Essays

Italian Constitutionalism and Its Origins

Steven G. Calabresi and Matteo Godi*

Abstract

Focusing on the evolution of constitutional thought in Italy is key to understand not only Italy's current legal order, but also constitutionalism more generally. In Italy, there has not been a true rupture point between the pre-unitary legal systems and the new constitutional order; a comprehensive study of Italian constitutional law, then, cannot do away with the preceding legal orders as modern textbooks do. And a study of modern constitutionalism cannot ignore Italy's contribution: centuries of attempts at constitutionalizing, detached from any meaningful revolutionary vacuum. This Article sets out to fill that gap by focusing on the little known, three-centuries-long history of Italian constitutionalism, and it does so by offering many previously unpublished English translations of Italian constitutions. Part II discusses the genesis of modern constitutional thought in Italy. It focuses, in particular, on the Draft Constitution of Tuscany (1787); the Second Constitution of the Cisalpine Republic (1798); and the Constitution of the Kingdom of Italy (1802). Part III analyzes the Albertine Statute, the most famous pre-modern Italian constitution, first enacted in 1848 by the Kingdom of Piedmont and Sardinia and later extended to the entire nation following the unification of Italy in 1861. Part IV briefly focuses on the 1948 Constitution of the Italian Republic – Italy's current constitutional document. Part V extrapolates from this history in order to make a few normative claims. A brief conclusion follows.

> 'If you want to go on a pilgrimage to the birthplace of our Constitution, go to the mountains where the Partisans died, go to the prisons where they were jailed, go to the fields where they were hung. Wherever an Italian died to redeem freedom and dignity, you should travel there with your mind, young souls, because it is there that our Constitution was born'
>
> Piero Calamandrei[1]

* Steven G. Calabresi is Clayton J. and Henry R. Barber Professor, Northwestern Pritzker School of Law; Visiting Professor of Law (Fall Semesters, 2013-2020), Yale University. Matteo Godi is Law Clerk to the Hon. Guido Calabresi, U.S. Court of Appeals for the Second Circuit; Visiting Lecturer (Spring Semester, 2021), Yale Law School. In accordance with Italian academic customs, the authors clarify that they jointly wrote Parts I, II, III, IV, and VI; Professor Calabresi primarily wrote Part V; and Mr. Godi translated all Italian language sources into English.

I. Introduction

In 1948, as a result of the state of general devastation that World War II left behind, the Italian Constitution created a unitary parliamentary republic in Italy. But the history of a 'unitary' Italy is a short one, dating back only to the 1860s. Up until then, Italy had been nothing more than 'a geographical expression'.[2] Written constitutionalism itself, just as Italy, is a relatively recent phenomenon; it arguably began with the writing of the great European codes, including the Code Napoleon, and it found its full form in the entrenched Constitution of the United States, ratified in 1788. The current Italian Constitution entered into force on the 160th anniversary of the ratification of the US Constitution. That year, 1948, also coincided with the 100th anniversary of Italy's previous and first nationwide constitution – the Albertine Statute of 1848. But the Albertine Statute was the product of a legislature, not a constituent assembly, and it was thus not entrenched. Italian constitutionalism is therefore a very recent example of a relatively recent development in world history. Yet, over the course of the last seventy years, the text of the Italian Constitution has remained substantially unaltered.

Since 1870, Italy has had four governing regimes. *First*, from 1861 until the rise to power of the fascist dictator Benito Mussolini in 1922, Italy had a classical liberal regime under a constitutional monarch who governed the country along with a two-house Parliament (the upper house of which was appointed by the King). *Second*, from 1922 to 1943, Italy was a fascist dictatorship under Mussolini, and then, from 1943 to 1945, the country was a puppet state under the German and American occupations. *Third*, on 2 June 1946, Italians voted to abolish their monarchy and to become a republic – and, notably, for the first time, women were allowed to vote in a national election. The ensuing Italian Constitution, which was ratified at the end of 1947, created the First Republic, which used an extreme system of proportional representation, and which lasted until the early 1990s. *Fourth*, in 1993, Italy changed its electoral law to move dramatically away from proportional representation, with the result that it now has a bipolar center-right and center-left coalition party system.[3]

Scholars generally believe that there is nothing more to be said about constitutionalism in Italy. For instance, Dieter Grimm's recent book on *Constitutionalism: Past, Present, and Future* offers a remarkable perspective on the evolution of modern constitutions all over the world.[4] But Grimm's working assumption – that is, that constitutionalism only emerges from the 'necessity to

[1] P. Calamandrei, ' 'La Costituzione e la gioventù' Discorso pronunciato da Piero Calamandrei nel gennaio 1955 a Milano' *Ufficio stampa dell'amministrazione provinciale di Livorno* (1975), 8.

[2] E. Lipson, *Europe in the Nineteenth & Twentieth Centuries: 1815-1939* (London: Adam & Charles Black, 1940), 159.

[3] See generally J.L. Newell, *The Politics of Italy: Governance in a Normal Country* (Cambridge: Cambridge University Press, 2010).

[4] See generally D. Grimm, *Constitutionalism: Past, Present, and Future* (Oxford: Oxford University Press, 2016).

reconstitute legitimate state power,' which results from 'a revolutionary break' – is too limiting.[5] To wit, most relevantly for the purpose of this Article, it completely excludes Italy from the picture. But the entire history of written constitutionalism – from the 1780s to the present day – is marked by Italian attempts to adopt constitutions. Italy has had at least *fifty* modern constitutions, all predating the 1848 Albertine Statute. Yet, Italian and international scholars alike tend to overlook that notable history – including Grimm.

Why is it important to discuss attempts at constitutionalization prior to the unification of Italy, since the Republican Constitution of 1948 replaced all of the preexisting legal systems? One cannot begin to understand Italy's current legal order, or constitutionalism more generally, without an understanding of constitutional thought in Italy. There has not been a true rupture point between the pre-unitary legal systems and the new constitutional order. Indeed, modern Italian courts, when applying today's laws, do not appear to assume that the post-World War II constituent assembly started from a blank slate: preexisting legal orders have continued to be respected so long as they do not conflict with the present constitution. Examples abound.[6] A comprehensive study of Italian constitutional law, then, cannot do away with the preceding legal orders as modern textbooks do. And a study of modern constitutionalism cannot ignore Italy's contribution: centuries of attempts at constitutionalizing, detached from any meaningful revolutionary vacuum.

This Article sets out to fill that gap by focusing on the little known, three-centuries-long history of Italian constitutionalism. It does so by offering many previously unpublished English translations of Italian constitutions not discussed in Grimm's *Constitutionalism: Past, Present, and Future*, and often overlooked in modern textbooks. Part II discusses the genesis of modern constitutional thought in Italy. It focuses, in particular, on the Draft Constitution of Tuscany (1787); the Second Constitution of the Cisalpine Republic (1798); and the Constitution of the Kingdom of Italy (1802). In fact, though the Albertine Statute became the most famous pre-modern Italian constitution, it was not an isolated attempt at written constitutionalism. Far from it. Part III analyzes the Albertine Statute, first enacted in 1848 by the Kingdom of Piedmont and Sardinia, and later extended to the entire nation following the unification of Italy in 1861. Part IV briefly focuses on the 1948 Constitution of the Italian Republic – Italy's current constitutional document. Part V extrapolates from this history and makes some normative claims. A brief conclusion follows.

[5] ibid 11; see also ibid 9 ('It was only the revolutionary situation that provided the opportunity to implement the ideas of social philosophy in positive law').

[6] See, eg, Corte di Cassazione 7 June 1971 no 1693, *Il Foro*, 2228 (1971) (enforcing a concession made in 1809 by the Kingdom of Sicily, turning a property into a prison); Corte di Cassazione 24 November 1962 no 3197, *Il Foro*, 556 (1963) (applying a 1771 law to a real estate controversy between the Church and a tenant); see also A. Cerri, *Istituzioni di diritto pubblico nel contesto europeo* (Milano: Giuffrè, 2015), 38-39.

II. The Historical Foundations of the Italian State

For a large part of the eighteenth and nineteenth centuries, Italy was splintered into a number of smaller states and city-states. In the years preceding the Napoleonic invasion of 1796, the current territory of Italy was divided into ten nations: the Kingdom of Piedmont and Sardinia, the Bisphoric of Trent, the Republic of Venice, the Republic of Genoa, the Duchy of Parma, the Duchy of Modena, the Republic of Lucca, the Grand Duchy of Tuscany, the Papal States, and the Kingdom of Sicily.[7] Moreover, Austria controlled some areas in the northern part of Italy.[8] But this was not a temporary condition: Italy had been deeply fragmented ever since the fall of the Western Roman Empire in 476 CE.[9]

For many years, it was believed that the Napoleonic invasion triggered the first constitutional movement toward the unification of Italy. Before the French Revolution, scholars believed, constitutional principles were simply not present in Italy.[10] But if that were truly the case, it would be impossible to understand the formation of constitutional systems in Italy and the quick diffusion of constitutional principles. As an early scholar noted,

> '(t)he customs and the laws of France imported through the (Napoleonic) war in Italy did not mark, did not define the constitutional dawn of Italy'.[11]

Indeed, had the French Revolution marked the beginning of constitutional thought in Italy, it would also be hard to account for the earliest example of constitutionalization in Italy, which *predated* the French Revolution: the 1787 Draft Constitution of the Grand Duchy of Tuscany. Nonetheless, the traditional position in legal scholarship generally is that Italy was first introduced to the idea of written constitutionalism following the French Revolution. In fact, Grimm's book overlooks Italian constitutionalism precisely for this reason.[12]

But some lone scholars, over sixty years ago, questioned this interpretation. Carlo Ghisalberti, for example, advanced the thesis that,

> '(i)n Italy, even before Montesquieu and Rousseau, (there) were present the seeds of the revolutionary philosophy and the new European public law'.[13]

According to Ghisalberti, Italian legal thought recognized from early on the

[7] H.M. Vernon and K.D. Ewart, *Italy from 1494 to 1790* (Cambridge: Cambridge University Press, 1909), 520.

[8] ibid.

[9] H. Hearder, *Italy in the Age of the Risorgimento: 1790 – 1870* (London & New York: Longman, 1983), 156.

[10] See, eg, A. Ferrari, *La preparazione intellettuale del Risorgimento italiano, 1748-1789* (Milano: Fratelli Treves Editori, 1923).

[11] S. Pivano, *Albori costituzionali d'Italia* (1796) (Torino: Fratelli Bocca, 1913), 131.

[12] D. Grimm, n 4 above, 13.

[13] C. Ghisalberti, *Le costituzioni "giacobine" (1796-1798)* (Milano: Giuffrè, 1957), 31.

contrast between positive law and natural law, and the subordination of the former to the latter.[14] Ghisalberti developed his argument by first focusing on the works of Gian Vincenzo Gravina (1664–1718), who he identified as the father of the Italian legal enlightenment. In his *De Imperio et Iurisdictione*, Gravina spoke of the foundation of sovereignty in rational rather than purely contractual terms; he outlined the idea of the separation of powers, of a sovereign subject to the law formulated by a legislative body and impartially applied by magistrates.[15] Ghisalberti then looked at Domenico Bandini's *Il Governante Politico Cristiano*, published in 1699. There, Bandini laid out the foundations for the 18th century theories of the state,

> 'a juridical and political organization of society in which the progress and the well-being of the citizens are the fulcrum of the legislative, administrative, and jurisdictional activity, in one word, of the life of the State'.[16]

Departing from these assumptions, in the second half of the 1700s, Italian constitutional thinkers took the position that the laws of their time were unjust under natural law. As a result, they argued, a new system of public law was necessary. Isidoro Bianchi refused to

> 'honor with the sacred name of law those constitutions that do not have any relationship with the natural laws and the laws of the enlightened reason'.[17]

Giuseppe Maria Galanti, instead, lamented that 'few have been the governments that have respected the rights of humankind'.[18] In sum, the Italian legal enlightenment saw the law as a powerful tool to reform the status quo: the idea of 'reform legislation' was exalted.

There is at least one other key figure of the Italian legal enlightenment that played an important role in shaping constitutional thought in Italy and abroad: Cesare Beccaria. Beccaria grounded his calls for legal reform not in natural law but rather in rationality. Beccaria wrote his treatise on *Dei Delitti e Delle Pene* as a member of a short-lived group of intellectuals known as the *Accademia dei Pugni* (Academy of Fists).[19] Their discussions had the reputation of becoming so heated that they escalated into fistfights. One of the goals of the *Accademia dei Pugni* was to convince the Austrian rulers of Lombardy to undertake a program of legal reform. With his treatise,

[14] ibid 38.
[15] ibid 30.
[16] ibid 33.
[17] ibid 39.
[18] ibid.
[19] See C. Beccaria, *On Crimes and Punishments and Other Writings* (Cambridge: Cambridge University Press, 1995).

> 'Beccaria sought to establish a legal framework that reflected the general programme of the reformers to replace the existing system of semi-feudal privileges, customs and honours with a new conception of social organisation, based on a regular system of justice involving equal laws for all'.[20]

In his famous *Dei Delitti e Delle Pene*, Beccaria criticized torture and capital punishment on utilitarian and rational terms. Beccaria called for the abolition of torture because it undermines the deterrent effect of punishment: the weak, he thought, would have no incentive not to commit crimes, since they would know that they could not withstand the pain of torture and would confess to *any* crime; the strong, instead, would continue to break the law, reasoning that their strength in tolerating torture would lead to impunity.[21] 'This is a sure route for the acquittal of robust ruffians and the conviction of weak innocents'.[22] In addition, Beccaria believed that capital punishment – 'an act of war on the part of society against the citizen' – could never be deemed useful or necessary to the protection of public interests.[23] '(I)f I can go on to prove that such a death is neither necessary nor useful, I shall have won the cause of humanity'.[24] Through the death penalty, Beccaria thought, the state would lose a potentially useful citizen who could have repaid his debt to society, and incite people to violence through a paradoxical use of state power.

> 'It seems absurd to me that the laws, which are the expression of the public will, and which hate and punish murder, should themselves commit one, and that to deter citizens from murder, they should decree a public murder'.[25]

In other words, the building blocks of constitutionalism existed in Italy long before the ideas of the French Revolution crossed the Alps with Napoleon's armies in the 1790s. And the currency of these ideas reached far beyond the Italian peninsula. Beccaria's writings shaped American history. There is no need to stress Beccaria's influence on the US Constitution: many of America's founders studied Italian, purchased copies of his treatise, and were greatly inspired it. As John Bessler recently wrote,

> 'Beccaria's views shaped the founders' understanding of the Declaration of Independence, the U.S. Constitution's First, Second, and Fifth Amendments,

[20] ibid xv.
[21] ibid 43.
[22] ibid 39.
[23] ibid 66.
[24] ibid.
[25] ibid 70.

and the Eighth Amendment bar against "cruel and unusual punishment" '.[26]

At the Boston Massacre trial in 1770, John Adams forcefully quoted Beccaria's words in defending British soldiers accused of murder.[27] George Washington bought a copy of the treatise in 1769 and, during the Revolutionary War, wrote to Congress lamenting '(t)he frequent condemnations to capital punishments' and noting the need for some intermediate and proportionate forms of punishment.[28] And, more generally, Beccaria's concepts of proportionality and cruelty were embedded in the US Constitution's Eighth Amendment.[29]

It is for these reasons that it is important to recognize the early attempts at constitutionalization across the Italian territory. And it is especially important to note the 1787 Draft Constitution of the Grand Duchy of Tuscany, evidently influenced by Beccaria's thought. But this draft should not be dismissed as a purely intellectual exercise of an enlightened monarch under Beccaria's influence. Nor should it be downplayed and skipped over as a 'solitary phenomenon,' as Grimm does in one sentence of his book on *Constitutionalism*.[30] This document, which predates the US Constitution, was revolutionary on its own terms – even in the absence of a truly revolutionary break.

1. Draft Constitution of the Grand Duchy of Tuscany (1787)

It did not take long for the new Enlightenment ideas about public law to give birth to their first, concrete attempt at constitutionalization in Italy. As early as 1779, the Grand Duchy of Tuscany moved toward the codification of its laws;[31] as part of those efforts, the Grand Duke Leopold II entrusted his vision to his prime minister, Francesco Maria Gianni, and gave him the power to draft a constitution.[32] The Grand Duchy's Draft Constitution was first completed in 1782, just one year after the ratification of the Articles of Confederation (the first constitution of the United States), and its latest iteration dates back to 1787.[33] The Draft Constitution represents perhaps the earliest modern and concrete example of Italian constitutional thought. The Draft Constitution was divided into three parts: a Preamble, a Constitution, and Consecutive Ordinances.[34] But a reader should not be confused by the titles of these sections. The three sections taken together – each focusing on different aspects of the envisioned legal order

[26] See J.D. Bessler, *The Birth of American Law: An Italian Philosopher and the American Revolution* (Durham, NC: Carolina Academic Press, 2014), 20.

[27] ibid 174.

[28] ibid 151.

[29] ibid 20-22.

[30] D. Grimm, n 4 above, 46.

[31] G. Manetti, *La Costituzione inattuata. Pietro Leopoldo Granduca di Toscana: dalla riforma comunicativa al progetto di Costituzione* (Firenze: Centro editoriale toscano, 1991), 77.

[32] ibid.

[33] ibid.

[34] A. Aquarone et al, *Le Costituzioni italiane* (Milano: Edizioni di Comunità, 1958), 632.

– form the body of the Draft Constitution.

The Preamble made clear the truly revolutionary nature of the document. The motivating force behind the Constitution was identified in the realization that

> 'a Government had risen with no fundamental law whatsoever, and entirely arbitrary and unjust, because founded on violence, and not on a consensus of the people, who alone can legitimize its institution'.[35]

The Preamble continued:

> 'A Nation cannot easily subsist, nor be governed justly, without a primordial and fundamental law, solemnly accepted by the nation itself, a law that invests the Sovereign with legitimate authority, and that limits its usage and exercise, a law that determines the Sovereign's and the people's reciprocal duties and respective rights, reserving to the public, that is, to the body of the nation legitimately represented, those faculties which it cannot renounce, not even voluntarily. These faculties are to freely represent, and to propose what is convenient to, the public and to reject everything that might cause detriment to it, freely releasing to the Sovereign the highest executive power'.[36]

Leopold II intended the constitution to be binding 'both for Us and for Our successors'.[37] And his vision was quite extraordinary. The Constitution was meant

> 'to return to all of the subjects of Our Grand Duchy of Tuscany their full national freedom to validly intervene to accept and to celebrate this present act in all of its parts'.[38]

The Constitution explicitly voided any previous document, however official, that limited the citizens' rights. That was done for a simple reason:

> 'we declare that neither Our living subjects nor their predecessors could have ever been stripped, or could have legitimately stripped themselves, of those inalienable rights with which they were invested by nature at birth, (both) in the political society and in the Nation that was their homeland'.[39]

The Draft Constitution would have created a seemingly independent legislative body. The Grand Duchy would have been divided into a number of municipalities and provinces,[40] and there would be three levels of representative elected bodies –

[35] ibid (translated by Matteo Godi).
[36] ibid 633 (translated by Matteo Godi).
[37] ibid.
[38] ibid 635 (translated by Matteo Godi).
[39] ibid.
[40] ibid.

at the municipal level, at the provincial level, and at the state level.[41] Members elected in the provinces through a popular vote would form the representative body of the State,[42] which limited the powers of the Grand Duke. Without

> 'the vote of the body representing the universality of the State', 'no ordinance (…) could come into being, and if it had it would be null and invalid, even if published with the orders, rescripts, and edicts of the Sovereign'.[43]

To be sure, the executive power remained in the hands of Leopold II and his heirs – with some checks from the legislature. Indeed, 'the sovereignty' continued to be represented 'by the person of the Grand Duke'.[44] Leopold II believed that the monarch should have the power to decide alone on matters of the fundamental laws of the state, including succession, territorial integrity, peace and war treaties, legislation, and finances.[45] Yet, Leopold II stripped himself of some fundamental powers, such as the power to declare war: 'war with any other nation will be neither declared or commenced'.[46] Moreover, the Constitution created some degree of checks and balances. According to the Constitution,

> 'the voice of the public and the will of the Sovereign will agree upon the most useful resolutions to form a healthy and just Government without allowing the one to be validly contradicted by the other, but both will be contained in the limits that are prescribed in the following Constitution'.[47]

It is not clear, then, whether the legislative power was completely protected from the influence of Leopold II, nor whether Leopold II would remain an absolute monarch.

When it came to the judiciary, however, the separation of powers was undeniable – and the Grand Duke's visionary ideas were truly remarkable. 'In the civil judgments the sovereign authority will not be allowed to intervene in any way'.[48] Similarly,

> 'in criminal proceedings and in the judgment of crimes and in the conviction of the guilty, the aforementioned authority will not intervene in any way'.[49]

There was one important caveat, though. The criminal justice system was

[41] ibid.
[42] ibid.
[43] ibid 636 (translated by Matteo Godi).
[44] ibid.
[45] G. Manetti, n 31 above, 78.
[46] ibid 368 (translated by Matteo Godi).
[47] ibid.
[48] ibid.
[49] ibid.

required to 'observe, with sane and constant intelligence, the laws and especially the reform, in all of its parts, and the criminal law promulgated in Pisa on 30 November 1786' by the Leopold II.[50] Although, at first, a constitutional reference to a piece of legislation that the monarch himself unilaterally promulgated might appear troubling, that cross-reference actually made the constitutional text even more extraordinary.

The criminal reform of 1786 is worth a brief detour. The Penal Code of 1786 is a remarkable and visionary text for its time. The Penal Code was the result of reforms that lead to the professionalization of the judicial careers and increased equality of citizens in front of the law. The Code was inspired by rule of law ideals and the publicity of trials, as well as themes of proportionality and humanity. Most notably, the Code endorsed Beccaria's critique of the death penalty in his *Dei Delitti e Delle Pene*:

> 'We have seen with horror the easiness with which in the previous Legislation the Death penalty was decreed even for Crimes that were not serious. We have considered that the objectives of the Criminal Penalty must be the satisfaction of the private and public damage done by the criminal, the correction of the Guilty, who is also a son of Society and of the State, … the guarantee that (persons) Guilty of the most serious and atrocious Crimes will not remain free to commit other crimes, and lastly the necessity of making a Public example – in the name of which the Government, in punishing the Crimes and in serving the objectives to which punishment is direct, always has to resort to the most efficient means with the least damage to the Guilty. We have considered that such efficacy and moderation are obtained together not through the Death Penalty but rather through the Penalty to Public Work, which serves as a continued example, and not an example of an instantaneous terror that often degenerates in compassion, and which takes away the ability to commit new Crimes and not the possible hope to see an eventual return to Society of a useful and corrected Citizen. We have otherwise considered that a truly different Legislation would be most convenient to increase the sweetness and docility of the customs of the present century, and especially of the Tuscan people. We have thus come to the determination to forever abolish, as we have abolished with the present Law, the Death Penalty against all Guilty – those presently convicted, those who are fugitives, and those who have not yet confessed – and for all of those convicted of whatever Crime declared Capital by the Laws promulgated up to this day, which are in that respect void and abolished'.[51]

The 1786 Penal Code thus represents the first codified abolition of the death

[50] ibid.

[51] G. Ricuperati, *1786. La riforma criminale di Pietro Leopoldo* (Roma-Bari: Laterza, 2013), 4 (translated by Matteo Godi).

penalty in the Western world, three years *before* the signing of the US Constitution.

The meaning of the section titled Constitution is perplexing. According to Franz Pesendorfer,

> '(i)t seems as though, at the end of a long period of peace and intense reforming activity, Leopold believed that everything ought to continue forever in the same fashion'.[52]

In fact, the Draft Constitution is filled with statements hinting just as much. For instance: 'The present state of neutrality generally present in the Grand Duchy of Tuscany will not be altered in any way'.[53] Under this light, the Constitution would not be a revolutionary document but rather one that eternally crystallizes the *status quo*. Giorgio la Rosa compared the Draft Constitution to the famous testament of Louis XIV, who wished to constraint his successors from radically changing the established order.[54] But it is not clear who would be protecting the immutability of the Grand Duchy's constitutional order. It is true that

> '(a)ll of the successors to the Throne of Tuscany will have to entirely ratify the present act in the presence of the body representing the State, and pledge through an oath observance of the present Constitution'.[55]

But how this could be squared with the hereditary and divine nature of the throne – and the apparent ability of any successor to refuse to abide by the Constitution – is not clear.[56]

At the end of the drafting process, Prime Minister Gianni wrote to Leopold II, expressing his belief that

> 'the mediations and the considerations necessary to the publication of the Constitution in this country are not over yet – a country that is not yet disposed toward receiving it well and usefully, but that is rather full of acts, customs, and opinions incompatible with such a new and big step, which might even become pernicious in the absence of the proper preparations to execute it'.[57]

In 1790, however, Gianni moved past his original reservations. After Leopold II relocated to Austria to be crowned Holy Roman Emperor, Gianni exhorted him to publish the Draft Constitution as a way of settling the revolts that followed the

[52] F. Pesendorfer, 'Ferdinando III (1791-1824): Una battaglia per la Toscana', in C. Rotondi ed, *I Lorena in Toscana: Atti del Convegno Internazionale di Studi* (Firenze: Olschki, 1989), 72.

[53] A. Aquarone et al, n 34 above, 635.

[54] G. La Rosa, *Il sigillo delle riforme: La "Costituzione" di Pietro Leopoldo di Toscana* (Milano: Vita e pensiero, 1997), 78.

[55] A. Aquarone et al, n 34 above, 635.

[56] G. La Rosa, n 54 above, 80.

[57] G. Manetti, n 31 above, 91.

departure of the monarch and ensuring the preservation of Leopold II's numerous reforms over the previous decades.[58] But Leopold II decided that Tuscany was not ready to accept the Constitution – partly because of the opposition of the governing administrative body, the *Cosiglio di Reggenza* – and so he decided against its promulgation before abdicating in favor of his son, Ferdinando, in 1791.[59]

In conclusion, the first serious attempt to write and put into effect a constitution in the Italian territory came to an unfortunate end. This is not surprising. Constitutionalism went through many fits and starts in the United States – first in American colonies prior to independence, and then in the American states from 1776 to 1791 – and was not finally accomplished until 1870, after the end of the American Civil War. At the same time, the Grand Duchy of Tuscany's constitutional reforms meant that the idea of a constitutional government in Italy was now at least conceivable, in a way that it had not been before.

2. The Jacobin Constitutions (1796–1798)

Once the French Revolution began, just a few years after Leopold II's Draft Constitution, Italy was an especially fertile ground for the Revolution's democratic ideals. Italian legal thought, which had been tinkering with the possibility of constitutionalism for decades, saw a drastic shift towards an open criticism of contemporary legislators. In particular, Italy embarked in an intellectual revolution of its own, with an eye on the prize: a constitution. In 1790, at a time when France was still a monarchy, Pietro Verri explicitly asked for a constitution during an assembly in Lombardy with local delegates and the Holy Roman Emperor Leopold II.[60] The following year Nicola Spedalieri, a catholic priest, published a book on *Human Rights*, stressing the importance of popular sovereignty and the role of the Church as a safeguard to the social contract – something that was not well received by the monarchists.[61] But Verri's and Spedalieri's hopes died young, and the only solution left for Italy was to follow France's revolutionary path.

The influence of the French Revolution put the newborn ideas of popular constitutionalism into motion. The three French constitutions of 1791, 1793, and 1795 reached Italy even before the Napoleonic invasions: the French Directory translated them into Italian and clandestinely brought them across the Alps.[62] Eventually, in 1796, Napoleon invaded northern Italy; with the occupation of Emilia Romagna, the first experiments with modern constitutionalism emerged.

[58] ibid.

[59] ibid 92.

[60] C. Morandi, *Idee e formazioni politiche in Lombardia dal 1748 al 1814* (Torino: Fratelli Bocca, 1927), 172.

[61] C. Ghisalberti, n 13 above, 76.

[62] G. La Rosa, n 54 above, 90.

The movements framed their efforts as a centuries-long fight against the power of the Church and the Papal State.[63] In July of 1796, the Republic of Bologna established a constituent assembly, which over the following months produced a constitution. Though democratic in nature and largely modeled after the 1795 French Constitution, the 1796 Constitution of Bologna was municipal in aspirations.[64]

When the Austrians were defeated and Lombardy conquered, Napoleon formally transferred sovereignty in this part of Italy back to the people and established the Cisalpine Republic. During those years, France often claimed to return sovereignty to the people. Yet in every city or region that he conquered, Napoleon's first moves were always authoritarian: he would establish a temporary order, directly subordinated to the French military, and all acts under the temporary governments bore the name of the French Republic. For example, in the case of the Cisalpine Republic, the temporary government lasted only about six months, but the 'people' were not truly free to mold the new constitutional order. Napoleon and the French Directory had a strong hand in the drafting process of the 1796 Cisalpine Constitution. The 1796 Constitution of the Cisalpine Republic, while in small parts modeled after the Constitution of Bologna, was an entirely new document – the product of a new constituent assembly, strongly inspired by the 1795 French Constitution.[65] The French Directory imposed on the representatives of the Cisalpine Republic a treaty that would have de facto subordinated the newly created government to the French Republic. As the Cisalpine Republic abolished the Napoleonic laws and opposed the treaty, the French rule turned authoritarian. The dissident representatives were removed from the legislative body, the opposition was arrested and prosecuted until the representatives approved the treaty.

Two years later, the Constitution of the Cisalpine Republic was amended, and the 1798 Constitution was forced onto the Cisalpine Republic by France.[66] In light of the protests that ensued after the proposed treaty, it appeared clear to the French Directory that a more authoritarian constitution than the 1797 document was needed. French emissaries met in Milan with representatives of the Cisalpine Republic. Although the French led the conversation on the required constitutional amendments, some of the Cisalpine representatives strongly opposed the proposal.[67] And there was no agreement on the French front either: the leader of the constituent assembly was replaced three times. Eventually, the 1798 Constitution was approved without a popular vote and with key changes over the 1797 document.

To be sure, the Second Constitution of the Cisalpine Republic was, in many

[63] ibid 106.
[64] A. Aquarone et al, n 34 above, 8.
[65] ibid 110.
[66] ibid 83-86.
[67] ibid.

respect, very ordinary. It invoked the sentiments that animated the French Revolution: 'Sovereignty essentially resides in the universality of the citizens'.[68]

> 'All of the duties of man and of the citizen derive from these two principles sculpted by nature in all hearts: "Do not do to others what you would not want to be done to yourself. Do for others the good that you would wish to receive" '.[69]

The first four articles included a list of four fundamental rights: liberty, equality, security, and property. 'Liberty consists in being able to do whatever does not harm the rights of others'.[70] 'Equality consists in the law being the same for all, both when it protects and when it punishes'.[71] 'Security results in the collaboration of all in assurance of the rights of each person'.[72] And 'Property is the right to enjoy and to dispose of one's goods, income, product of his labor, and industriousness'.[73] The Constitution also enshrined additional fundamental rights, such as the right not to be forced to do something the law does not require, and the right to be free from unlawful prosecution.[74] Moreover, the document embraced fundamental concepts of criminal procedure – proportionality between the penalty and the crime, no *ex post facto* laws, and so on.[75]

But the Second Constitution was also revolutionary for its time. For instance, the very first paragraph of the Constitution, which 'is from this moment onwards the only fundamental law of the republic,' guaranteed 'to all citizens, with no distinction based on gender, primary education (and) a paid job with a minimum wage sufficient to survive'.[76] Moreover, in the criminal justice context, '(a)ny bodily constraint not necessary to ensure the appearance of the accused must be severely prohibited by law'.[77] And, importantly, the Constitution also recognized the central role of a system of checks and balances:

> 'The social guarantee cannot exist if the separation of powers is not established, if their limits are not fixed, if the accountability of the public functionaries is not assured'.[78]

At the same time, the 1798 Constitution was authoritarian. In particular, compared to the 1797 document, the freedom of press was diminished. Compare

[68] ibid 110 (translated by Matteo Godi).
[69] ibid.
[70] ibid 111 (translated by Matteo Godi).
[71] ibid.
[72] ibid.
[73] ibid.
[74] ibid 113 (translated by Matteo Godi).
[75] ibid.
[76] ibid.
[77] ibid 115 (translated by Matteo Godi).
[78] ibid.

the following provisions:

> 'No one may be denied the right to say, write, and print his thoughts. The writings cannot be subject to any censorship before their publication. No one may be held accountable for what he has written or published if not under the specific instances provided by the law'. (Art 354 of the 1797 Constitution)

> 'No one may be denied the right to say, write, and print his thoughts. The writings cannot be subject to any censorship before their publication, *but everyone will be held accountable for what he has published. As long as the law has not determined the specific instances of such accountability, the Directory is charged witb proceeding against slanderous and seditious writings'*. (Art 348 of the 1798 Constitution)

This second, more authoritarian constitution remained in effect only a few months. With the return of the Austrian rule in April of 1799, the 1798 Constitution of the Cisalpine Republic lost all powers. Its founding principles would resurface a year later, when Napoleon returned to Milan after his defeat of the Austrians in the Battle of Marengo.

2. The Constitution of the Italian Republic (1802)

With an eye towards true independence, Italian patriots had already set out to amend the Cisalpine Constitution notwithstanding the brief Austrian comeback. With Napoleon's victory in Marengo, 'it was necessary to swiftly begin a reconstruction' and to 'raise a flag that would rally the uncertain, the lost, the believers: any hesitation would be fatal'.[79] Two competing visions emerged. Francesco Melzi d'Eril, an Italian politician, wanted a monarchical constitution because the Italian people were at the time intrinsically suspicious of the revolution, which had been externally imposed.[80] Instead, Charles Maurice de Talleyrand–Périgord, a French diplomat, argued for a weak central state – a federation led by Napoleon's brother.[81] These two visions resulted in two separate constitutional projects, which were presented to Italian representatives in Paris in 1801. After a few amendments, a committee of 454 deputies was invited to Lyon to discuss the new constitution.[82] The delegation's two chief goals were freedom and stability.[83] Napoleon was elected President of the Republic, now officially referred to as *Italian* and not *Cisalpine*. The text of the Constitution

[79] U. Da Como, *I Comizi nazionali di Lione per la costituzione della repubblica italiana* (Bologna: Zanichelli, 1938), 3.
[80] ibid.
[81] ibid.
[82] A. Aquarone et al, n 34 above, 308.
[83] ibid.

that was later on approved, however, was much different from the one discussed by the committee. Napoleon, Talleyrand, and Melzi amended the text of the 1802 Constitution of the Italian Republic so as to concentrate all powers in the person of the President. Some of the Italian representatives futilely protested.[84]

At the end of the day, what is remarkable about this Constitution is that, though strongly influenced by France, it represents a partially conscientious and voluntary decision of *national* servitude, in the hopes of creating – as indeed was the case – a stronger movement that would lead to true independence. Napoleon treated Italy as a laboratory for his hopes to establish a French Empire in Europe. But he soon realized the need to give something to the Italian patriots, hence the change in name from Cisalpine to Italian Republic. Nonetheless, Napoleon was not willing to make any other concessions: he all too well realized the dangers of letting Italy rule itself as a truly independent nation from France. So this was a bittersweet compromise for the Italian patriots, who were pushing for true independence. In earlier years, Melzi had written that 'liberty could not sustain itself if it were not born from the people' and 'liberty planted through a foreign hand is and will be tough and of uncertain duration'.[85] And yet, Melzi cooperated with Napoleon and opposed secret societies created to resist the French hegemony.[86]

The 1802 Constitution of the Italian Republic was significantly shorter than its predecessor, the Cisalpine Constitution. In many ways, it was modeled after it. For instance, the 1802 Constitution took the familiar position that 'Sovereignty resides in the universality of the citizens'.[87] But if it did not fail to introduce novel ideas – from the very first article, which established Catholicism as the religion of the state.[88] Yet, at the same time, the Constitution declared that '(a)ny inhabitant of the territory of the republic is free to practice his own religion'.[89] This was the result of Napoleon's realization that, without the support of local parishes, he would not be able to remain in power.[90]

Moreover, the Constitution was novel in its creation, under Title III, of the electoral councils.[91] The Republic was founded on a system of three electoral councils: the council of the *landowners*, the council of the *wise*, and the council of the *merchants*.

> 'Upon the invitation of the governments, the councils meet at least once every two years to fill their ranks, and nominate the members of the council of state, of the legislative body, of the tribunals of revision and of

[84] U. Da Como, n 79 above, 244.
[85] ibid 248.
[86] ibid.
[87] A. Aquarone et al, n 34 above, 312 (translated by Matteo Godi).
[88] ibid.
[89] ibid 315 (translated by Matteo Godi).
[90] U. da Como, n 79 above, 233.
[91] A. Aquarone et al, n 34 above, 317 (translated by Matteo Godi).

> cassation, and the commissaries of finance. Their sessions will not last longer than fifteen days'.[92]

The council of landowners was composed by three hundred citizens chosen among the landowners of the republic who met a certain income threshold.[93] The council of the wise was composed by two hundred citizens chosen among the most well-known men

> 'in any kind of science, liberal or mechanical arts, and also among the most distinct in the ecclesiastical subjects, or for moral, legal, political, and administrative knowledge'.[94]

The council of merchants was composed of two hundred citizens chosen 'from among the most accredited traders and those makers most distinct for the importance of their commerce'.[95] Each electoral council resided in a different city: Milan, Bologna, and Brescia.[96] The councils' main purpose was to elect the members of the Censura. The Censura, which sat in Cremona, was a commission of 21 members entrusted with electing from the members of the three councils those who will cover the constitutional roles: a president,[97] a vice president,[98] the council of state,[99] the ministers,[100] and a legislative council.[101]

Whether the Constitution of the Italian Republic was actually a meaningful reform or a mere imposition of France is debated. Scholars have contrasting views. Antonio Zanolini wrote:

> 'But the Constitution, which was supposed to be the product of the

[92] ibid.
[93] ibid.
[94] ibid 320 (translated by Matteo Godi).
[95] ibid.
[96] ibid.
[97] The president holds a term of ten years and he can be indefinitely reelected. He is in charge of all diplomatic negotiations and is the sole holder of the executive power, which he exercises through the ministers. The president nominates the ministers, the civil and diplomatic agents, the heads and generals of the army.
[98] The vice-president will take the president's seat in the legislative council in the president's absence, and who represents the president in all manners which the president may delegate. Nominated only once, the vice president may not be removed during the term of the president who elected him.
[99] The council of state is composed of eight citizens above forty years of age, elected for life by the councils and distinct for their recognized services to the republic. The council of state is especially entrusted with the examination of all diplomatic treaties and everything that has to do with the foreign relations of the state.
[100] The Constitution recognized at least three ministers: the minister of justice (also chief judge); the minister of foreign relations; and the minister of the treasury.
[101] The legislative council is composed of at least ten citizens above thirty years of age, elected by the president and revocable by him after three years. The councilmen give their deliberative vote on the legislative projects proposed by the president, which are not approved if not by an absolute majority of the votes.

> Italian representatives – for that reason, in fact, they had undertook such a burdensome trip in the middle of the winter – was actually delivered, already finalized, by the First Consul (Napoleon). He, however, summoned the presidents of the committees, reexamined the document with them and made some additional changes. Once presented to the Consulta, it faced little oppositions and a short discussion'.[102]

Ugo da Como, instead, argued:

> 'What was created (by the Constitution) nonetheless represents progress; even during the brief lives of the new constitutions some conclusions may be drawn. Through the Constitution of the Italian Republic, we witnessed the formation of the beautiful Italian Kingdom: the appearance of Napoleon's Italy shows a movement towards the rise of the Italian ideal'.[103]

At the very least, though, the Constitution of the Italian Republic had positive externalities on the growth of Italy. There was an increase in public projects, including the creation of the Postal System.[104] The public debt decreased and, starting in 1802, its liquidation was underway.[105] And a national pension fund was also established.[106]

The Italian Republic as set out in 1802 Constitution was short-lived. As he did in France, Napoleon soon moved to create a system which only gave the people the impression that the freedoms they obtained through the revolution continued to be protected. By 1804, Napoleon set in motion the transformation of the republic into a monarchy. The republican government began the discussion of a new constitution, but the project never saw the light of day.[107] Napoleon wanted a monarchy governed by the French Constitution. In March 1805, a statute recognized that

> 'the time has come … to declare the government of the Italian Republic to be an hereditary, monarchical one, following the same principles that constitute the French Empire. … Napoleon I, founder of the Republic, shall be declared first King of Italy'.[108]

Its preamble also announced that the new constitution would recognize a number of civil and political freedoms. Eight statutes followed, outlining the competencies of the courts, the position of Viceroy, the succession to the throne,

[102] A. Zanolini, *Antonio Aldini ed i suoi tempi: Narrazione storica con documenti inediti o poco* (Firenze: Le Monnier, 1869), 198.
[103] U. da Como, n 79 above, 253.
[104] ibid.
[105] ibid.
[106] ibid 267.
[107] ibid.
[108] A. Aquarone et al, n 34 above, 324.

and so on. The Constitution of the Italian Republic was never abolished, but it was effectively turned into a monarchic constitution with some aristocratic touches. The direct governance of Italy was entrusted by Napoleon to his 24-year-old stepson, Eugène de Beauharnais, who served as Viceroy. By the end of the year, Napoleon had also defeated the Bourbons and seated his older brother, Joseph Bonaparte, on the throne of the Kingdom of Naples. When Joseph moved from southern Italy to Spain in 1808, Joachim Murat succeeded him. In 1808, Napoleon also annexed Marche and Tuscany to the Kingdom of Italy. In 1809, Bonaparte occupied Rome, exiling the Pope to France and moving the Papal States' art collections to the Louvre.

But even the life of the Kingdom of Italy turned out to be rather short. The story of the fall of Napoleon is a rather familiar one. Napoleon's fortunes changed dramatically in 1812 after his failed invasion of Russia. The European powers, including Austria, resumed hostilities towards France in the War of the Sixth Coalition. After the Battle of Leipzig, the Italian Napoleonic states (spearheaded by Murat) abandoned Napoleon to ally with Austria. On 11 April 1814, Napoleon abdicated the thrones of France and Italy and was exiled to Elba. With the German and Austrian invasions looming and riots in many Italian cities, Eugène de Beauharnais's hopes to be crowned King by the Senate vanished and he surrendered.

With the defeat of Napoleon, the Treaty of Paris and the ensuing Congress of Vienna restored the geopolitical situation that had been present in 1795, dividing Italy between Austria (in the north-east and Lombardy), the Kingdom of Sardinia, the Kingdom of the Two Sicilies (in the south and in Sicily), Tuscany, the Papal States, and other minor states. Napoleon's escape from Elba and his failed Hundred Days led to the fall of the Italian kingdoms and the beginning of Italy's Restoration period, with many pre-Napoleonic sovereigns returning to their thrones. Piedmont, Genoa, and Sardinia were united under the rule of the Savoy; Lombardy, Veneto, Istria, and Dalmatia were reannexed to Austria. The Pope came back to Rome, and the Kingdom of Naples returned to the Bourbons.

Because the Napoleonic years had brought to life Italian nationalism, the Restoration was followed by popular uprisings. Secret societies proliferated all over Italy to counteract the post-Napoleonic restoration years.[109] In the South, these societies focused their energies in the 1848 unrest, and on obtaining a constitution from the Bourbon king.[110] In the North, instead, they focused on a quite distinct interest: a unified nation. Giuseppe Mazzini's Young Italy resembled a modern political party, and had an entire recruitment program in place. Mazzini's movement was very successful in recruiting members in the Northern regions, but less so in central and southern Italy: some revolts were occurring, but energies were pulled in different directions and towards different visions.

[109] E. Holt, *The Making of Italy 1815-1870* (New York: Atheneum, 1971), 44.
[110] ibid 49.

III. The First Constitution: The Albertine Statute of 1848

The Revolutions of 1848 swept through Italy like a storm and stirred long nascent desires both to unify Italy and to give it a constitution. The storm was felt throughout the country and marked the apex of 60 years of Italian constitutional thought as well as a fond remembrance of Napoleon's centralized and efficient government.[111] The Revolutions of 1848 began the work of creating the Italian constitutional state, but Italian liberals could not agree on the forms that the unified government would take. Followers of Giuseppe Mazzini envisioned a unitary republic, while others argued for a federal system headed by the Pope.[112] As various liberal movements and revolts developed all over Italy – from Sicily to Lombardy by way of the Papal States – the Kingdom of Sardinia and Piedmont was forced to make some concessions too. This was significant because the Kingdom of Sardinia and Piedmont was the largest, best educated, and wealthiest regime within the territory that would become the nation of Italy.

In order to avoid a democratic revolt that could have led to the creation of a constituent assembly, King Carlo Alberto of Savoy, the King of Sardinia and Piedmont, followed the examples of the Kingdom of Two Sicilies and of the Grand Duchy of Tuscany. On 4 March 1848, he promulgated the Albertine Statute.[113] This document is in relation to the modern Italian Constitution akin to what the Articles of Confederation are for the US Constitution. The Albertine Statute was presented to the people of Sardinia and Piedmont as a constitution that established a representative system of government. Over its first decade, the Albertine Statute only applied to the Kingdom of Sardinia and Piedmont. But the Statute would soon go on to become the longest serving constitution of Italy, replaced in 1948 by the Republican Constitution.

In 1848, King Carlo Alberto decided to exploit the moment of general confusion across Europe: in alliance with the Papal States and the Kingdom of Sicily, he declared war against Austria and unsuccessfully invaded Austria's Italian possessions. When he failed to overcome the Austrian dominion, King Carlo Alberto abdicated in favor of his son, Vittorio Emanuele II. In a little over a decade, Vittorio Emanuele II succeeded where his father had failed. Between 1859, when Lombardy was annexed to the Kingdom of Piedmont, and 1860, when the territories of central Italy joined Piedmont by plebiscite, Italy was unified under the rule of Vittorio Emanuele II. Giuseppe Garibaldi led the Kingdom of the two Sicilies and all of southern Italy to join Piedmont in 1860. With the Law no 4761 of 17 March 1861, the Kingdom of Italy was proclaimed.[114] A war in 1866 led to the acquisition of Venice and the Veneto, and in 1870 Rome and the Papal State

[111] P. Casana, *Le Costituzioni Italiane del 1848-49* (Torino: G. Giappichelli, 2001), 6.

[112] V. Onida et al, *Constitutional Law in Italy* (Alphen aan den Rijn: Kluwer Law International, 2013), 23.

[113] P. Casana, n 111 above, 18-19.

[114] A. Cerri, n 6 above, 30.

were also annexed. Italy, as we know it today, was for the most part (with the exception of the northeastern regions, which would join only after World War I) unified under the Albertine Statute – a law that had originally been written by King Carlo Alberto to establish a representative system of government only for Sardinia and Piedmont.

The juridical meaning of the unification of Italy is debated in the literature. The acquisition of the entire peninsula by the Kingdom of Sardinia and Piedmont, and the application of Piedmont's laws to the whole of the new nation,

> 'explains how a State born from the unification of many different territories and States, each with its own traditions and institutions, managed to become a centralized unitary State with total uniformity as to legislations and administration'.[115]

Some scholars, like Dionisio Anzilotti, argued that the unification of Italy was a 'fusion' bringing to life a 'new' state.[116] Others, such as Augusto Barbera, believe that the unification of Italy did not mark the creation of a new legal order but rather the expansion of the juridical order of the Kingdom of Piedmont and Sardinia to the remaining Italian territories.[117] Vittorio Emanuele II retained his official name, without becoming the 'first' King of Italy; the customary numbering of the Parliamentary session continued into the Kingdom of Italy with no interruption; and the Albertine Statute was imposed onto the new national territory with no amendments.[118]

The Albertine Statute's eighty-four articles were inspired by the 1830 French Constitution and the 1831 Belgian Constitution.[119]

> 'The (unification of the Italian) State was ... perceived, at least by the cultural and political élites, as the historical realization of their aspirations for the freedom and unity of the country'.[120]

The text of the Albertine Statute is undeniably that of a monarchical constitution and not that of a democratic republic. 'The state is governed by a representative monarchical government. The throne is hereditary according to the Salic law'.[121] The King retained the executive power, and he shared in the legislative power as well. 'The King alone has the power to sanction and promulgate laws', but '(t)he

[115] V. Onida et al, n 112 above, 25.

[116] D. Anzilotti, 'La Formazione del Regno d'Italia nei riguardi del Diritto Internazionale' 6 *Rivista di diritto internazionale*, I, 1-33 (1912).

[117] A. Barbera, *Corso di diritto pubblico* (Bologna: il Mulino, 2014), 456-457.

[118] A. Cerri, n 6 above, 30.

[119] V. Barsotti et al, *Italian Constitutional Justice in Global Context* (Oxford: Oxford University Press, 2016), 4.

[120] V. Onida et al, n 112 above, 25.

[121] P. Casana, *Le Costituzioni italiane del 1848-49* (Torino: Giappichelli, 2001), 126 (translated by Matteo Godi).

King and the two Chambers have the right to propose legislation'.[122] Career magistrates exercised the judicial power, but they were not completely independent from the executive and had no powers to annul administrative acts.[123] In addition, the King chose the members of the upper house of the legislature, while the people chose the members of the lower house.[124]

The Statute was, for most intents and purposes, a constitution. It had 'the force of Constitution and Fundamental Law, perpetual and irrevocable by the Monarchy'.[125] It set out three branches of government, but without much separation of powers. 'The legislative power shall be exercised collectively by the King and two Chambers, the Senate and the Chamber of Deputies' – all nominated by the King.[126] 'The executive power is reserved to the King alone. He is the supreme head of the state'.[127] And 'Justice emanates from the King and is administered in his name by such judges as he shall appoint'.[128] Most importantly, with promulgation, '(a)ll laws contrary to the present Statute are abrogated'.[129]

The Statute had quite a few remarkable provisions. For instance, it included a progressive taxation clause. 'All shall contribute without distinction to the burdens of the state, in proportion to their assets'.[130] It recognized the inviolability of the home, 'except in cases and in the manner prescribed by law'.[131] It recognized, to a degree, the freedom of the press – which 'shall be free, but the law may suppress abuses of this freedom'.[132] It included an equal protection clause: 'All subjects of the Kingdom are equal before the law, regardless of their rank or title. All shall equally enjoy civil and political rights and shall be eligible to civil and military offices'.[133] The Statute also recognized parliamentary immunity:

> 'Unless caught while committing a crime, no Senator can be arrested except by an order of the Senate. The Senate alone is competent to judge crimes of which its members are accused'.[134]

And the Chamber of Deputies had 'the right to impeach the King's Ministers and bring them to trial before the High Court of Justice'.[135] Interestingly, there was also some degree of political accountability: 'Senators and Deputies shall not be

[122] ibid 127 (translated by Matteo Godi).
[123] V. Onida et al, n 112 above, 25-26.
[124] P. Casana, n 111 above, 129 (translated by Matteo Godi).
[125] ibid.
[126] ibid 130 (translated by Matteo Godi).
[127] ibid.
[128] ibid.
[129] ibid 131 (translated by Matteo Godi).
[130] ibid 133 (translated by Matteo Godi).
[131] ibid.
[132] ibid.
[133] ibid 134 (translated by Matteo Godi).
[134] ibid.
[135] ibid 135 (translated by Matteo Godi).

held accountable for opinions expressed and votes given in the Chambers,' yet 'Ministers are accountable'.[136]

It is important to note the very undemocratic nature of the Albertine Statute. At first, the right to vote was recognized only for male citizens who were at least 25 years old and who met certain income and tax requirements. In 1848, only 1.57 percent of the population were registered voters.[137] In 1882, the right to vote was extended to all male citizens above twenty-one years of age, who knew how to read and write; 6 percent of the population met this requirement.[138] In 1912, the inclusion of all illiterates who had turned thirty and fulfilled their military duties extended the right to vote to 25 percent of the population. Women were not allowed to vote until 1946.[139]

Soon after its promulgation, due to the influence of Prime Minister Cavour,[140] the Albertine Statute began to operate following the model of a parliamentary government: though the King still appointed the representatives, the practice of asking for the Parliament's continued support of the government became the norm.[141] If a majority was lost, or if the King disagreed with the parliamentary majority, the Chamber of Deputies could be dissolved.[142]

Though the Albertine Statute was presented as an 'order with the force of Constitution and Fundamental Law, perpetual and irrevocable by the Monarchy' and 'All laws contrary to the present Statute are abrogated', there was no means of reviewing the constitutionality of an act of Parliament.[143] Originally, it has been argued, the Albertine Statute was meant to be – just as any other constitution granted by a monarch in the wake of liberal protests – a rigid constitution.[144] Only a formal process of amendment could have derogated from the Statute's provision, though no amendment process was outlined in the Statute itself.

But the traditional wisdom is that the Albertine Statute was a flexible constitution. As Vittoria Barsotti et al discussed,

> 'lacking an amendment clause, assuming that the Statute could not be thought of as forever unchanging, and recognizing that the King had "irrevocably" ceded his own lawmaking power, the only body capable of modifying it would be the holder of the legislative power'.[145]

[136] ibid.
[137] ibid.
[138] ibid.
[139] G. de Vergottini, *Diritto Costituzionale* (Padova: CEDAM, 2012), 117-118.
[140] ibid.
[141] ibid 117.
[142] V. Onida et al, n 112 above, 25-26.
[143] P. Casana, n 111 above, 127-29 (translated by Matteo Godi).
[144] See, eg, A. Pace, 'La "naturale" rigidità delle costituzioni scritte' *Giurisprudenza costituzionale*, 4085-4134, 4085 (1993).
[145] V. Barsotti et al, n 119 above, 6.

That is to say, any law passed by Parliament and signed by the King became the supreme law of the land. Indeed, just a few days after the promulgation of the Statute, Prime Minister Cavour defined as absurd the idea that the Statute could not be modified through the consent of both the King and the legislature.[146] Barsotti et al identify in the idea of parliamentary omnipotence and the lack of an independent judiciary the two main forces that for all purposes turned the Albertine Statute into a flexible constitution.[147]

Indeed, there was no judicial review mechanism in place under the Albertine Statute. In its opinion dated 15 June 1880, the Court of Cassation held that 'the fundamental laws of the state do not give to the judicial authority the power to assess the constitutionality of the laws, but only to ensure that everyone abides by them and to justly apply them to concrete cases'.[148] Behind the Albertine Statute lay the fear not of the future but of the past: it was an 'irrevocable barrier against the past rather than a juridical regulation of the future acts of the public organs'.[149] Two decisions by the Court of Cassation in the 1880s are indicative of the meaning of judicial review under the Albertine Statute. In a nutshell, although there was no power to investigate the substantive constitutionality of a law, the courts could invalidate legislation that was passed through a flawed procedure, and the judges had the power to review the constitutionality and legality of administrative regulations.

On 11 March 1885, the Court of Cassation decided the scope of judicial review of regulations.[150] In January of 1883, Carmela Vicedomini rented a property in Naples for 490 Liras. Vicedomini refused to pay a tax that was being imposed on her rental property because her rent was below the minimum taxable amount (500 Liras). Vicedomini failed to timely file a complaint over the tax with the competent administrative agency. The lower court ruled against Vicedomini. The Court of Appeals denied jurisdiction because the dispute does

> 'concern a tax exemption but the necessary means to answer that question is by assessing whether the rental income is actually below five hundred Liras; and this second question, prejudicial to the first, dictates whether this court has competency; and answering that question is a purely administrative matter'.[151]

Although the Court of Cassation affirmed the ruling of the Court of Appeals, it held that courts possess

[146] R. Bin and G. Pitruzzella, n 167 above, 125.

[147] V. Barsotti et al, n 119 above, 7-8.

[148] 19 *Annali della Giurisprudenza Italiana: Raccolta Generale delle Decisioni delle Corti di Cassazione e di Appello* (1885), 37-39 (translated by Matteo Godi).

[149] F. Racioppi and I. Brunelli, *Commento allo Statuto del Regno* (Torino: Unione tipografico-editrice, 1909), 194.

[150] Annali, n 148 above, 37.

[151] ibid 38 (translated by Matteo Godi).

> 'the authority to ascertain the constitutionality of a regulation, . . . that is, whether the regulation corresponds to the law to which it refers or if the agency that has promulgated it has introduced new dispositions without being empowered to do so'.[152]

The Court provided two rationales for this holding:

> 'because the law is evident only through its forms and otherwise there is no way to dispute what a law is, and because the law cannot invade the executive power but the executive power can invade the legal sphere'.[153]

On 28 June 1886, the Court of Cassation decided a rather unique case.[154] On 30 May 1878, both the Senate and the Chamber of Deputies passed the same bill. The King subsequently signed the act into law. The bill contained a provision, Art 96, regulating the customs tariff imposed on bleached cotton textiles. The text approved by the Senate increased the old tariff by twenty percent; that of the Chamber of Deputies by fifteen percent. The Senate text was published in the collection of the acts of Parliament, but the text of the Chamber of Deputies was published in the Official Gazette. After the mistake was noticed and fixed, numerous merchants brought suit against the Government to obtain a reimbursement for the higher tariffs they had paid between 1878 and 1883 – claiming that, in those years, Art 96 was invalid. The Court portrayed the case as raising two possible questions. On the one hand,

> '(i)t could be said that the question that surfaces in similar cases – that is, when the approval of one or more of the bodies that have to exercise collectively the legislative power under the Albertine Statute is absent – may not consist in the examination of the constitutionality of the content or the form of the law'.[155]

On the other hand,

> 'the question presented may amount to the assessment of whether the word sanctioning and promulgating the law is indeed the word of the legislator – that is to say, the collective word of the King, the Senate, and the Chamber of Deputies'.[156]

The Court ultimately punted the issue, justifying its holding on narrow grounds that avoided the constitutional review question.

[152] ibid.
[153] ibid 39 (translated by Matteo Godi).
[154] Corte di Cassazione 28 June 1886 no 11, *Il Foro*, 705 (1886).
[155] ibid 706 (translated by Matteo Godi).
[156] ibid.

This opinion was reported with the accompanying thoughts of a commentator, Carlo Francesco Gabba – a renowned Italian jurist who taught at the University of Pisa. Gabba, while not openly opposing the decision of the court, took this opportunity to discuss (in the abstract) the constitutionality of a law affected by the same vice as the 1878 legislation. Gabba believed that the Court of Cassation was well suited to answer the question it first frames but then avoids deciding, because the challenged law simply never existed.

> 'Truly, the first thing to settle in the application of a law is most certainly its very existence. ... If one is ready to admit that judges cannot investigate if the parliamentary vote reported in the royal promulgation of a law were truthful or not, accurate or not, neither could it be admitted that the judges may refuse to apply a law that the tyrant King promulgated by himself, without bothering to call upon the Chambers, let alone mention them (in his promulgation)'.[157]

Gabba then went on to discuss, again in the abstract, whether the Court of Cassation could address the constitutionality of a law. He drew a distinction between formal unconstitutionality and inherent unconstitutionality. There is an evident distinction, he wrote,

> 'between an unconstitutional law due to a defect in its necessary forms and a law truly unconstitutional because repugnant to some fundamental law of the State'.[158]

He believed that

> 'the judiciary may contest the external forms of the laws, given their own nature, without at all invading the field of the legislative power. The judiciary can do so because these are external forms and not the substance of the law; because they are determinate and, in their determinateness, they are not subject to interpretation'.[159]

This is certainly very reminiscent of the line of reasoning proposed by Hans Linde, arguing for constitutional review of lawmaking under the Due Process Clause.[160]

The next move towards judicial review occurred over thirty years later, in 1922, with respect to Royal Decrees that the King unilaterally promulgated with the force of law. This was thanks to Ludovico Mortara, a prominent jurist and President of the Court of Cassation. According to Giovanni Urtoller, a scholar of the time, the courts have no authority to review executive acts because the Executive

[157] ibid.
[158] ibid 707 (translated by Matteo Godi).
[159] ibid.
[160] See H.A. Linde, 'Due Process of Lawmaking' 55 *Nebraska Law Reveview*, 235 (1976).

answers to the Parliament alone.[161] Judge Mortara disagreed. In the decision of the Court of Cassation of 16 November 1922, Judge Mortara held that:

> 'The Decree-Laws are arbitrary acts of the Government, exceeding the sphere of authority of the executive, and therefore unconstitutional. ... The judicial authority cannot ascertain the reasons of supreme necessity and urgency that led the government to usurp, in the name of the public good, the legislative power without exceeding the limits of its functions, because this is an eminently political question, which may be answered only by the Parliament. But the judicial authority may ascertain whether in fact the urgency existed from the external manifestations that are inherent to its nature, like the suspension of parliamentary sittings, the immediate execution given to the provision, the prompt publication and promulgation, etc. Similarly, the judicial authority may examine … if the Government has fulfilled its promise to present the decree to the Parliament for its approval, or if due to particular facts and circumstances it fell short of obtaining the conversion of the decree into law. In the absence of the elements of urgency subject to the control of the judicial authority, or in the absence of the Government's intention to promote the deliberation of Parliament, the legislative efficacy of the decree must be denied in relation to the individual right whose infringement is complained'.

Judge Mortara seemed to identify Art 3 of the Albertine Statute (on the shared legislative power of the King and the Parliament) as an intrinsically 'rigid' rather than 'flexible' constitutional provision. History did not tell whether Judge Mortara cogently addressed Urtoller's concerns: the following year, the Fascist Regime forced Judge Mortara into early retirement.[162]

The relationship between the Fascist Regime (1922–1943) and the Albertine Statute is rather complex. In 1922, when Benito Mussolini attempted a coup, the King of Italy was so intimidated that he invited Mussolini to form a government as Prime Minister. This development, which was accompanied by the growth all over Italy of violent fascist gangs, led to the Fascist dictatorship. In 1923, the so-called Acerbo Law was adopted, which

> 'provided that the party obtaining the most votes in an election would be allocated two-thirds of the seats (in Parliament), as long as it obtained twenty five percent'

of the total vote.[163] In the election of 1924, Mussolini benefitted from this law and won a two-thirds majority in Parliament. He governed continuously as a

[161] G. Urtoller, *La competenza legislativa ed i decreti-legge* (Roma: Elzeviriana, 1896), 23.
[162] V. Barsotti et al, n 119 above, 10.
[163] See J.L. Newell, n 3 above, 19.

fascist dictator until he was overthrown in 1943. Though in its first couple of years the fascist regime generally preserved the structure of the Albertine Statute, the laws and politics of the regime soon de facto emptied the Statute of its meaning.[164] The Chamber of Deputies was dissolved and replaced with the Chamber of Fasci and Corporations; all parties other than the Fascist Party were outlawed; and, towards the end of its rule, the Party promulgated anti-Semitic laws.[165] More generally, individual freedoms and rights were severely suppressed.

In particular, the fascist laws seem to abrogate what had been considered the core of the Albertine Statute, Art 3: 'The legislative power shall be exercised collectively by the King and two Chambers, the Senate and the Chamber of Deputies'.[166] This was supposed to be an irrevocable provision of the Statute.[167] But Law no 100 of 1926, passed four years into the fascist regime, provided that,

> '(f)ollowing deliberation of the Council of Ministers and the advice of the Council of State, Royal Decrees may be used to emanate juridical norms necessary to regulate the execution of the laws'

and that,

> '(f)ollowing deliberation of the Council of Ministers and the advice of the Council of State, Royal Decrees may be used to emanate norms having the force of law when the Government has been so delegated power by a law and within the limits of that delegation, (and) in extraordinary circumstances, in which reasons of urgent and absolute necessity may so require. The judgment over necessity and urgency is not subject to any other check beyond the political one of Parliament'.[168]

In sum, what the fascist regime left behind was only a semblance of the 'Constitution and Fundamental Law, perpetual and irrevocable' that the Albertine Statute had embodied for much of the second half of the 19th century.[169]

IV. The Second Constitution: The Constituent Assembly of 1946–1948

Fast forward twenty years and, in 1943, Mussolini's rule was overthrown. This history is well known. With the Albertine Statute formally unchanged, and King Vittorio Emanuele III still formally in power, Italy was invaded by two foreign forces: the United States and Germany. Two legal orders resulted. In the northern

[164] V. Onida et al, n 112 above, 28.
[165] G. de Vergottini, n 139 above, 119.
[166] P. Casana, n 111 above, 129 (translated by Matteo Godi).
[167] R. Bin and G. Pitruzzella, *Diritto costituzionale* (Torino: Giappichelli, 2014), 126.
[168] *Gazzetta Ufficiale del Regno d'Italia* (1 February 1926), 426 (translated by Matteo Godi).
[169] P. Casana, n 111 above, 129 (translated by Matteo Godi).

and central regions, occupied by the Germans, the Italian Social Republic was established with the goal of continuing the fascist regime. Limited in its powers, as a subordinate of Germany, the Italian Social Republic was recognized as an independent sovereign only by Germany. The areas south of Rome, where the King found refuge from the Germen invasion, were occupied by the Allies and witnessed a return to the Albertine Statute's constitutional order.

But with the reestablishment of the political parties abolished by the fascist regime, united under the umbrella organization known as the anti–fascist National Liberation Committee, demands for a new constitution emerged – initially refused by the King, who declined to abdicate. For the National Liberation Committee, a return to the Albertine Statute – evidently impotent against the dictatorship – was unwise.[170] Eventually the National Liberation Committee and the King reached a truce: following the liberation of Rome (which eventually occurred on 22 January 1944, with the Battle of Anzio), the King abdicated and convened a constituent assembly entrusted with deciding over the monarchical or republican nature of the post-World War II Italian state. Accordingly, Vittorio Emanuele III withdrew to private life, and he appointed his son as a caretaker regent of the Kingdom. The pact was sealed with Law no 151 of 25 June 1944, which provided that,

> 'until such time as a new Parliament is established, acts having the force of law shall be issues by the Council of Ministers through legislative decrees approved by the (regent) of the Kingdom'.[171]

Eventually, under the pressure of the supporters of the monarchy, the decision over whether to adopt a new constitution was left to a popular referendum.[172] On the eve of the referendum, Vittorio Emanuele III abdicated in favor of his son, Umberto II.

On 2 June 1946, Italians voted to abolish the monarchy and to elect a constituent assembly. For the first time in Italian history, true universal suffrage was granted – and 89.1 percent of eligible voters cast their ballots.[173] On the one hand, the vote on Italy's new form of government was overall a close one: 12,717,923 (54.3 percent) voted for the republic and 10,719,284 (45.7 percent) for the monarchy, and 1,498,136 null votes were cast.[174] But Italy was divided in two: though 66.2 percent of the voters in the northern regions voted for the republican system, 63.8 percent in the south voted for the monarchy.[175] On the other hand, the election of the Constituent Assembly embodied the political

[170] V. Onida et al, n 112 above, 29.
[171] V. Barsotti et al, n 119 above, 11.
[172] ibid.
[173] G. Parlato and M. Zaganella, *Fare gli Italiani: dalla costituzione dello Stato nazionale alla promulgazione della Costituzione repubblicana, 1861-1948* (Roma: Nuova cultura, 2011), 140.
[174] G. de Vergottini, n 139 above, 124.
[175] G. Parlato and M. Zaganella, n 172 above, 140.

fragmentation that would characterize Italy for many decades to come.[176] Though the Constituent Assembly was formed by 556 representatives from numerous parties, three emerged as the leading political forces: the Christian Democrats (37 percent), the Socialist Party of Proletarian Unity (21 percent), and the Communist Party (19 percent).[177]

The Constituent Assembly met for the first time on 25 June 1946, and worked on the constitutional text until 31 December 1947 – with the new constitution set to enter into force on 1 January 1948.[178] Only seventy-five members of the Assembly actively worked on the draft, which was then discussed with the entire body and approved by 453 of its members. Because of its internal fragmentation, the Constituent Assembly drafted the Italian Constitution behind a veil of ignorance. Since no one knew which party would win at the first free elections, each player aimed at ensuring a level playing field.[179] The text was a compromise of catholic, Marxist, and liberal views, and it included an ample Bill of Rights, enforced by a Constitutional Court entrusted with the power of judicial review. In other words, the Italian Constitution replaced the flexible Albertine Statute with a rigid constitution, one from which neither Parliament nor the Executive could deviate.

V. Lessons from the Italian Experience with Constitutionalism

Written constitutionalism was commonplace in Europe for much of the 19th century; yet, as of 1945, only three nations in the world – Australia, Canada, and the United States – had both judicial review of the constitutionality of executive and legislative actions, and a constitutional system of checks and balances.[180] One might wonder why judicial review and checks and balances became entrenched in Italy only *after* 1945, notwithstanding the centuries of experimentation with constitutionalism. One possible answer might be: indignation and anger over the terrible wrongs that the fascist regime committed under Mussolini and that the Albertine Statute utterly failed to preempt.[181] In other words, the Italian Constitution might have emerged for *rights from wrongs* reasons: the Italian people realized that they could not always rely on elected legislative and executive officials to protect their fundamental rights, and so they turned to a rigid constitution.

As a result, the Italian Constitution checks and balances power among more entities than the Albertine Statute did: the two Houses of the legislature are made co-equal, unlike the situation in France, so that they may keep one another in

[176] G. de Vergottini, n 139 above, 124.
[177] R. Bin and G. Pitruzzella, n 167 above, 134.
[178] G. de Vergottini, n 139 above, 125.
[179] R. Bin and G. Pitruzzella, n 167 above, 135.
[180] See Steven G. Calabresi, *The Global Rise of Judicial Review Since 1945* (2018), at 2-3, available at tinyurl.com/y77bbyqy (last visited 7 July 2020).
[181] See ibid 34; see also generally A. Dershowitz, *Rights from Wrongs: A Secular Theory of the Origin of Rights* (New York: Basic Books, 2004).

line;[182] the Prime Minister and the Government are accountable to Parliament;[183] the President of the Republic, elected by the Parliament,[184] is more than merely a ceremonial figure, for the President appoints five of the fifteen judges on the Constitutional Court[185] and has the final say on the nomination of the Prime Minister and the Ministers;[186] and the Constitutional Court is all-powerful as to the meaning of the Constitution,[187] although it can only act if the Court of Cassation or the Council of State certifies a constitutional question to it.

It has now been seventy-five years since the end of World War II, and it is quite clear that the judicial review structure and checks and balances structure of the Italian Constitution work very well. There remain areas of constitutional law where reform is needed, of course, but the move from the flexible Albertine Statute to the current rigid Constitution has been an unqualified success. Reformers in newly emerging democracies should follow the model of the Italian Constitution and set up a rigid constitution, and they should reject the flexible constitutionalism of the Albertine Statute. This is our main normative recommendation in light of our discussion of the history of Italian constitutional theory.

VI. Conclusion

From 1776 until 1945, the western world was buzzing with discussions of, and admiration for, written constitutions. This movement began around the same years in various countries, including Italy, and it is a mistake to focus on France and the United States without discussing the Italian experience. This Article strived to fill a gap in the scholarship surrounding the genesis of Italian constitutionalism. It has done so by surveying some of the most emblematic examples of successful and failed Italian constitutions. Many of them were revolutionary documents for their times. And some continue to cast their shadows onto Italy's current legal system. Indeed, laws from these preexisting legal orders have continued to be respected so long as they do not conflict with the present constitution.[188] The history of Italian attempts at constitutionalization is a rich one. It dates back to the years *before* the signing of the US Constitution, and its numerous iterations have continued for centuries *after* the American Revolution. And this history also tells an unusual tale – one that is not necessarily tied to revolutionary movements, and yet also cannot be dismissed as just an emulation of those constitutional movements that arose out of revolutionary vacuums.[189]

[182] Italian Constitution, Art 70.
[183] ibid Arts 94, 95.
[184] ibid Arts 83.
[185] ibid Art 135.
[186] ibid Art 92.
[187] ibid Art 136.
[188] See n 6 above.
[189] D. Grimm, n 4 above, 13.