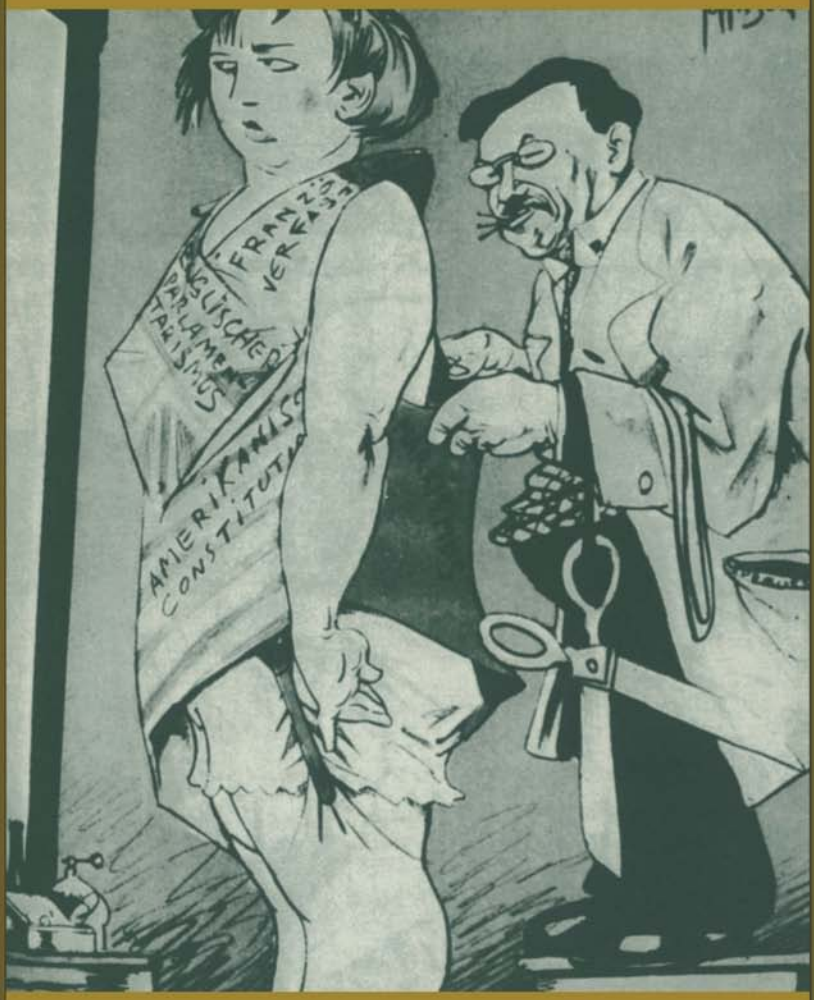
POPULAR SOVEREIGNTY *and the* CRISIS *of* GERMAN CONSTITUTIONAL LAW

The Theory & Practice of Weimar Constitutionalism



Peter C. Caldwell

Popular Sovereignty and the Crisis of German Constitutional Law

The Constitutional Dress of 1919

Germania: "Well, the old dress made of good German fabric suited me better!" Reprinted from W. A. Coupe, *German Political Satires from the Reformation to the Second World War* (White Plains, NY: Kraus International Publications, 1985), by permission

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The Theory & Practice of Weimar Constitutionalism

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To

Peter R. Caldwell

&

Susan Havens Caldwell

for their support in

so many ways

CONTENTS

PREFACE

This work examines the debates over the meaning and practice of constitutional law that took place during Germany's first democracy, the Weimar Republic (1919–33). It focuses on the professors of state law who played and continue to play a central role in German constitutional debates: the compilers of manuals of state law, the authors of treatises on the abstract meaning of legal norms, and the scholars who trained and monitored the lawyers and judges of the German judicial system. Under the pressures of the new democracy, these scholars, and to a lesser extent the judges of the high courts, developed approaches to constitutional law that rejected or fundamentally reworked the categories and methods of the legal positivism that had come to dominate the legal profession during the German Empire (1871–1918).

The frontispiece to this book illustrates the way the constitution itself came into question as part of the debate over constitutional theory and method in the Republic. The cartoon, whose title translates as "The Constitutional Dress of 1919," caricatures Hugo Preuss, the author of the Weimar Constitution, as a Jewish tailor fitting Germania with a new dress. The constitutional dress is made up of rags from a number of foreign sources: English parliamentarianism, French constitutionalism, American constitutionalism, and, surreptitiously sewed on behind Germania's back, the ominous Marxism. Germania, looking in the mirror, says, "Well, the old dress made out of good German fabric suited me better!"

The cartoon conveys a number of messages. First, it suggests that the 1871 Imperial Constitution was somehow more "becoming"—more natural and less problematic—than the Weimar Constitution. And in fact, the 1871 Constitution did remain fairly unproblematic during the German Empire. It was in a way an "unpolitical" constitution, a constitution without a list of basic rights, a constitution that merely described

the form of the state and the procedure for creating laws. Political controversy took place—but beyond the realm of constitutional law. By contrast, the Weimar Constitution, written in the aftermath of military defeat in the First World War, raised new and difficult—and politically charged—questions. The framers of the 1919 Constitution sought answers to the problems facing a constitutional democracy by examining the functioning of English and French parliamentarianism and the U.S. system of separation of powers. They also sought to accommodate those groups that had been marginalized in the German Empire, most notably the Social Democrats, by including social rights and opening the door to legislation that could have radical or socialist content. The constitution became a matter of political dispute in debates over how the democratic state would function, over the basic rights of German citizens, and over political parties and the president. The cartoon translates those problems into accusations of foreign influence and poor skill in forming the document, with anti-Semitic overtones. It illustrates both the real process of rethinking constitutional law and the ideological condemnation of the constitution itself that characterized antidemocratic thinking during the Republic.

The debates over the theory and practice of Weimar constitutionalism are important, first, because they indicate the possibilities and problems inherent in the concept of constitutional democracy in the context of a weak and defeated central European power in the interwar period. But the debates have also played a major role in the long-term formation of a postmonarchical constitutionalist tradition in Germany—a process that took place within the Federal Republic of Germany between 1949 and 1990—a tradition that emerged victorious, but still conflict-ridden and contentious, in the period after German unification. The main objects of my study, especially Carl Schmitt and Hermann Heller, have once again taken center stage in German constitutional debates during the past half decade as a politically united Germany has begun to discuss the substantive foundations of its unity, the meanings of political democracy, the concept of the German "nation," and the role of the state in times of economic limitations.

With one exception, all translations are my own unless otherwise noted. The exception is to be found in the frequently cited constitutional articles from the Imperial Constitution of 1871 and the Weimar

Constitution, for which I rely on the translations in Elmar M. Hucko, ed., *The Democratic Tradition: Four German Constitutions,* unless otherwise indicated.

Some words describing institutions peculiar to the German political tradition have been left in the original German. The *Rechtsstaat* was, literally, a state that operated within the realm of legality. Historically, the concept of the *Rechtsstaat* was associated as well with an independent judiciary and a neutral and predictable set of procedures for applying the law. But the term is not identical with the English phrase "rule of law." The main noun in *Rechtsstaat* remains the state, conceptualized as a unity, perhaps even a unified will. I have left *Rechtsstaat* in German as a concept specific to the continental tradition of law. During the German Empire, the governments of particular provinces were called states (*Staaten*) as in the United States, enabling a direct translation. By contrast, the Weimar Constitution explicitly referred to these entities as *Länder,* or "lands," to emphasize the states' subordinate place in the constitutional system. I have retained the German *Land* and *Länder* to emphasize the specific meaning of German federalism in the Weimar Republic. The Reichstag is the German popular assembly: something less than a parliament in the English sense before 1919 but more than the U.S. Congress during the Weimar Republic. Similarly, an assembly at the level of the *Land* was called a *Landtag,* a term that I also retain. The assembly of state representatives in the empire was the Bundesrat, or Federal Council; that assembly was considerably weakened and renamed the Reichsrat—literally, Imperial Council, but more accurately Federal Council—in the Weimar Republic. I retain the German names to underline the distinction between the institutions. Finally, the highest court of civil and criminal law in unified Germany was called the Reichsgericht. Substituting "Supreme Court," as a number of authors have done, obscures the important differences between the German and U.S. traditions of judicial review. "Imperial Court" also fails to convey the proper meaning of the institution in the Republic. Therefore I have retained Reichsgericht.

Other words have been given different translations according to the context. I translate *Reich* in the context of the 1871 Constitution as "empire." The 1871 Reichsverfassung is therefore translated as "Imperial Constitution." But *Reich* can also mean simply the higher politi-

cal unity in a federation—the federal state; or it can refer to an organ of the national government, such as the National Economic Council (Reichswirtschaftsrat) of the Weimar Constitution. *Regierung* in German refers to the executive body—the kaiser and his ministers, for example. I have translated the term in different cases as "government" or "executive."

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aid in comprehending Kelsen in the neo-Kantian context and translating some of his more technical language into English. Bill Scheuerman passed along his own essays and works-in-progress, and made helpful suggestions about my work. In Germany, Bertram Belda, Raphael Gross, and Christoph Schönberger provided useful comments and criticisms. Donald Kommers and an anonymous reader for Duke University Press suggested ways to revise the initial manuscript. Of the many others who helped me, I would like to thank in particular Kathleen Canning, Roger Chickering, Steve Hastings-King, Rainer Horn, Ken Ledford, Mary McGuire, Maria Mitchell, Hubert Rast, Mark Swofford, and Guy Yasko. On a collective level, I thank the Cornell University European History Colloquium, my colleagues at Rice University, and the participants in Roger Chickering's standing seminar in German history at Georgetown University.

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I owe unrepayable debts to Lora Wildenthal, whose patience, love, and careful criticism helped create this book.

Popular Sovereignty and the Crisis of German Constitutional Law

THE POWER OF THE PEOPLE AND THE RULE OF LAW

The Problem of Constitutional Democracy in the Weimar Republic

On August 11, 1919, for the first time in the history of the German nation, a constitution based on the principle of popular sovereignty came into effect. The hopes bound up with the proclamation of democracy were quickly undermined by civil strife, inflation, and resentment on both the left and the right against the failures of the new republic. Thirteen years later, the constitutional system lay in shambles, making way for an antidemocratic and anticonstitutional dictatorship. As a final insult to the principles of democratic constitutionalism, Adolf Hitler gave National Socialist rule the gloss of constitutionality through the enabling act approved by the Reichstag on March 24, 1933.[1] At least in appearance, the constitutional democracy had given itself up, legally and peacefully, to its most extreme enemy.[2]

The Weimar Constitution has played a key negative role in German constitutional politics ever since the fall of the Nazi regime. The founders of the 1949 West German Basic Law made a conscious attempt to avoid the "mistakes" of Weimar by limiting the role of plebiscites, restricting the power of the president, eliminating the ability of the parliament to paralyze the government, and asserting the primacy of basic rights over both legislative and executive powers.[3] Less generally recognized is the positive contribution Weimar constitutional lawyers have made to the culture of constitutional debates in the Federal Republic. The ongoing crisis of constitutional democracy in the Weimar Repub-

lic provided the backdrop for Weimar lawyers' attempt to break away from the "statutory positivism" that had dominated law schools in the German Empire. Lawyers and courts began to rethink the role of basic rights in a democracy, the way constitutional law could function to integrate antagonistic social groups into the commonwealth, and the limits to constitutional amendment in the basic principles of constitutional democracy. The questions and problems posed by the "postpositivist" theories have continued to dominate German constitutional law up to the present day.[4]

This book examines the development of that new constitutional jurisprudence during the Weimar Republic. The adoption of a democratic constitution raised basic questions about democracy and law that have a familiar ring to observers of debates in the United States. First and foremost came the theoretical problem of what the "foundation" or "source" of the system was. On the one hand, the people allegedly produced all state power. But on the other hand, the production of law took place only through legal procedures. Who was sovereign, the constitutional people or the democratic constitution? That question led directly to debates on the legitimate interpretation and application of constitutional articles in a democracy. At issue was not only the usefulness of natural law and sociology in interpreting law, but also what in the U.S. context has been termed the "countermajoritarian difficulty": Is judicial review of statutes ipso facto antidemocratic, since judges supplant the people's representatives as arbiters of constitutional meaning?[5] A third discussion ensued over constitutional practice itself. High courts of law and political actors struggled over the meaning of the constitution as it appeared in actual adjudication, granting concepts such as "equality before the law" a substantive value where formerly they had possessed a merely formal significance in the realm of practical law. The heated debates over the theory and practice of constitutional democracy took place in the context of a weak postwar republic whose citizens increasingly opposed the values of the Weimar Constitution itself. In 1933, the National Socialists swept aside both constitutionalism and democracy to institute a system that they asserted was based immediately on the racial *Volk* and its obedience to its *Führer*.

As the social and political systems entered into crisis in the Weimar Republic, so did the discipline of "public" or "state" law, defined in the

continental tradition in opposition to the "private" law of contracts. But the crisis had deeper roots in the transition from constitutional monarchism to the constitutional democracy of 1919. State law, which encompassed administrative, procedural, and constitutional law,[6] had developed under the stable constitutional system of the German Empire (1871–1918). That stability rested on the putatively unpolitical nature of the 1871 Imperial Constitution. Political debate took place in other arenas: for example, in the development of administrative law, in other areas of social and labor law, and in the Anglo-German naval rivalry. As constitutional law diverged from political practice, constitutional theory became depoliticized. This was the heyday of positivist and organic theories of stability in state law.

Chapter 1 explores the positivist tradition in state law during the German Empire. One must employ the term *positivism* with care because it can signify at least three distinct concepts in legal theory.[7] First, positivism can refer to a theory of law as factual social practice. *Sociological positivism* identifies law with the social practices of a community. The norms that are objectively enforced—whether by state officials or by people in their everyday lives—count as law, regardless of whether those norms are written or unwritten. The task of the legal scholar is to determine which norms are effective. The tools for making this determination are sociological.[8] *Statist positivism,* by contrast, identifies law with those norms positivized by a legal authority, or, to express the point more abstractly, those norms produced according to the correct procedure. This second variety of positivism corresponds to the ideas of H. L. A. Hart and other Anglo-American writers in the analytic tradition.[9] While sociological positivism defines law on the basis of a distinction between effective and ineffective norms, statist positivism distinguishes law from what is not law on the basis of a norm's recognizable validity within the legal system. The distinction between these two approaches is often disciplinary: the sociologist of law observes and records social fact, while the legal statist takes the "internal" point of view (Hart), observing what for the legal actor counts as a binding norm. The distinction also marks a line between a monist view of the world that seeks to reduce law to causal or physical relations, and a dualist view that sees law as an embodiment of spirit or normativity not immediately part of social reality.[10]

The *statutory positivism* associated with state law in the German

Empire was qualitatively different from the other two varieties of legal positivism, although it resembled the statist current more closely. It was a school founded on a specific method of interpreting statutes, understood as the highest expression of the state's will, through concepts such as "dominion" (*Herrschaft*) and "contract." For the central figure of the school, Paul Laband (1838–1918), the articles of the 1871 Constitution and correctly produced statutes comprised the legal system. He excluded all consideration of natural law (i.e., moral or sociological limits to man-made law) and common law to concentrate on the will of the state. The distinction was rooted in a particular historical moment, the creation of a unified German state, rather than in a philosophy. In this respect, Labandian positivism differed from both sociological legal positivism, which took cognizance of social norms, and statist legal positivism, which considered common law to be positive law if the normative rules for recognizing law so allowed it. Laband furthermore refused to grant the constitution as a whole any special authority. In his approach, the state, as a willing sovereign, produced both the constitution and statutory law. The constitution was therefore logically no "higher" or more sacred than statutes.[11]

Laband's school paralleled German liberalism in affirming the existing state. It turned away from questions regarding the nature and status of the constitution. Instead, it analyzed legal norms in a formalist fashion: it sought to clarify the precise rights, duties, and procedures in each legal norm. It then organized these laws into a coherent, logically closed system of norms, compiled in the form of a handbook. But the Labandian approach came into question at the end of the century as changes in society and in the conduct of politics challenged traditional constitutional systems across Europe, from France of the Third Republic, to England during the crisis of liberalism in the years before World War I, to the imperiled tsarist autocracy in Russia. Despite threats to the German constitutional monarchy by parliamentary forces after 1900, however, the 1871 Constitution remained unchanged. But if constitutional laws remained unchanged, the younger generation's approach to them did not.

Chapter 2 examines the works of two constitutional theorists who challenged the foundations of statutory positivism after 1900. In 1911, Hans Kelsen (1881–1973) published a massive *Habilitation* that under-

took a systematic investigation of the theory of public law, taking as its starting point the methodological split between "is" and "ought," "fact" and "norm." His radical neo-Kantian skepticism led him to criticize the methods and the ideological, authoritarian implications of Laband's approach to state law.[12] Carl Schmitt (1888–1985) struck at the Laband school from another side. He developed its affirmation of the state into a conservative critique of constitutionalism in general. His work on the "state of siege" during World War I laid the foundations for a theory of dictatorship. Kelsen and Schmitt thus began their attacks on fundamental concepts of nineteenth-century constitutionalism that would bear fruit in reconceptualizations of constitutionalism during the Weimar Republic.

Germany's defeat in the First World War led to the collapse of the monarchy. According to Article 1 of the Weimar Constitution, the state's power emanated from the people. The doctrine of popular sovereignty raised questions about the meaning of minority rights, about limits to the power of the people's representatives (be they political parties, the parliament, or the president), and in general about the relationship between the power of the people and constitutional law. These issues became brutally concrete in the early years of the Republic. The revolutionary right rejected constitutionalism entirely, endorsing instead the quasi-mystical, immediate unity of the *Volk* as symbolized in the "peace of the fortress" (*Burgfrieden*) of World War I. The revolutionary left called into question the constitution's claim to found a "democracy" while leaving untouched property relations and large parts of the military and administrative hierarchies. Rejection of the constitution's claim to legitimacy led to situations approaching civil war in the early years of the Republic. The first president, the Social Democrat Friedrich Ebert, responded with extensive use of the presidential emergency powers granted by Article 48 of the constitution. As Germany entered into hyperinflation and economic crisis in 1922–23, the Reichstag passed enabling laws extending to the president legislative and even budgetary powers.[13] The Republic had barely come into existence, and already the president was undertaking measures that went far beyond what the constitution's founders had expected. The situation was fundamentally new for lawyers trained in the constitutional history and constitutional law of the German Empire. The legitimacy of the Bismarckian consti-

tution, after all, had never been in doubt. Revolution and civil strife put into sharp focus problems of legitimacy for a discipline that had been taught to avoid "political" disputes.

Germany returned to political stability in 1924. But the events of the preceding years had profoundly altered debates about constitutional law. The government had intervened extensively in social and economic relations over the preceding decade, imposing economic and police controls during wartime, regulating the period of demobilization, and revaluing the mark in 1923–24. Under these conditions, lawyers began to rethink their concepts of state law. They asked if the impoverishment of certain social groups by inflation and revaluation amounted to discriminatory and illegal actions by the state that violated citizens' basic right to equality before the law. Some asserted that revaluation had expropriated the middle classes without compensation, against the express wording of the constitution. Underlying these ruminations was the problem of what role the courts should play in the new constitutional system: Did the courts have the right to review the actions of the Reichstag or the president for their constitutionality? The issue of judicial review of statutes and presidential decrees for their constitutionality went to the heart of the political presuppositions of the positivist tradition, which had sought to defer to the sovereign on political questions. The new jurisprudence of constitutional law asked whether the democratic sovereign—as opposed to the sovereign of the monarchical constitution—was limited by constitutional law, adjudicable by the courts.

The debates on currency revaluation were the immediate occasion for rethinking the inherited notions of constitutional law. During the relatively stable years of the Republic between 1924 and 1929, works of the new constitutional jurisprudence began to appear. In 1924, Heinrich Triepel (1868–1946) published a legal brief suggesting the unconstitutionality of revaluation.[14] The influential essay had a profound impact on conservative scholars' approach to the ideas of equality and expropriation. This was soon followed by a dissertation on the subject of equality by Triepel's student Gerhard Leibholz (1902–1982), later a judge on the Constitutional Court in postwar West Germany.[15] Rudolf Smend (1882–1975) released *Constitution and Constitutional Law* in 1928. Smend, a colleague and friend of Triepel, applied an explicitly political standard to constitutional law, asking what would serve to "integrate" society

into the political system.[16] In the same year, Carl Schmitt's *Theory of the Constitution* appeared, asking what the fundamental decisions of the constitution were and where limits to legislative activity and constitutional amendment could be found. Schmitt located the limits in "fundamental decisions" of the revolution that stood prior to the constitutional text itself.[17] Finally, over the second half of the 1920s, Hermann Heller (1891–1933) attempted to adapt the antipositivist theories developed by Smend, Triepel, and Schmitt to the needs of Social Democracy.[18]

The development of a new constitutional culture was interrupted by a political crisis that struck at the heart of the constitutional system. In 1928, following victories by the Social Democrats in Reichstag elections, the precarious compromise between unions and industry that had enabled the political parties to cooperate in the Reichstag began to fall apart.[19] The collapse of the international economy the following year contributed to the growing paralysis of the Reichstag. The "great coalition" came under pressure as the number of people on the unemployment lines soared. When the Social Democrats refused to approve a cut in unemployment insurance benefits in early 1930, the coalition collapsed, and President Paul von Hindenburg appointed Heinrich Brüning chancellor. Brüning, from the right wing of the Catholic Center party, had never felt wholly at home in the new democracy. He formed a new cabinet without consulting the Reichstag. In effect, his government excluded the deeply divided Reichstag from state activity. In July 1930, the Reichstag demanded that Brüning's emergency economic decree be repealed. The president responded by dissolving the parliament and reissuing the decree. Over the next two years, Brüning released a string of decrees designed to deal with the "economic emergency" that the major parties of the Reichstag felt compelled to accept; the alternative was elections that threatened to expand Nazi representation in the assembly.[20]

In the short term, much of Brüning's activity, even when it ran counter to basic principles of parliamentary government, seemed necessary for the survival of the constitution. His memoirs (published in 1970) and his papers, however, show that Brüning aimed in the long term to restore the monarch and weaken the Reichstag.[21] Far more open were the antirepublican aims of Franz von Papen and his cabinet of far-right aristocrats, who succeeded the Brüning government on May 30,

1932. Papen aimed to create a new authoritarian order based on presidential power and an alliance with the far right. With that aim in mind, he suspended the ban on Nazi storm troopers on June 14, 1932, and on June 28 he forbade *Länder* governments from issuing new bans on wearing uniforms and demonstrating in public. The police of the individual *Länder* had to deal with the dramatic increase in street violence that resulted from lifting the bans. The government in Prussia, dominated by the Social Democrats, openly criticized Papen's course. On July 20, 1932, Papen intervened in Prussia on the basis of Article 48 to remove the Social Democrats from office and insert himself in their place as a commissar responsible only to the president. Article 48 was used to destroy the federalism that the constitution itself claimed to guarantee. The application of Article 48 against the word of the constitution in the name of a legitimacy higher than mere constitutional legality, to paraphrase Carl Schmitt, was the first scene of the final act of the Weimar Republic.[22] By the end of the year, Papen had fallen; the authoritarian-corporatist experiment of General Kurt von Schleicher failed almost immediately; and on January 30, 1933, Adolf Hitler was named chancellor of Germany.

Pinpointing the moment when the Weimar Constitution finally collapsed inevitably raises a theoretical issue for the constitutional historian: What *was* the constitution that collapsed? Precisely this question stood at the heart of the debates over constitutional law that unfolded during the Weimar Republic. And precisely this kind of question was what the tradition of statutory positivism—whatever the value of that tradition's reading of individual legal provisions—neither could nor desired to answer.

Chapter 3 shows how the leading representatives of statutory positivism in the Republic elucidated the new constitution. Richard Thoma (1874–1957) and Gerhard Anschütz (1867–1948) presented a view of the constitution that operated politically to affirm its legitimacy and legally to affirm the validity of all its written provisions. The positivist conceptualization of the constitution came under attack from both conservative lawyers, who decried its lack of "substance," and legal scholars, who argued that the positivists could not address the theoretical and practical problems of constitutional law that faced the new republic.

Chapter 4 returns to Carl Schmitt and Hans Kelsen, who became the most significant philosophers of the constitution during the years

of the Weimar Republic. They dealt with the theoretical issue of how to conceive of the constitution as foundation of the state. Kelsen developed a neo-Kantian notion of the constitution as the "basic norm" from which all other norms in the legal system could be logically derived. He conceived of sovereignty as the system's logical unity. Schmitt, however, insisted that sovereignty was not merely a transcendental presupposition (in the Kantian sense of a necessary logical assumption) but rather a transcendent, metaphysical fact. Therefore Schmitt conceived of the constitution as an immutable statement of will posited by the sovereign (the people). Kelsen's nominalism led him to reject claims made by any state organ to represent the will of the sovereign precisely because there was no sovereign will. Schmitt claimed that one state organ immediately represented the sovereign will of the substantively unified people: the president. The debate between the two came to a head in 1931 and 1932.

The theory of legal practice is much messier than that of "pure" theory, because it deals with the way principles, politics, and social pressures enter into decisions.[23] Chapter 5 examines the works of Rudolf Smend and Hermann Heller, whose constitutional theories concentrated on the moment of practice, the point at which a norm becomes a concrete decision. Smend's "theory of integration" started from the assumption that the constitution was a real, living spiritual entity. Legal practice was limited not only by written law, but also by the unwritten law embodied in the state's political needs and the nation's system of values. Smend's theory was important for the interpretation of basic rights. A hierarchy of rights, he argued, could be derived from the basic values of the community in relation to other values, such as political expediency. The theory of integration had conservative implications, especially as it shifted the authority to decide which actions "integrated" society away from the party politics of the Reichstag to the basic values that Smend assumed formed a kind of consensual bedrock for the national community. The conservative Social Democrat Hermann Heller developed a theory of practice that started with the problem of who should determine the content of constitutional norms. The formal organization of the state, Heller argued, was itself based on basic principles of right (*Rechtsgrundsätze*). Like the statutory positivists, Heller viewed the formal procedure of legislation as a source of legitimacy in a constitutional democracy.

Chapter 6 turns from the theory of constitutional practice to the

practice of the highest German courts, the Reichsgericht and the State Court (Staatsgerichtshof). Over the course of the Weimar Republic, the high courts began to develop new notions of equality before the law, of property as defined by the constitution, and of judicial review. These notions developed in Reichsgericht and State Court practice would become standard features of the Constitutional Court in the Federal Republic. As the courts grappled with the new problems of the democratic interventionist state, they also invoked the new scholars of constitutional law. The new concepts of jurisprudence began to transform the reality of judicial decision making.

English-language scholarship has begun in recent years to focus on the works of the Weimar lawyers. Carl Schmitt, whose essayistic style and conservative politics are arguably more accessible to U.S. scholars, has been the subject of a number of historical and political science monographs over the past two decades that have explored the context of his antiliberalism in the Weimar Republic and its relevance for the present.[24] By contrast, the scholars who study Kelsen, most of whom are in the legal profession, have concentrated on Kelsen's analytical, abstract thought and paid less attention to historical context.[25] Heller and Smend have received little attention in the English-speaking world, despite their centrality to the development of German constitutional law and the jurisprudence of the Constitutional Court.[26] Yet the debates of the 1920s are still highly relevant for the political and legal culture of the Federal Republic. The amount of German-language literature on the Weimar constitutional debates is overwhelming. The major figures have been examined in detail by legal scholars, sociologists, political scientists, historians, and literary critics. Annually revised handbooks of state law contain summaries of the main figures' arguments. By providing a contextualized account of the Weimar debates on constitutional law, the present volume will contribute to scholars' understanding of the constitutional culture of the Federal Republic.

The issues Weimar constitutional theorists grappled with are not unfamiliar to students of U.S. constitutional history. The problem of popular sovereignty and its relationship to constitutional law, at the heart of the dispute between Schmitt and Kelsen, reappears regularly in debates in the United States over the legitimacy of government actions, court decisions, and the role of the federal government in state politics. "We

the People" in U.S. constitutional theory, for example, may be either the "republican" community of citizens or the civil rights and procedures that constitute a "liberal" conception of the Constitution.[27] Likewise, the Weimar period disputes over the theory of constitutional practice resemble developments in the Supreme Court's interpretation of constitutional law. Smend, for example, argued for reformulating rights as values instead of viewing them as absolute negative protections of areas of social life from government interference. Then he sought to balance the values he found in concrete decisions.[28] Smend's arguments parallel U.S. debates over the issue of whether rights, such as the right to own property, are negative in the sense that they exclude state interference, or positive values that must be weighed against the values embodied in other rights.[29]

What may seem foreign to observers in the United States is the abstract level of the German debates. In part, that abstraction reflects German jurists' orientation toward the "state" and the high theory taught at the universities rather than toward concrete aspects of legal practice. To this day, major surveys of German constitutional history contain almost no account of the controversial judicial decisions of high courts.[30] That abstraction reflects something besides a stereotypically "Germanic" orientation toward abstraction and theorizing, however. It reflects the many breaks in legal continuity that punctuate twentieth-century German history: the Revolution of 1918, the Nazi grab for power in 1933, the defeat of Nazism and the elimination of the German state in 1945, and the formation of two new German states in 1949. Constitutional histories of the United States can perhaps all too easily assume a stable, continuous development by examining the decisions of the Supreme Court; in Germany, the highest courts have taken many different institutional structures and carried out many different political functions over the course of this century. Accounts of the major Weimar theorists of constitutional law, not court decisions, provide the continuity between Weimar constitutionalism and that of the Federal Republic.

The concept of constitutional democracy was itself the subject of debate during the Weimar Republic. Indeed, conservative historiography's argument that constitutional democracy was "defenseless" and "gave itself up" hypostatizes what was an unstable entity and not a coherent subject. Further, that historiography obscures the way one conception of

constitutional democracy, associated with Carl Schmitt and Chancellor von Papen, undermined other aspects of the Weimar Constitution, and thus laid the groundwork for the Nazi takeover. The debates of the Weimar Republic outlined tensions and contradictions in the theory and practice of constitutional democracy itself. These tensions have not been absent from the constitutional history of the United States; and they have in no way disappeared at the end of the twentieth century.

[1]

THE WILL OF THE STATE AND THE REDEMPTION OF THE GERMAN NATION

Legal Positivism and Constitutional Monarchism in the German Empire

In 1871, in the wake of the Wars of Unification, Germany was unified within a constitutional framework. Otto von Bismarck's foreign policy satisfied nationalistic aims. And liberal majorities in the new national assembly, the Reichstag, and in the individual state assemblies ensured that the new system would fulfill some of the constitutional aims of conservative liberals as well.[1] National Liberalism affirmed the new constitutional monarchy. National Liberals worked closely with the government in the early years of the empire to create the laws and institutions of the new state, from the national court system of the 1870s and the Civil Code of 1900 to statutes limiting "ultramontane" and "internationalist" influence in the 1870s and 1880s.[2]

In this context a new, formal approach to law came to dominate constitutional jurisprudence in the German Empire. In the first edition of his commentary on German state law, Paul Laband, the leading representative of the school, declared that the 1871 Imperial Constitution marked the "redemption" of the German people from its division.[3] For Laband, "redemption" meant the fulfillment of a sacred history: Germany's struggle for existence was resolved. Both he (unaffiliated with a party) and the National Liberals found the Bismarckian system open to centralizing and modernizing reforms.[4] Labandian legal positivism took

as its task the description of a constitutional system. And what Laband described, he affirmed. His method and his handbook set the standards for work on constitutional law in the empire.

The affirmative approach to the Bismarckian system expressed itself in the "neutral" language of science. Both Laband's legal positivism and its alleged opponent in the empire, the "organic" state theory of Otto von Gierke (1841–1921), were part of a more general trend within the humanities to emulate natural scientific methods in the nineteenth century. Both schools rejected notions that the law had a transcendent origin: the positivist school insofar as it saw all law as posited by the worldly and human state, and the organic school insofar as it derived laws from the worldly "spirit of the nation" (*Volksgeist*) in its natural, historical development. At the same time, both positivist and organic theories—in Germany as in other European states in the nineteenth century—assumed that the law comprised a unified system or even a real subject. The positivists assumed that all statutes and ordinances were the expression of a unified "state's will"; the organic theorists presupposed the natural unity of the people or nation (*Volk*) from which law derived.[5] The two opposing theories of law in the empire shared an anthropomorphism of the state.

Perhaps no one offers better evidence of the connection between the organic and positivist traditions than Laband's forerunner, Carl Friedrich von Gerber (1823–1891). Gerber had become famous before 1848 as a compiler and synthesizer of the many systems of private law in the German-speaking lands. Unlike the historical school of legal scholarship, which sought to derive the validity of a law from its historical origins, Gerber built his system on existing law. In order to synthesize the law (contract law, family law, etc.) of the German states, however, he had to assume an underlying, quasi-organic unity of German law. Gerber extended his work to the realm of state law after the Revolution of 1848, when the issue of German unity had been placed on the table. He attempted to describe German state law using the same method of compiling and synthesizing the law of the many German states. Germany had ceased to exist as a public law entity after the fall of the Holy Roman Empire in 1806. Therefore, Gerber had to presuppose an underlying unity of the legal systems. But he excluded that presupposition of organic unity in the dogmatic, systematic exposition of German state law itself.[6]

Paul Laband applied Gerber's approach to law to the new German state coming into being between 1866 and 1871. Like Gerber, he presupposed an organic connection between state and nation. The statutes and ordinances of the empire expressed the "state's will," which he argued was also the will of society. But unlike Gerber, and to the chagrin of scholars in the organic tradition such as Otto von Gierke, Laband never explicitly theorized how the statutes and ordinances he studied related to the social "organism."[7] Prussia's victory over Austria in 1866 had paved the way for the 1867 Constitution of the North German Confederation, the forerunner of the 1871 Imperial Constitution. Laband simply assumed that all laws based on the 1871 Constitution were valid. Because of Bismarck's success in forging a new state, Laband was able to draw a far stricter line than Gerber had between legal scholarship and politics, history, and sociology.[8]

Born in 1838 to a Jewish professional family in Breslau, Laband converted to Protestantism and entered into a professional career in civil law in the 1860s. In 1870 he turned from his earlier work on the history of Roman civil law to address legal aspects of the constitutional crisis that had raged from 1862 to 1866 in Prussia. His essay on the subject quickly earned Laband praise from the most important law journals and jurists of the time.[9] It followed strict, formal rules of exegesis and exposition and excluded all "politics" in approaching the central problem of the new constitutional system: the requirement that the budget be approved by both monarch and popular assembly to become a valid statute. His next major work, the monumental *State Law of the German Empire* (1st ed., 1876–82; 5th ed., 1911–13), set out in systematic fashion the entire system of state law of the German Empire. Already by 1872 Laband had become a professor of public law at Strasbourg and a state adviser on legal matters.[10] His *State Law* was the standard work to which other scholars and even politicians had to refer. Laband was also a cofounder and coeditor of the most important journals of public law in the empire.[11] He died in March 1918, his life as a jurist of state law thus coinciding with the constitutional life of his object, the German Empire.

Laband was not given to long reflections on method, which may help to explain his popularity among practical-minded lawyers, judges, and administrators.[12] His brief statements on method were included in the forewords to the first and second editions of *State Law*. First, he claimed that the jurist had at his disposal a series of superhistorical concepts