

Modern Constitutionalism and its Sources

Horst Dippel
University of Kassel, Germany



www.modern-constitutions.de

IV. Modern constitutionalism

VI. Project introduction: "The Rise of Modern Constitutionalism"

VIII. Editing constitutional documents in our project (examples)

I. Modern constitutionalism

1. The ten principles of modern constitutionalism

- Sovereignty of the people
- Unalienable and inherent rights of the people, including individual liberty
- Universal principles
- Representative and accountable government
- Government limited and circumscribed
- Separation of powers and checks and balances
- Judicial independence
- Right of the people to reform their government
- Constitution as the paramount law of the land
- Amending power of the people

I. Modern constitutionalism

2. Desiderata in scholarship and sources

Period of 1776 through 1849 (1860 for the U.S.) essential to understanding modern constitutionalism, *but* ...

- History of modern constitutionalism of that era hardly researched at all beyond national constitutional histories
- Need for a global perspective on constitutional history
- Research in sources often lacking
- Many older "official publications", especially in the Americas, contain flaws and errors
- Many older collected editions unreliable and only partial

➔ **Editions to date very often do not meet demanding scholarly criteria**

I. Modern constitutionalism

3. Illuminating the desiderata

(Problems in Thorpe, several state constitutions as examples)

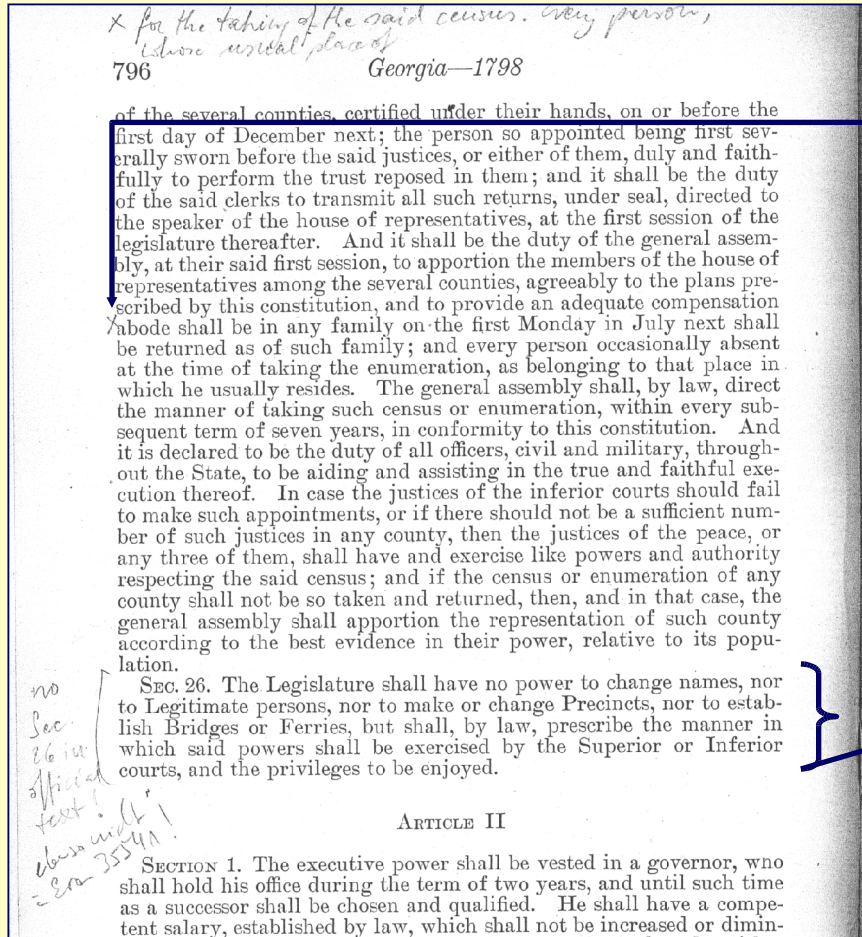
- Delaware
 - 1776: declaration of rights missing and minor errors
 - 1792: minor errors
- Kentucky
 - 1792: missing lines and minor errors
 - 1799: mixed-up headlines, missing lines, and minor errors
- Vermont
 - 1777: minor errors
 - 1786: missing line, distorting error, and minor errors
- ...

➔ **All 18th century U.S. state constitution faulty**



I. Modern constitutionalism

3. Illuminating the desiderata (Constitution of Georgia (1798) as example)



One line missing

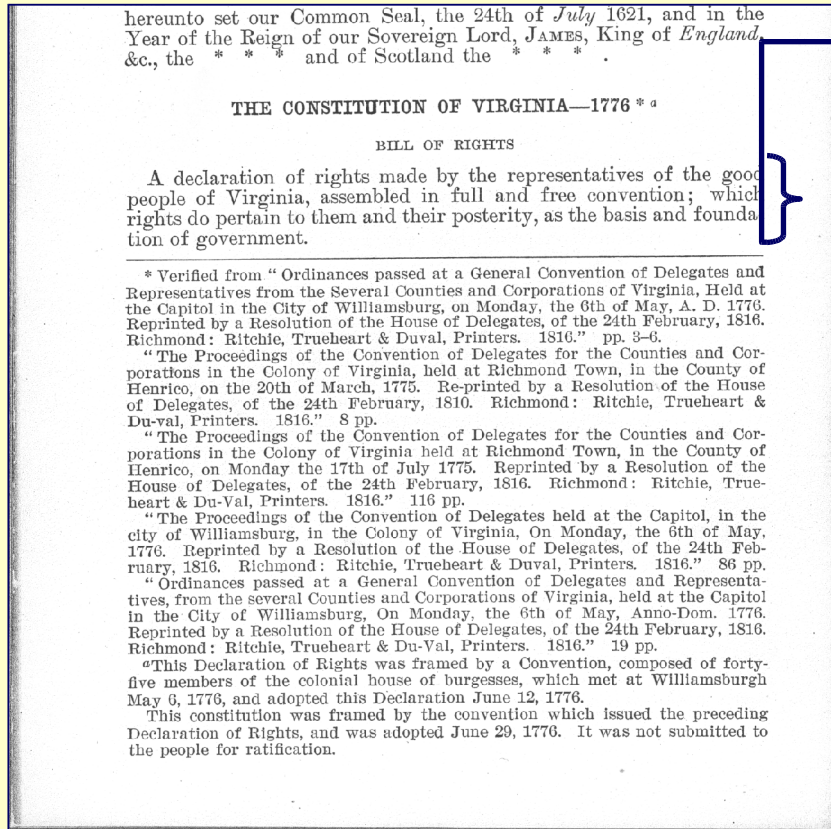
No Sect. 26 in official text

Thorpe (Ed.), *Charters and Constitutions* (1909), Vol. 2, p. 796.

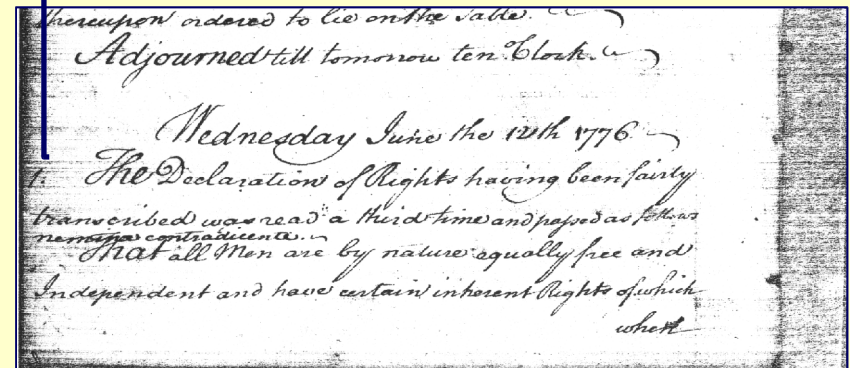
I. Modern constitutionalism

3. Illuminating the desiderata

(Constitution of Virginia (1776) as example)



Reprint in Thorpe has added an introduction not found in the manuscript



Thorpe (Ed.), *Charters and Constitutions* (1909), Vol. 7, p. 3812.

Manuscript courtesy: The Library of Virginia, Richmond, VA

I. Modern constitutionalism

3. Illuminating the desiderata

(Constitution of Virginia (1776) as example)

of the former members, to be again eligible, or ineligible, as the laws shall direct.

SEC. 6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assembled, for the public good. *assented*

SEC. 7. That all power of suspending laws, or the execution of laws,

Wrong wording

public good.

SEC. 7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

SEC. 8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

SEC. 9. That excessive bail ought not to be required, nor excessive

Text added, leading to meaning substantially different from original

Thorpe (Ed.), *Charters and Constitutions* (1909), Vol. 7, p. 3813.

I. Modern constitutionalism

3. Illuminating the desiderata

(Constitution of Vermont (1786) as example)

at all times, in a legal way, accountable to them.

VII. That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community: and ~~that the community hath an indubitable, unalienable,~~ single man, family, or set of men, who are a part only of that community: and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged ~~to be~~ most conducive to the public weal.

VIII. That those who are employed in the legislative and executive business of the State may be restrained from oppression, the people have a right, by their legal representatives, to enact laws for reducing their public officers to a private station, and for supplying their vacancies in a constitutional manner, by regular elections, at such periods as they may think proper.

IX. That all elections ought to be free and without corruption; and that all freemen, having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, and be elected into office.

X not for the particular emolument or advantage of any

Wrong insertion of a phrase
replaces original wording and
creates nonsense meaning

Thorpe (Ed.), *Charters and Constitutions* (1909), Vol. 6, p. 3752.

II. "The Rise of Modern Constitutionalism"

1. Goals and results/products of the project

○ Goals of the project:

- Comprehensive and reliable collection of authentic constitutional documents, 1776-1849 (1860 for U.S.-documents)
- To document the history of the origins of modern constitutionalism

○ Results and products

- *Facsimiles* of historical constitutional documents (online images)
- *Editions*: Verified and authentic editions of the original texts
- *Translations*: Authentic editions accessible in English translation
- More than 1,000 documents in 20 languages have been collected from archives and libraries worldwide
- Roughly 50% (10,000 pages) have already been made available online as facsimiles
- First volume (*United Kingdom, 1782-1835*) scheduled for publication in March, 2005

II. "The Rise of Modern Constitutionalism"

2. Scope of the project

- Five to six years of funded research, involving
 - six researchers and six assistants in the core research group
 - about 50 internationally acclaimed scholars as contributors
 - inter-institutional cooperation in Europe and the Americas
- 24 print volumes (with sub-volumes) of annotated editions
- Corresponding volumes (ca. 22) with translations planned
- Permanent online service, including
 - facsimiles – freely accessible
 - electronic texts (editions and translations) – restricted access
 - Multiple search options
 - Intra- and cross-document navigation

II. "The Rise of Modern Constitutionalism"

3. Uniqueness of the project

- Bringing together of widely dispersed and sometimes unknown documents – online and in print
- Provide documents that are normally not included in standard collections (e.g. failed constitutions and amendments, official translations)
- Identify and correct editorial flaws in commonly used editions
- Improvement over existing edited versions by providing the authentic text
- Record and explain the genesis of documents

→ RMC to become the most complete and academically best-founded collection of its kind

III. Editing constitutional documents

- Historical constitutional documents in standard collections often contain errors and/or omissions
- Failed constitutions, drafts, and amendments are sometimes most difficult to locate
- Editorial work in RMC seeks to
 - reconstruct the authentic document
 - retrace its development
 - make it available in print and onlinein a process that involves careful and elaborate research, processing, and scholarly editing to provide the authentic and annotated text of the original document

III. Editing constitutional documents

1. Creating editions by using the original manuscript

(Constitution of Florida (1839) as example)

- From the *Journal of Proceedings*

compelled to give evidence against himself.
11. That all persons shall be bailable, by sufficient securities, unless in capital offences, where the proof is evident, or the presumption is strong; and the habeas corpus shall not be suspended, unless when in case of rebellion, or invasion, the public safety may require it.
12. That excessive bail shall in no case be required; nor shall excessive fines be imposed; nor shall cruel or unusual punishments be inflicted.

- From the original manuscript

able, by sufficient securities, unless in capital offences, where
; and the privilege of habeas corpus shall not be suspended
blic safety may require it. 12. That excessive bail shall in no

- ➔ "privilege of" missing in the official text as published in the *Journal of Proceedings*

III. Editing constitutional documents

1. Creating editions by using the original manuscript (Constitution of Florida (1839) as example)

○ Final print edition

SECT. 11. That all persons shall be bailable, by sufficient securities, unless in capital offences, where the proof is evident, or the presumption strong³; and the privilege of⁴ *habeas corpus* shall not be suspended, unless when in case of rebellion, or invasion, the public safety may require it.

SECT. 12. That excessive bail shall in no case be required; nor shall excessive fines be imposed; nor shall cruel or unusual punishments be inflicted.

SECT. 13. That no person shall for the same offence, be twice put in jeopardy of life, or limb.

SECT. 14. That private property shall not be taken, or applied to public; use; unless just compensation be made therefor.

SECT. 15. That in all prosecutions and indictments for libel, the truth may be given in evidence; and, it⁵ shall appear to the jury, that the libel is true, and published with good motives,

² In *Journal of the Proceedings*, p. 2, "council".

³ *Ibid.*, "is strong".

⁴ *Ibid.*, "privilege of" missing.

⁵ *Ibid.*, "if it".

Error in original,
official edition
corrected

Correction
identified in
editorial note

III. Editing constitutional documents

2. Creating editions without an existing original manuscript (Failed Constitution of the State of Franklin (1784) as example)

- Reliable source used and editorial explanation in first editorial note:

¹ Verified by Samuel Cole Williams, *History of the Lost State of Franklin*, Johnson City, TN: The Watauga Press, 1924, 330-338. Williams published the text according to the certified copy of it that was transmitted to the State authorities of North Carolina, and which he discovered in 1904 in "a small paper box in the office of the Insurance Commissioner of North Carolina, and not in the State Archives" (*ibid.*, 43). A hundred years later, the "small paper box" was no longer extant, nor was anything known in the office of the Insurance Commissioner of North Carolina about its former contents and its present whereabouts. Neither do the State Archives of North Carolina at Raleigh NC, nor those of Tennessee at Nashville TN. I wish to express my thanks to Jim Long, Insurance Commissioner of North Carolina, for his, though futile, efforts to trace the "small paper box" and its contents. Italics as in Williams print. The first attempt to achieve statehood came to nothing and was succeeded in 1785 by a second attempt with a new constitution.

- Failed constitutions most difficult to locate in standard editions and/or document depositories

III. Editing constitutional documents

2. Creating editions without an existing original manuscript (Failed Constitution of the State of Franklin (1784) as example)

SECT. 22. That no hereditary emoluments, privileges, or honors ought to be granted or conferred in this State.

SECT. 24.² That retrospective laws punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore no *ex post facto* law ought to be made.

SECT. 25. That the people have a right by their representatives to enact laws to encourage virtue and suppress vice and immorality.³

² Either misnumbered or Sect. 23 omitted by Williams.

³ Section 25 of the North Carolina Bill of Rights relates to the boundaries of the State. It was omitted and another inserted in its place. Williams's footnote.

Note possible problems

Note relation to other documents (applies not only to failed documents, of course)

○ Failed constitutions typeset in Arial/Helvetica

III. Editing constitutional documents

3. Identify and correct flaws in commonly used editions (Constitution of Louisiana (1812) as example)

French

ARTICLE 1er.
De la distribution des pouvoirs du Gouvernement.
SECT. 1ère. Les pouvoirs du Gouvernement de l'Etat de la Louisiane, seront divisés en trois départements distincts, chacun desquels sera confié à un corps particulier de Magistrature, savoir: le pouvoir Législatif à un corps, le pouvoir exécutif à un autre corps, et le pouvoir judiciaire à un autre corps.

English

ARTICLE 1st.
Concerning the distribution of the Powers of Government.
SECT. 1st. The powers of the government of the State of Louisiana shall be divided into three distinct departments, and each of them be confided to a separate body of Magistracy viz—those which are Legislative to one, those which are Executive to another, and those which are judiciary to another.

Incorrect translation of the original French text

III. Editing constitutional documents

3. Identify and correct flaws in commonly used editions (Constitution of Louisiana (1812) as example)

Louisiana (1812), English

ARTICLE 1st.
*Concerning the distribution of the Powers of
Government.*

SECT. 1st. The powers of the government of
the State of Louisiana shall be divided into three
distinct departments, and each of them be con-
fided to a separate body of Magistracy viz—those
which are Legislative to one, those which are Exe-
cutive to another, and those which are judiciary
to another.

Kentucky (1799)

ARTICLE I.
CONCERNING THE DISTRIBUTION OF THE
POWERS OF THE GOVERNMENT.

SECT. I. THE powers of the government of the
state of Kentucky, shall be divided into three
distinct departments, and each of them be con-
fided to a separate body of magistracy; to wit:
Those which are legislative to one; those which
are executive to another; and those which are
judiciary to another.

This section copied from the
Constitution of Kentucky (1799)

III. Editing constitutional documents

3. Identify and correct flaws in commonly used editions (Constitution of Louisiana (1812) as example)

ARTICLE 1st.

On⁷ the distribution of the Powers of Government.

SECT. 1st. The powers of the government of the State of Louisiana shall be divided into three distinct departments, and each of them be confided to a separate body of Magistracy viz. -the legislative power to one body, the executive power to another body, and the judiciary power to another body.⁸

SECT. 2d. No person or body⁹ of persons, being part of one of these¹⁰ departments shall exercise any power properly belonging to either of the others; except in the instances hereinafter expressly designated and determined.¹¹

⁷ In Baird edition, "Concerning".

⁸ In Baird edition, "those which are Legislative to one, those which are executive to another, and those which are judiciary to another." Here as in subsequent cases major deviations in the Baird edition from the exact phrasing of the French text are not the result of a liberal translation, but of substituting it by a faithful copy of the respective section of the Kentucky constitution of 1799 (in this case art. I, sect. 1).

⁹ In Baird edition, "Collection".

¹⁰ In Baird edition, "being one of those"

¹¹ In Baird edition, "directed or permitted." Instead of a literal translation the Baird text is a verbatim copy of the Constitution of Kentucky of 1799, art. I, sect. 2.

Error corrected in the edition as it appears in RMC

Further corrections also noted

III. Editing constitutional documents

4. Record and explain the genesis of a document

(Constitution of Iowa (1844 [failed], 1846, 1857) as example)

- Constitution of 1857 as reprinted in the *Code of Iowa* contains **12** articles

but

- Failed constitution of 1844 and constitution of 1846 both contain **13** articles

➔ **Latter reprint (1857) omitted designating the preamble as "Article I. Preamble and Boundaries"**

➔ **Failed constitution of 1844 also not reprinted in standard collections**

III. Editing constitutional documents

4. Record and explain the genesis of a document (Constitution of Iowa (1844 [failed], 1846, 1857) as example)

1844

CONSTITUTION.

ARTICLE I.

PREAMBLE AND BOUNDARIES.

We, the people of the Territory of Iowa, within the boundaries hereinafter designated, by our representatives in Convention assembled at Iowa City, on Monday the seventh day of October, in the year of our Lord one thousand eight hundred and forty-four, grateful to the Supreme Ruler of the Universe for the blessings hitherto enjoyed as a people, and acknowledging our dependence upon him for a continuation of those blessings, in order to establish justice, ensure tranquillity, provide for the common defence, promote the general welfare, secure to ourselves and our posterity, the rights of life, liberty, and the pursuit of happiness, do agree to form and establish a free and independent government, by the name of the State of Iowa, the boundaries whereof shall be as follows, to wit: Beginning in the middle of the main channel of the Mississippi river opposite the mouth of the Des Moines river; thence up the said river Des Moines in the middle of the main channel thereof, to a point where it is intersected by the Old Indian Boundary line, or line run by John C. Sullivan in the year 1816; thence westwardly along said line to the "Old North-west corner of Missouri;" thence due west to the middle of the main channel of the Missouri river; thence up in the middle of the main channel of the river last mentioned to the mouth of the Sioux or Calumet river; thence in a direct line to the middle of the main channel of the St. Peters river, where

1846

THE CONSTITUTION.

Article I.

PREAMBLE AND BOUNDARIES.

We, the People of the Territory of Iowa, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government, by the name of the State of Iowa, the boundaries whereof shall be as follows:

Beginning in the middle of the main channel of the Mississippi river, at a point due east of the middle of the mouth of the main channel of the Des Moines river, thence up the middle of the main channel of the said Des Moines river, to a point on said river where the northern boundary line of the State of Missouri, as established by the constitution of that State, adopted June 12th, 1820, crosses the said middle of the main channel of the said Des Moines river; thence westwardly, along the said northern boundary line of the State of Missouri, as established at the time aforesaid, until an extension of said line, intersect the middle of the main channel of the Missouri river; thence up the middle of the main channel of the said Missouri river, to a point opposite the middle of the main channel of the Big Sioux river, according to Nicollett's map; thence up the main channel of the said Big Sioux river, according to said map, until it is intersected by the parallel of forty-three degrees and thirty minutes north latitude; thence east, along said parallel of forty-three degrees and thirty minutes, until said parallel intersect the middle of the main channel of the Mississippi river; thence down the middle of the main channel of said Mississippi river, to the place of beginning.

1857

CONSTITUTION

WE, THE PEOPLE OF THE STATE OF IOWA, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government, by the name of the STATE OF IOWA, the boundaries whereof shall be as follows:

Beginning in the middle of the main channel of the Mississippi river, at a point due east of the middle of the mouth of the main channel of the Des Moines river; thence up the middle of the main channel of the said Des Moines river, to a point on said river where the northern boundary line of the State of Missouri—as established by the Constitution of that State, adopted June 12th, 1820—crosses the said middle of the main channel of the said Des Moines river; thence westwardly along the said northern boundary line of the State of Missouri, as established at the time aforesaid, until an extension of said line intersects the middle of the main channel of the Missouri river; thence up the middle of the main channel of the said Missouri river to a point opposite the middle of the main channel of the Big Sioux river, according to Nicollett's map; thence up the main channel of the said Big Sioux river, according to the said map, until it is intersected by the parallel of forty-three degrees and thirty minutes north latitude; thence east along said parallel of forty-three degrees and thirty minutes, until said parallel intersects the middle of the main channel of the Mississippi river; thence down the middle of the main channel of the said Mississippi river to the place of beginning.