

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

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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”¹ 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

1. A.E. Dick Howard, *How Ideas Travel: The Bill of Rights at Home and Abroad*, 63-DEC N.Y. ST. B.J. 6 (1991).

with, or backed up by, reference to U.S. constitutionalism (regardless of whether its original roots are elsewhere).

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.”²

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.³ This Article largely ignores influences other than American constitutionalism, excluding for example the debates about the social questions⁴ and about the Pan-German solution⁵ 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.⁶ 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

2. George N. Shuster in his address at a commemoration of the Forty-Eighters held in the Library of Congress on May 12, 1948, cited according to A.E. Zucker, *Preface* to THE FORTY-EIGHTERS. POLITICAL REFUGEES OF THE GERMAN REVOLUTION OF 1848, at viii (A.E. Zucker ed., 1950).

3. A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383, 402 (1996).

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 BERICHT ÜBER DIE VERHANDLUNGEN DER DEUTSCHEN CONSTITUIERENDEN 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 HANNSJOACHIM W. KOCH, A CONSTITUTIONAL HISTORY OF GERMANY 50, 66-69 (1984).

6. Howard, *supra* note 3, at 403.

my own.⁷ 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)⁸ and Switzerland (1847)⁹ managed to set off what the French revolution caused: a chain reaction that created one public sphere throughout Europe.¹⁰ It all began with barricades, in Paris at the end of February

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.

8. WERNER FROTSCHER & BODO PIEROTH, VERFASSUNGSGESCHICHTE 151 (3d ed. 2002); see Hans Henning Hahn, *The Polish Nation in the Revolution of 1846-49*, in EUROPE IN 1848: REVOLUTION & REFORM 1-24, 2, at 170-85 (Dieter Dowe et al. eds., 2001).

9. See Thomas Christian Müller, *Switzerland 1847/49: A Provisional, Successful End of a "Democratic Revolution?"* in EUROPE IN 1848, *supra* note 8, at 210-41.

10. Heinz-Gerd Haupt & Dieter Langewiesche, *The European Revolution of 1848*, in EUROPE IN 1848, *supra* note 8, at 3.

1848.¹¹ The monarchy of Louis-Philippe, who had been in power since July 1830, collapsed unexpectedly and without any true resistance.¹² Besides in France,¹³ revolutionary movements took place in the German Confederation,¹⁴ in the Habsburg Monarchy,¹⁵ in Denmark,¹⁶ and in Italy¹⁷—to name just a few.¹⁸ Even on the British islands, where Metternich had taken refuge,¹⁹ the tremors from the continent were felt.²⁰ Only Russia was left untouched. In 1848, more states on the European continent were overcome by revolutions than ever before and ever since.²¹

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.²² 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.²³ 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 time²⁴—national autonomy and

11. See GEORGES DUVEAU, 1848: THE MAKING OF A REVOLUTION 3 (Anne Carter trans. 1967); FROTSCHER & PIEROTH, *supra* note 8, at 151.

12. Pierre Lévêque, *The Revolutionary Crisis of 1848-1851 in France: Origins and Course of Events*, in EUROPE IN 1848, *supra* note 8, at 91-119.

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 Ko alka, *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.

18. Haupt & Langewiesche, *supra* note 10, at 2.

19. Steinberger, *supra* note 7, at 194.

20. Haupt & Langewiesche, *supra* note 10, at 2, see John Belchem, *The Waterloo of Peace and Order: The United Kingdom and the Revolutions of 1848*, in EUROPE IN 1848, *supra* note 8, at 242-58; LEWIS B. NAMIER, 1848: THE REVOLUTION OF THE INTELLECTUALS 3 (1946, reprinted 1993) (stressing that Great Britain as Russia was not "penetrated" by the revolution).

21. Haupt & Langewiesche, *supra* note 10, at 2, 12-13.

22. *Id.* at 4-5.

23. *Id.* at 3-5.

24. Lévêque, *supra* note 12, at 91; Haupt & Langewiesche, *supra* note 10, at 4, 9.

the building of a nation-state was a revolutionary goal.²⁵ This was especially true for Germany.

B. German Revolution of 1848

In March 1848, the events in Paris fueled largely uncoordinated²⁶ uprisings across-the-board in Germany, e.g., in Berlin, Cologne, Dresden, Stuttgart, and Heidelberg.²⁷ In Berlin, the Prussian King Friedrich Wilhelm IV soon satisfied the revolutionary demands.²⁸ 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.²⁹

In its desire for national unity, Germany had been inspired by the French.³⁰ 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*).³¹ 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.³²

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.³³ The pivotal goals of the German revolution

25. Haupt & Langewiesche, *supra* note 10, at 9.

26. KOCH, *supra* note 5, at 46.

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 fédératif" (art. 6, § 2). The treatises 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,³⁴ it was split with respect to the other goal. The two opposing wings were the radical Democrats and the moderate Liberals.³⁵

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.³⁶ In its first article, the *Offenburger Programm* demanded that the government renounce certain conservative resolutions,³⁷ for “[t]hese resolutions” violate both “our unalienable rights of men”³⁸ 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.³⁹ 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.⁴⁰

The liberal wing of the opposition, on the other hand, met one month after the Democrats, in Heppenheim.⁴¹ 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.⁴² The bourgeoisie wanted their own sphere, unfringeable by the government, where liberty and property could

34. Hucko, *supra* note 33, at 5; FROTSCHER & PIEROTH, *supra* note 8, at 150.

35. See HARTWIG GEBHARDT, *REVOLUTION UND LIBERALE BEWEGUNG: DIE NATIONALE ORGANISATION DER KONSTITUTIONELLEN PARTEI IN DEUTSCHLAND 1848-49* (1974) (about the revolution and the liberal movement); LIBERALISMUS IN DER GESELLSCHAFT DES DEUTSCHEN VORMÄRZ (Wolfgang Schieder ed., 1983) (about liberalism during *Vormärz*); HANS ROSENBERG, *POLITISCHE DENKSTRÖMUNGEN IM DEUTSCHEN VORMÄRZ* (1972) (about political intellectual movements during *Vormärz*).

36. FROTSCHER & PIEROTH, *supra* note 8, at 148.

37. Namely the resolution of Carlsbad (1819), the resolutions of Frankfurt (1831 and 1832), and the resolution of Vienna (1834).

38. Reprinted by FROTSCHER & PIEROTH, *supra* note 8, at 148 (“Wir verlangen, daß sich unsere Staatsregierung lossage von den . . . Beschlüssen . . . Diese Beschlüsse verletzen gleichmäßig unsere unveräußerlichen Menschenrechte, wie die deutsche Bundesakte und unsere Landesverfassung.”).

39. A.E. Dick Howard, *The Values of Federalism*, 1 *NEW EUR. L. REV.* 143 (1993); FROTSCHER & PIEROTH, *supra* note 8, at 12, 149.

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.”⁴³ 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.⁴⁴ 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).⁴⁵ The *Vorparlament* prepared the election of the National Assembly,⁴⁶ resolving that in every German state, every independent citizen of age was to enjoy suffrage.⁴⁷ It was considered self-evident that this excluded women from electing, and being elected.⁴⁸ As the National Assembly, the first German Parliament, was elected on May 1, 1848,⁴⁹ about eighty percent of adult males had the right to vote.⁵⁰ Due to this unusually broad franchise (in comparison not

43. Langewiesche, *supra* note 14, at 124; see Stoll, *supra* note 4, at v.

44. NAMIER, *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),⁵¹ the *Paulskirchenverfassung* became the first democratic constitution in Germany.⁵¹

As the members of the National Assembly took their seats in Frankfurt's *Paulskirche* on May 18, 1848,⁵² 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.⁵³

B. Political and Demographic Composition

According to the election law, the Assembly was to be composed of 649 members.⁵⁴ Counting acting deputies as well, there were more than eight hundred delegates at one time or another.⁵⁵ Politically, the Liberals held the greatest influence in parliament,⁵⁶ 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.⁵⁷ In the Assembly, the delegates formed factions. The factions, the precursors of Germany's parties,⁵⁸ met separately and were named

51. JÖRG-DETLEF KÜHNE, *DIE REICHsverFASSUNG DER PAULSKIRCHE* 49-50 (1985).

52. 1 STEN. BER., *supra* note 4, at 1, *cf.* the seating chart in *DIE FRANKFURTER NATIONALVERSAMMLUNG 1848/49: EIN HANDEXIKON DER ABGEORDNETEN DER DEUTSCHEN VERFASSUNGSGEBENDEN REICHS-VERSAMMLUNG* 34-35 (Rainer Koch ed., 1989) [hereinafter *HANDEXIKON*].

53. Langewiesche, *supra* note 14, at 122.

54. *See* WOLFRAM SIEMANN, *DIE FRANKFURTER NATIONALVERSAMMLUNG 1848/49 ZWISCHEN DEMOKRATISCHEM LIBERALISMUS UND KONSERVATIVER REFORM: DIE BEDEUTUNG 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 *HANDEXIKON*, *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.⁵⁹ 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 “Württembergischer Hof” (left center) and the “Casino” (right center).⁶⁰

Demographically speaking, all delegates were male. More than three-quarters of them were academics,⁶¹ and one-half of those were lawyers.⁶² More than half of the Assembly’s members were government officials,⁶³ and among the especially influential delegates were seventy-six full-time professors (*Universitätsprofessoren*).⁶⁴ On the other hand, less than one-eighth of the members were executives, and farmers and workers were almost not present.⁶⁵ 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*).⁶⁶

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.⁶⁷ The leading role of intellectuals was perceived as both an

that the *Paulskirche* quickly developed a functional parliamentary party system that survived into the Weimar Republic); KOCH, *supra* note 5, at 34-41 (discussing the formation of parties in 1848).

59. FROTSCHER & PIEROTH, *supra* note 8, at 157.

60. See HANDLEXIKON, *supra* note 52, at 37; KOCH, *supra* note 5, at 57-58.

61. Siemann, *supra* note 54, at 19, and Stoll, *supra* note 4, at viii, refer to 653 members (81.6%).

62. Siemann, *supra* note 54, at 34, counts 445 “Volljuristen” and an additional 46 members who had studied law, but not necessarily took the two mandatory state exams.

63. FROTSCHER & PIEROTH, *supra* note 8, at 156. HEINRICH BEST & WILHELM WEGE, BIOGRAPHISCHES HANDBUCH DER ABGEORDNETEN DER FRANKFURTER NATIONALVERSAMMLUNG 1848/49, at 5 (Düsseldorf 1996), count even 670 members who had been, at one point in their lives, members of the government (which interestingly enough includes, for their count, the church).

64. DIE DEUTSCHE REVOLUTION 1848/49 IN AUGENZEUGENBERICHTEN 131 (Hans Jessen ed., 1968) (quoting the lawyer and delegate WILHELM WICHMANN, DENKWÜRDIGKEITEN AUS DEM ERSTEN DEUTSCHEN PARLAMENT 24-25 (1890)). But see Stoll, *supra* note 4, at viii (counting “around 50”).

65. Hucko, *supra* note 33, at 8 (counting 319 lawyers and civil servants, 104 academics, 38 merchants and industrialists, one farmer, and not a single worker).

66. FROTSCHER & PIEROTH, *supra* note 8, at 156; Hucko, *supra* note 33, at 8; KOCH, *supra* note 5, at 56.

67. Hucko, *supra* note 33, at 8.

advantage and a disadvantage, as reflected by two other nicknames: Parliament of the Intellect (*Parlament des Geistes*)⁶⁸ and College for Political Science (*Hochschule für Politik*).⁶⁹ 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,⁷⁰ composed “In parlia-, parlia-, parliament, / the debates, they will never end.”⁷¹ 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.”⁷² Allegedly, the persons pictured were Carl Joseph Anton Mittermaier, Georg Beseler, and Friedrich Christoph Dahlmann.⁷³

Already within the first few weeks, the Assembly was criticized for how the professors lecture “from the lectern downwards.”⁷⁴ 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

68. Alexander Scharff, *Revolution und Reichsgründungsversuche*, in DEUTSCHE GESCHICHTE IM ÜBERBLICK 433-53, 439 (Peter Rassow, 3d ed. 1973).

69. VEIT VALENTIN, 2 GESCHICHTE DER DEUTSCHEN REVOLUTION 13 (1930).

70. See Wolfgang Büttner, *Georg Herwegh. Poet und Revolutionär*, in 2 MÄNNER DER REVOLUTION VON 1848, at 151-82 (Helmut Bleiber et al. eds., [East-]Berlin 1987).

71. “Im Parla-, Parla-, Parlament / Das Reden nimmt kein End,” from Georg Herwegh’s poem “Das Reden nimmt kein End,” reprinted in ULRICH OTTO, DIE HISTORISCH-POLITISCHEN LIEDER UND KARIKATUREN DES VORMÄRZ UND DER REVOLUTION VON 1848/49 [The historic-political Songs and Cartoons of Vormärz and of the revolution of 1848/49] (1982) (with Herwegh’s poem at 354-55 and with sources and a discussion about the National Assembly in songs and cartoons at 351-91).

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 deutsche Professoren entwerfen den Entwurf des Entwurfs 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, 1 STEN. 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

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.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.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.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.⁸² In 1807, Zachariä, a leading German constitutionalist, juxtaposed confederation and federation by pointing to the American example.⁸³ Görres praised American federalism,⁸⁴ and in 1824, Robert von Mohl, one of Germany's leading constitutional lawyers and a member of the *Paulskirchen* Convention, published the first

79. FRANZ, *supra* note 78, at 115-16.

80. Steinberger, *supra* note 7, at 189.

81. *Id.* at 190.

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).

83. See CARL SALOMON ZACHARIAE, *IUS PUBLICUM CIVITATUM QUAE FOEDERI RHENANO ADSRIPTI SUNT* (1807), cited according to Steinberger, *supra* note 7, at 192 n.5.

84. See JOSEPH GÖRRES, *DEUTSCHLAND UND DIE REVOLUTION* (1819).

systematic treatise on the United States Constitution.⁸⁵ In the 1830s, the Federalist Papers and (partly) the commentaries of Story and Kent were translated and reviewed⁸⁶ (the translator of Story later was to become a member of the Assembly).⁸⁷ 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 1840.⁸⁸ In his treatise, Tocqueville gave a broad overview of the United States Constitution.⁸⁹ 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.⁹⁰ Tocqueville's works also were widely quoted throughout the debates.⁹¹

The deputies gathered in the *Paulskirche* were quite familiar with American constitutionalism as well. At least the delegates Raumer,⁹²

85. See ROBERT VON MOHL, DAS BUNDES-STAATSRECHT DER VEREINIGTEN STAATEN VON NORD-AMERIKA (1824).

86. But see Steinberger, *supra* note 7, at 190 (noting that the Federalist Papers, for all practical purposes, were not accessible in Germany).

87. His name was Franz Josef Buß. See FRANZ, *supra* note 78, at 129.

88. ALEXIS DE TOCQUEVILLE, DE LA DEMOCRATIE EN AMERIQUE (vol. 1 Paris 1835, vol. 2 Paris 1840) (only the first volume was translated (by Friedrich August Rüder (Leipzig 1836) and by Otto Spazier (Weimar 1836)); see FRANZ, *supra* note 78, at 15, 17 n.12; Steinberger, *supra* note 7, at 193.

89. The following summary relies on FRANZ, *supra* note 78, at 20-22.

90. Von Mohl, *supra* note 100; see FRANZ, *supra* note 78, at 16; Langewiesche, *supra* note 14, at 127.

91. See, e.g., Reichensperger, 7 STEN. BER., *supra* note 4, at 5260 (quoting in French).

92. Friedrich von Raumer (1781-1873) had studied law in Halle and Göttingen to become a professor of political science (*Staatwissenschaften*) and history in Berlin, where he had also been President of the University (*Rektor*). He traveled the United States in 1841 or 1844. In

Duckwitz,⁹³ Rönne,⁹⁴ Moering,⁹⁵ Mittermaier,⁹⁶ and Tellkamp⁹⁷ 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.”⁹⁸ Mittermaier and Tellkamp also emphasized that their accounts of North America were not from hearsay, but had an eyewitness quality.⁹⁹

Several delegates had published scholarly works on the matter, among them Mittermaier, Dahlmann, Döllinger, Robert von Mohl, Raumer, Rönne, Reichensperger, and Waitz.¹⁰⁰ 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. I

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.

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

94. 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.

95. 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.

96. See *supra* text accompanying note 113.

97. See *supra* text accompanying note 114.

98. 1 STEN. BER., *supra* note 4, at 433 (emphasis added).

99. Mittermaier, *supra* text accompanying note 101; Tellkamp, 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. . .”).

100. FRANZ, *supra* note 78, at 16, 139; see, e.g., ROBERT VON MOHL, DAS BUNDESSTAATSRECHT DER VEREINIGTEN STAATEN VON NORD-AMERIKA. 1. ABT.: VERFASSUNGS-RECHT (1824), Robert von Mohl, *Nordamerikanisches Staatsrecht* (Review of *J. Story, Commentaries on the Constitution of the United States*), 7 KRITISCHE ZEITSCHRIFT FÜR RECHTSWISSENSCHAFT UND GESETZGEBUNG DES AUSLANDES [Critical Review of Foreign Jurisprudence and Lawmaking] 1-26 (1835) [hereinafter KRIT. ZS.]; Robert von Mohl, *Amerikanisches Staatsrecht* (Review of B.L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN, and of 1 DE TOCQUEVILLE, DE LA DEMOCRATIE EN AMERIQUE), 8 KRIT. ZS., *supra*, at 359-87 (1836); Robert von Mohl, *Nordamerikanisches Staatsrecht* (Review of THE WRITINGS OF JOHN MARSHALL, LATE CHIEF JUSTICE OF THE UNITED STATES, UPON THE FEDERAL CONSTITUTION), 12 KRIT. ZS., *supra*, at 161-85 (1840); Robert von Mohl, *Entwicklung der Demokratie in Nordamerika und der Schweiz* (Review of TOCQUEVILLE, DEMOCRATIE EN AMERIQUE I/II and of CHERBULIEZ, DE LA DEMOCRATIE EN SUISSE), 16 KRIT. ZS., *supra*, at 275-311 (1844). KRIT. ZS. was published by Mittermaier, another member of the Assembly, and Zachariä. For publications by Raumer, see *supra* note 92; for Rönne, see *supra* note 94.

... 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 classischen Buche über Amerika angebahnt sind.")

104. FRANZ, *supra* note 78, at 1.

105. *Tellkampf*, 7 STEN. BER., *supra* note 4, at 5305 (citing with respect to the franchise MASS. CONST. pt. II, ch. I, §§ 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 *Württembergischer 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

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?”).

111. JOHANN GUSTAV DROYSEN, AKTENSTÜCKE UND AUFZEICHNUNGEN ZUR GESCHICHTE DER FRANKFURTER NATIONALVERSAMMLUNG 453 (Rudolf Hübner ed., 1924) [hereinafter AKTENSTÜCKE] (“Zell: Er wisse diesmal auch etwas aus Amerika, nämlich . . .”).

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 Tellkamp, a Protestant, was born in 1808, the son of a high government official (*Kanzleirat*).¹¹⁴ 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, Tellkamp practiced as an attorney in Hannover. After several academic journeys, he visited North America in 1838. Being appointed Professor in Ordinary, Tellkamp 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, Tellkamp undertook several journeys through the United States.

Tellkamp 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, Tellkamp 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.¹¹⁵ Tellkamp 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 & WEEGE, *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.¹¹⁶ Be that as it may: The Assembly did not follow Tellkampf.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:¹¹⁸ (5) federalism and (6) the judicial branch.

1. Rules of Procedure

As any parliament, the National Assembly needed to agree on rules of procedure (*Geschäftsordnung*) before actual lawmaking could take place. After adopting preliminary bylaws,¹¹⁹ the Assembly debated the final rules in the ninth session on May 29, 1848.¹²⁰ Robert Mohl reported for the committee that had drafted the proposal,¹²¹ modeled according to examples from England, France, and the German states.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,”¹²³ a reference to the “well-known”¹²⁴ and “highly respected”¹²⁵ *Manual of Parliamentary Practice for the Use of the Senate of the United States* from 1801 (translated to German in 1819).¹²⁶ Parliamentary proceedings, Tellkampf believed, existed “nowhere in such perfection as in North America and England.”¹²⁷ The deputy perceived

116. AKTENSTÜCKE, *supra* note 111, at 315 (“Tellkampf: Er wünsche, daß . . . der Sitz der Reichsregierung . . . an möglichst kleinen Ort gelegt werde, und zwar dies im Interesse der möglichst ruhigen Debatten, damit sie ohne den Einfluß des Pöbels vor sich gehen können. Hat man doch in Nordamerika den Sitz der Regierung in das kleine Dorf Washington gelegt.”).

117. AKTENSTÜCKE, *supra* note 111, at 316; *see* FRANZ, *supra* note 78, at 118.

118. Bodo Pieroth, *Amerikanischer Verfassungsexport nach Deutschland*, 42 NJW 1333-1337/1334 (1989); Steinberger, *supra* note 7, at 195.

119. 1 STEN. BER., *supra* note 4, at 5-9.

120. *Id.* at 163-74.

121. *Id.* at 7 (preliminary); *id.* at 165.

122. Jacob Grimm, 1 STEN. BER., *supra* note 4, at 166 (referring to all three examples); *see* Wigard, 1 STEN. BER., *supra* note 4, at 167 (referring only to his own experience with procedural rules in different German states); Tellkampf, 1 STEN. BER., *supra* note 4, at 167 (referring only to the English example).

123. Tellkampf, 1 STEN. BER., *supra* note 4, at 167.

124. Fallati, 1 STEN. BER., *supra* note 4, at 169 (“Jefferson’s bekanntes Werk”).

125. Schwarzenberg sen., 1 STEN. BER., *supra* note 4, at 169 (“hochgeachtet”).

126. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES (Washington 1801), *translated in* THOMAS JEFFERSON, HANDBUCH DES PARLAMENTSRECHTS, ODER: DARSTELLUNG DER VERHANDLUNGSWEISEN UND DES GESCHÄFTSGANGES BEIM ENGLISCHEN PARLAMENT UND BEIM CONGRESS DER VEREINIGTEN STAATEN VON NORDAMERIKA (Leopold von Henning trans., 1819).

127. Tellkampf, 1 STEN. BER., *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”¹²⁸ than the French. One of the reasons for that, Tellkampff claimed, was “that the settlers in North America knew the English parliamentary proceedings . . . completely.”¹²⁹ It seemed to Tellkampff:

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.¹³⁰

The Assembly was not impressed. It perceived Jefferson’s *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.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 *Vorparlament*, Friedrich Struve had demanded the end of monarchy.¹³² In the Assembly, however, less than a third of the delegates supported parliamentary democracy.¹³³ Democrats cherished diverse and hopeful visions of the republic. But Gustave Flaubert had observed the echo: “[I]n every syllable of the word

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 . . .”).

129. *Id.* (“[D]arin lag, daß die Ansiedler in Nordamerika mit dem parlamentarischen Rechte vollständig vertraut waren.”).

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 constituieren und wie dabei Ruhe und Ordnung selbst unter den wildesten Charakteren herrschen.”).

131. Fallati, 1 STEN. BER., *supra* note 4, at 169.

132. 1 DIE VERHANDLUNGEN DES VERFASSUNGS-AUSSCHUSSES DER DEUTSCHEN NATIONALVERSAMMLUNG 7 (Johann Gustav Droysen ed., 1849), quoted according to FRANZ, *supra* note 78, at 104.

133. At first, only the less than hundred members of the two left-wing factions *Deutscher Hof* and *Donnersberg* supported parliamentary democracy. Later on, they were joined by another hundred members of the left-centered *Württembergischer Hof*. Cf. Stoll, *supra* note 4, at xiv.

'Republic', the sound of the guillotine resonates."¹³⁴ Thus, Liberals and Conservatives forming a vast majority in the assembly favored a constitutional monarchy with a hereditary emperorship.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.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."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."¹³⁸ He predicted that Germany was going to be "for a long time" to come "Europe's playground and its bone of contention."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."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.¹⁴¹ Von

134. GUSTAVE FLAUBERT, *THE SENTIMENTAL EDUCATION* 295 (Robert Baldick trans., 1964) (cited according to Langewiesche, *supra* note 14, at 126).

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.

136. Langewiesche, *supra* note 14, at 125.

137. Von Vincke, 1 STEN. BER., *supra* note 4, at 442.

138. *Id.* at 443 ("der Blick von ganz Europa auf uns gerichtet ist, wir von allen Seiten mit Krieg bedroht sind").

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)).

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.").

141. *Id.* ("das politische Moment, daß die Bewohner von Nordamerika seit Jahrhunderten einen angeerbten Sinn für Recht und Gesetzlichkeit 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.”¹⁴²

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.¹⁴³ Given the sudden shift in power, the new state inevitably was to become a constitutional monarchy.¹⁴⁴ 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.”¹⁴⁵

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:

[B]efore 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.¹⁴⁶

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

JEFFERSON 226, 231 (Thomas Jefferson Randolph ed., 1829), quoted by *Raumer*, 7 STEN. BER., *supra* note 4, at 5284.

147. *Id.*

148. FROTSCHER & PIEROTH, *supra* note 8, at 134.

149. *Cf.* Tellkamp, 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

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.

158. Gerald Stourzh, *Die Grundrechte in der Paulskirche und im Kremsierer Reichstag: Gemeinsamkeiten, Unterschiede, Rezeptionen*, in VERFASSUNGSWANDEL UM 1848 IM EUROPÄISCHEN VERGLEICH 269, 281 (Martin Kirch & Pierangelo Schiera eds., 2001) (counting with respect to fundamental rights only one reference to the United States Constitution).

159. CONRAD BORNHAK, GENEALOGIE DER VERFASSUNGEN 104 (1935). *But see* KÜHNE, *supra* note 51, at 148.

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.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.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,¹⁶² and it is fair to say that federalism in the contemporary sense had been created by the United States Constitution.¹⁶³ In the *Paulskirche*, the American influence was clearly the strongest and most decisive with respect to this subject.¹⁶⁴

The Assembly based its debate on a draft the Constitutional Committee had presented, together with its reasons in support.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.”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.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.”¹⁶⁸ It was convinced that a federation would correspond best with Germany’s “peculiar circumstances.”¹⁶⁹

160. Hucko, *supra* note 33, at 8-9.

161. Steinberger, *supra* note 7, at 195.

162. *Id.* at 194.

163. Pieroth, *supra* note 118, at 1333.

164. FRANZ, *supra* note 78, at 117; Steinberger, *supra* note 7, at 192.

165. 4 STEN. BER., *supra* note 4, at 2717-46.

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”).

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.

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.¹⁷⁰ The United States Constitution was extolled with delight as "a wonder of the time being":¹⁷¹

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 its details 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.¹⁷²

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

zugleich mit den Erfahrungen jener Länder zum Gegenstand der Aufmerksamkeit zu machen waren").

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 wohlthätigen 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 die 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 Staate 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.¹⁷³

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,¹⁷⁴ but with corresponding clauses directly in view.¹⁷⁵

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 6-67.¹⁷⁶ 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, Eigentümlichkeiten 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

177. *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824).

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, cls. 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,¹⁸⁴ matters of federal legislation entail as well customs and trading,¹⁸⁵ import and export,¹⁸⁶ weights and measures,¹⁸⁷ and copyright and intellectual property.¹⁸⁸ In contrast to its American counterpart, the German federation had the power to legislate on rights of associations¹⁸⁹ 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.”¹⁹⁰

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.¹⁹¹ 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.”¹⁹² 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. 44.¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵

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.

191. *Cf.* Wigard, 4 STEN. BER., *supra* note 4, at 2988.

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

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 Gesamt-Interesse Deutschland’s 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 begrenzt. 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).²⁰⁰ 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.²⁰¹ 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,²⁰² which is what the proposed extension would make possible.

Tellkamp argued more accurately on the matter than Mittermaier, however, as he referred to the United States Constitution as an argument against the extension.²⁰³ In the end, the proposed addendum was not passed.²⁰⁴

(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, unenumerated 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. FRANZ, *supra* note 78, at 129-30.

202. The extension of federal commerce power, with and without respect to the Necessary and Proper Clause, did not take place before 1937, certainly not before *Housten E. & W. Ry. Co v. United States (Shreveport)*, 234 U.S. 342 (1914). For the New Deal court, see *Wickard v. Filburn*, 317 U.S. 111 (1942), and *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451 (1941). See also the very deferential civil rights cases, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964). Recently in this realm, the Court has become stricter again, see *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

203. Tellkamp, 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.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.²⁰⁶ In support of this concept, the report refers expressly to the commentaries by Kent and Story, and also to Tocqueville.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.”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.”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

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” (Präsident von Gagern, 4 STEN. BER., *supra* note 4, at 2987).

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.

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)”).

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).

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.²¹⁰ In the end, the framers favored the Virginia Plan and its concept of dual sovereignty.²¹¹ 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.²¹² This was a change with respect to the previous constitution in the Confederation of 1815.²¹³

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 law²¹⁴—a solution similar to the Supremacy Clause in United States Constitution Article VI, Section 2.²¹⁵ 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.²¹⁶ 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.²¹⁷

210. See Alexander Hamilton, *Federalist No. 15*, in *THE FEDERALIST PAPERS* 67, 70-71 (Garry Wills ed., 1982) [hereinafter *FEDERALIST PAPERS*]; *New York v. United States*, 505 U.S. 144, 164 (1992).

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.

217. Justice Hugo Black's argument in his dissent from *Adamson v. California*, 332 U.S. 46, 68 (1947); see also *Palko v. Connecticut*, 302 U.S. 319 (1937).

(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.²¹⁸ Besides the legal influence of inter alia England, Belgium,²¹⁹ France, and the German states,²²⁰ once again the American model influenced the debate.²²¹ The system, however, differed considerably from the American example.²²² After all, in modern constitutional history, there was no precedent for a union of monarchical states within a democratic federal state.²²³

Under the *Paulskirchenverfassung*, the federal legislature was to consist of two chambers, the *Volkshaus* (House of the People) and the *Staaenhaus* (House of the States).²²⁴ While the *Volkshaus* was to represent united Germany, the *Staaenhaus* was to represent the states.²²⁵ 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).²²⁶

However, with respect to the representation of the states, the delegates wanted to establish a “*Staaenhaus* of a German creed.”²²⁷ In the debate, deputy Ahrens explained:

218. See Tellkamp, 5 STEN. BER., *supra* note 4, at 3808; cf. Justice Blackmun’s argument in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and his concurrence in *National League of Cities v. Usery*, 426 U.S. 833 (1976). See generally A.E. Dick Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789 (1985).

219. With regard to 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; Tellkamp, *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 it 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 Tellkamp 5 STEN. BER., *supra* note 4, at 3808.

222. Steinberger, *supra* note 7, at 198.

223. Hucko, *supra* note 33, at 13.

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 (“*Staaenhaus nach deutschem Maaße.*”).

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 (*Volksgeist*), 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 Volksgeist, 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.²³³ 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.²³⁴

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.²³⁵ At the time, the U.S. Senators for each state were elected “by the legislature thereof.”²³⁶ 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.²³⁷ Just like in the United States, members of the upper chamber had to be thirty years of age.²³⁸ In contrast to the American model, however, the *Paulskirchenverfassung* emphasized that the minimum age was the same for members of both houses.²³⁹

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.²⁴⁰ 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.²⁴¹

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

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, cls. 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, cls. 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.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.²⁴³

6. Judicial Branch: The *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 *Reichsgericht*.²⁴⁴ The delegates debated about the Court, which they considered the “cornerstone” of the constitution,²⁴⁵ in November 1848 and again in March 1849.²⁴⁶ During their debate, they referred, inter alia, to England, France, Switzerland, Bavaria, Prussia, Saxony, and once more to the United States.²⁴⁷ Again, American constitutionalism had probably the strongest impact.²⁴⁸ Mittermaier told his colleagues:

242. Waitz, 4 STEN. BER., *supra* note 4, at 3157; 5 STEN. BER., *supra* note 4, at 3240.

243. Waitz, 4 STEN. BER., *supra* note 4, at 3157.

244. Even though the *Paulskirchenverfassung* did not allow for a hierarchy of federal courts, it reserved Reich legislation to institute admiralty and maritime courts in PKV article 129.

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 . . .”).

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).

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.”).

248. Steinberger, *supra* note 7, at 199; *cf.* KÜHNE, *supra* note 51, at 200.

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.²⁴⁹

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.”²⁵⁰ 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.²⁵¹

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.²⁵² 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 unsern Verhältnissen befolgen, das Mittel gegeben ist, die Richter . . . so zu belehren, daß sie im Stande sind, das herrlichste Urtheil, das allgemeines Vertrauen erweckt, zu fällen.”).

251. Steinberger, *supra* note 7, at 200.

252. *Id.* at 199-200.

American model. As Mittermaier stated, after yet another acknowledgment 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 *Paulskirchen* 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. Cf. PKV 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, 7-9, 115-18 (2000). *See* G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION. PROFILES OF LEADING AMERICAN JUDGES* 2, 22-25 (1976).

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

258. *Id.* at 201.

with the constitution,²⁵⁹ 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.”²⁶⁰ 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.²⁶¹

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.”²⁶² 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 well²⁶³ 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.”²⁶⁴

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

259. *Marbury v. Madison*, 5 U.S. 137 (1803); *Dred Scott v. Sandford*, 60 U.S. (19 How) 393 (1856).

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.

261. Moritz Mohl, 5 STEN. BER., *supra* note 4, at 3609.

262. 8 STEN. BER., *supra* note 4, at 5669 (“a) Streitigkeiten zwischen der Reichsgewalt und den Einzel-Staaten über den Umfang ihrer Befugnisse.”).

263. 8 STEN. BER., *supra* note 4, at 5669 (“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.”).

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.²⁶⁵ But the provision was persuasively defended as a measure to protect the states.²⁶⁶ After all, only the states, not an individual could challenge the constitutionality of a law.²⁶⁷ As the Assembly adopted the provision including the reference to federal statutes,²⁶⁸ 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.²⁶⁹ 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,²⁷⁰ and with it the entire reform movement died. Nor did it help that twenty-eight German governments recognized the constitution as valid.²⁷¹ Without ratification in important states like Prussia, Austria, and Bavaria, the constitution remained a proud product of the 1848 revolution, but never governed Germany.²⁷²

While the German revolution of 1848 eventually failed, the *Paulskirchenverfassung* survived. It became the most influential document for the future of German constitutional development.²⁷³ It served as “a model and yardstick of the quest for a democratic Germany for the next one hundred years”²⁷⁴ and beyond. Being drafted as carefully as it was, several principles the *Paulskirchenverfassung* embodied resurfaced later on in history.²⁷⁵ 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.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 1848-1849.²⁷⁷ 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.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 1849.²⁷⁸ 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

276. FROTSCHER & PIEROTH, *supra* note 8, at 166, 175, 264; Wolfgang Gerhardt, *Vorwort*, in *HANDEXIKON*, *supra* note 52, at 7.

277. Pieroth, *supra* note 118, at 1333.

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.”²⁷⁹ 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.²⁸⁰ Today, legislation in Germany is more centralized than in the United States.²⁸¹ At the same time, the *Paulskirchen* concept resurfaces in that not the federal administration, but the states apply the federal laws (GG art. 83).²⁸²

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.²⁸³ The Basic Law still adheres to the idea that the number of representatives depends upon the population in each state.²⁸⁴

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,²⁸⁵ 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.²⁸⁶ 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.²⁸⁷

With respect to judicial review of legislative acts, the American doctrine was widely neglected until the late nineteenth century.²⁸⁸ The Weimar Constitution did not reach the American standard of *Marbury v. Madison* and *Dred Scott*.²⁸⁹ In its text, it failed to provide for judicial review with respect to the compliance of statutes with fundamental rights.²⁹⁰ Nevertheless, the Reichsgericht announced that it would perform this task anyhow.²⁹¹ Finally, the concept of judicial review was codified under the Basic Law.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.²⁹³

VI. CONCLUSION

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.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

287. FROTSCHER & PIEROTH, *supra* note 8, at 24.

288. Steinberger, *supra* note 7, at 203.

289. *Marbury v. Madison*, 5 U.S. 137 (1803); *Dred Scott v. Sandford*, 60 U.S. (19 How) 393 (1856).

290. GERHARD ANSCHÜTZ, *DIE VERFASSUNG DES DEUTSCHEN REICHS VOM 11. AUGUST 1919* art. 70.2, at 216 (8th ed. 1928); Carl Joachim Friedrich, *The Issue of Judicial Review in Germany*, 43 POL. SCI. Q. 188, 190 (1928); Richard Thoma, *Das richterliche Prüfungsrecht*, 43 (=4 NF) ARCHIV DES ÖFFENTLICHEN RECHTS [AÖR] 267, 269 (1922); Heinrich Triepel, *Der Weg der Gesetzgebung nach der neuen Reichsverfassung*, 39 AÖR 456, 534 (1920); Hartmut Maurer, *Das richterliche Prüfungsrecht zur Zeit der Weimarer Verfassung*, 15 DIE ÖFFENTLICHE VERWALTUNG 683 (1963).

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, *Judicial Review in Germany under the Weimar Constitution*, 14 TUL. L. REV. 361, 368 (1940). *Cf.* CURRIE, *supra* note 7, at 5 n.35; Lenoir, *supra*, at 368; Maurer, *supra* note 290, at 684; Steinberger, *supra* note 7, at 206.

292. GG art. 100, § 1, art. 20, § 3, art. 1, § 3.

293. FROTSCHER & PIEROTH, *supra* note 8, at 25.

294. *See, e.g., supra* text accompanying notes 170-172, 249.

(such as Tocqueville's *De la démocratie en Amérique*) had been translated into German and were widely available.²⁹⁵ Some members of the Assembly authored works on the United States Constitution themselves,²⁹⁶ and others had visited or lived in North America where they had made the acquaintances of American political leaders in person.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 exist²⁹⁸ and to "measures," which the U.S. federal legislation allegedly had the power to adopt.²⁹⁹ These flaws, however, did not have an influence on the *Paulskirchenverfassung*. Fortunately, either another delegate was able to correct his colleague's mistake³⁰⁰ or the error was about a detail in a provision the Assembly decided not to adopt anyhow.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,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*.³⁰³ The assembly also created, on its own, a unique concept about the administration of federal law.³⁰⁴

Wherever the Assembly accepted American ideas, the concept was implemented not wholesale, but selectively. The delegates refrained from comprehensively incorporating the relevant provisions.³⁰⁵ This kind of "reception" had been the way Roman law was received in Germany. Nor did the Assembly mechanically adopt American law, as many Latin American countries did at the time.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.³⁰⁷

295. See *supra* Part IV.A.

296. See *supra* note 100.

297. See *supra* notes 92-99 and accompanying text.

298. See *supra* text accompanying note 108.

299. See *supra* text accompanying note 199.

300. See *supra* text accompanying note 108.

301. See *supra* text accompanying note 199.

302. See *supra* text accompanying note 157.

303. See *supra* Part IV.B.1 and especially text accompanying note 131.

304. See *supra* Part IV.B.5.b.

305. Stourzh, *supra* note 158, at 281.

306. Steinberger, *supra* note 7, at 189.

307. See *supra* text accompanying notes 150-151, 166-169, 227-228, 250.

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.³¹⁶ 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.³¹⁷ In his quote, however, the delegate omitted the succeeding paragraph, in which Jefferson announced that he saw the people in Europe improving already.³¹⁸ 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. Rowen ed., 2d ed. 1968).

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.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.³²⁰ Thus, America has started an influence on German constitutionalism through the *Paulskirchenverfassung* which continues to be of great importance.³²¹

319. See *supra* Part IV.B.5-6.

320. See *supra* Part V.

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).