constitutional bargaining in Prussia continued for the rest of the century, 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, few reforms were accepted, and there was no clear liberal trend to the 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 architecture of Prussia's 1850 constitution turned out to be important for the future of Europe, not because it was widely copied, but because the Prussian government that emerged under it played a pivotal role in German politics for the next 70 years.

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

The German confederation's procedures and policies were not very much affected by the "revolution of 1848," and continued more or less as before, with relatively few policy decisions being made by the confederal government. Rather than liberalism and industrialization, the next three decades of constitutional reform in Germany were consequences of geopolitical tensions and wars 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 those wars are beyond the scope of this volume, except insofar as they affected constitutional developments.²⁷⁷ 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 former Danish duchy of Schleswig-Holstein.

Prussian territory after the war included most of present-day Northern Germany and part of present-day Poland. This made Prussia by far the largest of the German duchies. Prussia's victory

²⁷⁶ Kings often threatened to revoke "their" constitutions during the nineteenth century, although none were carried out. In long-standing parliamentary systems, institutional conservatism tended to make such threats less credible. The plausibility of such threats also diminished as the fiscal changes increased the bargaining strength of parliaments in the late nineteenth century.

²⁷⁷ See Bueno De Mesquita (1990) for a rational choice and statistical analysis of the Austro-Prussian war.

over Austria also implied that Prussia was also militarily the strongest member of the German confederation. The new balance of military power and political influence in Germany created new constitutional gains to trade.

The Constitution of the Northern Confederation: 1866–71

The Prussian government encouraged the remaining independent northern duchies to leave the old confederation, as it had done, and to 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 potential members. Membership in the new confederation was voluntary, but constitutional negotiations and internal deliberations regarding membership were undertaken in the shadow of the recent Prussian annexations.

To be adopted, the new confederal treaty had to account for the interests of its potential member states, which would require advancing the interests of duchy rulers and majority support by 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 uppermost in mind.

The new government would consist of a sovereign king (initially referred to as the president of the federation), a council of ministers appointed by the king, and a bicameral legislature. The king appointed the council without parliamentary review, although the chancellor was subject to parliamentary oversight (although he did not require its support). The members of the federal chamber of the parliament (Bundesrat) were appointed by member-state governments and had the power to initiate and veto all legislation. In this the new federal chamber was similar to the diet of the German confederacy that it replaced. Voting in the federal chamber also used weighted voting. Member votes would be weighted roughly by population. Prussia held 17 of 43 votes in the federal chamber. Most other member states had only one or two votes (Renzsch 1989: 20–21).²⁷⁸

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 over taxes and

²⁷⁸ 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).

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, 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.²⁷⁹ Electoral competition was clearly evident in most districts after the confederal treaties were ratified. A large number of groups obtained seats. The king (who would be Prussian) retained control of military and foreign policy.

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 the council and other senior posts in the confederal government. For example, Wilhelm I appointed Bismarck to be chancellor and selected only Prussians as cabinet ministers. Prussia's representation in the federal chamber allowed it to effectively control the federal council. Even in the elected chamber, Prussian interests were likely to be decisive because of its relatively large population, although the interests represented were not necessarily the same as those of the Prussian government. 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 and the King control over its ministry.

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

²⁷⁹ 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, the Prussian parliament's inclination to accept Bismarck's proposed constitution.²⁸⁰

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. 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 northern 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 conservatives, liberals, radical liberals, progressives, and moderate socialists. Access to northern markets was of interest to southern industrialists and bankers. The militant policies of Napoleon III had also increased the apparent Southern benefits from affiliation with a larger more powerful polity. New treaties of association were negotiated, and the results were codified in a slightly

²⁸⁰ 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).

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.²⁸¹

The 1871 federal constitution of Germany was based on that of the Northern Confederation, which in many respects was among the more liberal constitutions 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 directly 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 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.

²⁸¹ The Prussian king initially 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 name of the confederation was also formally changed to 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, and the new government is often referred to as the third confederation rather than the second empire.

Selection of the German chancellor and control over Germany's military and foreign policy, were retained by the king (who was simultaneously king of Germany and Prussia). This responsibility was important, because the main duty of the central government was initially national defense, foreign affairs, and the promotion of internal free trade, which were all controlled by the kings and his appointed council of state (Mork 1971: 67–68; Stern 1977: ch. 9; Koch 1984: 122–27, Ogg 1918: 217–24). All other laws were also formally royal proclamations, but new laws had to be approved by both chambers of the parliament and countersigned by the chancellor.

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 required a three-quarters supermajority in each chamber of parliament. This implied that 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. Constitutional stability was further reinforced by the stability of Prussian elite interests and Bismarck's ingenuity at forming majority coalitions in the parliaments of the next two decades. Changes in the representation of either chamber were very unlikely to occur, nor was it likely that ministerial responsibility could be formally introduced.²⁸²

Politics in the Third German Confederation

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

²⁸² An English translation of the constitution of 1871 is available from the *German History in Documents and Images Project*.

1998: 264–69).²⁸³ 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 two decades, 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. (Indeed, many of the provisions on which late nineteenth century liberals could 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 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 support of his government's policies (often by exploiting fears associated with imaginary international and internal crises).

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:

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.

²⁸³ 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).

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. Parliamentary influence is evident in economic legislation of direct interest to liberals and in a variety of other matters, including military ones. For example, 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. Internal and external tariffs were reduced during the period in which liberal coalitions were important, even though these were important revenue sources. As the free trade coalition splintered and pragmatists lost confidence in the merits of free trade (or acquired economic interests that trumped their ideological inclinations), tariffs rose.

It was normally effective politics, rather than institutional design or threats, that allowed Bismarck to have his way in the Reichstag. “Anti-liberal” restrictions were adopted by the Reichstag by “his” 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).²⁸⁴ 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 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)

²⁸⁴ 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.”

German social insurance programs was thus adopted over the objections of most liberals and Social Democrats with the support of Catholic centrists and nationalist conservatives in the Reichstag.²⁸⁵ 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.²⁸⁶

Constitutional Bargaining Intensifies after Bismarck: 1890–1918

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.²⁸⁷ In the post-1890 period, the chancellor's term of office was much shorter than before, because the new chancellors could not replicate Bismarck's genius for 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

²⁸⁵ 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 1990: 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).

²⁸⁶ 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)

²⁸⁷ 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.

lasted a bit longer, six years (1894–1900), 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 in the Reichstag disintegrated 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 party in the Reichstag, which made pro-government coalitions even more difficult to assemble (Fulbrook 1990: 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 had complete control of military and foreign policy during emergencies.

That liberal influence were 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 and freedom of the press were broadened.

Overall, there is considerable evidence that the Reichstag's power of the purse became more important after Wilhelm I's death and Bismarck's retirement.

The Final Steps to Parliamentary Democracy: 1918–20

The final step to parliamentary democracy in Germany required a substantial increase in parliament's authority over public policy, rather than suffrage expansion, in contrast to the other countries analyzed in this book.

An increase in parliament's authority does not necessarily require ideological support, as tends to be the case for suffrage reform. Nor does an increase in parliament's authority require formal constitutional reforms. It is sufficient that the royal government becomes increasingly dependent on majorities in parliament to advance the king's agenda, whatever that agenda might be. In Germany, however, the usual liberal fiscal bargains could not be obtained, because Wilhelm II was not willing to accept ministers from the Reichstag's majority parties.

There were a variety of proposals for the reform of the German confederations' constitution, but no ingenious liberal was able 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. 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.

Constitutional 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 so that the local government reforms could 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 truly 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 voting 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 1990: 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 crown until November 28 (Orlow 2008: 106–107).

There was no longer a German king or council of state with veto power over reforms, which provide new gains from constitutional exchange among members of the parliament. 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. This was done in a somewhat extra-constitutional manner, because 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 transitional government was based on constitutional proposals discussed before Wilhelm II's abdication. Representatives to a new Reichstag (National Assembly) were elected in January of 1919, and members of a new Bundesrat (Committee of the States) were appointed by the *länder* governments. The government (council of ministers) was appointed by a majority coalition of the new National Assembly, which was a center-left coalition of Social Democrat, Liberal, and Center Party members under the leadership of the Social Democrat Friedrich Ebert.

The new government called for a formal constitutional convention, which took place in the small city of Weimar.

The Weimar Republic

The first drafts of what became the Weimar constitution were prepared before the elections for the constitutional assembly. Hugo Preuss, a left liberal was given the task of writing a constitution a month after Wilhelm II's abdication. His draft constitution was discussed at length within the provisional government, by members of the Reichstag, and by a few distinguished scholars, including Max Weber. Those early drafts were subsequently revised in negotiations at Weimar, where among other changes, the office of president was strengthened. Approval, required majorities in the National Assembly, the Committee of the States, and by transitional government (Kolb 2004: 17–19). There was no longer a king or royal council of state to veto proposed reforms.

The proposed constitution adopted 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 president was elected with a fixed term, but nonetheless 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 electoral basis of the Reichstag was changed in two ways: proportional representation was introduced and suffrage was extended for the first time to women. The constitution was approved after several months of negotiation and bargaining on August 11, 1919.

It is interesting to note that the Weimar reforms of the German parliament paralleled those being adopted elsewhere in Europe at about the same time. The new constitution created a government dominated by parliament and grounded in elections with universal adult suffrage. The formal transition also was largely constitutional and lawful, although governance in Germany was neither peaceful nor orderly in the period in which constitutional reforms were negotiated, nor entirely so in the years that followed. As in many other countries, central government's authority to use income taxation for revenues was adopted at the same time that other constitutional reforms were adopted as part of a constitutional bargain. The governments of the former duchies, *now länder*, also became republics after their governments had resigned. The *länder* retained considerable local fiscal and regulatory authority under the new constitution, although the central government had somewhat greater powers to tax than before.

In this manner, constitutional negotiations, often in the shadow of wars, made Germany a parliamentary democracy, although a republic, rather than a kingdom.

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 by exploiting its emergency powers provisions. Whether the Weimar constitution's failure 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. 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.²⁸⁸

It is interesting to note that with the death of Hitler in 1945, the Weimar constitution essentially returned to force, as specific enabling acts expired and the offices of chancellor and president became separate again. Given this, it is not surprising that the "new" post war constitution for Western Germany is broadly similar to the Weimar constitution in its bicameral architecture and in much of its language, although its various emergency powers provisions (i.e. Article 48) were eliminated (Koch 1984:315-7, 340-3).

G. Conclusions and Overview

Overall, German constitutional history from 1815 through 1925 is largely consistent with the models developed in part I. Although military events were unusually important factors as catalysts for constitutional negotiations and development, the constitutions adopted were negotiated by members of parliaments, councils of state, and kings, rather than imposed by victorious armies or drafted by leaders of mass demonstrations. There were clear constitutional trades and compromises in each successive reform and constitution. There were also liberal trends. Suffrage and civil liberties expanded. Party competition and a relatively free press emerged by the end of the nineteenth century. The importance of parliamentary majorities tended to increase as national budgets increased

²⁸⁸ 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.

and more disciplined national parties emerged, especially in the two decades before World War I. Internal liberal and economic pressures were sufficient to end feudalism and produce relatively liberal trade regimes internally and externally. Economic life in Germany became more urban, commercial, and industrial during the nineteenth century.

Suffrage and parliamentary authority were quite different phenomena in Germany, as predicted by the analysis of part I. Liberal pressures for constitutional reform were sufficient to obtain very broad suffrage at a very early date, although suffrage was not the only constitutional matter negotiated in 1850. To obtain the necessary support from conservatives required accepting other constitutional details that reduced the potential effects of broad suffrage on public policy. Indeed, parliamentary dominance never completely emerged in the third German confederation (second Reich).

This was evidently largely because of the particular persons involved in the negotiations between kings and parliaments. Only in late 1918, after several important veto players disappeared, were significant reforms of parliament adopted. German and world history might have been very different if Wilhelm I had accepted the proposal of the Frankfurt convention, if Bismarck had been less adept at forming majority coalitions, or if Wilhelm II had engaged in a bit of constitutional bargaining with his parliament a decade or two before World War I. In this, the German case can be said to be the converse of the British case, where parliamentary dominance emerged several decades before universal suffrage was adopted.

The reforms adopted at Weimar after Wilhelm II abdicated also reflected institutional conservatism, liberal theories of governance, and constitutional bargaining. The bargains struck produced reforms that were consequently very similar to those adopted by other European countries at approximately the same time, where similar theories and interests were represented at the negotiation tables.