How American Ideas Traveled: Comparative Constitutional Law at Germany’s National Assembly in 1848-1849

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I. INTRODUCTION .................................................................24

II. PRELUDE TO THE CONVENTION: THE HISTORY OF THE REVOLUTION .................................................................26
   A. Precursors in Europe .....................................................26
   B. German Revolution of 1848 .............................................28

III. NATIONAL ASSEMBLY AT FRANKFURT’S PAULSKIRCHE ...............30
   A. Evolution and Election .................................................30
   B. Political and Demographic Composition .........................31

IV. DEBATE OVER THE CONSTITUTION ........................................34
   A. Basis for References to American Constitutionalism ...........34
   B. Examples of References to American Constitutionalism ......40
      1. Rules of Procedure ..................................................41
      2. Republic or Monarchy ..............................................42
      3. Democratic Elections ...............................................44
      4. Bill of Rights ..........................................................46
      5. Federalism ...............................................................47
         a. Legislative Branch: Federal and State Lawmaking ........49
            (1) Federal Legislative Powers ..............................50
            (2) State Legislative Powers: Reserved Power Clause ........53
            (3) Federal Law vs. State Law: Virginia Plan and Supremacy Clause ..........54

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I. INTRODUCTION

Comparative Constitutional Law is an academic domain that can aid in the decision whether a foreign solution shall be adopted at home. Legal scholars are institutionally well equipped to handle this task, but usually they lack the power to enforce a foreign solution they deemed superior. Contrastingly, constitutional conventions enjoy this power, but the politicians meeting there usually lack the expertise to thoroughly compare constitutions. This was different when Germany’s National Assembly met at Frankfurt’s Paulskirche (Saint Paul’s Church) in 1848-1849 in order to draft a new constitution. The Assembly was called Professorenparlament (Professors’ parliament) because it enjoyed the expertise of a remarkable number of scholars turned politicians. Hence, the legal and political minds gathered at the Paulskirche were in a position to overcome the dilemma and make the “travel of ideas” possible.

Drafting the Paulskirchenverfassung (Saint Paul’s Constitution, PKV), as the constitution is called because of the Assembly’s location, the delegates drew upon many foreign constitutions, among them the English, the French, the Belgian, and the Swiss constitutions. However, the United States Constitution was referred to the most. Thus, the debate is a paradigmatic example of how American ideas traveled to Germany. Although the Paulskirchenverfassung eventually was not enforced, it nevertheless turned out to be very influential. Some American ideas planted in German constitutionalism at that time are still alive today. Focusing on how American ideas influenced the debate in the Paulskirche, this Article counts an idea as American if it is introduced

This Article will analyze the Paulskirchen Convention as a case study in order to gain general insights into how and why comparativism is done. In order to achieve this aim, the Article is organized as follows. First, Part II briefly summarizes the European Revolutions taking place all across the continent in 1848 as they triggered the revolution in Germany. As the German revolution succeeded, a new constitution became necessary. Part III, then, focuses on the delegates of the National Assembly who were to draft this new constitution. As noted above, the Forty-Eighters—as the revolutionists sometimes are called—were very well educated “men of ideas.”

Part IV is the heart of this Article as it scrutinizes the Paulskirchen debate. Framing a constitution typically is at least partly a synthetic process which draws not only upon one’s own constitutional history but also on contemporary foreign constitutions. This Article largely ignores influences other than American constitutionalism, excluding for example the debates about the social questions and about the Pan-German solution as U.S. constitutionalism did not play a significant role in these realms. The focus allows a closer look at how comparative constitutionalism was practiced back then. For it to be successful, the drafters needed an understanding of an American principle’s genesis and its implications. In order to evaluate how fair their knowledge of American constitutionalism was, this Article will report on what body of literature the delegates turned to and scrutinize the references in their speeches. The nine volumes of transcripts are not available in English, so the translations are

4. During the debates in the Paulskirche, the “central” and “burning” questions of the nineteenth century about social welfare, privileges for the nobility, etc. (Christoph Stoll, Einführung, in REDEN FÜR DIE DEUTSCHE NATION 1848/49, at i, xiii (1979), were debated only once, see 7 STENOGRAPHISCHER BERICH T ÜBER DIE VERHANDLUNGEN DER DEUTSCHEN CONSTITUERENDEN NATIONALVERSAMMLUNG ZU FRANKFURT AM MAIN 5100-21 (Franz Wigard ed., 1848-1849) [hereinafter STEN. BER.], reprinted in REDEN FÜR DIE DEUTSCHE NATION 1848/49, supra.
5. The term refers to the question whether or not to include Austria into the new federation (“greater Germany” vs. “small Germany,” i.e., großdeutsche vs. kleindeutsche Lösung), see HANNSSJOACHIM W. KOCH, A CONSTITUTIONAL HISTORY OF GERMANY 50, 66-69 (1984).
6. Howard, supra note 3, at 403.
my own. In order to allow verification, I have provided the original language in the footnotes. As this Article tries to illustrate how comparativism works, it pays close attention to the speeches and reports given at the Paulskirchen Convention.

The influence of American ideas on German constitutionalism cannot be measured without a glimpse into the present. Therefore, Part V briefly summarizes how influential the Paulskirchenverfassung has been with respect to Germany’s current constitution, the Basic Law. Part VI, finally, draws some generalizing conclusions from the case study of Germany’s Paulskirchen Convention.

II. Prelude to the Convention: The History of the Revolution

In 1848, continental Europe witnessed revolutions ubiquitously. This Part briefly summarizes in Subpart A the movement which once again started in France. It then explains in Subpart B the history of the German revolution as background to the constitutional convention that evolved from the revolution.

A. Precursors in Europe

Even before the French revolution took place in 1848, the Italian revolution had celebrated its first victories. However, neither this revolution nor the preceding revolutions in Poland (1846) and Switzerland (1847) managed to set off what the French revolution caused: a chain reaction that created one public sphere throughout Europe. It all began with barricades, in Paris at the end of February

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7. There is one exception: The quote accompanying footnote 249 has been translated by Helmut Steinberger, *Historic Influences of American Constitutionalism upon German Constitutional Development: Federalism and Judicial Review*, 36 COLUM. J. TRANSNAT’L L. 189, 194 (1997), and I deferred to Professor Steinberger’s translation. The translation of the Paulskirchenverfassung follows *The Democratic Tradition: Four German Constitutions* 3 (Elmar M. Hucko ed., 1987), even though the translator has missed PKV article 36. The Basic Law is translated according to *David P. Currie, The Constitution of the Federal Republic of Germany* (1994), who in turn relied on the translation the Press and Information Office of the German Federal Government had provided; see *id.* at xiv n.8. Other sources of translations are credited in the relevant footnotes.


The monarchy of Louis-Philippe, who had been in power since July 1830, collapsed unexpectedly and without any true resistance. Besides in France, revolutionary movements took place in the German Confederation, in the Habsburg Monarchy, in Denmark, and in Italy—to name just a few. Even on the British islands, where Metternich had taken refuge, the tremors from the continent were felt. Only Russia was left untouched. In 1848, more states on the European continent were overcome by revolutions than ever before and ever since.

Although the 1848 revolutions began with violent protests and uprisings and escalated into military conflicts, they were characterized less by the barricades than by an attempt to reform in a non-violent fashion. Not the guillotine, but the constitution served as the instrument to bring about equality for all citizens. Soon, the focus of political interest shifted to the parliaments, as that became the place in which society’s desire for reform was translated into government policy. Parliamentarization and democratization of the government were universal core demands. How far this reform should go, however, sparked a bitter debate between Liberals and Democrats over the best form of government. Everywhere except in France, the revolutionary movements sought a compromise with the hereditary dynasties. Everywhere except in France—the Grande Nation, whose existence as a nation-state was well established at the time—national autonomy and

13. Duveau, supra note 11 passim; Lévêque, supra note 12, at 91-119.
14. See Dieter Langewiesche, Revolution in Germany: Constitutional State—Nation State—Social Reform, in Europe in 1848, supra note 8, at 120-44.
15. See Ji i Kaal, Revolutions in the Habsburg Monarchy, in Europe in 1848, supra note 8, at 145-69.
16. Steen Bo Frandsen, Denmark 1848: The Victory of Democracy and the Shattering of the Conglomerate State, in Europe in 1848, supra note 8, at 289-312.
17. Simonetta Soldani, Approaching Europe in the Name of the Nation: The Italian Revolution, 1846-1849, in Europe in 1848, supra note 8, at 59-90.
19. Steinberger, supra note 7, at 194.
22. Id. at 4-5.
23. Id. at 3-5.
the building of a nation-state was a revolutionary goal. This was especially true for Germany.

B. German Revolution of 1848

In March 1848, the events in Paris fueled largely uncoordinated uprisings across-the-board in Germany, e.g., in Berlin, Cologne, Dresden, Stuttgart, and Heidelberg. In Berlin, the Prussian King Friedrich Wilhelm IV soon satisfied the revolutionary demands. Although his troops had been victorious in open street fighting at first, the king was deeply shaken and ordered the armed forces to withdraw from the capital. As the revolutionaries seized control of the situation, the king found himself forced to acknowledge the legitimacy of the revolutionaries, to promise a constitution drafted by representatives of the people, and to commit himself to fighting for national unity.

In its desire for national unity, Germany had been inspired by the French. During Vormärz (pre-March, the pre-revolutionary stage), as the time leading to the German revolution in March 1848 is called, the German states were only loosely connected in the German Confederation (Deutscher Bund). Against this backdrop, the French idea of a nation-state soon gained political power and planted a powerful spirit of national unification and identity all over Germany.

At that time, the French Enlightenment promoted both: the idea that men are entitled to human rights, and a spirit of defiance against the established authorities. The pivotal goals of the German revolution

27. Currie, supra note 7, at 2 (noting the revolution to have spilled over from France); cf. Koch, supra note 5, at 46 (providing further locations).
28. Carl J. Friedrich, The European Background, in THE FORTY-EIGHTERS, supra note 2, at 3-25/5; Koch, supra note 5, at 52.
29. Friedrich, supra note 28, at 5; Koch, supra note 5, at 52; Frotscher & Pieroth, supra note 8, at 152.
30. Steinberger, supra note 7, at 192.
31. This framework had been set by treaties signed at the Congress of Vienna on June 8, 1815, and May 15, 1820. It built on the (first) peace treaty of Paris from May 1814, which prescribed: “Les Etats de l’Allemagne seront indépendants et unis par un lien fédéral” (art. 6, § 2). The treaties are reprinted at 1 DOKUMENTE ZUR DEUTSCHEN VERFASSUNGSGESCHICHTE 84-90, 91-100 (document nos. 30, 31) (Ernst Rudolf Huber ed., 3d ed. 1978) [hereinafter DOKUMENTE].
32. Steinberger, supra note 7, at 192.
33. Elmar M. Hucko, Introduction: The 1849 Constitution, in THE DEMOCRATIC TRADITION, supra note 7, at 3-5 (naming thirdly a general dissatisfaction in the face of the economic crisis which had started with the bad harvest in 1846); see also Namier, supra note 20, at 4-5 (on the economic and social background of the intellectuals’ revolution) and 40 (on the influence of Enlightenment).
were national unity on the one hand and liberty and democracy on the other. While the opposition was united in aiming for national unity, it was split with respect to the other goal. The two opposing wings were the radical Democrats and the moderate Liberals.

The Democrats met in Offenburg in September 1847 under the leadership of two lawyers, Friedrich Hecker and Gustav Struve. They adopted a declaration that was named for the location. In its first article, the *Offenburger Programm* demanded that the government renounce certain conservative resolutions, for “[t]hese resolutions” violate both “our unalienable rights of men” and the federal and states’ constitutions. Already this line of reasoning resembles the American struggle for independence seventy years earlier when the colonists, in George Mason’s 1776 Declaration of Rights for Virginia, backed up their claims against the British crown with reference to both unalienable and constitutional rights. Because the *Offenburger Programm* demanded liberties and equalities such as Freedom of Speech, of the Press, of Religion, of Assembly, and Equal Suffrage, it is obvious that the Democrats intended to catch up with Western constitutionalism.

The liberal wing of the opposition, on the other hand, met one month after the Democrats, in Heppenheim. They were epigones of the revolutions of 1789 as far as they were opposed to absolutism and to social hierarchies based on birthright. Although they favored monarchism, they wanted a constitution to legitimize and to restrict it. One of the main demands of Liberalism was the guarantee of fundamental rights on the constitutional level. The bourgeoisie wanted their own sphere, uninfringeable by the government, where liberty and property could

34. Hucko, *supra* note 33, at 5; Frotscher & Pieroth, *supra* note 8, at 150.
37. Namely the resolution of Carlsbad (1819), the resolutions of Frankfurt (1831 and 1832), and the resolution of Vienna (1834).
40. Frotscher & Pieroth, *supra* note 8, at 149.
41. Id. at 150.
42. Hucko, *supra* note 33, at 3.
flourish. In contrast to the Democrats, however, the Liberals focused more on procedural guarantees, like a rule of law and the separation of powers.

III. National Assembly at Frankfurt’s Paulskirche

The National Assembly drafted the Paulskirchenverfassung. Thus, this Part will focus on this body, how it evolved from the revolution (Subpart A) and how it was composed politically and demographically (Subpart B).

A. Evolution and Election

With national unity a pivotal goal, it took a national constitution to “form a liberal nation-state out of thirty-nine illiberal individual states.” Thus, as fifty-one politicians of the opposition from several state parliaments gathered in Heidelberg, they quickly recognized the need of a more representative convention with delegates from all German states. The Fifty-one, as they were referred to, created a committee of seven, which in turn organized the meeting of a Vorparlament (pre-parliament, the pre-parliamentary assembly). The Vorparlament prepared the election of the National Assembly, resolving that in every German state, every independent citizen of age was to enjoy suffrage. It was considered self-evident that this excluded women from electing, and being elected. As the National Assembly, the first German Parliament, was elected on May 1, 1848, about eighty percent of adult males had the right to vote. Due to this unusually broad franchise (in comparison not

43. Langewiesche, supra note 14, at 124; see Stoll, supra note 4, at vi.
44. NAMEIER, supra note 20, at 66; Stoll, supra note 4, at v. They unanimously “resolved in their devotion to the freedom, unity, independence and honor of the German nation” that “what the Fatherland urgently needs” is, inter alia, a “meeting of a national representation elected in all the German lands according to the number of the people,” see Declaration issued March 5, 1848, DOKUMENTE, supra note 31, at 326-28 (document #73), translated in THE REVOLUTIONS OF 1848-49, at 48-50 (Frank Eyck ed., 1972) [hereinafter REVOLUTIONS]; DOKUMENTE, supra note 31, at 327, translated in REVOLUTIONS, supra, at 49.
45. Stoll, supra note 4, at vi; KOCH, supra note 5, at 53.
46. DOKUMENTE, supra note 31, at 334 (Apr. 4); Stoll, supra note 4, at vi (Apr. 3); see CURRIE, supra note 7, at 2.
47. Art. 4, § 3 (“Jeder volljährige selbständige Staatsangehörige ist wahlberechtigt und wählbar”), reprinted in DOKUMENTE, supra note 31, at 335.
48. Stoll, supra note 4, at vii. The delegates quoted in Part IV will continuously address the Assembly as “Gentlemen!”
49. FROTSCHER & PIEROTH, supra note 8, at 153-54; see KARL OBERMANN, DIE WAHLEN ZUR FRANKFURTER NATIONALVERSAMMLUNG IM FRÜHJAHR 1848 ([East-]Berlin 1987) (from the East-German, i.e., communist, perspective)
50. Langewiesche, supra note 14, at 124.
only with other European countries and with the United States at the time, but also with the enactment of the Basic Law), the Paulskirchenverfassung became the first democratic constitution in Germany. As the members of the National Assembly took their seats in Frankfurt’s Paulskirche on May 18, 1848, the constitutional convention was recognized both by the political public and by the core of governmental authority (which everywhere had survived the first wave of uprisings). Thus, the revolution had been legalized, parliamentarized, and transformed into a process of institutionally led reform.

B. Political and Demographic Composition

According to the election law, the Assembly was to be composed of 649 members. Counting acting deputies as well, there were more than eight hundred delegates at one time or another. Politically, the Liberals held the greatest influence in parliament, even though Democrats surpassed them in numbers of association and membership outside parliament. It was in parliament on the question of “republic” vs. “constitutional monarchy” that Liberals and Democrats became political enemies. In the Assembly, the delegates formed factions. The factions, the precursors of Germany’s parties, met separately and were named

52. 1 STEN. BER., supra note 4, at 1, cf. the seating chart in DIE FRANKFURTER NATIONALVERSAMMLUNG 1848/49: EIN HANDLEXIKON DER ABGEORDNETEN DER DEUTSCHEN VERFASSUNGSGEBENDEN REICHS-VERSAMMLUNG 34-35 (Rainer Koch ed., 1989) [hereinafter HANDLEXIKON].
53. Langewiesche, supra note 14, at 122.
54. See WOLFRAM SIEMANN, DIE FRANKFURTER NATIONALVERSAMMLUNG 1848/49 ZWISCHEN DEMOKRATISCHEM LIBERALISMUS UND KONSERVATIVER REFORM: DIE BEDIUTUNG DER JURISTENDOMINANZ IN DEN VERFASSUNGSVERHANDLUNGEN DES PAULSKIRCHENPARLAMENTS 33 (1976). Later, the number was increased to 655, see Stoll, supra note 4, at vii.
55. The numbers given vary. See SIEMANN, supra note 54, at 19 (counting 812), Stoll, supra note 4, at vii (counting 831), Franz Wigard, Register, in 9 STEN. BER., supra note 4, after 6886, at 105-119 (counting 819), Rainer Koch, Biographien der Abgeordneten. Editorische Vorbemerkung, in HANDLEXIKON, supra note 52, at 50 (referring to Max Schwarz counting 832). The numbers vary as the Assembly did not acknowledge all elections as lawful, and not all members elected accepted their positions, see Koch, supra at 50.
56. Stoll, supra note 4, at vii.
57. Langewiesche, supra note 14, at 125.
58. FROTSCHER & PIEROTH, supra note 8, at 157; cf. Michael Wettengel, Party Formation in Germany: Political Associations in the Revolution of 1848, in EUROPE IN 1848, supra note 8, at 529-58 (outlining the development of political associations during Vormärz); Heinrich Best, Structures of Parliamentary Representation in the Revolution of 1848, in EUROPE IN 1848, supra note 8, at 475-506; Haupt & Langewiesche, supra note 10, at 19 (regarding 1848 as a “phase of experiment and trial” for the modern party); Langewiesche, supra note 14, at 123-25, 128 (stating
after those restaurants. On the left, there were the factions “Donnersberg” and “Deutscher Hof”; on the right was the “Café Milani.” In the center, in between, one could find the “Württemberger Hof” (left center) and the “Casino” (right center).

Demographically speaking, all delegates were male. More than three-quarters of them were academics, and one-half of those were lawyers. More than half of the Assembly’s members were government officials, and among the especially influential delegates were seventy-six full-time professors (Universitätsprofessoren). On the other hand, less than one-eighth of the members were executives, and farmers and workers were almost not present. In the year, Marx published the Communist Manifesto, the National Assembly was composed of the “bourgeoisie,” of patricians of the cities and rural communities, and had been nicknamed accordingly Parliament of Notables (Honoratiorenparlament).

In terms of class and race, the composition of the assembly did not represent the composition of the people very well, despite the rather democratic election. At the same time, neither before, nor thereafter, was there ever a parliament of so many highly educated men. Among the delegates, the country’s best and brightest men could be found: Ludwig Uhland, Ernst Moritz Arndt, the so-called “Turnvater” Adolf Jahn, Robert Blum, Jakob Grimm, to mention but a few prominent participants. The leading role of intellectuals was perceived as both an
advantage and a disadvantage, as reflected by two other nicknames: Parliament of the Intellect (Parlament des Geistes) and College for Political Science (Hochschule für Politik). While the first notion carries clearly an admiring connotation with it, the second term sounds rather like ridicule.

The reason for ridicule was the perception that the deliberations took too long. Georg Herwegh, a poet who fought actively in the revolution himself and was elected to the National Assembly, composed “In parlia-, parlia-, parliament, / the debates, they will never end.” His last verse is “Your parliament, your parliament, / O people, put it to an end.” In another exhibit of that time, a cartoon showed three professors in dressing gowns gathering at a table around an inkpot in order to write. The cartoon was entitled: “Three German Professors draft the draft of the German Federal Army Act’s draft.” Allegedly, the persons pictured were Carl Joseph Anton Mittermaier, Georg Beseler, and Friedrich Christoph Dahlmann.

Already within the first few weeks, the Assembly was criticized for how the professors lecture “from the lectern downwards.” The criticism did not go unnoticed: Mittermaier, one of the law professors in the caricature mentioned above, once sighed ironically, “So often you talk about professors; we as professors are going to be guilty of all revolutions and misery; poor professors work, as one can see, too

69. Veit Valentin, 2 Geschichte der deutschen Revolution 13 (1930).
72. The cartoon by A. von Boddien appeared in 1 Badischer Liederhort 122-23 (J. Ph. Glock ed., 1910) reprinted in Otto, supra note 71, at 356. The slogan, “Drei deutschen Professoren entwerfen den Entwurf des Entwürfs für die Verfassung des deutschen Reichsheeres,” is cited as well by Stoll, supra note 4, at xii. According to PKV article 12, § 1, cl. 2, article 16 a “military constitution” (Wehrverfassung) was necessary to determine the strength and the composition of the federal army.
73. Eduard Fuchs, 2 Die Karikatur der europäischen Völker 68 (1903); see Otto, supra note 71, at 356.
74. Simon, 1sten. Ber., supra note 4, at 407 (20.06.1848) (“die Professoren vom Katheder herunter”).
doctrinally. 75 Because the Paulskirchenverfassung eventually failed, there is something true about it: The delegates should have paid closer attention to politics and influences outside the Paulskirche.

Today, however, the thoughtful debate of the Parliament of the Intellect seems to be rather an advantage. As lawyers, professors, the haute bourgeoisie, and other more or less sophisticated minds set the tone of the discussion, the Assembly engaged “in a sophisticated debate upon constitutional principles representative of the best which European thought had produced in this field.” 76 The members of the Frankfurt Parliament, longing for reconciliation after the bloody clashes in March, wanted to talk freely and at length, which they had been prevented from doing for so long. Most of them thought it right and proper to present their perfectly agreeable theories in well-measured prose. 77 The Paulskirchenverfassung, although never properly enacted, turned out to be very influential precisely because it was so thoroughly deliberated—something members with less intellectual background might not have been able to achieve.

IV. DEBATE OVER THE CONSTITUTION

As the National Assembly gathered in Frankfurt’s Paulskirche to draft the new constitution, the members of the Professors’ Parliament were able to draw on a very broad intellectual background, upon which Subpart A shall shed some light. Against this backdrop, Subpart B, the heart of the Article, focuses on paradigmatic examples, giving a detailed account of delegates’ references to the United States Constitution.

A. Basis for References to American Constitutionalism

In the National Assembly, comparisons with foreign constitutions were made very frequently. The constitutions of Switzerland, Great Britain, France, Belgium, The Netherlands, Poland, to name but a few, surfaced in the debate. However, references to the United States Constitution substantially outnumbered all others. 78 The task the National Assembly had to accomplish was at least twofold: The German

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75. 4 STEN. BER., supra note 4, at 2983 (“Sie reden so oft von Professoren; wir Professoren sind halb Schuld an allen Revolutionen und Elend; die armen Professoren arbeiten, wie man sieht, zu doctrinär.”).
76. Friedrich, supra note 28, at 6.
77. Hucko, supra note 33, at 8.
78. ECKHART G. FRANZ, DAS AMERIKABILD DER DEUTSCHEN REVOLUTION VON 1848/49. ZUM PROBLEM DER ÜBERTRAGUNG GEWACHSENER VERFASSUNGSFORMEN 116 (1958); Steinberger, supra note 7, at 194.
people demanded both unity and liberty, as is still displayed in the national anthem sung today (Einigkeit und Recht und Freiheit). Liberty was to be secured by fundamental rights, and unity was to be accomplished by a German federation of still independent states that would be bound more closely to each other than in the existing confederation. Because the United States Constitution—in contrast to the centralized French republic—could serve as a model in both respects, it became outstandingly important in the debates of the National Assembly.\textsuperscript{79}

The interest in North American affairs had started with the outbreak of the American Revolution, as thousands of young Germans were pressed by their princes to serve with the British army.\textsuperscript{80} The American ideas of liberty and equality met the middle class’s efforts to accomplish equality with the privileged class of nobility, and America became the most important foreign topic in Germany. German poets such as Klopstock, Wieland, and Herder spoke favorably of America, and the French Revolution’s “égalité, liberté, fraternité” confirmed the focus on American ideas of liberty and equality. Not only did the interest in American Constitutionalism grow as the Enlightenment triumphed, but it was also sustained when Jacobinian terrors in France caused an aversion towards the French revolution.\textsuperscript{81}

During the course of time, quite a body of literature had been published on the matter. Friedrich Gentz, a highly esteemed scholar, constructed a comparison of origins and principles of the American and the French Revolution as early as 1800. The article, translated by John Quincy Adams (then American envoy to Prussia), appeared in Philadelphia the same year.\textsuperscript{82} In 1807, Zachariä, a leading German constitutionalist, juxtaposed confederation and federation by pointing to the American example.\textsuperscript{83} Görres praised American federalism,\textsuperscript{84} and in 1824, Robert von Mohl, one of Germany’s leading constitutional lawyers and a member of the Paulskirchen Convention, published the first

\textsuperscript{79} FRANZ, supra note 78, at 115-16.
\textsuperscript{80} Steinberger, supra note 7, at 189.
\textsuperscript{81} Id. at 190.
\textsuperscript{82} Friedrich Gentz, The origin and principles of the American Revolution compared with the origin and principles of the French Revolution (1800), reprinted in Friedrich Gentz, The French and American Revolutions Compared, in THREE REVOLUTIONS (John Quincy Adams trans., 1959).
\textsuperscript{83} See CARL SALOMON ZACHARIAE, IUS PUBLICUM CIVITATUM QUAE FOEDERI RHENANO ADScripti sunt (1807), cited according to Steinberger, supra note 7, at 192 n.5.
\textsuperscript{84} See JOSEPH GÖRRES, DEUTSCHLAND UND DIE REVOLUTION (1819).
systematic treatise on the United States Constitution. In the 1830s, the Federalist Papers and (partly) the commentaries of Story and Kent were translated and reviewed (the translator of Story later was to become a member of the Assembly). Also in these years, probably the most influential scholarly work on American constitutionalism appeared: Alexis de Tocqueville’s *De la démocratie en Amérique*. The two volumes of his work were published respectively in 1835 (translated into German the very next year) and in 1840. In his treatise, Tocqueville gave a broad overview of the United States Constitution. He considered three elements of American constitutionalism as decisive in protecting the republican and democratic form of government. Besides self-government of counties, Tocqueville highlighted federalism and the design of the judicial branch. The latter two were to become not only important issues to the Paulskirchen Convention, but also the two best examples of American influence on German constitutionalism.

With respect to federalism, for example, Tocqueville explained the nature of the American federation, the advantages of a clear separation of legislative matters between federal government and the states, the two chamber system, and the importance of the federal government’s power to address individuals in the states directly. It was exactly in these respects that the Paulskirchen Convention was especially receptive to American thoughts. Tocqueville’s ideas were very well known among the delegates. Robert von Mohl, for example, had written a praising review of Tocqueville’s work, which appeared in a journal published by another delegate, the aforementioned Mittermaier. Tocqueville’s works also were widely quoted throughout the debates.

The deputies gathered in the Paulskirche were quite familiar with American constitutionalism as well. At least the delegates Raumer,
Duckwitz, Rönne, Moering, Mittermaier, and Tellkampf had been to the United States. Moering was proud to report that not only had he spent two years in North America, but he had also “lived with Jefferson, Hamilton, Tocqueville at hand.” Mittermaier and Tellkampf also emphasized that their accounts of North America were not from hearsay, but had an eyewitness quality.

Several delegates had published scholarly works on the matter, among them Mittermaier, Dahlmann, Döllinger, Robert von Mohl, Raumer, Rönne, Reichensperger, and Waitz. Mittermaier once told the Assembly:

Gentlemen, for more than forty years it has been part of my life’s work to dedicate myself primarily to studies of the North-American constitution.

1845, he had published two volumes about “The united (sic!) States of America” (Die vereinigten Staaten von Amerika). Raumer’s work was quoted by Nauwerck, 7 STEN. BER., supra note 4, at 5521, as an argument for direct elections. See generally Best & Weege, supra note 63, at 270-71; Franz, supra note 78, at 34 n.18 and 139 n.9; Handlexikon, supra note 52, at 324-25.

According to Franz, supra note 78, at 139 n.7, envoy of Bremen.

Friedrich Ludwig von Rönne (1798-1865) studied law in Kiel and Berlin and was an envoy of Prussia in Washington from 1834-1843. He has published a “memorandum about provisions in the North-American federal constitution dealing with national economy” (Denkschrift, die volkswirtschaftlichen Bestimmungen der nordamerikanischen Bundesconstitution betreffend, reprinted in Julius von Rönne, Friedrich von Rönne 149-69 (1867)). See Best & Weege, supra note 63, at 283-84; Handlexikon, supra note 52, at 343; Franz, supra note 78, at 139 n.7.

Karl Moering (1810-1870), also Carl Möring, since 1849 von Möring, a member of the armed forces from Vienna, had been to North-America for military studies from 1841-1843, see Best & Weege, supra note 63, at 241-42; Franz, supra note 78, at 139 n.7.

See supra text accompanying note 113.

See supra text accompanying note 114.

1 STEN. BER., supra note 4, at 433 (emphasis added).

Mittermaier, supra text accompanying note 101; Tellkampf, 7 STEN. BER., supra note 4, at 5305 (“Die Gründe, welche mir für die indirecten Wahlen zu sprechen scheinen, beruhen auf den Beobachtungen, die ich mehrere Jahre lang Gelegenheit gehabt habe, in Nord-Amerika zu machen...”).

... have been constantly in contact with America’s statesmen, who have revealed their experience to me. Upon them are based the statements in my report and several drafts that have been suggested.101

Having published scholarly works on American constitutionalism was not always an advantage in the assembly, since the rule “anything said can and will be used against you”102 also applied to constitutional conventions. Once, a delegate took on Robert von Mohl: “The Secretary himself will, as far as I know, agree to these ideas, as they are already initiated in his highly appreciated book about America.”103

During the debates, all factions referred to the New World.104 With American Constitutionalism widespread among the people and present in the minds of the delegates, even state constitutions were taken into consideration.105 It is no surprise that the text of the United States Constitution had been translated into German106 and was even physically present in the Paulskirche. Once, delegate Wesendonck from Düsseldorf challenged deputy Ravenaux’s quotation from the United States Constitution as outdated because of an amendment. To solve the problem, Vice President von Soiron could hand “the new, amended constitution” to Ravenaux.107 The dispute was about impeachment according to the United States Constitution Article II, Section 4. However, this provision had never been amended, and at the time of the debate, June 24, 1848, the latest amendment, the twelfth on the election of President and Vice President, had been enacted more than forty-four

101. Mittermaier, 4 STEN. BER., supra note 4, at 2982 (with respect to federalism) (“Meine Herren, es gehörte zu meiner Lebensaufgabe seit mehr als 40 Jahren, mich vorzüglich dem Studium der nordamerikanischen Verfassung zu widmen. Ich habe nicht die Congreßacte allein studiert, sondern ich bin in beständigem Verkehr mit Staatsmännern Amerika’s (sic!) gewesen, die mir ihre Erfahrungen mitgetheilt haben. Darauf gründen sich die Aeußerungen meines Berichts und manche Fassungen, die vorgeschlagen worden sind.”).

102. Cf. Miranda v. Arizona, 86 S. Ct. 1602, 1625 (1966) (in a different context); see also id. at 1630 (only “... can be used ...”).

103. Mittermaier, 5 STEN. BER., supra note 4, at 3616 (“Der Herr Reichsminister wird selbst, soviel ich weiß, diesen Ideen schon zustimmen, weil sie schon in seinem klassischen Buche über Amerika angebahnt sind.”).

104. FRANZ, supra note 78, at 1.

105. Tellkamp, 7 STEN. BER., supra note 4, at 5305 (citing with respect to the franchise MASS. CONST. pt. II, ch. 1, §§ 2-3; CONN. CONST. art. 6, § 2; R.I. CONST. art. 2, § 1; and N.H. CONST. pt. II.)

106. The deputy Mittermaier once complained about their quality: “Read the American Constitution, in the usual bad translations, and compare it to the living Constitution . . . .” (5 STEN. BER., supra note 4, at 3614 (quoted according to the translation by Steinberger, supra note 7, at 200)).

107. 1 STEN. BER., supra note 4, at 515; see FRANZ, supra note 78, at 137-38 n.4.
years earlier, in 1804.108 In the end, then, Wesendonck was wrong and Ravenaux right.

Some delegates took exceptions to the frequent references to American Constitutionalism. Delegate Seuffert, for example, inveighed already in May 1848 against “the foolish tendency to plant institutions from the free states in North America into German soil.” This reminded him of a “political delusion,” which spreads around the country “as cholera does,” only “without confining itself as this plague does to a small portion of the people.”109 Delegate Kosmann asked whether the North-American republic was to be the only model,110 and delegate Zell, an America-skeptic, announced ironically at the outset of a speech that this time, for a change, he was going to contribute “something from America” as well.111

The two members fondest of the American constitution were two law professors, Johann L. Tellkampf and Carl Joseph Anton Mittermaier, the third member of the cartoon’s draft committee. Both delegates were affiliated with the left-centered Württemberger Hof; had been elected to the very influential Constitutional Committee,112 and voted for Friedrich Wilhelm IV as emperor of the Germans.

Carl Mittermaier was born in Munich, the Catholic son of a pharmacist, in 1787. He married in 1812.113 After studies of law in Landshut, Munich, and Heidelberg, he received his Ph.D. in 1809. He also held four Ph.D. honoris causa, among them one from Cambridge, U.S.A. As a professor, he taught in Landshut and Bonn before he returned to Heidelberg. During his career, he frequently traveled for research (Studienreisen). Mittermaier was a member of the National Institute for the Promotion of Science in Washington (since 1843) and of the American Academy of Arts and Science in Boston (since 1853). He

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108. The next amendment was going to be about the abolition of slavery, enacted in 1865.
109. Allgemeine Zeitung, 22.05.48, Supplement (cited according to FRANZ, supra note 78, at 118 n.118 (“die törichte Neigung, Einrichtungen der nordamerikanischen Freistaaten auf deutschen Boden zu verpflanzen” erinnere an “politischen Wahn,” der sich wie eine “Miasma,” “’nach Art der Cholera” über das Land verbreite, “ohne sich wie diese Seuche auf einen kleinen Teil der Bevölkerung zu beschränken.”)).
110. Kosmann, 1 STEN. BER., supra note 4, at 510 (“Soll dieses Gebäude nach dem Systeme, welches uns in Belgien, Norwegen, England u. s. w. geboten wird, gebaut werden, oder gibt nur die nordamerikanische Republik hierzu das einzige Muster?”).
112. Cf. KÜHNE, supra note 51, at 43-44.
113. For the information given in this Part, see BEST & WEEGE, supra note 63, at 240-41; HANDLEXIKON, supra note 52, at 287; Langewiesche, supra note 14, at 127; KÜHNE, supra note 51, at 550. Sometimes, Mittermaier’s first name is spelled Karl.
had served as a member and President in the state parliament (lower house) in Baden, was a member of the liberal Heppenheimer convention, and the President of the Vorparlament. After the *Paulskirchenverfassung* failed, Mittermaier devoted the remainder of his life to jurisprudence with a special emphasis on comparativism. He died in Heidelberg in 1867.

Johann Tellkampf, a Protestant, was born in 1808, the son of a high government official (*Kanzleirat*). He studied law in Göttingen from 1828-1831, when he received his Ph.D. He also held a Ph.D. in philosophy. From 1833 until 1835, Tellkampf practiced as an attorney in Hannover. After several academic journeys, he visited North America in 1838. Being appointed Professor in Ordinary, Tellkampf taught at New York's Union College (1839-1843) and Columbia College (1843-1846). In the Big Apple, he also co-published *Hunt's Merchant's Magazine and Commercial Review*. During that time, Tellkampf undertook several journeys through the United States.

Tellkampf was member of several societies, inter alia of the Prison Association, the German Society for the Protection of Immigrants, and the Society for Poor-Relief (all of them in New York). In 1845, he helped to establish a steamship connection between New York and Bremen, Germany. After the *Paulskirchenverfassung* failed, Tellkampf became a member of the Prussian parliament. He died in 1876.

B. Examples of References to American Constitutionalism

During the debate on almost any subject, one delegate or another referred to, or compared with, the corresponding American solution. Tellkampf even went so far as to propose the German capital be—in compliance with the “Washingtonian model”—in a town as small as possible. The proposal was meant to ensure that debates could be held

114. For the information given in this Part, see Best & Wege, supra note 63, at 334-35; Handlexikon, supra note 52, at 399; Kühne, supra note 51, at 553-54.

115. Steinberger, supra note 7, at 195 (mentioning examples such as the American presidential system, the republican form of government, a system for amendments to the constitution, an election system, a definition of citizenship, immunity and indemnity for members of parliament, a provision for a state of emergency, freedom of trade and occupation, free movement within the federation, freedom of the press and jury trial, the separation of church and state, freedom of religion, and powers of the judiciary).
“quietly”—because fewer disruptions of the rabble had to be expected.\footnote{116} Be that as it may: The Assembly did not follow Tellkampf.\footnote{117}

This Part will focus on selected areas of reference, namely (1) the rules of procedure of the convention, (2) the debate of republic vs. monarchy, (3) democratic elections to parliament, (4) the bill of rights, and, finally, the two examples most important in future constitutionalism in Germany: legend (5) federalism and (6) the judicial branch.

1. Rules of Procedure

As any parliament, the National Assembly needed to agree on rules of procedure (\textit{Geschäftsordnung}) before actual lawmaking could take place. After adopting preliminary bylaws,\footnote{119} the Assembly debated the final rules in the ninth session on May 29, 1848.\footnote{120} Robert Mohl reported for the committee that had drafted the proposal,\footnote{121} modeled according to examples from England, France, and the German states.\footnote{122} During the debate, Tellkampf suggested to fill the gaps that might occur “according to the German translation of Jefferson’s collection of parliamentary rules of procedure,”\footnote{123} a reference to the “well-known”\footnote{124} and “highly respected”\footnote{125} \textit{Manual of Parliamentary Practice for the Use of the Senate of the United States} from 1801 (translated to German in 1819).\footnote{126} Parliamentary proceedings, Tellkampf believed, existed “nowhere in such perfection as in North America and England.”\footnote{127} The deputy perceived

\footnote{117. \textit{AKTENSTÜCKE}, supra note 111, at 316; see \textit{FRANZ}, supra note 78, at 118.}
\footnote{118. Bodo Pieroth, \textit{Amerikanischer Verfassungsexport nach Deutschland}, 42 NJW 1333-1337/1334 (1989); Steinberger, \textit{supra} note 7, at 195.}
\footnote{119. 1 \textit{STEN. BER.}, supra note 4, at 5-9.}
\footnote{120. \textit{Id}. at 163-74.}
\footnote{121. \textit{Id}. at 7 (preliminary); \textit{id}. at 165.}
\footnote{122. Jacob Grimm, 1 \textit{STEN. BER.}, supra note 4, at 166 (referring to all three examples); see Wigard, 1 \textit{STEN. BER.}, \textit{supra} note 4, at 167 (referring only to his own experience with procedural rules in different German states); Tellkampf, 1 \textit{STEN. BER.}, \textit{supra} note 4, at 167 (referring only to the English example).}
\footnote{123. Tellkampf, 1 \textit{STEN. BER.}, \textit{supra} note 4, at 167.}
\footnote{124. Fallatti, 1 \textit{STEN. BER.}, \textit{supra} note 4, at 169 (“Jefferson’s bekanntes Werk”).}
\footnote{125. Schwarzenberg sen., 1 \textit{STEN. BER.}, \textit{supra} note 4, at 169 (“hochgeachtet”).}
\footnote{127. Tellkampf, 1 \textit{STEN. BER.}, \textit{supra} note 4, at 168 (“Ich habe den parlamentarischen Geschäftsgang nirgends in solcher Vollendung gefunden, als in Nordamerika und England.”).}
the American Revolution as “much more regular and businesslike”\textsuperscript{128} than the French. One of the reasons for that, Tellkampf claimed, was “that the settlers in North America knew the English parliamentary proceedings . . . completely.”\textsuperscript{129} It seemed to Tellkampf:

that North America, namely its wide West, could not at all govern itself, if not all its inhabitants agreed upon the same English parliamentary rules. It was interesting for me to observe how even in the jungle, at locations where only a dozen of people live, they convene to go about their joint business, constitute themselves by the election of a president so that peace and order prevail even among the wildest types of characters.\textsuperscript{130}

The Assembly was not impressed. It perceived Jefferson’s \textit{Manual} and the English parliamentary rules as tailored too tightly to the circumstances in England and North America. The rules, then, could certainly not be adopted wholesale. To decide for each rule at a time whether or not it suits the German situation was deemed too costly so that, in the end, the Assembly declined the proposal.\textsuperscript{131}

2. Republic or Monarchy

Republic or Monarchy was, besides national unity, a major question of the time. Already at the first session of the \textit{Vorparlament}, Friedrich Struve had demanded the end of monarchy.\textsuperscript{132} In the Assembly, however, less than a third of the delegates supported parliamentary democracy.\textsuperscript{133} Democrats cherished diverse and hopeful visions of the republic. But Gustave Flaubert had observed the echo: “[T]n every syllable of the word

\begin{itemize}
  \item \textsuperscript{128} Id. (“Ich bin sogar der Meinung, daß einer der Gründe, weshalb die amerikanische Revolution einen weit regelmäßigeren, und ich möchte sagen geschäftsmäßigeren Charakter hatte, als die französische . . . .”).
  \item \textsuperscript{129} Id. (“[D]arin lag, daß die Ansiedler in Nordamerika mit dem parlamentarischen Rechte vollständig vertraut waren.”).
  \item \textsuperscript{130} Id. (“daß ich Sie, meine Herrn, darauf aufmerksam mache, wie ich fest überzeugt bin, daß Nordamerika, namentlich dessen weiter Westen, gar nicht sich selbst regieren könnte, wenn nicht alle Bewohner jenes Landes einig wären über ein und dasselbe englische parlamentarische Recht. Es war mir dort interessant zu bemerken, wie selbst in den Urwäldern Nordamerika’s an Orten, wo vielleicht nur ein Dutzend Menschen wohnen, diese zum Zweck gemeinsamer Geschäfte zusammentreten, sich durch Wahl eines Präsidenten constituirieren und wie dabei Ruhe und Ordnung selbst unter den wildesten Charakteren herrschen.”).
  \item \textsuperscript{131} Fallati, \textit{1 STEN. BER.}, supra note 4, at 169.
  \item \textsuperscript{132} \textit{1 DIE VERHANDLUNGEN DES VERFASSUNGS-AUSSCHUSSES DER DEUTSCHEN NATIONALVERSAMMLUNG} 7 (Johann Gustav Droysen ed., 1849), quoted according to \textit{Franz}, supra note 78, at 104.
  \item \textsuperscript{133} At first, only the less than hundred members of the two left-wing factions \textit{Deutscher Hof} and \textit{Donnersberg} supported parliamentary democracy. Later on, they were joined by another hundred members of the left-centered \textit{Württemberger Hof}. \textit{Cf.} Stoll, supra note 4, at xiv.
\end{itemize}
‘Republic’, the sound of the guillotine resonates.”\textsuperscript{134} Thus, Liberals and Conservatives forming a vast majority in the assembly favored a constitutional monarchy with a hereditary emperorship.\textsuperscript{135} They both associated “republic” with doom and destruction and were afraid of a mob rule that would destroy morality and property, dissolve family ties, and, ultimately, demolish bourgeois life.\textsuperscript{136}

Georg von Vincke, a lawyer and monarchist from Westphalia, fought the republic by American example. He acknowledged that Americans had cherished the republic “‘for generations.”\textsuperscript{137} In his opinion, however, Germany should not follow the American example, however, because it was dependent upon a unique geographical, demographical, and political situation. Geographically, von Vincke considered North America as being practically without external enemies. Germany, on the other hand, was located in the center of Europe and therefore “faced the threat of war from all sides.”\textsuperscript{138} He predicted that Germany was going to be “‘for a long time” to come “Europe’s playground and its bone of contention.”\textsuperscript{139} Demographically, von Vincke viewed North America as lacking proletarians “‘for now and for a long time to come, given that there is still land in the West to send those elements to.”\textsuperscript{140} Historically, the deputy perceived North America as having been equipped with “an inherited sense of law and conformity brought with them across the ocean from England” centuries ago.\textsuperscript{141} Von

\textsuperscript{134} Gustave Flaubert, The Sentimental Education 295 (Robert Baldick trans., 1964) (cited according to Langewiesche, supra note 14, at 126).

\textsuperscript{135} Stoll, supra note 4, at xiv (noting some name changes and regroupings as well). As the debates progressed and the German question (see supra note 5) became the center of attention, the ideological affiliation became less important, see Stoll, supra note 4, at xx.

\textsuperscript{136} Langewiesche, supra note 14, at 125.

\textsuperscript{137} Von Vincke, 1 Sten. Ber., supra note 4, at 442.

\textsuperscript{138} Id. at 443 (“der Blick von ganz Europa auf uns gerichtet ist, wir von allen Seiten mit Krieg bedroht sind”).

\textsuperscript{139} Id. at 442-43 (“daß Deutschland, vermöge seiner Lage in der Mitte von Europa, noch lange Zeit der Tummelplatz und der Zankapfel von ganz Europa sein wird”); see similarly Kosmann, 1 Sten. Ber., supra note 4, at 510 (arguing that “Germany is not surrounded by North American jungles” — “daß Deutschland in seinen Umgebungen keine nordamerikanischen Urwälder besitzt”). The geographic argument had been raised already by Alexander Hamilton who once remarked that the amount of internal liberty in a state was closely related to the amount of pressure, or the lack of it, from without (cited according to Koch, supra note 5, at 35 (who fails to credit a source)).

\textsuperscript{140} Von Vincke, 1 Sten. Ber., supra note 4, at 443 (“Nordamerika besitzt keine Proletarier und wird sie noch auf lange hin nicht besitzen, so lange nur im Westen noch Land genug ist, um diese Elemente dort hinüber zu senden.”).

\textsuperscript{141} Id. (“das politische Moment, daß die Bewohner von Nordamerika seit Jahrhunderten einen angeeiberten Sinn für Recht und Gesetzmäßigkeit von England über den Ocean mit hinübergebracht haben”); see similarly Kosmann, 1 Sten. Ber., supra note 4, at 510 (arguing that in Germany, nobody is used to the republican virtue to govern themselves).
Vincke added that the American republic had its problems as well. After all, “we find slavery and Indians.”

No matter how accurate von Vincke’s account, in the end it was not refined academic arguments that carried the day. Rather, it was the raw power of the besieged crown that had recovered by January of 1849 at the latest, crushing all hopes for a republic. Given the sudden shift in power, the new state inevitably was to become a constitutional monarchy. In order to emphasize that the German Emperor was legitimated by the people, he was to be called the Emperor “of the Germans,” not “of Germany.”

3. Democratic Elections

Despite the democratic elections and the unusually broad franchise that had legitimized the delegates as representatives of the people, the Assembly debated about the question how democratic elections under the new constitution ought to be. In this discussion, members cited the American example as an argument against general suffrage. Arguing to restrict suffrage to males with property, the delegate Raumer quoted from a letter Thomas Jefferson had written from Monticello. Jefferson wrote to John Adams in 1813:

[Before the establishment of the American States, nothing was known to history but the man of the old world, crowded within limits either small or overcharged, and steeped in the vices which that situation generates. A government adapted to such men would be one thing; but a very different one, that for the man of these States. Here every one may have land to labor for himself, if he chooses; or, preferring the exercise of any other industry, may exact for it such compensation as not only to afford a comfortable subsistence, but wherewith to provide for a cessation from labor in old age. Every one, by his property or by his satisfactory situation, is interested in the support of law and order. And such men may safely and advantageously reserve to themselves a wholesome control over their public affairs, and a degree of freedom, which, in the hands of the canaille of the cities of Europe, would be instantly perverted to the demolition and destruction of every thing public and private.]

142. Von Vincke, 1 STEN. BER., supra note 4, at 443 (“in Nordamerika, . . . finden wir die Sklaverei und die Indianer”); see also Tellkampf, 7 STEN. BER., supra note 4, at 5305-06.
143. FRANZ, supra note 78, at 114-15.
144. Hucko, supra note 33, at 10.
145. Like the “roi des français” of the July monarchy, see Aktenstücke, supra note 111, at 315, and Hucko, supra note 33, at 11.
146. Thomas Jefferson, Letter CXV to John Adams, written at Monticello on October 28, 1813 (IV MEMOIR, CORRESPONDENCE AND MISCELLANIES FROM THE PAPERS OF THOMAS
What the delegate Raumer did not quote, however, was how the letter continued. Jefferson contrasted the dark analysis with a rather optimistic outlook:

But even in Europe a change has sensibly taken place in the mind of man. Science had liberated the ideas of those who read and reflect, and the American example had kindled feelings of right in the people. An insurrection has consequently begun, of science, talents and courage, against rank and birth, which have fallen into contempt. It has failed in its first effort, because the mobs of the cities, the instrument used for its accomplishment, debased by ignorance, poverty and vice, could not be restrained to rational action. But the world will recover from the panic of this first catastrophe. Science is progressive, and talents and enterprise on the alert.147

Given that Jefferson had written his letter in 1813, a faithful citation had to include the optimistic outlook as well. More than thirty years later, after a dozen new, liberal constitutions in Germany’s South between 1814 and 1833,148 and after the 1848 revolution had been parliamentarized and channeled into an institutionally led reform movement, the fellow delegates could have concluded that not Jefferson’s analysis of the past, but his prophecy into the future governs the case.

After all, the National Assembly had refused to implement general suffrage at first. The model was perceived as not transferable, once again because of the demographic reason von Vincke had advanced earlier. Because America was perceived as not having a proletariat at all, general suffrage could certainly not be adopted in Germany, where—so the claim went—almost more proletarians than members of the “owning class” existed.149 It was perceived as a problem “to walk around in different countries and pick here and there an institution, which might have functioned under the circumstances over there, in order to reanimate it over here, even though the circumstances are quite different, maybe even contradictory.”150 Especially in the United States, the circumstances were

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147. Id.
148. Frotecher & Pieroth, supra note 8, at 134.
149. Cf. Tellkampf, 7 Sten. Ber., supra note 4, at 5306; Reichensperger, 7 Sten. Ber., supra note 4, at 5260; Waitz, 7 Sten. Ber., supra note 4, at 5222-23.
150. Reichensperger, 7 Sten. Ber., supra note 4, at 5260 ("[W]enn man so in verschiedenen Ländern umhergeht und sich bald hier, bald dort eine Institution aussucht, die sich vielleicht unter den dortigen Verhältnissen bewährt hat, um sie gleich hier, obschon unter ganz andern, vielleicht sogar entgegengesetzten Verhältnissen, ins Leben treten zu lassen.").
perceived as so different that it had been doubted whether the application of the same principles will lead to the same results. 151

Nevertheless, in the end general and direct suffrage were adopted. On March 2, 1849, the assembly not only complied with the demands of the public opinion. 152 The liberal and conservative majority in this way primarily won over the democratic left for erecting the new Reich without Austria. After its adoption, the new suffrage was praised as more liberal than suffrage “even” in the United States. 153

4. Bill of Rights

Fundamental Rights were so important to the National Assembly that its members agreed to debate them at the outset, before turning their attention to the structure of the new government (from July until October 1848). 154 Once the provisions about fundamental rights were drafted, they were adopted (on the statutory level) even before the constitution was ready as a whole. 155 Even today, the debate on the Bill of Rights is perceived as a brilliant performance of the Paulskirche. 156 The delegates wanted to, and did, catch up with the avantgarde especially in America and France, which had established a standard of fundamental rights protection for the Western World. 157 Not America and France, however, but another country’s constitution turned out to be of an even stronger influence. 158 Geographically closer and adopted more recently, Belgium’s constitution seemed to have even more appeal to the delegates. 159

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151. Waitz, 7 STEN. BER., supra note 4, at 5222-23.
152. Nauwerck, 7 STEN. BER., supra note 4, at 5520; see Franz, supra note 78, at 124-25.
153. Scheller, 7 STEN. BER., supra note 4, at 5329 (“freisinniger, liberaler . . . wie die Verfassungen der freisinnigsten, liberalsten Staaten”). Referring to the draft of the committee that not yet included property restrictions, see Franz, supra note 78, at 124 n.151.
154. Frotscher & Pieroth, supra note 8, at 164; Hucko, supra note 33, at 8; cf. Kühne, supra note 51, at 44.
155. Gesetz betreffend die Grundrechte des deutschen Volkes [Act Relating to the Basic Rights of the German People], December 27, 1848, RGBl. 1848, S. 49, 57. The Act has been perceived as the “actual climax of the 1848 revolution” (Hucko, supra note 33, at 9). The Bill of Rights was later on included into the Paulskirchenverfassung as PKV articles 130-189.
156. Stoll, supra note 4, at xv (“Glanzleistung”).
157. Frotscher & Pieroth, supra note 8, at 164.
5. Federalism

As the deputies had debated civil liberties first, it was not before the 99th session on October 19, 1848, that the Assembly became immersed in the discussion of structural and organizational matters.\textsuperscript{160} As the delegates strived to unify the German states, federalism became a very important issue, just as it had been in Philadelphia seventy years earlier.\textsuperscript{161} With respect to federalism, Germany could draw on its own history: For well over a thousand years, Germany had always had a federally structured political landscape. However, liberal constitutional lawyers widely considered the American solution as an ideal pattern,\textsuperscript{162} and it is fair to say that federalism in the contemporary sense had been created by the United States Constitution.\textsuperscript{163} In the Paulskirche, the American influence was clearly the strongest and most decisive with respect to this subject.\textsuperscript{164}

The Assembly based its debate on a draft the Constitutional Committee had presented, together with its reasons in support.\textsuperscript{165} The Committee realized that a new constitution should “evolve from the most fundamental needs of the people for which it is intended” and “have its roots in national issues and needs.”\textsuperscript{166} The Committee felt on the one hand that under the preceding German constitution of 1815, the states had retained too many powers and rights of their own. On the other hand, the Committee wanted to avoid a central government, which the still strong states would never agree upon. In between those extremes, the concept of federation is located.\textsuperscript{167} The Committee was determined to listen to “the voice of experience” with respect to “the two federal forms [of government] that realized such a federation: America and Switzerland.”\textsuperscript{168} It was convinced that a federation would correspond best with Germany’s “peculiar circumstances.”\textsuperscript{169}

\textsuperscript{160} Hucko, supra note 33, at 8-9.
\textsuperscript{161} Steinberger, supra note 7, at 195.
\textsuperscript{162} Id. at 194.
\textsuperscript{163} Pieroth, supra note 118, at 1333.
\textsuperscript{164} FRANZ, supra note 78, at 117; Steinberger, supra note 7, at 192.
\textsuperscript{165} 4 STEN. BER., supra note 4, at 2717-46.
\textsuperscript{166} Id. at 2722 (“wenn sie [neue Verfassungen] aus den innersten Bedürfnissen des Volkes, dem sie bestimmt sind, hervorgegangen, in den nationalen Ansichten und Bedürfnissen ihre Wurzel haben”).
\textsuperscript{167} See, e.g., Mittermaier, 4 STEN. BER., supra note 4, at 2982 (noting that the federation stands in between the centralized monarchy and the confederation: “Was ist das Herrliche des Bundesstaates, der in der Mitte steht zwischen der einheitlichen Monarchie und zwischen dem Staatenbund?”); Zachariä, 4 STEN. BER., supra note 4, at 3154.
\textsuperscript{168} Id. at 2723 (“werden wir . . . die Stimme der Erfahrung . . . hören . . . insofern die zwei Bundesformen, in denen der Bundesstaat durchgeführt ist, Amerika und die Schweiz,
Professor Mittermaier, reporting on behalf of the Committee, acknowledged the proposal’s roots in American constitutionalism. The United States had accomplished a “true federation” by harmonizing the powers of the central government while upholding the possibility to flourish for the states. The United States Constitution was extolled with delight as “a wonder of the time being.”

No country can praise itself that its statesmen, of equal greatness both theoretically and practically, have discussed in their works the nature of the federal constitution in such a glorious way as men such as Hamilton, Jefferson, Story, Kent, Rawle, Serjeant did. A lot of experience with the gaps which the federal constitution contains, with the dangers of a vague wording of an article, with the obstacles that make its application impossible lay before us; they will be a lesson and a warning for everybody who deals with the realization of the idea of a federation. America shows us the picture of a country in which different states compete with each other in terms of legislation and administration, in the pursuit of different interests—in one state preferably commerce, in an other industry, in a third broad education—but at the same time pursue a common purpose.

Nevertheless, Mittermaier rebutted a mechanical reception of the American model not only with a reiteration of the geographical, but also with a compositional argument:

The careful statesman yet takes good care not to admire blindly something foreign, whose imitation under different circumstances brings about danger. He knows that America’s location which protects it from war with foreign countries and the fact that it is a federation of free states leads to

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169. Mittermaier and Droysen, reporting for the Committee, 4 STEN. BER., supra note 4, at 2722.
170. Id. at 2724 (“In [Amerika] ist die Aufgabe gelöst, die Macht einer Zentralregierung . . . mit der vollsten Möglichkeit einer wohltätigen Entwicklung der Einzelstaaten in Harmonie zu bringen.”).
171. 4 STEN. BER., supra note 4, at 2723 (“ein Wunder unserer Zeit”). Citing Robert von Mohl who was himself a member of the Assembly and the committee, see Best/Weege, supra note 63, at 243.
172. 4 STEN. BER., supra note 4, at 2724 (“Kein Land kann sich rühmen, daß seine theoretisch wie praktisch gleich großen Staatsmänner in ihren Werken das Wesen der Bundesverfassung in ihren Einzelheiten so herrlich erörtert haben, als dien (sic!) von Männern wie Hamilton, Jefferson, Story, Kent, Rawle, Serjeant geschehen ist. Eine Fülle von Erfahrungen über die Lücken, welche die Bundesverfassung veranlaßt, über die Gefahren der unbestimmten Fassung eines Artikels, über die Klippen, an welchen die Ausführungen scheitert, liegen vor uns, und wirkt belehrend und warnend für Jeden, der mit der Durchführung der Idee eines Bundesstaates sich beschäftigt. Amerika zeigt uns das Bild eines Landes, in welchem verschiedene Staaten wetteifern mit einander in Gesetzgebung und Verwaltung, verschiedenartige Interessen—in einem Staat vorzugsweise die des Handels, im anderen die der Industrie, im dritten die der umfassendsten Bildung—verwirklichend, ein gemeinsames Ziel verfolgen.”).
peculiarities that call for a thorough examination when it comes to imitating American institutions in Germany, under the given circumstances a union of monarchies.  

The Paulskirchenverfassung followed its American model with respect to the design of (a) federal legislative powers, but invented its own concept of (b) federal executive powers. The following examples will show that the Assembly drafted central elements of federalism not only with the United States Constitution in mind, but with corresponding clauses directly in view.  

a. Legislative Branch: Federal and State Lawmaking

In federalism, the relationship between the nation and the states is shaped especially by the distribution of legislative powers between the two (vertical) levels of government. Secondly, it is crucial what influence the states have on federal law making. Among the different conceivable techniques of distribution, the Paulskirchen Convention followed the American example. Like its American model, the Paulskirchen Constitution bestowed powers upon the federal legislature, reserved the remaining powers with the states, and kept certain powers from the states (U.S. CONST. art. I, § 10, and, e.g., PKV art. 7.) United States Constitution Article I, Section 8 enumerates matters of federal legislation, and so do most of the provisions in PKV article 6-67. Federal legislation is possible only on subject matters enumerated. Similar to United States Constitution amendment 10, PKV article 5 declares that the “German states keep all the sovereign powers and rights of a state in so far as these have not been explicitly transferred to the Reich authority,” and PKV article 62 adds: “The Reich Authority has the right of

173. 4 STEN. BER., supra note 4, at 2724 (“Der sorgfältige Staatsmann aber hütet sich vor dem blinden Bewundern des Fremden, dessen Nachahmung unter verschiedenen Verhältnissen leicht Gefahr birgt. Er weiß, daß die Lage Amerika’s, welche es vor dem Kriege mit fremden Staaten schützt, ebenso wie der Umstand, daß hier ein Bund von Freistaaten vorliegt, Eigenthümlichkeiten herbeiführt, die zur vorsichtigen Prüfung bei Nachahmung amerikanischer Einrichtungen in Deutschland, unter Verhältnissen eines Bundes von Monarchien, auffordern.”).

174. Steinberger, supra note 7, at 196.

175. FRANZ, supra note 78, at 128.

176. The Paulskirchenverfassung contains seven parts (Abschnitte). Each part contains Artikel. Each Artikel contains Paragraphs. Even though in each part, the enumeration of the Artikel restarts at one, the Paragraphs are counted through. The last Paragraph in part I, Artikel I is Paragraph 5. The next provision is the first provision of part I, Artikel II. This provision is named Paragraph 6. To cite a provision most efficiently, then, it is sufficient to refer to the number of the Paragraph. For the convenience of the American reader, I follow the translator of the Paulskirchenverfassung (Hucko, supra note 33) and cite a Paragraph with the abbreviation “art.” Thus, Paragraph 6 would be cited as “art. 6.”
legislation in so far as this is required for the execution of the powers with which it is endowed under the Constitution and for the protection of the institutions over which it has charge.”

Within this framework, the distribution of legislative powers will be scrutinized in this Part. First, (1) federal legislative powers deserve a closer look with respect to the areas enumerated, then (2) the remaining state legislative powers shall be discussed, before (3) a potential conflict of state and federal laws can be analyzed. Finally, (4) the participation of the states in federal legislation will be the subject.

(1) Federal Legislative Powers

In the United States Constitution, Article I, Section 8, clauses 1-17 expressly enumerate areas within which Congress can legislate. Immediately following this catalog, the Necessary and Proper Clause (U.S. Const. art. I, § 8, cl. 18) allows Congress to make “all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” Since Gibbons v. Ogden, this clause is read as expanding the legislative powers of the federation.177 Just as its American model, the Paulskirchenverfassung contains a catalog of competences, which this Article will deal with first. However, the National Assembly refused to add a Necessary and Proper Clause, which shall be discussed thereafter.

PKV article 6-67 enumerate matters of federal legislation. Despite differences in detail, the catalog of competences shows striking similarities to the corresponding U.S. powers.178 Listed as matters of federal legislation were, for one, the “obvious subjects” (David P. Currie)179 such as foreign,180 military,181 and monetary affairs,182 transportation, and communication.183 Because the driving force in the National Assembly and in Philadelphia alike had been a strong economic

178. Steinberger, supra note 7, at 197.
179. CURRIE, supra note 7, at 2.
180. Cf. U.S. Const. art. I, § 8, cl. 11, § 10, cl. 1 (for “Letters of Marque and Reprisal”); PKV art. 6, 7, 19, § 1 (for the letters, but also for Germany’s and the German states representation in international relations).
181. With respect to war and armed forces, cf. U.S. Const. art. I, § 8, cl. 1, 11-14, § 10, cl. 3 and PKV art. 10 (declaration of war and peace), arts. 11-19. German states were allowed and had to keep troops (at the disposal of the Reich), American states could not keep troops without consent of Congress (U.S. Const. art. I, § 10, cl. 3 v. PKV arts. 11-13.)
182. See U.S. Const. art. I, § 8, cl. 5, § 10, cl. 1; PKV arts. 45, 47.
183. See U.S. Const. art. I, § 9, cl. 6; PKV arts. 20-23, 24-27 (for ports, but also for shipping), PKV arts. 28-30 (railways), art. 31-32 (roads) and U.S. Const. art. I, § 8, cl. 7; PKV arts. 41-44 (postal services, but also telecommunications).
and commercial interest, matters of federal legislation entail as well customs and trading, import and export, weights and measures, and copyright and intellectual property. In contrast to its American counterpart, the German federation had the power to legislate on rights of associations and was “charged with establishing a uniform legal system among the German people by promulgating general codes relating to civil law,” including contracts, torts, “commercial and banking law, criminal law and legal procedure.”

Two examples of references to the United States Constitution shall suffice. Regarding foreign relations, PKV article 6 bestowed the representation of Germany as a nation and of the member states exclusively upon the federal government. The committee believed that in North America “the relationship [between foreign relations, taken care of by the federal government, and states’ independence] is designed most pleasantly by the text of the constitution and its development by adjudication and the academy.” It referred with respect to details of foreign relations, inter alia, to United States Constitution Article I, Section 10, clause 1, to Story’s Commentaries, and to Federalist No. 44. Secondly, with respect to war and peace, PKV article 10 assigned the “right of decision on whether to declare war or to stay at peace” exclusively to the federation. In order to establish that the states could not make peace contrary to the federation’s decision, the Constitutional Committee referred not only to the previous German constitution, but also to United States Constitution Article I, Section 10 and to Story’s Commentaries.

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184. Currie, supra note 7, at 2; Frotscher & Pieroth, supra note 8, at 170; see Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 61 (2d ed. 1997) (noting the desire for economic integration throughout German history as the driving force behind of federalism).
185. U.S. Const. art. I, § 8, cl. 3 (Commerce Clause); PKV art. 6, § 2, arts. 33-39 (“single customs and trading area”); PKV art. 33, § 1.
186. U.S. Const. art. I, § 9, cl. 5, § 10, cl. 2; PKV arts. 33-39.
187. U.S. Const. art. I, § 8, cl. 5; PKV art. 46.
188. U.S. Const. art. I, § 8, cl. 8; PKV art. 40.
189. PKV art. 59.
190. PKV art. 64, see Currie, supra note 7, at 2.
192. 4 Sten. Ber., supra note 4, at 2728.
193. Id. (“Artikel 1, Sect. X, § 1 . . . § 2, Story Comentar III. p. 218 und p. 272 The federalist Nr. 44”).
194. Steinberger, supra note 7, at 197.
195. Mittermaier, 4 Sten. Ber., supra note 4, at 2729 (“Story, Comm. III. p. 273”) (discussing the exceptions of being “actually invaded, or in such imminent Danger as will not admit of delay,” U.S. Const. art. 1, § 10, cl. 3).
At the beginning of the debate, the proposed federal powers of legislation were envisioned to be even broader. The provision limiting federal legislation to the matters enumerated, PKV article 62 (cited above),\(^{196}\) at first was to entail an addendum (which is emphasized in the following quotation):

The Reich Authority has the right of legislation in so far as this is required for the execution of the powers with which it is endowed under the Constitution and for the protection of the institutions over which it has charge, and in any case, in which the interest of whole Germany demands the creation of joint institutions and measures.\(^{197}\)

While the body of the clause refers to the catalog of competences (the “powers with which it is endowed under the Constitution”), the addendum makes federal legislation possible beyond the enumeration. According to wording, context, and legislative intent,\(^{198}\) the federal legislation of “measures” would be allowed outside the realms expressly enumerated in the constitution. Deputy Professor Mittermaier, reporting for the Constitutional Committee, explained the broad range of federal legislation as follows, quoting the decisive notion, “measures,” literally in English:

It is a great authority which is granted to the Reich here, but the authority is still limited. You find the same expression in America. In America, it is expressed that Congress has the power to ‘Maßregeln’—‘measures’ as it is framed verbatim—that are deemed necessary and appropriate.\(^{199}\)

However, it is somewhat dubious what provision Professor Mittermaier was citing as he quoted the notion of measures. In the United States Constitution, this word appears nowhere in the sense Mittermaier had in mind. United States Constitution Article I, Section 8, clause 5 deals with the “Standards of Weights and Measures.” United States Constitution Article II, Section 3 refers to the President who “shall

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196. See supra Part IV.B.5.a.
197. 4 STEN. BER., supra note 4, at 2721 (“Der Reichsgewalt steht das Recht der Gesetzgebung zu, soweit es zur Ausführung der ihr verfassungsmäßig übertragenen Befugnisse und zum Schutz der ihr überwiesenen Anstalten erforderlich ist, sowie in Fällen, wo das Gesammt-Interesse Deutschlands die Begründung gemeinsamer Einrichtungen und Maßregeln erheischt.”). The proposed provision was first enumerated as article 58, but later was modified and enacted as articles 62 through 63.
198. See Beseler, AKTENSTÜCKE, supra note 111, at 487-88.
199. Mittermaier, 4 STEN. BER., supra note 4, at 2983 (“Es ist eine große Vollmacht, die hier der Reichsgewalt übergeben ist, aber sie ist dennoch begränzt. Es ist derselbe Ausdruck, den Sie in Amerika finden. Es ist in Amerika erklärt, der Congreß habe das Recht zu ‘Maßregeln,’ heißt es dort wörtlich, ‘measures’ die nötig und geeignet gefunden werden.”); see Steinberger, supra note 7, at 197; FRANZ, supra note 78, at 129.
from time to time . . . recommend to [the Congress’] Consideration such Measures as he shall judge necessary and expedient.”

If any provision of the United States Constitution comes to mind, then this would be the Necessary and Proper Clause (U.S. Const. art. I, § 8, cl. 18). This Clause, however, does not contain the word “measures,” and it resembles more the first alternative of PKV article 62 than its proposed extension. Both the first alternative and the Necessary and Proper Clause refer to the catalog of competences. According to the Supreme Court at the time, the Necessary and Proper Clause does not allow for federal legislation on matters totally unrelated to the competences enumerated, which is what the proposed extension would make possible.

Tellkampf argued more accurately on the matter than Mittermaier, however, as he referred to the United States Constitution as an argument against the extension. In the end, the proposed addendum was not passed.

(2) State Legislative Powers: Reserved Power Clause

Because the federal government had legislative powers only on matters listed in the catalog of competences, the remaining, un-enumerated subjects rested under the states’ authority. PKV article 5, quoted in part already above, emphasized this at the outset:

200. See Currie, supra note 7, at 2 n.7 (noting that article 62 contained a necessary and proper clause that read, not coincidentally, very much like that found in the United States Constitution).

201. Franck, supra note 78, at 129-30.


203. Tellkampf, Aktenstücke, supra note 111, at 487.

204. Instead, the Assembly chose the formulation: “Should the Reich Authority deem it necessary to establish common institutions and rules in the interest of the whole of Germany, it has the right and competence to promulgate the required laws for their establishment within the guidelines laid down for constitutional amendments.” (PKV art. 63.) This formulation does not expand the federal legislative powers enumerated in the catalog, but refers to constitutional amendments instead and thus is declaratory in this respect. The final framing of § 58 (old) and §§ 62/63 (new) had been established late in the process, during the 154th meeting of the Constitutional Committee on February 12, 1849, see Aktenstücke, supra note 111, at 483, 486-91.
The individual German states retain their independence in so far as it is not limited by the Reich Constitution; they have all the sovereign powers and rights of a state in so far as these have not been explicitly transferred to the Reich authority.\textsuperscript{205}

Reporting to the plenary, representative Mittermaier argued that in order to determine the relationship between the federation and the member states, one could rely only on one principle, the one recognized in North America and Switzerland: The powers of the states were original, while those of the federation were derived.\textsuperscript{206} In support of this concept, the report refers expressly to the commentaries by Kent and Story, and also to Tocqueville.\textsuperscript{207}

Compared with American constitutionalism, PKV article 5 resembles two provisions: the Tenth Amendment and the Second Article of the Articles of the Confederation. The Tenth Amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”\textsuperscript{208} As the German provision contains the notion “explicitly transferred,” its wording is even more similar to the Second Article of the Articles of the Confederation, which states: “Each State retains its sovereignty, freedom and independence and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”\textsuperscript{209}

(3) Federal Law vs. State Law: Virginia Plan and Supremacy Clause

Both the Paulskirchenverfassung and the United States Constitution adhere to the idea that not only the federation, but also the states have legislative powers. From that it follows that federal legislation can regulate behavior of the citizens in the states. This poses the question

\textsuperscript{205} This provision was presented as article 6 of the draft. Later on, it became article 5 of the Constitution. The President of the Assembly, von Gagern, noted, after voting on this provision, that “§ 6 has thus been adopted exactly in the version the committee had proposed” (Präident von Gagern, 4 STEN. BER., supra note 4, at 2987).

\textsuperscript{206} Mittermaier and Droysen, reporting for the Committee, 4 STEN. BER., supra note 4, at 2726, 2728; Mittermaier, 4 STEN. BER., supra note 4, at 2982; 5 STEN. BER., supra note 4, at 3614.

\textsuperscript{207} 4 STEN. BER., supra note 4, at 2726 (“Kennt, Commentar I. p. 166 Rawle, a view of the constitution of the united states p. 77. Story, Commentar, III. p. 109. Tocqueville, la démocratie dans les états-unis (p. 166)”).

\textsuperscript{208} The provision has had some trouble to unfold its regulatory. The post New Deal Court had the amendment perceived as stating “but a truism,” see United States v. Darby, 312 U.S. 100, 124 (1941). After World War II, the clause experienced a revival in National League of Cities v. Usery, 426 U.S. 833 (1976). National League of Cities, however, was overturned in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), New York v. United States, 505 U.S. 144, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992).

\textsuperscript{209} Cited according to FRANZ, supra note 78, at 129, who added the emphasis.
international law is familiar with, namely how law legislated on the higher level comes into effect on the lower level. There are two options: A federal law is effective in the states either from its federal enactment on, or only after, subsequent ratification by each state. The framers of the United States Constitution debated this question lively, as the Virginia Plan competed with the New Jersey Plan. In the end, the framers favored the Virginia Plan and its concept of dual sovereignty. According to this concept, Congress could exercise its legislative authority directly upon individuals, without employing the states as intermediaries. Accordingly, the Constitutional Committee emphasized that federal laws did not have to be proclaimed by the states to become effective locally, but were binding upon each citizen in each state directly. This was a change with respect to the previous constitution in the Confederation of 1815.

Since state implementation of federal law was superfluous, conflicts between federal and state law became more likely. Thus, the Paulskirchenverfassung, providing a solution to potential conflicts, bestowed federal law with priority over state law—a solution similar to the Supremacy Clause in United States Constitution Article VI, Section 2. Furthermore, not only federal statutory law was perceived as overriding conflicting state law, but the federal constitution’s fundamental rights were designed as supreme to state law as well. Thus, in Germany, the federal constitutional rights had a very centralizing effect. While in the United States, incorporation of federal fundamental rights into the Fourteenth Amendment had to be debated, the Paulskirchenverfassung provided for “total incorporation” right away.

211. See New York, 505 U.S. at 165.
212. 4 STEN. BER., supra note 4, at 2723.
213. Steinberger, supra note 7, at 196.
214. PKV art. 66 provided that “Reich laws override laws of the individual states unless they are explicitly said to have a subsidiary validity.” PKV article 194 added that “[n]o clause in the constitution or the laws of an individual state may stand in contradiction to the Reich Constitution.”
215. Steinberger, supra note 7, at 197; cf. KÜHNE, supra note 51, at 186.
216. Ruth Fuchs, Franz Jacob Wigard, in 1 MÄNNER DER REVOLUTION VON 1848, supra note 70, at 369, 380.
(4) State Participation in Federal Legislation: Bicameralism

Because the states had lost many important legislative matters to the federal level, the National Assembly tried to compensate them for the diminution with participation in federal legislation. Besides the legal influence of inter alia England, Belgium, France, and the German states, once again the American model influenced the debate. The system, however, differed considerably from the American example. After all, in modern constitutional history, there was no precedent for a union of monarchical states within a democratic federal state.

Under the Paulskirchenverfassung, the federal legislature was to consist of two chambers, the Volkshaus (House of the People) and the Staatenhaus (House of the States). While the Volkshaus was to represent united Germany, the Staatenhaus was to represent the states. Both chambers were modeled after the American example, even with respect to particular provisions, such as six-year terms, rolling reelections, and conditions for candidacy (thirty years of age, requirement of residency in the respective state).

However, with respect to the representation of the states, the delegates wanted to establish a “Staatenhaus of a German creed.” In the debate, deputy Ahrens explained:


219. With regard of equally divided votes, the Paulskirche decided to follow the Belgian Constitution rejecting the American solution to have the president of the body cast the tie-breaking vote. Compare PKV art. 98, § 2, with U.S. CONST. art. I, § 3, cl. 4, and Dahlmann reporting for the Constitutional Committee, 5 STEN. BER., supra note 4, at 3805.

220. Dahlmann reporting for the Constitutional Committee, 5 STEN. BER., supra note 4, at 3803, 3804; Tellkampf, id. at 3808; von Watzdorf, id. at 3809 (claiming that the two-chamber system was born out of coincidence as the English members of Parliament did not have enough room to meet altogether and thus divided themselves up into two units); Dahlmann, id. at 3812 (claiming that it was not coincidence, but taxes, that brought the two chamber system into being, and that is was not coincidence but its success that kept it there).

221. Besides many references to the current United States Constitution, even the Articles of Confederation and the State Constitutions of Georgia and Pennsylvania were mentioned, see Tellkampf 5 STEN. BER., supra note 4, at 3808.

222. Steinberger, supra note 7, at 198.


224. Steinberger, supra note 7, at 198. PKV article 85 corresponds with the proposal of the Constitutional Committee, cf. 5 STEN. BER., supra note 4, at 3799.

225. Dahlmann reporting for the Constitutional Committee, 5 STEN. BER., supra note 4, at 3803.

226. Id. at 3812, compare with id. at 3803.

227. Id. at 3804-05 (“Staatenhaus nach deutschem Maße.”).
Gentlemen, it is said that in a federation all the single states must be represented as such, and one refers to North America as far as the structure of this chamber is concerned, where the legislators of each state send the Senators to the Upper House. Gentlemen, I honor history and I acknowledge the experience of other countries. However, I do not believe that all lines of political progress have been followed already. I believe that the spirit of the people (Volkgeist), that political reasonableness can create new forms of government as well, and thus I argue that the American way of structuring is neither the only possible nor the best one.\(^{228}\)

The delegates had to decide several questions about the composition of the Staatenhaus, among them, first how many representatives the states should send, second how it was to be determined who those representatives ought to be, and third how reelection was to be organized.

With respect to the first question about the number of representatives, the delegates had to decide between the American Senate model and the Federal Council model. According to the Senate model, all states send an equal number of representatives, no matter how big the state or how numerous its population.\(^{229}\) According to the Federal Council model, the number of representatives differs from state to state, with big and powerful states sending many representatives and small states only a few.\(^{230}\) Wigard proposed the American Senate model. He wanted all the states to be represented with the same amount of senators.\(^{231}\) The proposal was rejected,\(^{232}\) however, because two German

\(^{228}\) Ahrens, 6 STEN. BER., supra note 4, at 4044, with respect to PKV art. 88, § 1 (“Meine Herren, man sagt nun, daß in einem Bundesstaate die einzelnen Staaten als Glieder desselben repräsentiert werden müssen, und man stützt sich in Bezug auf die Art der Zusammensetzung dieses Hauses auf Nordamerika, wo die einzelnen Landesvertretungen den Senat, das Oberhaus beschicken. Meine Herren, ich ehre die Geschichte und achte auch die Erfahrungen anderer Länder; allein ich glaube nicht, daß schon alle Bahnen des politischen Fortschritts durchlaufen sind, ich glaube, daß der Volkgeist, die politische Vernunft auch neue Formen schaffen könne, und deshalb halte ich dafür, daß die amerikanische Zusammensetzungsart nicht die einzig mögliche oder die beste sei.”). PKV art. 88, § 1, equals art. II, § 4, of the draft presented by the Constitutional Committee (5 STEN. BER., supra note 4, at 3799).

\(^{229}\) “Minoritäts-Erachten” with respect to Art. II, § 3 of the draft (5 STEN. BER., supra note 4, at 3799).

\(^{230}\) Art. II, § 3 of the draft (5 STEN. BER., supra note 4, at 3799). The number of representatives for each state could not have been derived strictly from its size or its population, as in this case, Prussia, German-Austria, and Bavaria would be entitled to send three fourth of the members, see Dahlmann reporting for the Constitutional Committee, 5 STEN. BER., supra note 4, at 3803, and the data provided at 5 STEN. BER., supra note 4, at 3847.

\(^{231}\) See AKTENSTÜCKE, supra note 111, at 146-51 (reporting the debate between Wigard and others in the Committee) and Wigard, 5 STEN. BER., supra note 4, at 3844, 3860 (with Wigard’s minority proposal in plenum).

\(^{232}\) AKTENSTÜCKE, supra note 111, at 151, with 17 against Wigard’s own lonely vote. The proposal was not even voted on in plenum, see Welcker, 7 STEN. BER., supra note 4, at 4896; FRANZ, supra note 78, at 121 n.133.
states, Austria and Prussia, were much bigger in terms of population and power than all the other states. The Paulskirchen convention adopted the Federal Council model, so that Prussia could send forty delegates, while Frankfurt and more than twenty other states had to settle for one.

With respect to the second question, how to determine who was to become a representative in the Staatenhaus, the American model was not followed either. At the time, the U.S. Senators for each state were elected “by the legislature thereof.” The Paulskirchenverfassung modified this concept. A state legislature could nominate only half of the members of the Staatenhaus. The other half was to be nominated by the state’s government. Just like in the United States, members of the upper chamber had to be thirty years of age. In contrast to the American model, however, the Paulskirchenverfassung emphasized that the minimum age was the same for members of both houses.

With respect to the third question, how reelection was to be organized, the convention decided to have members of the Staatenhaus and of the Senate to be elected alike, for six years. While in the United States, one-third of the Senators face reelection every two years, the Paulskirchenverfassung had one-half of the members run for reelection every three years.

b. Executive Branch: Federal Administrative Powers?

Finally, a combination of horizontal and vertical separation of powers was peculiar to the Paulskirche. The horizontal separation between the three branches of government and the vertical separation

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233. Dahlmann, reporting for the Committee, 5 STEN. BER., supra note 4, at 3803; Philipps, id. at 3851, Welcker, 7 STEN. BER., supra note 4, at 4896.
234. PKV art. 87.
235. 6 STEN. BER., supra note 4, at 4049-55.
236. According to U.S. CONST. art. I, § 3, cl. 1. Since the adoption of the Seventeenth Amendment in 1913, Senators are elected by the people. Since 1913, the Seventeenth Amendment provides that in lieu of the legislature, the people of the state are in charge. Never has it been changed, however, that each state, no matter whether big or small, elects the same number of representatives. This shows that a senator is meant to represent not the people of his or her state, but the state itself in its sovereign capacity.
237. PKV art. 88. The following article declared that wherever there is an odd number of members, the government shall put forward three candidates from among parliament shall elect the representative of the state. Note that the translation by Hucko, supra note 33, is not accurate in PKV article 89, § 2, as it refers to “candidates” instead of members which not only lacks sense but also does not comply with the original wording.
238. Compare PKV arts. 91, 92 § 1 cl. 1, with U.S. CONST. art. I, § 3, cl. 1, 3.
239. Compare PKV art. 91, no. 2, with U.S. CONST. art. I, § 2, cl. 2, § 3 cl. 2.
240. Compare PKV arts. 91, 92, § 1 cl. 1, with U.S. CONST. art. I, § 3, cl. 1, 3.
241. Compare PKV art. 92, § 1 cl. 2, with U.S. CONST. art. I, § 3, cl. 2.
between state and federal level form a unique interplay when it comes to administering federal law. It was the states, not a federal administration, that had the power and the duty to administer federal legislation.\textsuperscript{242} Delegate Waitz acknowledged that this principle was without model “in the republican federations in the old and the new world.” For the Assembly, it was simply impossible to adopt “what the republican federations in the old and the new world had created so far,” because the task was one that “politics in the history of the world has never faced before:” to form a democratic union out of monarchies.\textsuperscript{243}

6. Judicial Branch: The \textit{Reichsgericht}

After the examination of (5.a.) the legislative and (5.b.) the executive branch, this Part is devoted to the judicial branch. While United States Constitution Article I, Sections 8-9 and Article III, Section 1 allow for a hierarchy of federal courts, PKV articles 52, 125 provide only for one federal court, the highest court in the land, the \textit{Reichsgericht}.\textsuperscript{244} The delegates debated about the Court, which they considered the “cornerstone” of the constitution,\textsuperscript{245} in November 1848 and again in March 1849.\textsuperscript{246} During their debate, they referred, inter alia, to England, France, Switzerland, Bavaria, Prussia, Saxony, and once more to the United States.\textsuperscript{247} Again, American constitutionalism had probably the strongest impact.\textsuperscript{248} Mittermaier told his colleagues:

\begin{itemize}
\item \textsuperscript{242} Waitz, 4 STEN. BER., supra note 4, at 3157; 5 STEN. BER., supra note 4, at 3240.
\item \textsuperscript{243} Waitz, 4 STEN. BER., supra note 4, at 3157.
\item \textsuperscript{244} Even though the \textit{Paulskirchenverfassung} did not allow for a hierarchy of federal courts, it reserved Reich legislation to institute admiralty and maritime courts in PKV article 129.
\item \textsuperscript{245} Zachariä, 5 STEN. BER., supra note 4, at 3611 (“Das Reichsgericht ist ohne Zweifel der Schlußstein der ganzen Reichsverfassung.”); Mittermaier, 5 STEN. BER., supra note 4, at 3616 (“Meine Herren! Lassen Sie uns die nöthigen Ergänzungen des Gerichts nach den Erfahrungen Amerika’s aussprechen; ich bitte Sie, meine Herren, geben Sie den Schlußstein für die Verfassung, einen Schlußstein, der die Freiheit sichert, und jedem einzelnen Bürger die Möglichkeit gibt, Recht zu finden, gegen den Höchsten, sowie gegen den Niedrigsten[,] einen Schlußstein, der die deutsche Einheit erst möglich macht . . . .”).
\item \textsuperscript{246} For the first time in November 1848, see 5 STEN. BER., supra note 4, at 3596-3619 (Nov. 27, 1848), 3628-3656 (Nov. 28, 1848, including vote, with the adopted wording at 3652); for the second time in March 1849, see 8 STEN. BER., supra note 4, at 5668-77 (Mar. 12, 1849, with a synopsis of the version the Assembly had adopted in the first reading and proposed changes to be debated in the second reading at 5668-72), 5689-5701 (Mar. 13, 1849, including vote).
\item \textsuperscript{247} Among others, see Mittermaier, 5 STEN. BER., supra note 4, at 3614-15; Cuyrim, 5 STEN. BER., supra note 4, at 3630; von Soiron, 5 STEN. BER., supra note 4, at 3633; Moritz Mohl, 5 STEN. BER., supra note 4, at 3609 (reporting that in England, it was impossible to sue parliament so that nobody could claim that a parliamentary law was unconstitutional—“In England . . .; Niemand kann das Parlament vor einem Gericht verklagen; Niemand kann sagen, verfassungsmäßig sei es nicht befugt gewesen, Gesetze zu erlassen.”).
\item \textsuperscript{248} Steinberger, supra note 7, at 199; cf. KÜHNE, supra note 51, at 200.
\end{itemize}
What is considered the highest decoration of the American Constitution? The Supreme Court. It is the unique means by which to overcome the indeterminateness contained in the Constitution and to fill its gaps, the unique means to the progressive development of law. Read the American Constitution, in the usual bad translations, and compare it to the living Constitution, then you will recognize: it owes its vitality, its vigor, the certainty of its specific provisions to the Supreme Court. I ask you, Gentlemen, to turn to the experiences of America . . . . Let us follow the American example and we shall harvest the most splendid fruits.

In the same speech, Mittermaier made clear that he did not envision a wholesale incorporation of the American model: “The procedure which will be presented to you will show you that, if you only follow the procedure practiced in America with the appropriate modifications according to our conditions, the means exist to teach the judges . . . to hand down the most marvelous verdicts which will create general confidence.”

In order to sketch out how and to what extent the Assembly followed the American example, this Article will focus (a) on the Reichsgericht’s jurisdiction and (b) on its power of judicial review.

a. Jurisdiction

PKV article 126 provided for the Court’s ample jurisdiction. The Reichsgericht was, inter alia, to review the constitutionality of the exercise of public power (be it federal, state, legislative, executive, or judicial) and to decide about controversies between federal institutions, between the states and between state institutions. Furthermore, the Court was empowered to hear a kind of constitutional complaint: suits by private citizens against the violation of individual rights guaranteed by the Federal Constitution.

By these jurisdictions, the Paulskirchenverfassung trusted the Reichsgericht to settle disputes according to constitutional law. Although this assignment finds support in a long German tradition, the American example of the Supreme Court heavily influenced the deputies’ decision. In other respects, however, the Paulskirche departed from the

249. 5 STEN. BER., supra note 4, at 3614 (quoted according to the translation by Steinberger, supra note 7, at 200).

250. Mittermaier, 5 STEN. BER., supra note 4, at 3614 ("Das Verfahren, das Ihnen vorgelegt werden wird, wird Ihnen zeigen, daß, wenn Sie das Verfahren, wie es in Amerika gilt, mit zweckmäßigen Abänderungen nach unseren Verhältnissen befolgen, das Mittel gegeben ist, die Richter . . . so zu belehren, daß sie im Stande sind, das herrlichste Urtheil, das allgemeines Vertrauen erweckt, zu füllen.").

251. Steinberger, supra note 7, at 200.

252. Id. at 199-200.
American model. As Mittermaier stated, after yet another acknowledge-
ment of the Supreme Court as the model: “The Reichsgericht . . . is not
the ordinary court that decides upon civil matters, but an Areopag which
has to make decisions on political questions.”253 The remark reveals a
twofold farewell to the American design. For one, the Reichsgericht did
not enjoy appellate jurisdiction.254 Second, the power to decide upon
“political questions” was deliberately vested into the Reichsgericht;255
while the Supreme Court no less deliberately refrains from deciding
political questions.256

Even though the Pau lskirchen Convention modified the American
model, it kept the essential premise: to entrust the settlement of
constitutional disputes to the highest court.257 The constitutional
convention did so under the influence of the United States Supreme
Court’s already unfolding role in the American political process. The
Assembly perceived an integrative function of constitutional jurisdiction
and assumed that the United States Supreme Court had accomplished
this integrative function.258

b. Judicial Review

Put in layperson’s terms, the notion of judicial review might be
understood as judges exercising control. In American legal terminology,
the concept is restricted to judges checking whether a statute complies

253. Mittermaier, 4 STEN. BER., supra note 4, at 2982 (“Das Reichsgericht ist aber nicht
das gewöhnliche Gericht, welches über Civilprocesse entscheidet, sondern auch ein Areopag, der
über politische Fragen zu entscheiden hat.”).

254. Hucko, supra note 33, at 21. As the Court’s jurisdiction was almost exclusively
limited to constitutional issues, it has been called “a constitutional court in the modern sense”
(Steinberger, supra note 7, at 200-01).

255. CYPKV art. 126, letter c. The Committee proposed to design the Reichsgericht to be
a “political court,” but to vest “civil” and “criminal” jurisdiction into it as well. Report of the
Committee, 5 STEN. BER., supra note 4, at 3597, and von Soiron reporting for the Committee,
5 STEN. BER., supra note 4, at 3631, see 5 STEN. BER., supra note 4, at 3597 (Political crimes seem
to belong into the category of a political court); Arndts, 5 STEN. BER., supra note 4, at 3616
(arguing that this distinction be elaborated more precisely); Rheinwald, 8 STEN. BER., supra note
4, at 5674. But see Report of the Committee, 8 STEN. BER., supra note 4, at 5669 (wanting the
court to decide as few political questions as possible); von Soiron, 5 STEN. BER., supra note 4, at
3634.

256. See Marbury v. Madison, 5 U.S. 1 Cranch 137 (1803), where Chief Justice Marshall
regarded law and politics as distinct and ordered the courts to avoid political decision making, and
William E. Nelson, Marbury v. Madison. The Origins and Legacy of Judicial Review 3-4,

257. Steinberger, supra note 7, at 200-01.

258. Id. at 201.
with the constitution, something German doctrine would call norm control (Normenkontrolle). Both the Constitutional Committee and the National Assembly had debated, whether the Reichsgericht should have the power to strike down legislative acts it conceives as unconstitutional. The minority of the Constitutional Committee was in favor of this and proposed to have the Court decide “controversies about the constitutionality of federal statutes.”\footnote{259} The majority, however, did not want this “novelty.” Deputy Moritz von Mohl confessed that he could not think of one constitution in Europe which allowed someone to challenge a legislative act as unconstitutional.\footnote{260}

Thus, on the first reading, the Constitutional Committee only adopted that the Reichsgericht decided “controversies between the federal government and the states concerning the range of their powers.”\footnote{261} This way, the majority allowed judicial review only with respect to competences, but rejected review with respect to a violation of fundamental rights.

For the second reading, the Constitutional Committee changed the wording to make its position abundantly clear. The originally intended version about “controversies between the federal government and the states concerning the scope of their powers” could have been construed, in compliance with German terminology, as subjugating only acts by the federal executive branch of “federal government” to the jurisdiction of the Reichsgericht. The revised wording was to clarify that federal statutes adopted by the legislation were reviewable as well\footnote{262} and it allowed a member state to sue the federal government “because of a violation of the federal constitution by adopting a federal statute or by a measure of the federal government.”\footnote{263}

In the assembly, this proposal was rebutted at first with the argument that it would place the courts above the sovereign, the people,

\footnote{259} Marbury v. Madison, 5 U.S. 137 (1803); Dred Scott v. Sandford, 60 U.S. (19 How) 393 (1856).  
\footnote{260} Cf. 5 STEN. BER., supra note 4, at 3598 (“Streitigkeiten über die Verfassungsmäßigkeit von Reichsgesetzen.”). On these lines there is also the proposal of deputy Mittermaier, see Tellkampf, 5 STEN. BER., supra note 4, at 3609.  
\footnote{261} Moritz Mohl, 5 STEN. BER., supra note 4, at 3609.  
\footnote{262} 8 STEN. BER., supra note 4, at 5669 (“a) Streitigkeiten zwischen der Reichsgewalt und den Einzel-Staaten über den Umfang ihrer Befugnisse.”).  
\footnote{263} 8 STEN. BER., supra note 4, at 5669 (“a) Nach diesem Beschluß konnte Zweifel darüber entstehen, ob bloß die Handlungen der Reichsregierung in ihrer Eigenschaft als vollziehende Gewalt, oder auch die von dem Reichstag beschlossenen Reichsgesetze der Beurtheilung des Reichsgerichts unterworfen werden sollten.”).  
\footnote{264} 8 STEN. BER., supra note 4, at 5669 (“a) Klagen eines Einzelstaats gegen die Reichsgewalt, wegen Verletzung der Reichsverfassung durch Erlassung von Reichsgesetzen und durch Maßregeln der Reichsregierung . . . .”).
as represented in parliament. But the provision was persuasively defended as a measure to protect the states. After all, only the states, not an individual could challenge the constitutionality of a law. As the Assembly adopted the provision including the reference to federal statutes, it did so to protect the states against the federation, not the individuals against unconstitutional laws.

V. LEGACY OF THE CONSTITUTION

The National Assembly passed the Paulskirchenverfassung in the spring of 1849, and yet the new constitution never was implemented. As the Paulskirchenverfassung provided for a constitutional monarchy, the National Assembly elected Friedrich Wilhelm IV on March 28, 1849. The Prussian King, however, rejected the parliamentary crown. In this very moment, the policy of cooperation endorsed by the National Assembly collapsed, and with it the entire reform movement died. Nor did it help that twenty-eight German governments recognized the constitution as valid. Without ratification in important states like Prussia, Austria, and Bavaria, the constitution remained a proud product of the 1848 revolution, but never governed Germany.

While the German revolution of 1848 eventually failed, the Paulskirchenverfassung survived. It became the most influential document for the future of German constitutional development. It served as “a model and yardstick of the quest for a democratic Germany for the next one hundred years” and beyond. Being drafted as carefully as it was, several principles the Paulskirchenverfassung embodied resurfaced later on in history. All constitutions that followed—Bismarck’s constitution of 1871, the Weimar constitution of 1919 and

265. Rheinwald, 8 STEN. BER., supra note 4, at 5674-75.  
266. Von Soiron, 8 STEN. BER., supra note 4, at 5690.  
267. See as well PKV article 126, letter g, which allowed a German citizen to sue because of a violation of constitutional rights. Whether or not this would encompass violations of federal laws was left open and to be decided by future by-laws.  
268. 8 STEN. BER., supra note 4, at 5694.  
269. Hucko, supra note 33, at 10. Reasons for its failure provides Hucko, id. at 6-7 (no single center of action, no coordination, no leadership by a charismatic personality, no consensus among the revolutionaries about their aims, internal and foreign policy obstacles).  
270. KÜHNE, supra note 51, at 47-48.  
271. Langewiesche, supra note 14, at 128.  
272. Steinberger, supra note 7, at 201.  
273. Id. at 194; cf. KÜHNE, supra note 51 (analyzing the legacy in great detail).  
274. Hucko, supra note 33, at 10.  
275. Steinberger, supra note 7, at 194.
even the Basic Law of 1949—regarded the Paulskirchenverfassung as a point of reference.\textsuperscript{276}

Because this Article deals with the Paulskirchenverfassung and not with its successors, current constitutional law will not be scrutinized in depth. However, a glance at the text of Germany’s Basic Law is sufficient to reveal that some American ideas adopted in the Paulskirche reappear. Overall, it is fair to say that American influence on German constitutionalism had reached a climax in 1848-1849.\textsuperscript{277} Among the Paulskirchen ideas of American origin, especially the principles of federalism, the rule of law, superiority of the constitution, and constitutional jurisdiction have pervaded democratic German constitutionalism ever since.\textsuperscript{278} In the following, this Article sets out to explain how American ideas are reflected by Germany’s current constitutionalism with respect to the two paradigmatic examples discussed above: (A) federalism and (B) judicial review.

A. Federalism

The Paulskirchen Constitution was the first comprehensive constitutional concept for national unity and identity. Principal federal elements in the Bismarck constitution of 1871 as well as the Weimar Constitution of 1919 and the Basic Law of 1949 have their roots in the Constitution of 1849.\textsuperscript{279} As far as the American influence is concerned, this Article has elaborated that the Paulskirchenverfassung was especially fond of the American balance of federal and state lawmaking. Despite differences in detail, the Paulskirchen convention adopted the idea of enumerated federal powers, with the remaining legislative domains resting with the states (Reserved Power Clause). Superior to state law, federal laws were directly applicable in the states (Virginia Plan, Supremacy Clause), and the states participated in federal law making through a second chamber.

All those ideas resurface in German constitutional law today. With respect to the division of powers, the principle of enumerated powers is encompassed in Grundgesetz (GG) article 30. Following PKV article 5 and United States Constitution amendment 10, GG article 30 reads: “Except as otherwise provided or permitted by this Basic Law, the exercise of governmental powers and the discharge of governmental functions is a matter for the Länder,” the German states. Catalogs of

\textsuperscript{276} FROTSCHER & PIEROTH, supra note 8, at 166, 175, 264; Wolfgang Gerhardt, Vorwort, \textit{in HANDLEXIKON, supra note 52, at 7.}
\textsuperscript{277} Pieroth, supra note 118, at 1333.
\textsuperscript{278} Steinberger, supra note 7, at 202.
federal matters of legislation are provided by GG article 72, 74, just like the *Paulskirchen-verfassung* and United States Constitution Article I, Section 8 do—similar not only in structure, but also in content. The areas encompassed in the Basic Law’s catalog, “taken together, nearly cover the whole range of public policy.”

Even though the Basic Law omits an Implied Powers provision, the Länder cannot legislate on much more than culture, education, police, local self-government, hospitals, and various social services. Today, legislation in Germany is more centralized than in the United States. At the same time, the *Paulskirchen* concept resurfaces in that not the federal administration, but the states apply the federal laws (GG art. 83).

The supremacy of federal law over state law is encompassed in GG article 31, just as it was in PKV article 66, 194 and as it is in the Supremacy Clause of the United States Constitution Article VI, Section 2. Finally, the Basic Law still adheres to bicameral legislation on the federal level, although the Federal Council (*Bundesrat*)—unlike the U.S. Senate—represents the Länder in their corporate capacities. The Basic Law still adheres to the idea that the number of representatives depends upon the population in each state.

B. Judicial Review

The Reichsgericht of the *Paulskirchenverfassung* was modeled according to the United States Supreme Court (supra IV.B.6.). As the *Reichsgericht* can be called a precursor of the Federal Constitutional Court, this area provides yet another example of how American Constitutionalism influenced current German Constitutionalism through the *Paulskirchenverfassung*. However, while the *Reichsgericht* under the *Paulskirchenverfassung* was to be a constitutional court, its successor, the *Reichsgericht* under the Weimar Constitution, was even closer to the United States Supreme Court, as the Weimar Constitution bestowed appellate jurisdiction in civil and criminal matters on the highest court as well. The Basic Law, finally, veers back more toward the *Paulskirchenverfassung* than to the U.S. and the Weimar Constitutions,

279. KOMMERS, supra note 184, at 76.
280. Id. at 79.
281. CURRIE, supra note 7, at 101.
282. CURRIE, supra note 7, at 25, 66-74; KOMMERS, supra note 184, at 75 (referring to this idea as the “legislative-executive” or “administrative” federalism), 82-83.
283. KOMMERS, supra note 184, at 96.
284. GG art. 51, § 2.
285. FROTSCHER & PIEROTH, supra note 8, at 172.
286. Hucko, supra note 33, at 21.
because the Federal Constitutional Court today does not deal with appeals, but specializes exclusively on constitutional issues.\textsuperscript{287} 

With respect to judicial review of legislative acts, the American doctrine was widely neglected until the late nineteenth century.\textsuperscript{288} The Weimar Constitution did not reach the American standard of \textit{Marbury v. Madison} and \textit{Dred Scott}.\textsuperscript{289} In its text, it failed to provide for judicial review with respect to the compliance of statutes with fundamental rights.\textsuperscript{290} Nevertheless, the Reichsgericht announced that it would perform this task anyhow.\textsuperscript{291} Finally, the concept of judicial review was codified under the Basic Law.\textsuperscript{292} Thus, today the most important similarities between the United States Supreme Court and the Federal Constitutional Court exist with respect to judicial review and norm control, and to this day, American constitutionalism enjoys a degree of attention unsurpassed by any other foreign constitutional law.\textsuperscript{293}

VI. \textbf{C}ONCLUSION

Building on the comparative references in the constitutional debate in Frankfurt's Paulskirche, this Part will try to draw generalizing conclusions about how comparativism works. To this end, two questions are focused upon: How were constitutional comparisons undertaken, and why did the delegates engage in this endeavor in the first place.

In the Germany of 1848-1849, American Constitutionalism was held in highest esteem.\textsuperscript{294} The members of the National Assembly could draw on a deep knowledge of the United States Constitution. Relevant documents (such as the Constitution itself) and scholarship on the matter

\begin{itemize}
\item \textsuperscript{287} Frotscher & Pieroth, supra note 8, at 24.
\item \textsuperscript{288} Steinberger, supra note 7, at 203.
\item \textsuperscript{289} Marbury v. Madison, 5 U.S. 137 (1803); Dred Scott v. Sandford, 60 U.S. (19 How) 393 (1856).
\item \textsuperscript{291} 111 Entscheidungen des Reichsgerichts in Zivilsachen [Decisions of the Federal Supreme Court in civil matters] 320, 322-23 (1925) [hereinafter RGZ], aff'd, 114 RGZ 27, 33 (1926) (obiter dictum); 128 RGZ 165 (1929), 129 RGZ 146, 148-49 (1930). For the facts, see Friedrich, supra note 290, at 196 n.1; J.J. Lenoir, \textit{Judicial Review in Germany under the Weimar Constitution}, 14 TUL. L. REV. 361, 368 (1940). \textit{Currie}, supra note 7, at 5 n.35; Lenoir, supra, at 368; Maurer, supra note 290, at 684; Steinberger, supra note 7, at 206.
\item \textsuperscript{292} GG art. 100, § 1, art. 20, § 3, art. 1, § 3.
\item \textsuperscript{293} Frotscher & Pieroth, supra note 8, at 25.
\item \textsuperscript{294} See, e.g., supra text accompanying notes 170-172, 249.
\end{itemize}
(such as Tocqueville’s *De la démocratie en Amérique*) had been translated into German and were widely available.\textsuperscript{295} Some members of the Assembly authored works on the United States Constitution themselves,\textsuperscript{296} and others had visited or lived in North America where they had made the acquaintances of American political leaders in person.\textsuperscript{297}

Despite this solid foundation of knowledge and experience, the Professors’ Parliament still committed some minor inaccuracies, among them a reference to an amendment to the United States Constitution that did not exist\textsuperscript{298} and to “measures,” which the U.S. federal legislation allegedly had the power to adopt.\textsuperscript{299} These flaws, however, did not have an influence on the *Paulskirchenverfassung*. Fortunately, either another delegate was able to correct his colleague’s mistake\textsuperscript{300} or the error was about a detail in a provision the Assembly decided not to adopt anyhow.\textsuperscript{301}

The *Paulskirchen* Convention did not always follow the American precedent. With respect to fundamental rights, for example, the delegates favored the Belgian model over the American,\textsuperscript{302} maybe because Belgium was closer and its constitution more recent. Not always when a delegate referred favorably to American law did he convince his colleagues. The majority rejected, for example, adherence to Thomas Jefferson’s *Manual of Parliamentary Practice*.\textsuperscript{303} The assembly also created, on its own, a unique concept about the administration of federal law.\textsuperscript{304}

Wherever the Assembly accepted American ideas, the concept was implemented not wholesale, but selectively. The delegates refrained from comprehensively incorporating the relevant provisions.\textsuperscript{305} This kind of “reception” had been the way Roman law was received in Germany. Nor did the Assembly mechanistically adopt American law, as many Latin American countries did at the time.\textsuperscript{306} Rather, the American solution was adopted only to some extent, with the due modifications, and sometimes even with what the Assembly believed to be improvements.\textsuperscript{307}

\begin{itemize}
  \item \textsuperscript{295} See supra Part IV.A.
  \item \textsuperscript{296} See supra note 100.
  \item \textsuperscript{297} See supra notes 92-99 and accompanying text.
  \item \textsuperscript{298} See supra text accompanying note 108.
  \item \textsuperscript{299} See supra text accompanying note 199.
  \item \textsuperscript{300} See supra text accompanying note 108.
  \item \textsuperscript{301} See supra text accompanying note 199.
  \item \textsuperscript{302} See supra text accompanying note 157.
  \item \textsuperscript{303} See supra Part IV.B.1 and especially text accompanying note 131.
  \item \textsuperscript{304} See supra Part IV.B.5.b.
  \item \textsuperscript{305} Stourzh, *supra* note 158, at 281.
  \item \textsuperscript{306} Steinberger, *supra* note 7, at 189.
  \item \textsuperscript{307} See supra text accompanying notes 150-151, 166-169, 227-228, 250.
\end{itemize}
As Professor Howard has put it: “Political institutions, to survive, must be shaped with a view to the society and culture of which they are a part.” 308 It does not always do to simply plant foreign ideas into one's own soil. Sometimes, it is necessary to adjust an idea to its new surroundings, to contemporary political concerns or to well established and highly cherished traditions. Just as the framers of the United States Constitution drew not only upon experiences from the American colonies, but also tapped into British constitutionalism and the Enlightenment as well, the framers of Germany’s Paulskirchenverfassung took both their own and foreign history into account. Sometimes the Assembly even set out to develop an idea further: With respect to democratic elections, for example, the Assembly provided for general suffrage on the federal level, a solution more liberal than the one established in America at the time. 309

In order to determine to what extent modifications were needed to transplant an idea, it was necessary to compare the idea’s old environment with its new. During the debate, the members of the Assembly mentioned several differences between Germany and the United States. Compositionally, the American union was one of free states, while Germany encompassed monarchies. 310 Geographically, America was not surrounded by enemies, but rather was a continental island. 311 Historically, the United States was perceived as having a long tradition of republicanism and an “inherited sense for law and conformity.” 312 Demographically, the United States was thought of as a country without proletarians. 313 At the same time, it did not go unnoticed that in North America, “we find slavery and Indians,” which posed challenges unparalleled in Germany. 314 When the delegates compared the United States to Germany, not all their accounts seem to have been accurate. To name just one example, it may be doubted whether in the American “jungle,” people comply with English parliamentary rules to get along. 315

Once comparativism had been established as a way to decide issues, it was not an immense step to look across the ocean beyond Europe, where the revolution had started. The American ideas of liberty and

308. Howard, supra note 39, at 143.
309. See supra text accompanying note 153.
310. See supra text accompanying notes 173, 223, 243.
311. See supra text accompanying notes 138-139.
312. See supra text accompanying notes 127-130, 141.
313. See supra text accompanying notes 140, 149.
314. See supra text accompanying note 142.
315. See supra text accompanying note 130.
equality were cherished by a middle class that strived for equality with
the nobility. The United States Constitution had been held in high
esteem, especially since the Jacobinian terrors had caused an aversion
towards France. Thus, references to America must have seemed
promising to most delegates. Even though foreign ideas still would have
to be tailored to German needs, it was efficient to choose among the
foreign models one that was already close to German needs in order to
minimize the efforts it took to adjust it. Therefore, the United States
Constitution was a better model than the French one especially with
respect to federalism that the French did not provide for.

Comparativism had been undertaken in the first place for at least
three reasons. First, the delegates strived for the best possible
constitution. Second, they needed to convince fellow delegates and the
public. Third, they sometimes seem to have turned to the United States
Constitution for tactical reasons.

First, comparativism was considered a means to help drafting the
best possible constitution. No romanticist, for example, dared to suggest
a codification of German natural law from the middle ages. Second,
references to America must have been considered as likely to convince
other delegates and the public from the quality of one’s own proposal, as
the American Constitution was held in such a high esteem. Thirdly, it
seems that sometimes references were made out of tactical consideration.
Maybe a delegate liked an idea for political reasons and then looked for a
foreign constitution that could support it. The speeches of the debate do
not prove this assertion, as an open confession of tactical consideration
would undermine the purpose. But an omission might show that it took
place, nevertheless. In order to argue against democracy, a delegate
quoted from Jefferson’s 1813 letter written to Madison in which Jefferson
had talked about the canaille in Europe, about people largely not ready
for democratic responsibilities. In his quote, however, the delegate
omitted the succeeding paragraph, in which Jefferson announced that he
saw the people in Europe improving already. Given this perspective
and what had happened in Germany since 1813, the letter seems not to
be such a strong argument anymore. That the delegate omitted

316. With respect to the Romantic Movement in Germany, see the great poet and essayist
Heinrich Heine, The Romantic School (1836), two parts of which, The Character of the
Romantic School in Germany, and Why did the Germans take to the Romantic School?, are
accessible in English in From Absolutism to Revolution 1648-1848, at 337-43 (Herbert H.
317. See supra text accompanying note 146.
318. See supra text accompanying note 147.
Jefferson’s optimistic outlook might have been owed to the delegate’s political preferences.

Although not every one of the very frequent references to American Constitutional Law played out in the final version of the Paulskirchenverfassung, especially federalism and the design of the judicial branch had a heavy impact on the drafting.\textsuperscript{319} Even today, the idea of judicial review and the framework of American federalism have survived—namely the concepts of a Reserved Power Clause, a Supremacy Clause, direct applicability of federal law in the states (according to the Virginia Plan), and even, despite a somewhat different design, the bicameral system.\textsuperscript{320} Thus, America has started an influence on German constitutionalism through the Paulskirchenverfassung which continues to be of great importance.\textsuperscript{321}

\textsuperscript{319} See supra Part IV.B.5-6.

\textsuperscript{320} See supra Part V.

\textsuperscript{321} Sometimes the influence took place vice versa, with Germany having an impact on American constitutionalism. Two examples will have to do: one old, one new. Very early in American constitutional history, James Madison and Alexander Hamilton referred to European Federalism, Federalist No. 20, in Federalist Papers, supra note 210, at 94-98 (about, inter alia, the United Netherlands and the “celebrated” Belgian confederacy). Very recently, in his dissenting opinion in Printz v. United States, Justice Breyer discussed the question how United States’ federalism can “reconcile the practical need for a central authority with the democratic virtues of more local control.” To back up his position, Breyer referred, inter alia, to Germany’s federal system as an example, see Printz v. United States, 521 U.S. 898, 976; 117 S. Ct. 2365, 2404 (1997) (referring to Germany, Switzerland, and the European Union).