

SOVEREIGNTY AND THE LEGAL LEGACIES OF EMPIRE IN EARLY NINETEENTH-CENTURY PRUSSIA*

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ABSTRACT. *The traceless disappearance of the Holy Roman Empire from the map and the minds of nineteenth-century Germany was until recently a pervasive historiographical trope. Revisionist scholarship has since uncovered the empire's modern afterlife as a model for federative political order and archetype of the greater German (großdeutsche) nation. This article identifies a different kind of legacy, by examining the empire's role in shaping the constitutional configuration of an individual successor state – Prussia. In a debate over Prussia's unwritten historical constitution unfolding in the 1840s, narratives of the empire's constitutional history became the basis on which the juridical structure of the kingdom's sovereignty was negotiated by jurists and political actors. These included, among others, King Frederick William IV and his brother William, the leaders of the German historical school of jurisprudence Savigny and Eichhorn, and the Prussian statesman Kamptz. The article contrasts two rival interpretations of the imperial legacy: a teleological narrative focusing on the evolution of state sovereignty within the imperial constitution and a genealogical narrative highlighting the origins of sovereignty as a hereditary fiefdom. In doing so, it questions the rigid distinction that historians have drawn between the empire and the statehood that replaced it in 1806.*

I

In his *La terreur prussienne à francfort*, Alexandre Dumas tells the story of a blunder committed by the former arch-chancellor of the Holy Roman

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Empire in the presence of Napoleon. During a dinner at the Congress of Erfurt in 1808, Karl Theodor von Dalberg allegedly cited an incorrect date for the promulgation of the Reich's best-known constitutional document, the Golden Bull. Napoleon, according to Dumas, was quick to point out the inaccuracy: 1356 had been the year of the Bull's publication, not 1409. How was it that Napoleon should have memorized 'so religiously' the date of a charter, Dalberg reportedly asked the French emperor. 'If it was the date of a battle', he added, 'it would surprise me less.'¹

Dumas wrote this anecdote from questionable source material in 1866, amidst a surge of anti-Prussian sentiment in France after the Austro-Prussian War.² But whether accurate or not, the story exemplifies a latent attitude towards the afterlife of the Holy Roman Empire which still informs historical scholarship: that as a constitutional structure, the Reich did not have enough of a legacy to remain present in the historical memory of nineteenth-century Europe. Merely two years after its dissolution in 1806, Dalberg, formerly the Reich's second highest dignitary, not only misremembered the most important date in the empire's constitutional timeline but was surprised that its constitutional history should be worthy of faithful remembrance. Similarly, narratives of modern Germany history were dominated for the better part of the twentieth century by the recurring historiographical trope of the Reich's vanishing 'without a trace (*sang- und klanglos*)'.³ Yet, as this article shows, the empire *did* have a specifically constitutional legacy that survived in an unlikely place: the political imagination of the Prussian state. In excavating this legacy, I propose that narratives of the empire's constitutional history shaped how the sovereignty of one of the Reich's most important successor states was conceptualized in the early nineteenth century. In consequence, the article questions the rigid distinction that historians have drawn between the empire and the statehood that formally replaced it in 1806.

The empire's constitutional afterlife in Prussia counters the long-standing presupposition that its traceless disappearance, both from the map and the minds of nineteenth-century Europe, yielded a watershed between two inherently different forms of political order. As Peter Wilson notes critically, 1806

¹ Alexandre Dumas, *La terre prussienne à Francfort: épisode de la guerre en 1866* (4 vols., Paris and Naumburg, 1868), II, p. 127.

² Horst Carl, "Schwerfälligen Andenkens" oder "Das Recht, interessant zu sein"? Das Alte Reich in der neueren Forschungsliteratur', *Zeitschrift für Historische Forschung*, 37 (2010), pp. 73–97, at p. 82.

³ The phrase first appears in Heinrich Gloël's 1911 book *Goethes Wetzlarer Zeit*: Wolfgang Burgdorf, *Ein Weltbild verliert seine Welt: Der Untergang des Alten Reiches und die Generation 1806* (Munich, 2009), p. 154 n. 188; see also Thomas Nipperdey, *Deutsche Geschichte 1800–1866: Bürgerwelt und starker Staat* (Munich, 1983), p. 14; Heinz Schilling qu. in Matthias Schnettger, 'Von der Kleinstaaterei zum komplementären Reichs-Staat. Die Reichsverfassungsgeschichtsschreibung seit dem Zweiten Weltkrieg', in Hans C. Kraus and Thomas Nicklas, eds., *Geschichte der Politik: Alte und neue Wege* (Munich, 2007), pp. 129–54, at p. 149; Joachim Whaley, *Germany and the Holy Roman Empire: the Peace of Westphalia to the dissolution of the Reich, 1648–1806* (2 vols., Oxford, 2011), II, p. 559.

was long chronicled as a ‘zero hour’ in the historiography.⁴ In this narrative, the empire’s dissolution demarcated the temporal boundary between an antiquated legalistic structure thought to have been ‘incompatible with modernisation and the building of the nation-state’ and the system of sovereign states replacing it.⁵ The underlying implication of the caesura was thus that Germany’s post-imperial shape owed little or nothing to the constitution that had preceded it. Its political order was predicated on the destruction rather than the recollection of the Reich. Or, as Christopher Clark has put it, Germany’s nineteenth-century future took shape ‘amid the ruins of the imperial past’.⁶

Since the 1990s, scholarship on the Reich has seen a revisionist turn against the view of the empire’s traceless disappearance. But it is a literature that focuses on the empire’s modern afterlife either in the continued tradition of federative institutions in Central Europe (the German Confederation, the European Union) or greater German (*großdeutsche*) visions of nationhood, which included the Austrian parts of the Habsburg Empire.⁷ What concerns me here, however, is a different kind of continuity, namely the empire’s role in shaping the constitutional configuration of an individual successor state.

⁴ Peter H. Wilson, *Heart of Europe: a history of the Holy Roman Empire* (Cambridge, MA, 2016), p. 656; see also Johannes Arndt, ‘Das Ende des Alten Reiches’, in Evelyn Hills-Brockhoff and Michael Matthäus, eds., *Die Kaisermacher: Frankfurt am Main und die Goldene Bulle 1356–1806* (Frankfurt a.M., 2006), pp. 152–61, at p. 152; Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte seit 1789: Reform und Restauration, 1789 bis 1830* (8 vols., Stuttgart, 1975), 1, pp. 61–74; Hans-Christof Kraus, *Das Ende des alten Deutschland: Krise und Auflösung des Heiligen Römischen Reiches Deutscher Nation 1806* (Berlin, 2010), p. 84, and passim; Volker Press, ‘Das Ende des Alten Reiches und die Deutsche Nation’, in Hans Joachim Kreutzer, ed., *Kleist-Jahrbuch 1993* (Stuttgart, 1993), pp. 31–55; Michael Stolleis, *Public law in Germany, 1800–1914* (New York and Oxford, 2001), pp. 7–14; Peter H. Wilson and Alan Forrest, ‘Introduction’, in idem and idem, eds., *The bee and the eagle: Napoleonic France and the end of the Holy Roman Empire, 1806* (Basingstoke, 2009), pp. 1–21, at pp. 8ff.

⁵ Karl Härter, ‘The early modern Holy Roman Empire of the German nation (1495–1806): a multi-layered legal system’, in Jeroen Duindam et al., eds., *Law and empire* (Leiden, 2013), pp. 111–31, at p. 131.

⁶ Christopher Clark, *Iron kingdom: the rise and downfall of Prussia, 1600–1947* (London, 2007), p. 296.

⁷ Heinz Angermeier, ‘Deutschland zwischen Reichstradition und Nationalstaat: Verfassungspolitische Konzeptionen und nationales Denken zwischen 1801 und 1815’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, German. Abt.*, 107 (1990), pp. 19–101; Peter Burg, *Die deutsche Trias in Idee und Wirklichkeit: Vom Alten Reich zum Deutschen Zollverein* (Wiesbaden, 1989); Burgdorf, *Ein Weltbild*; Abigail Green, ‘The federal alternative? A new view of modern German history’, *Historical Journal*, 46 (2003), pp. 187–202; Dieter Langewiesche, ‘Föderativer Nationalismus als Erbe der deutschen Reichsnation: Über Föderalismus und Zentralismus in der deutschen Nationalgeschichte’, in idem and Georg Schmidt, eds., *Föderative Nation: Deutschlandkonzepte von der Reformation bis zum Ersten Weltkrieg* (Berlin and Boston, MA, 2000), pp. 215–44; Joachim Whaley, ‘“Hier existiert noch das alte heilige deutsche Reich”: the legacy of the Holy Roman Empire and the unity of Germany’, *Publications of the English Goethe Society*, 83 (2014), pp. 1–21; Peter H. Wilson, ‘Still a monstrosity? Some reflections on early modern German statehood’, *Historical Journal*, 49 (2006), pp. 565–76.

Crucially, of the sovereign states that emerged from the disintegration of the imperial constitution, Prussia is routinely cast as the one that most unambiguously defied its imperial heritage. After all, the kingdom became the greatest beneficiary of the territorial reshuffling that took place in European politics after the Napoleonic Wars, which cleared the path for a smaller German (*kleindeutsche*) nation-state founded under Prussian leadership in 1871.⁸ Prussia's nineteenth-century trajectory thus appeared to epitomize the break between the old Reich and the new post-imperial order. As the recent revisionist literature has been quick to point out, Prussian historiography in the late nineteenth century was instrumental in crystallizing this view, and linking it to the trope of the empire's traceless disappearance. Berlin's historians drowned earlier German pasts in mythic tales of heroic resistance against Napoleon, by hailing Prussia as the model of modern statehood and true political embodiment of the German nation.⁹

But in the sphere of constitutional law, the break between the old imperial and the new state-based orders was not as clean as the history books suggested. On the contrary, imperial constitutional history continued to shape legal conceptions of Prussian statehood in the first half of the century, as this article shows based on a particular, and hitherto rarely studied, constitutional debate that ensued inside the Prussian government between 1842 and 1847. The controversy occurred when the Prussian King Frederick William IV set out to transform the institutional makeup of Prussia's political system by summoning an assembly of the kingdom's provincial parliaments in Berlin. His right to change the Prussian constitution was disputed, however, by his brother William, the crown prince. The disagreement prompted the involvement of some of the most prominent German legal scholars of this period: the founders of the historical school of law Friedrich Carl von Savigny and Karl Friedrich Eichhorn, and the former Prussian minister Karl Albert von Kamptz. Though these jurists stood on different sides of the constitutional dispute, they collectively turned to the history of the Reich to map out the legal configuration of Prussian sovereignty, by tracing its origin and evolution in the context of the imperial constitution.

The type of imperial legacy that is the subject of this article was hence distinct from patriotic invocations of the imperial past, or *Reichspatriotismus*, which

⁸ For instance Richard J. Evans, *The pursuit of power: Europe, 1815–1914* (London, 2016), pp. 20–8, especially p. 25.

⁹ The paradigmatic expositions are Heinrich von Treitschke, *Deutsche Geschichte im neunzehnten Jahrhundert* (5 vols., Leipzig, 1879), 1; and Friedrich Meinecke, *Cosmopolitanism and the national state*, trans. Robert B. Kimber (Princeton, NJ, 1970); on the empire in Prussian historiography, see Burgdorf, *Ein Weltbild*, pp. 154–5, 242–50; Jason Coy, 'The Holy Roman Empire in history and historiography', in idem et al., eds., *The Holy Roman Empire, reconsidered* (Oxford, 2010), pp. 1–10, at pp. 2ff; Whaley, 'The legacy', pp. 4–5; Wilson, 'Still a monstrosity?', pp. 568–9.

formed the basis of the empire's federalist and nationalist afterlives.¹⁰ It was not, in other words, an engagement with imperial history that aimed to resurrect the empire, or presented it as a model for nineteenth-century constitutionalism. Nor was the past utilized in this case to underpin the monarchy's legitimacy in the public sphere, in response to revolutionary upheaval, social change, or territorial expansion.¹¹ In fact, the Prussian constitutional debate of the 1840s took place almost exclusively behind closed cabinet doors, and is reconstructed here based primarily on archival records which at the time were not accessible to the public. Rather, the past in this context was a resource for jurists to make sense of Prussia's constitutional present. In Savigny's own words, history here was not 'merely a collection of examples, but rather the sole path to the true knowledge of our own condition'.¹² Even after its dissolution, the empire remained the source of the principles and precedents that defined the juridical structure of Prussian sovereignty.

Sovereignty was conceptualized in this context as a heritage of the imperial past because, unlike the majority of the states that succeeded the Reich, Prussia did not introduce a written constitution until 1848. Much of the literature on German constitutionalism has been consumed by debates on whether to interpret this absence of a written constitution as a fateful failure to 'modernize' Prussian politics in the first half of the nineteenth century.¹³ This focus on constitutional paths untaken left little room to investigate the role that jurisprudence *did* play in Prussian politics in this period. Yet, as Prussia's constitutional crisis in the 1840s shows, monarch, princes, and ministers justified their claims and actions based on a system of legal rules. However, these were rules established not by the codified, abstract norms of a written text but by historical narrative. Even in the absence of a constitutional charter, concepts such as sovereignty, monarchy, and the state still required

¹⁰ Michael Stolleis, 'Reichspublizistik und Reichspatriotismus vom 16. zum 18. Jahrhundert', *Aufklärung*, 4 (1991), pp. 7–23.

¹¹ For instance Ambrogio A. Caiani, 'Re-inventing the ancien régime in post-Napoleonic Europe', *European History Quarterly*, 47 (2017), pp. 437–60; Alain Boureau, 'The king', in Pierre Nora, ed., *Rethinking France: les lieux de mémoire*, trans. Mary Trouille (4 vols., Chicago, IL, and London, 2001), 1, pp. 181–216; David Cannadine, 'The context, performance and meaning of ritual: the British monarchy and the "invention of tradition"', in Eric Hobsbawm and Terence Ranger, eds., *The invention of tradition* (Cambridge and New York, NY, 1983), pp. 101–64; on Germany, see Christopher Clark, *Time and power: visions of history in German politics, from the Thirty Years' War to the Third Reich* (Princeton, NJ, 2019), ch. 3; John Edward Toews, *Becoming historical: cultural reformation and public memory in early nineteenth-century Berlin* (Cambridge, 2004).

¹² Friedrich Carl von Savigny, 'Über den Zweck dieser Zeitschrift', *Zeitschrift für geschichtliche Rechtswissenschaft*, 1 (1815), pp. 1–17, at p. 4; see also Reinhart Koselleck, *Futures past: on the semantics of historical time*, ed. Keith Tribe (New York, NY, 2004), pp. 41–2.

¹³ Michael John, 'The Napoleonic legacy and problems of restoration in Central Europe – the German confederation', in David Laven and Lucy Riall, eds., *Napoleon's legacy: problems of government in Restoration Europe* (Oxford and New York, NY, 2000), pp. 83–96, at p. 84.

legal interpretation, particularly once their meaning had been thrown into question by a constitutional dispute.¹⁴

But the act of interpretation, as Olivier Jouanjan points out, is not determined by the legal script itself. It involves a choice of hermeneutic rules and tools. There thus exists more than one mode in which constitutional law can be applied.¹⁵ While interpreting Prussia's unwritten constitution required constructing a historical narrative, there was more than one way of telling the story of sovereignty's historical development within the empire. Two different accounts of the Reich's constitutional history, yielding two rival interpretations of the Prussian constitution, circulated within the government in the 1840s: a teleological one that centred on the conceptual evolution of state sovereignty in doctrines of imperial public law, and a genealogical one that presented the juridical structure of Prussian sovereignty as immutable in light of its original conception as a heritable fief. Who occupied the seat of sovereignty in early nineteenth-century Prussia and held the right to change its constitution depended, at least in legal terms, on the temporal structure of the empire's constitutional history. In juxtaposing competing interpretations of the historical foundations of Prussian sovereignty, the article not only uncovers the political implications of the Reich's constitutional legacy but argues further that this legacy challenges the prevailing view of the sovereign state as transcending the empire.

The inquiry proceeds in four steps. The first section discusses how Prussia's unwritten constitution was conceptualized in government circles. The second shows that what shifted the debate onto the terrain of imperial constitutional history was the hereditary nature of the Prussian monarchy, which formed the basis of Crown Prince William's legal challenge to constitutional reform. The third reconstructs the teleological narrative on the evolution of Prussian state sovereignty within the imperial constitution put forth by Savigny and Eichhorn. The fourth section examines the rival genealogical account of the empire's constitutional legacy presented by Kamptz.

II

The so-called constitutional question (*Verfassungsfrage*) hovered over the heads of Prussian policy-makers like a dark cloud in the period between the Reich's dissolution in 1806 and the outbreak of the 1848 revolutions. Attempts by the Prussian reformer Karl August von Hardenberg in the 1810s to introduce a system of representative government based on a national assembly were blocked by King Frederick William III in 1819. The decision responded, at

¹⁴ Olivier Jouanjan, 'What is a constitution? What is constitutional history?', in Kelly L. Grotke and Markus J. Prutsch, eds., *Constitutionalism, legitimacy, and power: nineteenth-century experiences* (Oxford, 2014), pp. 323–31, at p. 325.

¹⁵ *Ibid.*, p. 324.

least in part, to a campaign mounted by Metternich, the Austrian minister and architect of the post-Napoleonic European order. Metternich had warned the king that a written constitution establishing a unitary representative body would lead to ‘the dissolution of Prussia...because such an innovation cannot be introduced into a great state without a revolution’. His involvement in the issue was driven by the belief that Prussia’s constitutional question was not an isolated domestic issue, but a matter of geopolitical significance. Metternich feared that turning one of Europe’s great powers into a constitutional monarchy would stoke the fires of revolution beyond the boundaries of the Prussian kingdom, and produce a pan-European domino effect.¹⁶ But despite the impact of his warnings, the Prussian government could not easily backtrack on the promise of political representation. Frederick William III had publicly issued three written pledges between 1810 and 1820 to create a national parliament. A commission led by his son, the future Frederick William IV, attempted to resolve the problem in 1823 by setting up a decentralized system of provincial diets.¹⁷

This change of direction in the constitutional politics of post-Napoleonic Prussia has, especially in the comparative literature on German and European constitutionalism, been interpreted predominantly as a failure, a failure to join the path of political modernization that France and the Southern German states are seen to have taken after 1813.¹⁸ As a result, little attention has been paid to the fact that Prussian statesmen still recognized the existence of a constitution in Prussia after 1823, albeit one that was derived from historical tradition rather than written law. This view was championed in particular by Frederick William III’s oldest son, who took the throne in 1840. Frederick William IV was an enthusiastic reader of Edmund Burke’s constitutional thought, which hailed historically grounded institutions that accumulated and preserved the wisdom of previous generations as the most solid foundations of political life.¹⁹ The new king regarded the legal

¹⁶ Qu. in James J. Sheehan, *German history, 1770–1866* (Oxford, 1989), p. 423; Matthew Levinger, *Enlightened nationalism: the transformation of Prussian political culture, 1806–1848* (Oxford, 2002), p. 42, and passim; Christian Schmitz, *Die Vorschläge und Entwürfe zur Realisierung des preußischen Verfassungsversprechens 1806–1819: Eine rechtliche Bilanz zum Frühkonstitutionalismus der Stein-Hardenberg’schen Reformzeit* (Göttingen, 2010), pp. 317ff; Wolfram Siemann, *Metternich: strategist and visionary* (Cambridge, MA, and London, 2019), pp. 605–8, and passim.

¹⁷ Herbert Obenaus, *Anfänge des Parlamentarismus in Preußen bis 1848* (Düsseldorf, 1984), ch. 3.

¹⁸ Paul Nolte, ‘Vom Paradigma zur Peripherie der historischen Forschung? Geschichten der Verfassungspolitik in der Reformzeit’, in Thomas Stamm-Kuhlmann, ed., *‘Freier Gebrauch der Kräfte’: Eine Bestandsaufnahme der Hardenberg-Forschung* (Berlin and Boston, MA, 2015), pp. 197–216; Markus Prutsch, *Making sense of constitutional monarchy in post-Napoleonic France and Germany* (Basingstoke, 2013), chs. 2–3.

¹⁹ Frederick William called Burke’s *Reflections on the revolution in France* ‘one of the most divine books’, qu. in David E. Barclay, *Frederick William IV and the Prussian monarchy, 1840–1861* (Oxford, 1995), p. 36 n. 56; on Burke, see J. G. A. Pocock, ‘Burke and the ancient constitution – a problem in the history of ideas’, *Historical Journal*, 3 (1960), pp. 125–43.

configuration of Prussian politics signified by the German term *Verfassung* as a structure not unlike the British constitution – a largely unwritten legal order embodied by corporate institutions and founded on ‘ancient historical grounding (*altgeschichtlicher Grund*)’.²⁰ Written charters, by contrast, he dismissed as a subversion of the sacred relationship between king and people. ‘I would lie to God, to my people and to myself if I gave them a written constitution (*Constitution*)’, he wrote in 1843 in a letter to his friend, the Prussian general Count Karl zu Dohna.²¹

Though largely ignored in the literature on German constitutionalism, this distinction between a historical *Verfassung* and a written *Constitution* opened up the question of the Reich’s legal legacy. After Frederick William IV’s accession, it transpired that the new king no longer regarded the provincial diets he had helped create in 1823 as an adequate resolution to the constitutional question. Staying true to his corporatist vision, he announced a plan in 1842 to unite the provincial assemblies into a unified representative body of Prussian imperial estates (*Preußische Reichsstände*). In this way, Frederick William argued, he would ‘strengthen, secure, develop and change the constitution (*Verfassung*) of my lands, my courts, my authorities, my estates’, while bypassing the damaging effects of a written constitution.²²

Yet if the Prussian constitution was a historical fabric rather than a clearly defined and demarcated textual body, then a part of its texture had been woven in the period preceding 1806, in the historical context of the empire. Frederick William IV’s constitutional vision was, unlike Burke’s, not concerned with institutions rooted in a comparatively homogeneous and continuous national past.²³ The traditions that the king strove to develop had arisen from a history shaped by the imperial legal and political structures that had vanished nearly four decades before his accession to the throne. Among nineteenth-century constitutional historians, the conventional view was that corporate representation in the German lands had originated and evolved within the empire’s own *Verfassung*, protected by its courts and institutions.

²⁰ Transcript of a statement by Frederick William IV to his cabinet, 8 Nov. 1842: Geheimes Staatsarchiv Preußischer Kulturbesitz Berlin (GStA), VI. HA Familienarchive und Nachlässe, NI Savigny, F.C. v., Nr. 1, p. 5; Metternich (see below) remarked that Frederick William ‘intends not to create a new Prussia; he wants to develop the existing one’: Metternich to Frederick William IV, 4 Aug. 1846, GStA BPH Rep. 50E II 2, pp. 320–1; on historical constitutionalism, see Barclay, *Frederick William IV*, pp. 35ff; Frank-Lothar Kroll, *Friedrich Wilhelm IV. und das Staatsdenken der deutschen Romantik* (Berlin, 1990), pp. 65–70, 94–8; Heinz Mohnhaupt and Dieter Grimm, ‘Verfassung’, in Reinhart Koselleck et al., eds., *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (8 vols., Stuttgart, 1990), vi, pp. 831–99, at pp. 850–8, 868–71; Toews, *Becoming historical*, ch. 1; Monika Wienfort, ‘Constitutionalism, inheritance, and orders of property: land laws in nineteenth-century Britain and Germany’, in Groteke and Prutsch, eds., *Constitutionalism*, pp. 143–60.

²¹ Frederick William IV to Dohna, 24 Feb. 1843, GStA BPH 50 E II 2, p. 57.

²² *Ibid.*, p. 56; statement by Frederick William IV, pp. 4–7.

²³ J. G. A. Pocock, ‘The origins of study of the past: a comparative approach’, *Comparative Studies in Society and History*, 4 (1962), pp. 209–46, especially p. 239.

However, the rise of absolutism since the Peace of Westphalia in 1648 had resulted in a shift of power from the empire to its individual principalities and eventually broken ‘the stiff neck of corporatism’, as one legal commentator put it.²⁴ Frederick William’s constitutional plans thus raised the question of whether these traditions could still be restored to their former glory after the empire’s dissolution. Exactly how porous was the boundary between the constitutional landscapes of the imperial past and the post-imperial present? What could slip through, and how?

The allusion to the corporatist elements of Prussia’s imperial past in Frederick William’s constitutional vision was instantly targeted by those within the kingdom’s political elite who feared the incalculable political effects of a centralized body of representation. The king’s critics were convinced that a weakening of the monarchy would debilitate the Prussian state itself, perhaps even lead to an upset of the European balance of power. Metternich, who once more intervened in the debate upon learning about Frederick William IV’s plans, worried that a ‘king constrained in his agency’ would result in Prussia’s ‘state powers, and hence its effectiveness in the political field being paralysed’.²⁵ He rallied the support of corporatist sceptics in Prussian government circles (most importantly for the course of this story, Crown Prince William and the former minister for legal reform, Karl Albert von Kamptz).²⁶ Frederick William’s opponents suggested that corporate constitutions belonged to an irrecoverable imperial past. Metternich, above all, insisted that the Reich’s dissolution had brought about a transformation that rendered Frederick William’s corporatist vision politically impracticable. The clock, he argued, could not be turned back on the Prussian *Verfassung*.

In a memorandum sent to Frederick William in 1844, Metternich claimed that 1806 had changed the stakes of constitutional power play.²⁷ Before the empire’s dissolution, its institutions had mitigated the powers of corporate assemblies. The role of estates in the context of imperial politics had been to safeguard the rights of subjects against over-reach on the part of their princes. But princely power had by definition been limited already, Metternich argued, because sovereignty did not reside in the individual territories but with the Reich and its emperor.²⁸ Imperial princes had not been

²⁴ Hermann Johann Friedrich Schulze, *Das Recht der Erstgeburt in den deutschen Fürstenhäusern und seine Bedeutung für die deutsche Staatsentwicklung* (Leipzig, 1851), p. 345; see also Karl Friedrich Eichhorn, *Deutsche Staats- und Rechtsgeschichte* (4 vols., Göttingen, 1823), iv, pp. 618–34, and passim; Carl Wilhelm von Lancizolle, *Ueber Königthum und Landstände in Preussen* (Berlin, 1846), pp. 9–24.

²⁵ Metternich to Frederick William IV, 26 Oct. 1844, *GSStA BPH 50E II 2*, pp. 208–9; Obenaus, *Anfänge*, p. 125.

²⁶ Siegfried Bahne, ‘Die Verfassungspläne König Friedrich Wilhelms IV. von Preussen und die Prinzenopposition im Vormärz’ (Habilitationsschrift, Bochum, 1970), chs. 1–2.

²⁷ Metternich to Frederick William IV, 26 Oct. 1844, pp. 262–3.

²⁸ On the question of the empire’s own statehood, see Wolfgang Burgdorf, *Protokonstitutionalismus: Die Reichsverfassung in den Wahlkapitulationen der römisch-deutschen*

sovereign in the nineteenth-century sense of the word. They merely held dominion over their lands (*Landeshoheit*). In this sense, there had been little need for corporate institutions to keep their governments in check, because rulers were supervised by ‘the legislation and hence the imperial authority standing above the princes and the estates’.²⁹ The relationship between monarchs and subjects had been mediated from above as well as below. The empire had maintained a balance of power between princes and corporate institutions.

This balance was broken in 1806 when German princes ‘attained sovereignty (*Souveränität*)’. The result, in Metternich’s eyes, was that without the empire to regulate the relationship between sovereigns and estates, the politics of representation had become a menace to monarchical power. No allusion to historical corporatism, he suggested, would ever be able to gloss over the fundamental threat that *any* political assembly now posed to the king’s position. The ‘ancient German corporate relations’, he concluded, ‘were applicable only to German territories under the sovereignty of the emperor and the Reich and the territorial dominion (*Landeshoheit*) of the princes’.³⁰ Corporate assemblies, because they were derived from the constitution of the lost empire, could not be transplanted into the nineteenth century.

These, in essence, were the two positions that collided in the debate over Prussia’s historical constitution in the 1840s. Frederick William IV looked to the pre-Westphalian heyday of corporate representation as a source of strength and stability for Prussia’s political present. His critics, by contrast, portrayed the imperial past not merely as a foreign (and, in this case, virtually dissolved) country, but as a dangerous model that could, if implicated, threaten the stability of the monarchical state. Both positions drew on interpretations of the empire’s history as a frame of reference for arguments about the feasibility of constitutional reform in Prussia. Whether and how it would be possible to change the Prussian *Verfassung* was a question of the extent to which the kingdom’s constitution was still connected to its imperial past. Developing the current order required a narrative of the old one.

But Frederick William was not easily deterred by his critics’ warnings. And the king’s persistence opened up a further dimension of the empire’s constitutional legacy in early nineteenth-century Prussia, one that concerned not the future shape of the Prussian constitution, but its *present* configuration. Led by Crown Prince William, the king’s critics set out to contest his power to summon the kingdom’s imperial estates, by subjecting the history of Prussian sovereignty itself to legal examination.

Könige und Kaiser 1519–1792 (Göttingen, 2015), p. 16, and passim; Georg Schmidt, *Geschichte des alten Reiches: Staat und Nation in der Frühen Neuzeit 1495–1806* (Munich, 1999), p. 44, and passim.

²⁹ Metternich to Frederick William IV, 26 Oct. 1844, pp. 261–2.

³⁰ *Ibid.*, p. 263.

III

In the early months of 1845, two of Germany's most prominent legal scholars in the early nineteenth century, Friedrich Carl von Savigny and Karl Friedrich Eichhorn, involved themselves in the controversy. The two jurists were known as leaders of the historical school of jurisprudence, a movement within legal scholarship that promoted historical legal sources over new legislation and codification as the basis of the German legal system.³¹ They were drawn into the government's internal constitutional debate because Frederick William IV had appointed Savigny as minister for legal reform (*Gesetzrevision*) in 1842.

As an academic phenomenon, the historical school is rarely associated with the constitutional history of either Prussia or the empire. In fact, the school is often seen to have filled the vacuum created by the decline of imperial constitutional historiography (*Reichspublizistik*).³² Savigny's widely discussed methodological manifestos named as the original source of law the mind or spirit of the people (*Volksbewusstsein/Volksgeist*).³³ They offered not only a new approach to jurisprudence, but also a legal basis for German national identity that did not require a material political form such as the empire. The historical school reimagined law as a source of unity amidst political division and separation in nineteenth-century Germany. As Frederic Maitland observed in his writings on the school, 'much else besides blood, iron and song went to the remaking of Germany'. At a time when 'the last shadow of political unity had vanished...the idea of a Common Law would not die'.³⁴ The paradigm shift within German jurisprudence brought about by Savigny and his collaborators replaced ambitions for a codified national legal system with the search for a common law among the written records of Germany's legal past. Law's histories, thus, became sites of identity construction, grounding the reinvention of German nationhood after the Reich's dissolution.³⁵

It was a highly selective version of Germany's legal past, however, that emerged from the school's scholarly output. Savigny's work focused on the history of Roman law. Eichhorn dedicated himself to the historical study of

³¹ Hans-Peter Haferkamp, *Die Historische Rechtsschule* (Frankfurt a.M., 2018), pp. 1–2, and *passim*.

³² Burgdorf, *Ein Weltbild*, pp. 278, 321–6; Stephan Meder, *Doppelte Körper im Recht: Traditionen des Pluralismus zwischen staatlicher Einheit und transnationaler Vielheit* (Tübingen, 2015), pp. 158–62.

³³ Friedrich Carl von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg, 1814), pp. 9–14 (translated by Abraham Hayward as *Of the vocation of our age for legislation and jurisprudence* (London, 1831)); Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* (8 vols., Berlin, 1840), 1, pp. 15–20.

³⁴ Frederic Maitland, 'Introduction', in Otto Gierke, *Political theories of the middle age*, trans. Frederic Maitland (Cambridge, 1900), pp. vii–xlv, at p. xvi.

³⁵ Gerhard Dilcher, *Die Germanisten und die Historische Rechtsschule: Bürgerliche Wissenschaft zwischen Romantik, Realismus und Rationalisierung* (Frankfurt a.M., 2017), p. 9; Haferkamp, *Die Historische Rechtsschule*, pp. 62–74; James Q. Whitman, *The legacy of Roman law in the German Romantic era: historical vision and legal change* (Princeton, NJ, 1990), pp. 91–5.

the Germanic legal tradition.³⁶ Neither scholar was an expert in Prussian law. Yet the purpose of their jurisprudence was not an exhaustive survey of German legal history. The school's approach, as outlined by Savigny, was that the past ought to inform the legal present. The objective of historical jurisprudence was 'to appropriate the riches of the past', as Savigny put it. It was not, as his student Johann Caspar Bluntschli later remarked, to 'make the future the servant of the past'.³⁷ The historical school took control of the narrative about Germany's contemporary, rather than merely its historical, legal system. Its members presented themselves as the guardians of legal memory. They patrolled the boundary between law's past and present, determining which historical legal sources would form the foundations of Germany's nineteenth-century legal system.³⁸

Why, then, did Frederick William IV require legal expertise of this nature? The king called upon Savigny's support in a fraternal feud with the crown prince (Savigny, in turn, enlisted Eichhorn's assistance). William had all along sided with Metternich in the dispute sparked by Frederick William's constitutional schemes. He took his brother to task for a project which, he claimed, was certain to result in revolution, or at the very least a lasting curtailment of monarchical sovereignty. 'The existence of Prussia', he wrote to the king, 'seems to me gravely imperiled, if your ideas are brought to life without modification.'³⁹ In the early months of 1845, however, William raised his protestations to a new level. He launched a constitutional challenge, insisting to the king that constitutional reform required his, the crown prince's, approval.⁴⁰ Changes to Prussia's *Verfassung*, William argued, had to be ratified by the king's designated successors, the *agnati* (in this case, Frederick William IV's three younger brothers) (see [Figure 1](#)). *Agnatus* was a term taken from Roman inheritance law. It referred to the closest relative in the male line. The choice of terminology indicates what was legally at stake in the crown prince's claim. In contesting his brother's constitutional prerogative, William drew on the juridical attributes of hereditary monarchy. His challenge was founded on the view that since in Prussia monarchs inherited the seat of sovereignty, their political rights were

³⁶ Maitland, 'Introduction', pp. xvi–xviii; Michael John, *Politics and the law in late nineteenth-century Germany: the origins of the civil code* (Oxford, 1989), p. 24, and *passim*.

³⁷ Savigny, *Vom Beruf*, p. 113; Johann Caspar Bluntschli, *Die neueren Rechtsschulen der deutschen Juristen* (Zurich, 1862), p. 49; see also Carl Friedrich Eichhorn, 'Über das geschichtliche Studium des deutschen Rechts', *Zeitschrift für geschichtliche Rechtswissenschaft*, 1 (1815), pp. 124–46.

³⁸ Stephan Meder, *Missverstehen und Verstehen: Savignys Grundlegung der juristischen Hermeneutik* (Tübingen, 2004), ch. 9, and *passim*.

³⁹ William to Frederick William IV, Jan. 1845, in Winfried Baumgart, ed., *König Friedrich Wilhelm IV. und Wilhelm I.: Briefwechsel 1840–1858* (Paderborn, 2013), p. 118.

⁴⁰ Bahne, 'Die Verfassungspläne', ch. 4; Heinrich von Treitschke, 'Der Prinz von Preußen und die reichsständische Verfassung (1840–1847)', *Forschungen zur Brandenburgischen und Preussischen Geschichte*, 1 (1888), pp. 587–98.

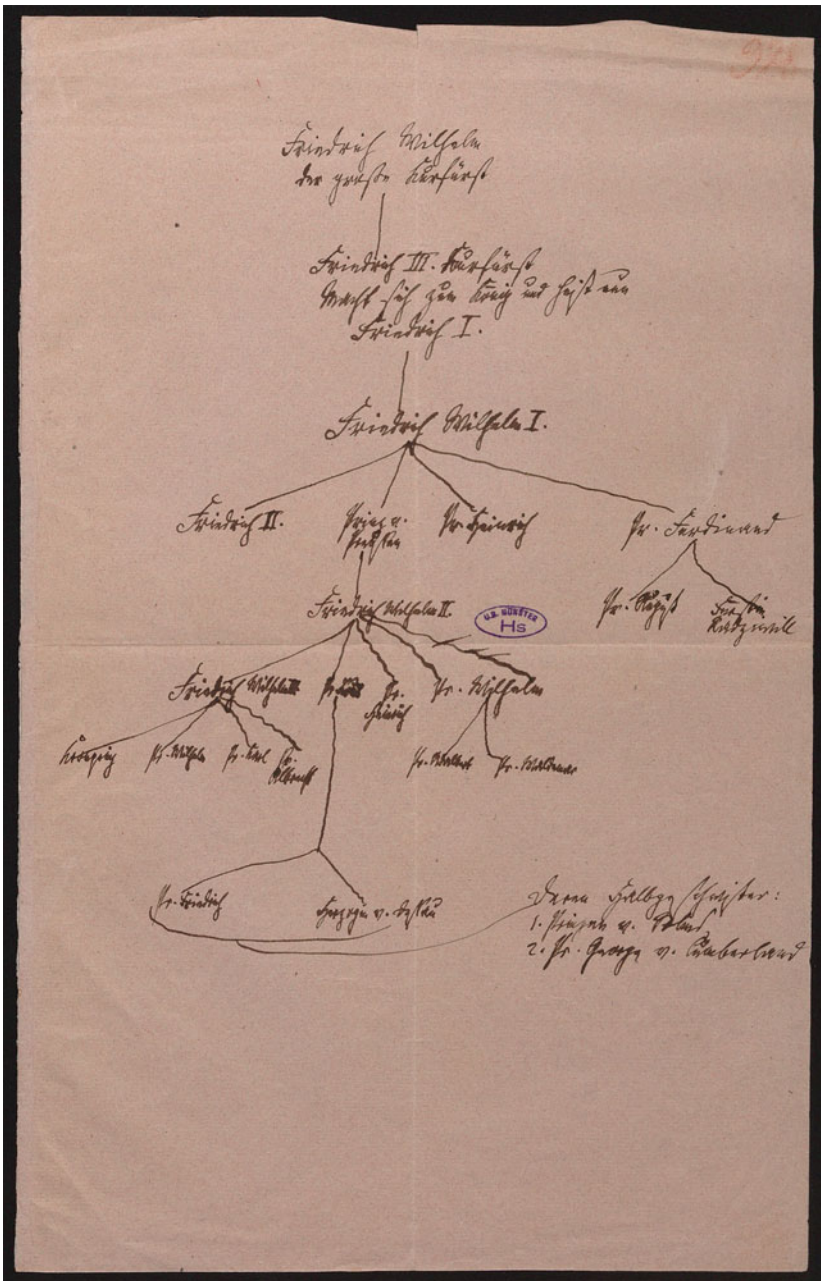


Fig. 1. Family tree drawn by Friedrich Carl von Savigny, undated. It shows the male members of the Hohenzollern house from the Great Elector (1620–88) to c. 1830. It was likely made before 1840 since it refers to Frederick William IV as Kronprinz (crown prince) on the far left arm of the far left branch, second row from the bottom (Universitäts- und Landesbibliothek Münster, N. Savigny, 2,8).

limited by dynastic and family law, just as the inheritance of a property was subject to legal requirements.

William's protestation rested on two legal institutions that defined the hereditary nature of the Prussian monarchy. The first was a 'political testament' left behind by his father, King Frederick William III, which presciently provided that 'no future monarch shall be authorized, without consulting all *agnati* (*Agnaten*) in the royal house, to make a change or submission through which a change in the current constitution (*Verfassung*) of the state, particularly with regard to corporate affairs, or a limitation of monarchical power would be provoked or established'.⁴¹ The second was a legal trust, the crown's *Fideikommiss*. A common legal form of property in nineteenth-century Germany, *Fideikommiss* were institutions not unlike English entails that bound property within the family according to a pre-defined order of succession, usually primogeniture.⁴² The *Fideikommiss* of the Prussian crown had been created as part of an overhaul of Prussia's public debt system in 1820.⁴³ Its purpose was to protect the livelihood of the royal family in the event of a state default.

Unpacking the implications of William's invocation of the hereditary principle as the true basis of the Prussian *Verfassung* requires consideration of the legal structure of inheritance, which was a familiar subject of constitutional thought in this period.⁴⁴ Inheritance originated in the actions of a bequeather or testator. Unlike legal institutions such as contracts, it consisted in a purely one-sided transaction. As the ordering principle of a political system, inheritance hence implied that rulers were bound by the will of their ancestors in the exercise of sovereignty. Some commentators hailed this aspect of the hereditary principle as a consolidating influence on politics. Frederick William's idol Edmund Burke famously celebrated Britain's ancient constitution for claiming and asserting 'our liberties, as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity'. The Baron de Montesquieu, one of Savigny's intellectual influences, argued that inheritance created stability on levels unattained by other forms of government because it made, in the words of Michael Sonenscher, 'the dead the authors of...the

⁴¹ Qu. in Bahne, 'Die Verfassungspläne', pp. 19–20 (my italics).

⁴² Jörn Eckert, *Der Kampf um die Familienfideikommiss in Deutschland: Studien zum Absterben eines Rechtsinstitutes* (Frankfurt a.M., 1992); for contemporaneous accounts, see Otto von Gierke, 'Fideikommiss', in Johann Conrad et al., eds., *Handwörterbuch der Staatswissenschaften* (7 vols., Jena, 1892), III, pp. 413–23; Carl von Salza, *Die Lehre von Familien-, Stamm- und Geschlechts-Fideicommissen nach den Grundsätzen des gemeinen deutschen Privatrechts und mit Rücksicht auf die Abweichungen der einzelnen Particularrechte* (Leipzig, 1838).

⁴³ 'Verordnung wegen der künftigen Behandlung des gesamten Staatsschulden-Wesens. Vom 17. Januar 1820', in *Gesetzsammlung für die Königlich-Preussischen Staaten* (Berlin, 1820), p. 10, §III.

⁴⁴ Dorothee Gottwald, *Fürstenrecht und Staatsrecht im 19. Jahrhundert: Eine wissenschaftsgeschichtliche Studie* (Frankfurt a.M., 2009); though it is conspicuously absent from the recent work on royal heirs, for instance Heidi Mehrkens and Frank Lorenz Müller, eds., *Sons and heirs: succession and political culture in nineteenth-century Europe* (London, 2015).

actions of the living'.⁴⁵ What the debate over Prussia's historical constitution showed above all was that the hereditary principle, in subjecting monarchs to rules not of their own making, created a link between the political order's past and present. Crown Prince William invoked the will of his ancestors in challenging his brother's constitutional powers. By the same token, he moved the constitutional debate onto historical terrain. The empire thus entered the constitutional debate as a legacy in the legal sense. The imperial past lived on in the hereditary structure of the Prussian monarchy.

IV

Commissioned to vindicate King Frederick William IV's right to change the Prussian *Verfassung*, Savigny and Eichhorn constructed a framework for interpreting the constitution that was rooted in a teleological narrative of its imperial past. They argued that German monarchies had evolved within the imperial constitution in such a way that their juridical nature had come to be comprised of two distinct components: one that consisted in the power to govern (*Regierungsgewalt/ obrigkeitliche Macht*) and one that resided in the monarch's family estate (*Stammgut*).⁴⁶ The first was regulated by public law, the second by private law. As rulers on one side and landowners on the other, German monarchs were two-faced legal entities.⁴⁷ And hence, the king's constitutional powers rested on a different legal basis, with different historical origins, from the dynastic principles invoked by Crown Prince William. In pointing to the monarchy's juridical double nature, Savigny and Eichhorn suggested that political rights were not subject to the same laws as other forms of inheritance.

The trouble was that the juridical structure of the Prussian monarchy had not always been thus. All jurists involved in this phase of the constitutional debate based their analyses on a common point of departure: they agreed that Prussian sovereignty originated historically in the empire. It had evolved from the territorial dominion conferred by the emperor to the holder of the kingdom's core province Brandenburg. Some time after the Frankish conquest

⁴⁵ Edmund Burke, *Revolutionary writings: reflections on the revolution in France and the first letter on a regicide peace*, ed. Iain Hampsher-Monk (Cambridge, 2014), p. 34; Michael Sonenscher, *Before the deluge: public debt, inequality, and the intellectual origins of the French Revolution* (Princeton, NJ, 2009), p. 136; Whitman, *The legacy*, pp. 70–1.

⁴⁶ Savigny, 'Rechtsgutachten die ständischen Einrichtungen betreffend', 3 Feb. 1845, GStA VI. HA N1 Savigny Nr. 2, p. 14; Eichhorn to Savigny, 6 Jan. 1845, GStA VI. HA N1 Savigny Nr. 2, p. 32. Only Savigny's report was circulated, but Savigny acknowledged Eichhorn's assistance to the king: GStA VI. HA N1 Savigny Nr. 2, p. 13.

⁴⁷ On the history of the public–private divide, see Morris R. Cohen, 'Property and sovereignty', *Cornell L. Q.*, 13 (1928/1927), pp. 8–30; Hans-Peter Haferkamp, 'The science of private law and the state in nineteenth century Germany', *American Journal of Comparative Law*, 56 (2008), pp. 667–89; Stolleis, *Public law*, pp. 6ff; Alice Erh-Soon Tay and Eugene Kamenka, 'Public law–private law', in Stanley I. Benn and Gerald F. Gaus, eds., *Public and private in social life* (New York, NY, 1983), pp. 67–92; for a global perspective, see Andrew Fitzmaurice, *Sovereignty, property and empire, 1500–2000* (Cambridge, 2014).

(none of the involved cared to be more specific than this), this dominion had been bestowed upon each of the imperial princes as an office, which over time had turned into a heritable fief. These feudal origins of political authority in Central and Western Europe were subject to a long-standing debate among legal scholars which, as Donald Kelley, John Pocock, and more recently Kathleen Davis have pointed out, can be traced back to the sixteenth century. It was rekindled in the nineteenth-century context of post-imperial German nation-building. Fought between the so-called Romanist and Germanist camps, the debate revolved around the existence of a Germanic constitution, and the question of whether feudal law emerged after the fall of the Western Roman Empire from either Germanic or Roman legal tradition. As the respective leaders of the historical school's Romanist and Germanist strands, Eichhorn and Savigny were well acquainted with, and embroiled in, this dispute.⁴⁸ But in their role as Frederick William IV's legal advisers, the question they faced did not concern the origins of territorial dominion but rather what followed its inception.

The post-Carolingian history of the imperial constitution presented a pressing problem to Savigny's and Eichhorn's account of the Prussian monarchy as legally divided. While the empire's principalities had evolved into hereditary monarchies, the Reich itself had turned into an elective monarchy. Its emperor was selected by the rulers of a small number of electorate principalities, of which Brandenburg was one. As Savigny pointed out in his report, the imperial constitution had 'mixed the imperial office...with the family estate'. Constitutional status within the empire was tied to land ownership.⁴⁹ Vindicating King Frederick William's powers thus hinged on constructing a historical trajectory of the imperial constitution that produced a separation between the political rights of rulers and their property. Over time, Savigny and Eichhorn suggested, imperial constitutional jurisprudence had developed a distinction between public and private legal orders that expelled dynastic claims from the political realm. As Eichhorn put it, if a conflict between the 'welfare of the state and the rights of the *agnatus*' occurred, 'the latter [can] be suspended because the public order must be the predominant one'.⁵⁰

But how exactly did this distinction between public and private law, between sovereignty and property, come about? Here, Eichhorn and Savigny's account drew on the work of yet another learned jurist inside the Prussian government, Savigny's predecessor in the ministry for legal reform Karl Albert von Kamptz.

⁴⁸ Kathleen Davis, *Periodization and sovereignty: how ideas of feudalism and secularization govern the politics of time* (Philadelphia, PA, 2008), pp. 23–50; Donald R. Kelley, *Foundations of modern historical scholarship: language, law, and history in the French Renaissance* (New York, NY, 1970), pp. 184–214; J. G. A. Pocock, *The ancient constitution and the feudal law* (Cambridge, 1987), pp. 1–29; on nineteenth-century Germany, see Donald R. Kelley, *Fortunes of history: historical inquiry from Herder to Huizinga* (New Haven, CT, 2008), pp. 182–90.

⁴⁹ Savigny, 'Rechtsgutachten', p. 18.

⁵⁰ Eichhorn to Savigny, p. 35 (my italics).

Theirs was not a political alliance. As we shall see, Kamptz sided with the crown prince in the constitutional debate. However, Kamptz had begun his career in the service of the empire, as a judge in the imperial chamber court in Wetzlar.⁵¹ One of the qualifications that earned him the position was a treatise that he published in 1800, *Consideration of the obligation of the secular imperial prince derived from the actions of his ancestors*. It dealt with precisely the question that occupied Prussian statesmen in 1845: whether or not the hereditary nature of monarchical sovereignty imposed legal limits on the king's decision-making powers.

Kamptz, too, built his argument in the *Consideration* on a distinction between public and private law derived from the dual nature of German monarchies. Princes were, as he put it, a 'double person (*doppelte Person*)': the public persona of the ruler, and the private persona of the landowner. As a private individual, the prince held property under the same laws as all. But as ruler, he governed territory as a dominion held in fief (*feudum regale*), rather than as a private estate.⁵² The distinction thus kept legal obligations incurred in the sphere of property law from leaking into the sphere of constitutional law. Dynastic laws (*Hausgesetze*), Kamptz wrote in a passage cited by Savigny, often prohibited changes to the family estate. But this

binding of the family estate...does not encompass the whole scope of territorial dominion, and cannot be extended to this [the dominion's] other expressions. To those, no principles particular to private affairs apply, but only the principles of German and universal public law, which by no means can be subordinated to these [private] affairs.⁵³

Still, Kamptz's treatise acknowledged that the relationship between political rights and property had been subject to negotiation and contestation throughout the empire's history. In fact, in his account, the distinction between public and private was a very recent achievement that took until the eighteenth century to establish itself firmly in the empire's constitutional law doctrines. For the better part of the empire's history, he argued, jurists had played fast and loose with the legal principles underlying hereditary monarchy.

Importantly, Prussian legal scholars in the nineteenth century generally agreed that the late empire's legal system had been home to more than one form of inheritance law. Under the umbrella of the imperial constitution, Roman and feudal legal orders existed side by side, occasionally overlapping with what Kamptz called 'German and universal public law'. In more than one nineteenth-century account, this legal pluralism was associated with an existential crisis of the hereditary monarchies governing the imperial principalities. Applying varying principles of succession to these monarchical systems had

⁵¹ Karl Albert von Kamptz, 'Reminiscenzen bei der Auflösung des Kaiserlichen und Reichskammergerichts', in idem, *Beiträge zum Staats- und Völkerrecht* (Berlin, 1815), pp. 163–80.

⁵² Idem, *Erörterung der Verbindlichkeit des weltlichen Reichsfürsten aus den Handlungen seiner Verfahren* (Neu-Strelitz, 1800), pp. 8, 11–12.

⁵³ *Ibid.*, p. 175; qu. in Savigny, 'Rechtsgutachten', p. 12.

had divisive political consequences. At some point during the early modern period (again, chronological specificity was not the strong point of these analyses), the jurisprudence of inheritance had threatened the territorial integrity of the empire's principalities. Hermann von Schulze, whose disdain for 'the stiff neck of corporatism' we encountered earlier, described the trajectory of imperial history as a 'millennial battle' to overcome the damaging effects of feudal succession. And Eichhorn, in his *History of law and the state in Germany*, published between 1808 and 1823, accused both Roman and feudal lawyers of 'twisting' the constitutional implications of 'these utterly inapplicable legal sources'.⁵⁴

Kamptz particularly deplored the political effects of the imperial reception of Roman law from the thirteenth century onwards, which, in his telling, did not recognize a distinction between public and private affairs in matters of inheritance.⁵⁵ Nevertheless, jurists had applied its principles indiscriminately, thus treating the prince's territorial dominion and the family estate as the same form of heritable property. As a result, the hereditary principle had put pressure on the divide between the public and private legal spheres. If political rights and property rights were transmitted down the generations through the same juridical channel, why should one be subject to different rites of passage than the other?

What finally consolidated the divide between public and private law in Kamptz's account was a shift that has received much attention in more recent constitutional historiography, albeit not in this context: the emergence of a concept of the state as a person. By the second half of the eighteenth century, Kamptz argued, the subject of constitutional rights and obligations had come to be identified as a legal entity distinct from the prince. The state and its dominion, he wrote, 'is the real subject of the assumed obligations, whose validity is not dependent on the life of the warden of state affairs (*Staatsgeschäftsführer*). The state is thus immortal, and its constitution (*Verfassung*) independent from the life or death, and succession of his [the warden's] ancestors.'⁵⁶ As a temporally infinite fiction of law, the person of the state separated the hereditary principle from the source of the prince's constitutional obligations. It rendered the monarch a representative rather than an embodiment of the imperial principality. Political leadership was now regarded as an office rather than as a possession, with succession being a mere appointment procedure.⁵⁷ In other words, inheriting the seat of territorial dominion

⁵⁴ Schulze, *Das Recht*, pp. 10–11; Eichhorn, *Deutsche Staats- und Rechtsgeschichte*, p. 357; see also Gottwald, *Fürstenrecht*, ch. 4.

⁵⁵ In recent historiography, Roman law is often argued to have reinforced rather than undermined the power of imperial princes; see Peter Stein, *Roman law in European history* (Cambridge, 1999), p. 91.

⁵⁶ Kamptz, *Erörterung*, pp. 200–1.

⁵⁷ *Ibid.*, p. 180.

did not transfer ownership of the substance of the state itself. Law, not bloodlines, transported constitutional powers through time.

The place of the empire in Kamptz's, and by implication Savigny's and Eichhorn's, story becomes more discernible in light of the fact that his argument was not without precedent. On the contrary, Kamptz put forth a nineteenth-century rendering of an intellectual tradition that Ernst Kantorowicz has defined as the doctrine of the king's two bodies. In his seminal study of the tradition's medieval history, Kantorowicz portrays the pivotal role played by the concept of the immortal *persona ficta* in jurisprudential efforts to construct an epistemology separating the king's physical body from the metaphysical existence of the body politic. In the process, he argues, late medieval Roman law commentators created a realm of public law which allowed for 'a difference between the king as a personal liege lord and the king as the supra-individual administrator of a public sphere'.⁵⁸ A rich literature on the history of state theory in the early modern period has shown that between the sixteenth and the eighteenth centuries, natural law thinkers further fortified the boundary between the public and private legal spheres, by separating the monarch from the fictional or moral personality of the state.⁵⁹ Kamptz was well aware of this history. In his *Consideration*, he acknowledged key figures in this tradition, such as Hugo Grotius and Samuel Pufendorf.⁶⁰

The *substance* of Kamptz's argument was therefore not novel, nor did he claim that it was. What is distinctive about his account is that Kamptz placed the evolution of a constitutional doctrine of the state's personhood in the institutional context of the empire. Imperial jurisprudence forged the legal framework separating princes from the juridical bodies of the imperial principalities. Historians of the early modern empire have recently come to appreciate the role that the Reich played in creating a culture of professional jurisprudence.⁶¹ In Kamptz's narrative, the empire's courts and law faculties assembled step by step over the course of the early modern period the conceptual tools to construct a political order based on the state's legal personhood, rather than on inherited property. Having witnessed the harmful effects of Roman inheritance law on the territorial integrity of the imperial principalities, jurists 'increasingly

⁵⁸ Ernst Hartwig Kantorowicz, *The king's two bodies: a study in mediaeval political theology* (Princeton, NJ, 1957), p. 191.

⁵⁹ For instance Annabel Brett, *Changes of state: nature and the limits of the city in early modern natural law* (Princeton, NJ, 2011), ch. 5; Rolf Gröschner et al., eds., *Person und Rechtsperson: Zur Ideengeschichte der Personalität* (Tübingen, 2015); Albrecht Koschorke et al., *Der fiktive Staat: Konstruktionen des politischen Körpers in der Geschichte Europas* (Frankfurt a.M., 2007); Meder, *Doppelte Körper*, chs. 3–5; Quentin Skinner, *The foundations of modern political thought: the age of reformation* (2 vols., Cambridge, 1978), II, pp. 349–58, and passim; idem, 'A genealogy of the modern state', *Proceedings of the British Academy*, 162 (2009), pp. 325–70; on the nineteenth century and beyond, see Natasha Wheatley, *The temporal life of states: sovereignty at the eclipse of empire* (forthcoming).

⁶⁰ Kamptz, *Erörterung*, p. 114.

⁶¹ Härter, 'The early modern Holy Roman Empire', pp. 116–17.

recognized the misapplication of the Roman theory'. By the late eighteenth century, a 'reformed theory' of German public law had consolidated itself.⁶²

For Kamptz, the empire's legal institutions brought forth the juridical architecture of nineteenth-century statehood. The result was a profoundly teleological narrative, a Whig history of the imperial constitution. Over the course of the empire's history, he suggested, the proper ways of theorizing 'the conditions of territorial dominion, of the nature and essence of the German lands, of the high purpose of their noble rulers, of the purpose of the state's assets' gradually became 'increasingly less contested'.⁶³

This narrative structure of the empire's constitutional history, which established public law's precedence over dynastic law, was the key element of Kamptz's *Consideration* adopted by Savigny and Eichhorn in 1845 to counter Crown Prince William's appeal to the hereditary principle. As Eichhorn put it, the 'more the formation of German public law progressed, the more precisely it formed the principles' according to which 'the public order must be the predominant one'.⁶⁴ Imperial jurisprudence had provided the legal grounds on which, decades after the empire's collapse, Frederick William IV's advisers attempted to vindicate his constitutional prerogative. By drawing on a tradition of thinking about monarchy as a legally divided phenomenon, Eichhorn and Savigny not only denied the king's successors a right to ratify changes to the Prussian *Verfassung*, but also argued that, upon their succession, they, too, would be bound by his decisions. The Reich, Eichhorn wrote in his report, had given rise to a constitutional order in Prussia in which 'every action of a monarch which regulates public affairs must be regarded as the action of the ruler, and therefore obliges his successor in government (son or *agnatus*)'.⁶⁵ By implication, Prussia's transition from imperial electorate to sovereign kingdom after the empire's dissolution in 1806 completed rather than demolished the legal framework of statehood that imperial jurisprudence had built.

It has recently been suggested that the separation of sovereignty and property and the distinction between public and private legal spheres was the signature achievement of the French Revolution. In instituting this 'great demarcation', as Rafe Blaufarb has argued, the revolutionaries of 1789 dismantled the constitutional basis of the *ancien régime* and 'crystallized modern ways of thinking about politics and societies'.⁶⁶ In the Prussian case, the narrative constructed by Savigny, Eichhorn, and Kamptz was a different one. It was not a story of rupture between old and new constitutional orders but rather of gradual evolution across historical watersheds. It might therefore be tempting to dismiss early

⁶² Kamptz, *Erörterung*, pp. 109, 92.

⁶³ *Ibid.*, p. 110.

⁶⁴ Eichhorn to Savigny, p. 35.

⁶⁵ *Ibid.* (my italics).

⁶⁶ Rafe Blaufarb, *The great demarcation: the French Revolution and the invention of modern property* (New York, NY, 2016), p. 1.

nineteenth-century Prussia as a mere instance of retardation in, or deviation from, the rise of constitutionalism in Europe. Yet rather than relying on a categorical distinction between the modern and the pre-modern, these Prussian jurists offered a historical account of what brought about the rise of the public–private divide based on a concept of state personality in the first place, namely the crisis of the hereditary monarchies embedded in the imperial constitution. In this story, then, it was the constitutional jurisprudence of the empire that laid the conceptual basis of these supposedly ‘modern ways’ of thinking about political order.

V

What was entailed in acknowledging that Prussian sovereignty had a history, one that originated in the empire? The trouble with invoking the imperial past was that it lent itself to more than one interpretation of the Prussian constitution. While the empire’s historical trajectory could lay the foundation of the Prussian king’s constitutional powers, it could also serve as the means of their dismantlement. The boundary separating the monarch’s public and private existences was subject to contingency *because* it relied on historical narrative. Eichhorn and Savigny had executed their seasoned strategy to appropriate the riches of the past to serve the legal present. But the debate over Prussia’s historical *Verfassung* demonstrated just how difficult it was to regulate the juridical transition between the two. Once the legal repositories of imperial history were opened up, they let out from their depths more than just the evidence supporting the king’s case.

Kamptz’s role in the constitutional dispute epitomized the versatility of legal historical narrative characterizing the debate. In 1800, as an aspiring imperial court judge, he had defended the legal autonomy of the imperial princes. But in 1845, as a retired minister who looked back on nearly forty years of service in the Prussian government, Kamptz rewrote the narrative crafted by his younger self. In a report that he penned in response to Savigny’s memorandum, he presented a counternarrative of the empire’s constitutional history which portrayed the empire as the source, rather than the undoing, of Crown Prince William’s constitutional rights. Kamptz disputed Savigny’s and Eichhorn’s conclusions about the juridical structure of Prussian sovereignty by inverting the empire’s constitutional legacy, and offering an account of hereditary monarchy that focused on its origins rather than its evolution within the imperial constitution.

Kamptz in 1845 set off from the same place as Eichhorn and Savigny: Prussian sovereignty originated in the emperor’s delegation of administrative rights and duties. Territorial dominion was first bestowed as a form of custodianship. Over time, this office had turned into a heritable fief.⁶⁷ Yet from this point

⁶⁷ Kamptz, ‘Gutachten über die Rechte der Agnaten bei Veränderung der Landes Verfaßung’, 1845, GStA BPH Rep. 192 NI Wittgenstein, W.v., III 8 Nr. 3, pp. 1–2, §1.

onwards, their narratives diverged. Kamptz suggested that while the monarch exercised political power, the *seat* of sovereignty in the legal sense was not held by the ruler alone, or even by an abstract juridical entity such as the state. The subject of sovereignty, he argued, was the royal house.⁶⁸

Kamptz's 1845 interpretation of the Prussian constitution revolved around the point that the concentration of constitutional powers in the person(s) of the prince had not been part of hereditary monarchy's original configuration within the empire. For centuries after territorial dominion was first instituted, he wrote, all members of the princely houses equally participated in its exercise. In the late medieval and early modern period, imperial jurists had tried to put an end to this practice due to the perceived crisis unleashed by the hereditary principle. Primogeniture had been established to maintain the territorial integrity of the principalities, and place political rights firmly in the hands of individual rulers. Kamptz here explicitly cited the Golden Bull of 1356, the imperial charter that the former imperial chancellor Dalberg reportedly misdated in his dinner conversation with Napoleon. The Bull had, next to laying out the laws governing the emperor's election, enshrined the principle of primogeniture in the imperial constitution.⁶⁹ Like his opponents in the Prussian constitutional debate, Kamptz thus addressed the shifts in the empire's legal architecture driven by different forms of inheritance law. But he insisted that underneath these constitutional modifications, the basis of territorial dominion remained the will of its original founder. Prussian sovereignty, both throughout the Reich's history and beyond, was sustained by constitutional rights derived from the empire but preserved through their transmission along hereditary dynastic lines.⁷⁰ Whatever amendments or additions were made to the legal structure of a legacy, it forever remained subject to the form of its initial endowment.

The legal principle Kamptz invoked here was *ex pacto et providentia maiorum* ('by the will and provision of the ancestors').⁷¹ It was known among contemporary jurists as the basis of the legal institution of the *Fideikommiss*, the property trust underlying Crown Prince William's interpretation of the Prussian *Verfassung*. Like so many of the legal principles encountered in this context, *ex pacto* was shrouded in a cloud of mystery in nineteenth-century jurisprudence. Diverging accounts of its history circulated in the legal community. As the legal scholar Otto von Gierke observed at the end of the century, the origins of the *Fideikommiss* were still not 'sufficiently researched', and had become the subject of 'a lively dispute'.⁷² Was it Roman in origin, or rather a

⁶⁸ Ibid., pp. 7–8, §5.

⁶⁹ Ibid., p. 8, §5.

⁷⁰ Ibid., pp. 1–2, §1.

⁷¹ Ibid., p. 8, §5.

⁷² Gierke, 'Fideikommiss', p. 413; see also Gottfried Schiemann, 'Zum Ursprung der Fideikommiss in Deutschland', in Dagmar Coester-Waltjen et al., eds., *Liber Amicorum Makoto Arai* (Baden-Baden, 2015), pp. 573–90.

Germanic institute in Roman clothing? Had it migrated from classical Roman into feudal law? Or had it emerged as a response to the decline of feudalism? What jurists *could* converge on, however, was *ex pacto*'s meaning. It provided that an inheritance was received not from the last possessor, but from the first acquirer.⁷³ The principle bound the rights and obligations that flowed from an inheritance to the will of its original founder or bequeather.

As a constitutional principle, *ex pacto* tied the shape of Prussia's nineteenth-century constitution to its legal origins as an imperial principality. Among the jurists involved in the constitutional dispute, it was therefore a highly controversial subject. The young Kamptz, in his *Consideration*, had associated the principle with the fateful Romanist equation of territorial dominion and property. *Ex pacto* had rendered the incumbent king a *successor singularis*, meaning that it treated the monarchy as a form of communal property, and blurred the boundary between the monarch's family estate and his responsibility to safeguard the 'welfare of the state'.⁷⁴ Eichhorn argued that by privileging the will of founders over the choices of their descendants, the principle licensed monarchs to disavow the obligations incurred by their other ancestors. And Savigny backed this point by attaching to his report a 1796 letter by the Reich's last emperor Francis II that cautioned his imperial electors against applying *ex pacto* to territorial dominion. The principle, Francis argued here, undermined the position that the prince is 'bound by the acts of state of his predecessors'.⁷⁵

Kamptz, by contrast, readily drew on *ex pacto* in 1845 to challenge the public-private divide that expelled the rights of royal family members from the realm of constitutional law. He challenged the progressive historical movement of hereditary monarchy away from the terms of its initial conception, that formed the basis of Eichhorn's and Savigny's argument. In his account, the juridical disposition of sovereignty's historical origins weighed more heavily than its evolution over time. 'It follows already from the acquisition of the power to govern (*Regierungsgewalt*)', he wrote, 'and from the fact that in the ruling house it is a heritable power, that it rests in this house and in all its members in the line of succession'.⁷⁶ The empire's dissolution had lifted the feudal hold of the emperor on the German monarchs, Kamptz admitted. But 'their internal constitution and the constitution of the electorate lands, and especially the rights of the *agnati*...have not perished with the imperial crown. Properly received rights which have been established under and according to the existing constitution are not at all forfeited with [the repeal of] that constitution.'⁷⁷

⁷³ Rudolf Huebner, *A history of Germanic private law*, trans. Francis S. Philbrick (London, 1918), p. 346.

⁷⁴ Kamptz, *Erörterung*, p. 176.

⁷⁵ Eichhorn to Savigny, pp. 35–6; 'Auszug aus dem Kaiserlichen Handschreiben an die Kurfürsten', 7 Sept. 1796, in *GStA BPH* 50J Nr. 969, p. 22.

⁷⁶ Kamptz, 'Gutachten', p. 22, §8.

⁷⁷ *Ibid.*, p. 12, §5 (my italics).

Kamptz's conversion from a Whig historian of state sovereignty to an advocate of the crown prince's political rights highlights the historical mode of the constitutional debate that took place inside the Prussian government in the 1840s. For although he changed his legal and political stance, Kamptz still turned to Prussia's imperial past to establish the juridical principles supporting his constitutional interpretation. There was agreement on all sides of the debate that the imperial constitution itself, rather than its undoing, was the cradle of Prussian sovereignty. The fault line of the debate ran between two temporal vanishing points, located at opposite ends of the era preceding 1806. For a brief moment in 1845, the Prussian *Verfassung* hovered in a field of tension between the beginning and end of the empire's constitutional history.

VI

The legal parameters of Prussian politics changed soon after the passing of the particular constitutional moment visited here. Politically, Crown Prince William never abandoned his critical position towards Frederick William IV's constitutional plans. But after several instances of mediation between the two brothers, which included a face-to-face conversation between William and Savigny, the crown prince withdrew his legal challenge. The imperial estates convened in April 1847. Less than a year later, however, the outbreak of the 1848 Revolution in Prussia fundamentally changed the nature of the debate around the kingdom's legal system. Under the pressure of the revolutionary upheaval, Frederick William IV issued a written constitution in December 1848.⁷⁸ Its promulgation upended the historical discourse underlying constitutional interpretation that has been the subject of this article. Constitutional jurisprudence from 1848 onwards was largely based on a single written text, rather than a multitude of legal doctrines, principles, and precedents woven into historical narratives.

But this written constitution was not injected into a legal vacuum. As we have seen, even before 1848, the monarch and his government understood Prussian sovereignty to have a legal structure. What they could not agree on, was its shape. Yet it was precisely this juridical volatility that kept the imperial legacy alive inside the Prussian state. 'Disinterested historiography', writes Pocock, 'is possible only in stable societies, where the present is fortified by means other than the writing of histories.'⁷⁹ Early nineteenth-century Prussia was not such a society. The unfixed foundations of its political order infused the imperial past with legal meaning for the constitutional present. Who held the keys to the kingdom was a question that Prussian law itself could not answer.

⁷⁸ Clark, *Iron kingdom*, pp. 475–83, 500ff.

⁷⁹ J. G. A. Pocock, 'Time, institutions and action: an essay on traditions and their understanding', in idem, *Politics, language and time: essays on political thought and history* (London, 1972), p. 271.

In this sense, the kingdom's *Verfassung* lacked hermeneutic self-sufficiency. Its interpretations relied on historical narrative. Hence, in the views of the jurists and statesmen revisited here, there did not exist a great demarcation or zero hour separating the empire from the sovereign state that succeeded it. The two constitutional orders were seen to be intimately connected, to share juridical substance.

Yet the ambiguity of the imperial legacy reconstructed in this article points to a further conclusion, beyond the discrepancy between the historiographical trope of the empire's traceless disappearance and its significance in Prussian constitutional debate. The competing accounts of the empire's constitutional history given by Savigny, Eichhorn, and Kamptz testify to the imagined nature of the legal narratives that tied Prussia's constitutional present to the Reich. Whether Prussian sovereignty remained forever bound to the conditions of its inception, or whether it had the capacity to evolve over time, was a question of how to portray the course of imperial history: as a narrative of origins or a narrative of progress. In this sense, the story of the empire's constitutional legacy opens up a window into a past in which the transcendence of modern statehood based on the separation of sovereignty and property, of public and private law, had not yet become a master narrative. In exposing the contingencies within the temporal construction of sovereignty in early nineteenth-century Prussia, it provides a cautionary tale.