Modern Constitutionalism.

An Introduction to a History in the Need of Writing

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More than sixty years ago, Charles Howard McIlwain opened his classic treatise Constitutionalism Ancient and Modern with the sentence: “The time seems to be propitious for an examination of the general principle of constitutionalism [...] and an examination which should include some consideration of the successive stages in its development.”

Today, at the onset of the 21st century after more than two hundred years of modern constitutionalism, we have to admit that our knowledge of the history of modern constitutionalism is still next to nothing. That modern constitutionalism came into being at the end of the 18th century seems to be beyond dispute. The American and French revolutions constituted, according to Maurizio Fioravanti, “a decisive moment in the history of constitutionalism”, inaugurating “a new concept and a new practice”. Two hundred years later, it is taken for granted that every country in the world, with the exception of the United Kingdom, New Zealand and Israel, boasts a written constitution on the basis of modern constitutionalism. But while we acknowledge the global acceptance of a political principle, singular as it may be, and while scholars such as Bruce Ackerman have already coined the term “world constitutionalism”, we uneasily have to admit that in spite of McIlwain, Fioravanti, and numerous other scholars, we definitely do not know how all this came about.

5 Obviously, I do not agree with A. E. Dick Howard, “The Essence of Constitutionalism”, in: Constitutionalism and Human Rights: America, Poland, and France. A Bicentennial Colloquium at the Miller Center, ed. by Kenneth W. Thompson and Rett R. Ludwikowski, Lanham, MD: University Press of America, 1991, 3-41, who fails to grasp modern constitutionalism as distinctly different from English ideas and concepts since Magna Carta and tries to establish seven essentials of constitutionalism (consent of the governed, limited
Great numbers of comparative studies have been undertaken in constitutional law and in constitutional history. Though they generally have enriched our knowledge, they have told us little about modern constitutionalism and its history. As they departed from the nation-state, they tended to lack any overruling perspective and usually restricted themselves to piling up information state by state. In contrast, the most ferocious opponents of modern constitutionalism already displayed their full awareness of the concept after the conclusion of that decisive event, the revolution of 1848. They thoroughly denounced what they called the “essence and nuisance of modern constitutionalism”, as the title of one book put it, and with it its history and its principles or essentials. Though their arguments cannot claim any validity today, the phenomenon they described merits even more attention in our time than it commanded a hundred and fifty years ago.
On 12 June 1776, the General Convention of delegates and representatives from the several counties and corporations of Virginia adopted what has come to be known as the *Virginia Declaration of Rights*. It was a revolutionary document, which sometimes, though incorrectly, is also called the *Virginia Bill of Rights*, in an unconscious or perhaps deliberate allusion to the English *Bill of Rights* of 1689. The reference to the English “Act for declaring the rights and liberties of the subject and settling the succession of the crown”, as its proper title runs, is misleading as it was issued by “the said Lords Spirituall and Temporall and Commons […] for the Vindicating and Asserting their auntient Rights and Liberties”. In strictly political terms it marked the end of the Glorious Revolution and became part of the Revolution settlement. It did not refer to universal principles or any abstract idea; rather, considering the endeavor of the late King “to subvert and extirpate the Protestant Religion, and the Lawes and Liberties of this Kingdome”, the Lords and Commons took recourse to what they understood to be “their undoubted Rights and Liberties”.

The Virginia delegates of 1776 easily could have made use of a similar kind of language, as numerous Americans had done during the preceding decade. But they deliberately introduced new language: “A declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity, as the basis and foundation of government.” This was a completely new kind

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12 1 & 2 Gul. & Mar. sess. 2 c. 2 (Quoted from *The Statutes of the Realm*, VI, 142; see also Williams, *Eighteenth-Century Constitution*, 26, 29).

of document employing a new, bold language. It was a “declaration of rights”, not a subjective document declaring rights, and it was set up by “the representatives of the […] people”, who were “assembled in full and free convention”, not in any random assembly with an equivocal legitimization. Furthermore they had declared rights properly belonging to the people and their offspring, not to their own assembly or convention in contrast to some other institution. These rights served, in the most revolutionary phrase of all, “as the basis and foundation of government”, an assertion completely unheard of and contradictory to any understanding of the English constitution.

This bold revolutionary language was substantiated in the first two sections of the document, which uncovered the source of all these rights ascertained: nature. Natural law not only conferred to the people “certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity”. It also proved “[t]hat all power is vested in, and consequently derived from, the people”. With no word on the English constitution or subverted ancient rights in need of being restored, the Virginia Declaration of Rights trumpeted into the world the sovereignty of the people, universal principles, and inherent human rights, declared in a written constitution as “the basis and foundation of government”. It was the very birth of what we understand today as modern constitutionalism.

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To be sure, the Virginia Declaration of Rights was not the first constitutional document of the American revolution. It was preceded by the New Hampshire constitution of 5 January 1776, and the South Carolina constitution of 26 March, 1776. But the language of these two documents much more resembles that of the English Bill of Rights, the language of ancient rights and liberties subverted, but rescued in order to be restored. Though there is a passing reference to natural law in the New Hampshire constitution, and the South Carolina document for the first time styled itself “constitution”, no appeal occurred in either of them to the sovereignty of the people, universal principles, inherent human rights, or a written constitution as “the basis and foundation of government”. As the first written constitutions their form was new, but their content had not yet shed its traditional connotations.

All this changed with the Virginia Declaration of Rights of June 1776. It not only enumerated several of these rights. It also proclaimed additional criteria, ever since then considered constitutive for modern constitutionalism. These are the responsibility and accountability of government, the right “to reform, alter, or abolish it”, the separation of powers, the “trial by an impartial jury”, and the inherent idea that constitutional government is by its very nature a limited government. It was a mixture of fundamental principles and structural elements to be contained in a subsequent constitution, both considered indispensable preconditions for securing individual liberty and guaranteeing rational government according to law, instead of government according to pleasure, privilege, or corruption. None of these criteria were really new. In fact, they all had been extensively discussed throughout the colonies during the preceding decade. But never before had they appeared in a public document in such a coherent form, constituting the foundation of a new political order.

Beyond having enumerated certain human rights, though incompletely, the singular importance of the Virginia Declaration of Rights of 1776 lies in its establishment of the complete catalogue of the essentials of modern constitutionalism, whose constitutive character appears no less valid today than it did over two hundred years ago: sovereignty of the people, universal principles, human rights, representative government, the constitution as paramount law, separation of powers, limited government, responsibility and accountability of
government, judicial independence and impartiality, and the right of the people to reform their own government or the amending power of the people. These ten essentials of modern constitutionalism are expressed in the Virginia Declaration of Rights, and for more than two hundred years no constitution that claims to adhere to the principles of modern constitutionalism has openly dared to challenge any one of these principles, as they have come to symbolize the modern reason-based society which provides for mediating interests and conflicts on a solid legal foundation.

The history of modern constitutionalism, though, is full of attempts either to evade one or several of the items in this catalogue, or to reject more or less the whole of it, in other words to establish a written constitution manifestly denying the principles of modern constitutionalism. This fundamental opposition to modern constitutionalism was never a viable political option in any of the evolving American states throughout the period up to the mid-19th century. Time and experience, however, were required to transform these essentials into generally accepted principles.

The Maryland constitution of 1776 incorporated the ten essentials of the Virginia Declaration of Rights, but the next constitution to do so was only that of Massachusetts in 1780. None of the other eight constitutions written between 1776 and 1780 fully conformed. The constitutions of New Jersey of 1776 and of South Carolina of 1778 diverged the most, merely adopting the idea of representative government. The greatest resistance arose against a strict separation of powers and a clear-cut independent judiciary during these years, whereas the wide-spread lack of a properly constituted amending power seems to have been more the result of inexperience and ignorance than of thorough opposition. The 1776 constitutions of Delaware and Pennsylvania and that of Vermont of 1777, embracing all the other Virginia essentials, failed to comply with just two of these three embattled principles.

Though some of these essentials had not risen above the status of mere paper declarations in several constitutions and still lacked substance, the principle had at least been acknowledged and might attain its factual weight in due course. The classic example is the sovereignty of the people, which from the lofty Virginia declaration ultimately melted down

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to the introductory formula “We, the people” in the preamble of the Federal Constitution of 1787, a loophole taken up by a number of state constitutions in subsequent decades. The last constitution, which refused to accept even this symbolic declaration, was the constitution of Louisiana of 1812. In many instances it had closely followed the Kentucky constitution of 1799, itself a revised version of the Kentucky constitution of 1792, which had been the next constitution after the Massachusetts constitution of 1780 and its New Hampshire clone of 1784 to reproduce all ten Virginia essentials. Louisiana, however, not only refused to emulate the democratic character of the Kentucky constitution, but also declined to adopt its Declaration of Rights with its emphasis on universal principles. Not the result of inattentive neglect, this was, among other things, a conscious evasion of a stipulation of the Enabling Act of Congress, which had mandated religious liberty to be included in the constitution.

The constitution of Louisiana of 1812 is a typical example of deliberate opposition to essentials of modern constitutionalism in the United States, an opposition assuming different shapes at different times. In the 1770s and 1780s the strict separation of powers was more often rejected than accepted, whereas between 1818 and 1849, when democracy gained ground in the United States, about half of the state constitutions failed to include strict

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21 Sect. 3 of the Enabling Act of 1811 ruled, "The constitution to be formed […] shall contain the fundamental principles of civil and religious liberty [and] shall secure to the citizen the trial by jury in all criminal cases, and the privilege of the writ of habeas corpus, conformable to the provisions of the constitution of the United States" (*The Federal and State Constitutions*, ed. by Thorpe, III, 1377). The mandated religious liberty was not included into the constitution, which passed unnoticed in Congress. Henry Clay declared in the House of Representatives on March 19, 1812: "The Convention of Orleans had framed a constitution for the State in conformity to the law of Congress imposing certain conditions as preliminary" (*The Debates and Proceedings in the Congress of the United States [Annals of the Congress of the United States]*, Twelfth Congress, First Session, Washington: Gales and Seaton, 1853, 1225).

22 Cf. e.g. Vermont, where until 1836 the Governor, Lieutenant Governor and Treasurer, in case they failed to obtain the absolute majority of votes in the popular election, were elected by joint ballot of “the [Executive] Council and General Assembly”, even if they stood for re-election, cf. Constitutions of Vermont of 1777, ch. II, sect. 17, of 1793, ch. II, sect. 10, in: *The Federal and State Constitutions*, ed. by Thorpe, VI, 3744-3745, 3766. I express my thanks to Gregory Sanford from the Vermont State Archives for having called the lasting and still unsolved problems with joint-ballot elections in Vermont to my attention.
entrenchment of the constitution as paramount law or at least of parts of it in the document. On a general scale, however, modern constitutionalism as a whole prevailed. The provisional constitution of Texas of 1835, still under the impact of the Mexican past, contained hardly any of the essentials of modern constitutionalism. The new constitution of 1836, resulting from what has been styled the Texas Revolution, left out almost none. By the middle of the 19th century, the constitutions of about half of the American states contained all ten essentials enumerated in the Virginia Declaration of Rights.

This constitutional decalogue, first introduced in Virginia in 1776, and so far nothing more than an American peculiarity, soon proved to be thoroughly intertwined with modern constitutionalism on a global scale. On 26 August 1789, the French Declaration of Rights of Man and Citizen was proclaimed, the European counterpart to the American declarations of rights, and here again, as thirteen years before, we encounter the essentials of modern constitutionalism. The differences are, however, noteworthy. The text begins with references to the representatives of the people, human rights, universal principles, and to what can be interpreted as sovereignty of the people, and it culminates in the famous art. 16: “Any society in which the guarantee of rights is not assured nor the separation of powers determined has no form of constitution.” Viewed in conjunction with the constitution of 1791, the two documents representing the quintessential constitutional achievement of the initial phase of the French Revolution, we have to admit that neither says anything about judicial independence, accountability, limited government, and the constitution as entrenched paramount law. But for the first time in a constitutional document the theory was established, as reflected in art. 16, that we are only allowed to speak of a constitution in the terms of modern constitutionalism if the text meets certain defined requirements. Therefore, in contrast to what may have been called “constitution” in preceding times, modern constitutionalism was now fixed on a number of essentials. What had started in America in 1776 as a new political language, born in revolutionary upheaval and finally sanctioned through practical politics and political experience, art. 16 of the French Declaration of Rights of 1789 raised to the level of an axiom in constitutional theory, thus providing the theoretical foundation of modern constitutionalism missing to that date. At the same time, true to its universal principles, it thus transformed modern constitutionalism from a purely American idea into a transnational phenomenon whose repercussions would be felt globally.

Cf. Paul D. Lack, The Texas Revolutionary Experience. A Political and Social History, 1835-1836,
The ten Virginia essentials, though not completely reproduced by the French Declaration of Rights of 1789 and the constitution of 1791, only received their credentials as being a constituent for modern constitutionalism as a global phenomenon because they were taken up in France in 1789 and because of art. 16 declaring that only the existence of certain essentials allow us to speak of constitution in its modern meaning. Whatever the importance of art. 16 in a specific French context may be, its overall significance lies in the fact that for the first time a constitutional document insists that modern constitutionalism involves certain essentials in the absence of which we are not allowed to speak of modern constitutionalism in its proper sense.

Judicial independence, accountability, limited government, and the entrenchment of the constitution were not omitted from the first two French constitutional documents by chance. For various reasons, it took a long time until they became accepted principles of French constitutionalism. Most, in fact, were only incorporated in recent decades as the constitution of the Fifth Republic evolved. The history of modern constitutionalism in France is not only characterized by these particularities, but also by major upheavals and ruptures, which made French, and with it, European constitutionalism as a whole so different from its American counterpart. Whereas the constitutions of 1791, 1793 and of the year III (1795) were thoroughly established on most of the principles of modern constitutionalism, abrupt change came with the constitution of the year VIII (1799). It contained none of the essentials of modern constitutionalism, concentrating all power in the hands of the First Consul, and

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College Station: Texas A & M University Press, 1992, esp. 87-95.


became a model for other authoritarian regimes and for how to disguise the consolidation of political power in the hands of a dictator behind a constitutional façade.\textsuperscript{26}

Obviously, constitutional fronts for authoritarian rule stand in open contradiction to the conception of modern constitutionalism. Their only contribution to the history of modern constitutionalism lies in documenting a fundamental and politically successful opposition to it. This may tell us something about the extent to which the principles of modern constitutionalism and of rational governance according to fixed legal rules had taken root in a country at a specific time, but the constitutional development after the inevitable final collapse of a political dictatorship usually will be much more revealing.

Three constitutional texts from the time of the breakdown of the Napoleonic Empire merit particular interest. These are the constitutional projects of the Senate of 6 April 1814, and of the House of Representatives of 29 June 1815, and the Declaration of the Rights of Frenchmen of 5 July 1815.\textsuperscript{27} Different as they are they all document the attempt to reintroduce modern constitutionalism and its major essentials in France. Sovereignty of the people, universal principles, human rights, representative government, separation of powers, and even an independent judiciary were proposed, but none of these ideas materialized in these years. Instead, Bourbon restoration achieved its legitimization with the Charter of 1814.

The Charter of 1814 quickly became the model constitution for restoration Europe in the early 19\textsuperscript{th} century for two reasons. Firstly, it accepted the revolutionary idea of a constitution, though without openly naming it so, while being decreed by the monarch. Secondly, it consciously rejected modern constitutionalism.\textsuperscript{28} The sovereignty of the people was not admitted, universal principles or human rights were not declared. The public rights of


\textsuperscript{27} The three documents are published in Léon Duguit et al., \textit{Les Constitutions et les principales lois politiques de la France depuis 1789}, 7\textsuperscript{th} ed. by Georges Berlia, Paris: Librairie Générale de Droit et de Jurisprudence, 1952, 164-167, 181-189.

\textsuperscript{28} This perspective is generally neglected especially in French interpretations of the Charter of 1814, cf. Pierre Rosanvallon, \textit{La Monarchie impossible. Les Chartes de 1814 et de 1830}, Paris: Fayard, 1994, who characterized it as the “English moment” (p. 8), or Alain Laquièze, \textit{Les Origines du Régime parlementaire en
Frenchmen were no equivalent substitute. Representative government was not really installed, nor was the constitution entrenched. Instead of a separation of powers all power emanated from the monarch. There were no provisions either for limited government and accountability or for a revision of the constitution with an amending power of the people. The only concession made was that judges, who were appointed by the monarch, held office during good behavior. This model was to become the paradigm for almost all German constitutions during the subsequent years, and it was acclaimed by conservatives throughout Europe, whereas ultra-royalists considered it still too liberal.

The Charter of 1830 only slightly curtailed the power of the monarch and extended the rights of the legislature, but as far as the essentials of modern constitutionalism are concerned things remained basically the same. Partial change only came with the constitution of 1848, which once again proclaimed the sovereignty of the people, but was hesitant to acknowledge universal principles and human rights. It certainly accepted representative government, separation of powers, judicial independence, and the amending power, but the constitution was not entrenched, nor were limited government or the accountability of government officers really secured. Though 1848 signified a crucial

France (1814-1848), Paris: Presses Universitaires de France, 2002, who speaks of a “limited monarchy” (p. 67), but at the same time maintains that it was “strongly marked by judicial concepts of the time before 1789” (p. 74).


The absence of a respective clause was a particular argument for the liberal opposition against the incompleteness of the constitution, cf. Albert Fritot, Esprit du droit et ses applications à la politique et à l’organisation de la monarchie constitutionnelle, 2nd ed., Paris: E. Pochard, 1825, 558-559.

Art. 58 (Constitutions de la France, ed. by Godechot, 223).


breakthrough for modern constitutionalism, it was – at least in France – at best a temporary and partial victory.\textsuperscript{35}

Whereas the French Charter of 1814 embodied the strain of anti-modern-constitutionalism in restoration Europe, the Spanish Cadiz constitution of 1812 stood for a liberal compromise. Most important of all, it had proclaimed the sovereignty of the people, though it was virtually silent about universal principles and human rights. It established representative government, the separation of powers, and the independence of the judiciary. It recognized the constitution as paramount law and contained provisions concerning the amending power, but it failed to address the ideas of limited government and government accountability. Despite the fundamental opposition of Metternich and the Holy Alliance, the constitution was twice readopted in Spain and additionally introduced in the early 1820s in the Two Sicilies, Piedmont, and Portugal. What the French Jacobin constitution of 1793 came to represent for the European democratic Left in the second half of the 19th century, the Cadiz constitution symbolized for the democratic Liberals in the first half.\textsuperscript{36}

The overall significance of the Cadiz constitution lies in the fact that it constituted the most important attempt in Europe in the first half of the 19th century to combine the essentials of modern constitutionalism with the existing monarchical order.\textsuperscript{37} For this very reason it was vehemently rejected not only by conservatives throughout Europe,\textsuperscript{38} but also by moderate

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\item\textsuperscript{37} Cf. Joaquín Varela Suanzes-Carpegna, La Teoría del estado en los orígenes del constitucionalismo hispanico (Las Cortes de Cádiz), Madrid: Centro de Estudios Constitucionales, 1983, esp. 374-377.
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liberals who refused to accept greater limitations of the monarchical power than the British constitution before 1832 provided.39

This British constitution continued to be held in high esteem by all those in Europe who had accepted the idea of a constitution but rejected modern constitutionalism. Since the 1790s, an active British foreign policy of constitution making along British lines in order to prevent revolutions of French provenance had substantially contributed to this climate of opinion.40 Basically, British ideas rested on the assumption that individual liberty could be safeguarded more efficiently and lastingly by enlightened political compromise than by rigid and entrenched constitutional stipulations. A telling example is the Constitution of the United Ionian Islands of 1817, the so-called Maitland Constitution, which did not acknowledge any of the essentials of modern constitutionalism, but allowed for the internal rule of the local aristocracy under strict British surveillance.

In view of the unyielding opposition of the Holy Alliance against the Cadiz constitution, which did not even shrink from military intervention to bring it down, a new constitution rose to prominence in liberal Europe, seeking to introduce the essentials of modern constitutionalism while tsarist Russia was engaged in quelling the Polish uprising and British diplomacy in London was working out a compromise among the five great European powers on the future status of the country: the Belgian constitution of 1831. It was a masterpiece of constitutional camouflage.41 Its strongest opponents might reproach it for containing all the essentials of modern constitutionalism, but its adherents could equally maintain that nowhere did it express them. It did not speak of the sovereignty of the people, proclaiming instead that

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41 This interpretation, obviously, contradicts A. de Dijn, “A Pragmatic Conservatism. Montesquieu and the Framing of the Belgian Constitution (1830-1831)”, in: History of European Ideas, 28 (2002), 227-245, who disregards as much the constitutional controversies of the time as the political constellation in Europe.
all power was derived from the nation. There was no declaration of rights and of universal principles, but in substance Title II “Of Belgians and their rights” served the very purpose. Government accountability was not proclaimed, but art. 24 ruled how public officers were to be made responsible for administrative acts. The constitution was entrenched, but no provision was made to prevent the respective article from being abrogated. The political privileges of the aristocracy were abolished, but in order to be elected senator a high property qualification was necessary. Thus representative government was assured, along with a separation of powers, limited government, independence of the judiciary, and finally the amending power.

Modern constitutionalism had achieved its greatest triumph so far in Europe, even surpassing Switzerland, where revolutionary enthusiasm had lead to a Declaration of Rights in Geneva as early as 1793. Besides French influence it had been characterized by unbroken local traditions at odds with modern constitutionalism. In particular, the Swiss tradition of the sovereign community acting in forms of direct democracy hardly allowed for adopting such essentials of modern constitutionalism as representative government, separation of powers, limited government, independence of a judiciary, or an entrenched paramount law. But whether in small republics or in extended states, the progress of modern constitutionalism

43 Cf. Gustave Beltjens, Encyclopédie du droit civil belge II: La Constitution belge revisitée, annotée au point de vue théorique et pratique de 1830 à 1894, Liège: Jacques Godenne, 1894, 333.
44 Constitution de la Belgique, art. 130, in: Bulletin officiel de la Belgique, 1038.
45 Constitution de la Belgique, art. 6 and 56, ibid., 1004, 1016, 1018.
continued to be more implicit than explicit. Sovereignty of the nation could also mean a conscious rejection of the idea of sovereignty of the people, as demonstrated anew by the deliberations in the Paulskirche in 1848-49. Even today, of the monarchies in the European Union only the Swedish constitution of 1974 and the Spanish constitution of 1978 openly proclaim the sovereignty of the people.

On the whole, the European revolutions of 1848 constituted the most decisive moment for modern constitutionalism and its future history since the end of the 18th century. No other single event in the sixty-year interim had given a comparable thrust to its basic principles and in the long run it proved any attempt to turn the tide to be futile. Its immediate results, though, were ambiguous. As a general rule the constitutions of 1848-49 can be divided into two groups, one comprising those who were set up and decreed in order to avert a revolution and the other containing those that were more truly the offspring of a revolution. Not surprisingly, modern constitutionalism and its essentials were rejected with only minor exceptions in the former, whereas they were crucial to the latter. The German state constitutions of 1848-49 are particularly well suited for illustrating the wide range of possibilities. The ruling elite of the Hanseatic town of Lübeck proved to be basically as resistant to the ideas of modern constitutionalism as that of Hamburg, where no constitution at all was achieved in these years. The Lübeck April constitution of 1848 actually sanctioned the traditional order of estates, whereas the only concession to the revolution the December constitution of 1848 made was the introduction of representative government.

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Even before the official human rights declaration of the Paulskirche, the states which adopted a new constitution generally inserted an extensive human rights catalogue in it, however, true to what had been extensively discussed in the Paulskirche and consistently without acknowledging universal principles as its legitimization. As a rule they adopted representative government, separation of powers, accountability, and the independence of the judiciary. Some also provided rules for amending the constitution. Two constitutions, those of Lauenburg and Waldeck-Pyrmont, made the constitution the paramount law with the latter ruling that “Legal provisions being inconsistent with this constitution are annulled.” The constitution of Anhalt-Dessau of 1848 was unique in additionally adopting the principle that “All power is derived from the people.” Though universal principles and limited government were nowhere expressly declared, modern constitutionalism had reached its 19th-century zenith in Germany, a culmination which would remain unsurpassed for the next seventy years.

The German situation, generally speaking, was not unique in Western Europe. The Danish constitution of 1849, though liberal in its tenor and documenting its adherence to the principles of limited government and separation of powers right from the start, secured representative government, independence of the judiciary, human rights, and the amending power, but failed to acknowledge the sovereignty of the people and universal principles, and was less expressive about accountability and an entrenched paramount law. With the essentials adopted it more or less resembled the Dutch constitution of 1848, whereas the constitution of Luxemburg of 1848 was largely an adaptation of the Belgian constitution of 1831, however with the telling exception of its art. 25 which stated that all power emanated from the nation.

51 Staatsgrundgesetz für die Fürstentümer Waldeck und Pyrmont [23 May 1849], § 141, as published in: Fürstlich Waldeckisches Regierung-Blatt, Nr. 13, 29.5.1849, 50.
52 Verfassungsurkunde für das Herzogtum Anhalt-Dessau [29 October 1848], § 5, separately published [s.l.: s.n., s.a.], 4.
55 Cf. Verordnings- und Verwaltungsblatt des Großherzogthums Luxemburg/Mémorial législatif et administratif du Grand-Duché de Luxembourg, 1848, 389-414. The constitution was signed by the same King William II who three months later signed the Dutch constitution, which also did not proclaim the sovereignty of
What was missing in the Luxemburg constitution of 1848 and partially disguised in the Belgian constitution of 1831 was openly declared in the constitution of the Roman Republic of 1849, the most democratic constitution and the one most closely conforming to the essentials of modern constitutionalism of all European constitutions of the revolution of 1848-49.\(^{56}\) It opens by proclaiming: “Sovereignty is the eternal right of the people”, and later confirms: “All power emanates from the people.”\(^{57}\) All other nine essentials were properly declared, with the sole exception of limited government, which failed to be expressly stated. The other Italian constitutions of the revolutionary years resembled the wide range of the German constitutions in their proximity to or distance from the essentials of modern constitutionalism. The Statuto Albertino, the longest living of all European constitutions from this biennium, marks the sole exception. Though decreed by a monarch, it recognized at least four essentials: human rights, representative government, separation of powers, and independence of the judiciary – more than most other constitutions of comparable provenance did, inside and outside Italy.\(^ {58}\)

Modern constitutionalism definitely had made a big step forward in Europe with the revolutions of 1848, and the most resounding example in Central Europe were presumably the two drafts of fundamental rights and of a constitution by the Imperial Diet at Kremsier,\(^ {59}\) which like the later Constitution of the Roman Republic only failed of all the essentials


\(^{59}\) Though Gerald Stourzh, “Frankfurt – Wien – Kremsier 1848/49: Der Schutz der nationalen und sprachlichen Minderheit als Grundrecht”, in: id., *Wege zur Grundrechtsdemokratie. Studien zur Begriffs- und Institutionengeschichte des liberalen Verfassungsstaates*, Vienna and Cologne: Böhlau, 1989, 197, stressed the analogies between the human rights declarations of the Paulskirche and the diet of Kremsier, the main difference is that in Kremsier the sovereignty of the people was unequivocally declared.
expressly to mention limited government.\textsuperscript{60} Though the political situation prevented further advances in other parts of Europe to this date, modern constitutionalism despite its many opponents and the severe setbacks resulting from the reaction of the 1850s had firmly taken root in Europe, even if its further history in this part of the world would prove to be full of contradictions. A major step to put government on a more rational foundation for the benefit of the people had been achieved.

Easy victory was procured in these days in a completely different place, where future contradictions were to be no less evident: Liberia. Its constitution of 26 July 1847, American as its provenance was, transplanted all ten Virginia essentials to the west coast of Africa.\textsuperscript{61} In Latin America, however, a formal structure of government according to the example set by the United States was filled with contents originating from the Spanish, Portuguese or French colonial past, the social discrepancies of a ruling elite facing the indigenous masses deprived of their rights, and some recent European influences. This particular setting caused and continues to cause a manifestly different understanding of constitution resulting in a gulf between the formal constitution and the material constitution, which only seems to have been narrowing in recent years.\textsuperscript{62} The constitutions of the first half of the 19\textsuperscript{th} century willingly acknowledged representative government and separation of powers. Some elevated the constitution to paramount law and contained elaborate provisions for an amending process. Limited government, accountability, and an independent judiciary, however, were generally not favorite topics nor did they assume real meaning. Quite often human rights were declared, though many constitutions had reserved them only for the “ciudadinos”, which appears to be just another word for the ruling elite, whereas the “duties”, which hardly any constitution forgot to list, seem to have primarily applied to the rest of the population. This may also explain why universal principles were so rare in these constitutions and most of them preferred to refer to the sovereignty of the nation, instead of the more radical sovereignty of

\textsuperscript{60} Cf. the texts as reproduced in: Texte zur österreichischen Verfassungsentwicklung 1848-1955, ed. by Ilse Reiter, Vienna: WUV-Universitätsverlag, 1997, 12-30.

\textsuperscript{61} Cf. Constitution of the Republic of Liberia With the Laws of the Republic. Enacted by the Senate and House of Representatives At their First Session, held in Monrovia, January and February, 1848. Printed at the Herald Office. By Authority, [Monrovia,] March 1848, 1-11.

the people. In spite of these sweeping impressions, substantial differences between the constitutions of e.g. Ecuador and Guatemala existed and different political situations or social contexts may have resulted in opening the countries more for the essentials of modern constitutionalism. Therefore, a much more detailed analysis of the hundreds of Latin American constitutions from Mexico to Argentina, their political origins, and the intellectual discourse in which they were embedded will be needed, for which I lack space and, even more so, competence.

The history of modern constitutionalism is a history still in need of writing. The preceding remarks only sketched out the rough outlines with the intention of inciting a new thinking on constitutional history generally and on its impact in the several countries in particular. It should have demonstrated that a fresh perspective is called for, which will shed new light on the constitutional history of all countries involved. Instead of asking when and where American or French ideas and institutions were copied, as has been done before, the constitutional development of both countries itself appears in a new light, demanding new answers. The history of modern constitutionalism thus deliberately strays from the well-trodden paths of national constitutional history and starts from a global perspective. The documents for such a new approach are all there. All they need is a new reading, promising to open a huge range of new vistas.

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63 This will also give perspective to Tadakazu Fukase and Yōichi Higuchi, *Le Constitutionalisme et ses problèmes au Japon: Une approche comparative*, Paris: Presses Universitaires de France, 1984, who without any theoretical underpinnings started from art. 16 of the French Declaration of Rights of Man and enumerated sovereignty of the people, separation of powers, human rights, and universal principles as characteristics of modern constitutionalism to conclude that after decades of constitutional debate and political fighting the country with the constitution of 1946 finally “adheres without reserve to the principles of modern constitutionalism” (p. 22).