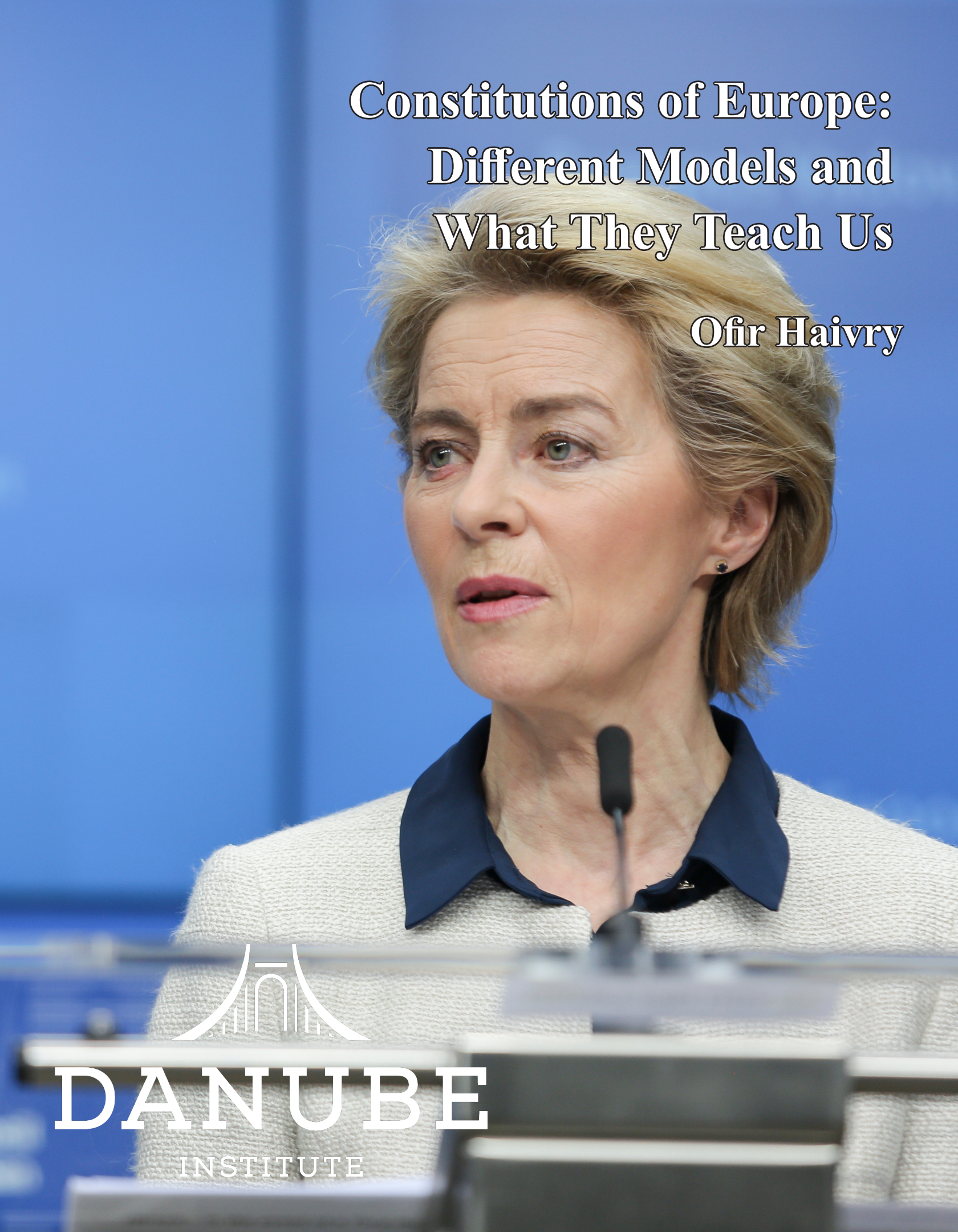
Constitutions of Europe: Different Models and What They Teach Us

Ofir Haivry



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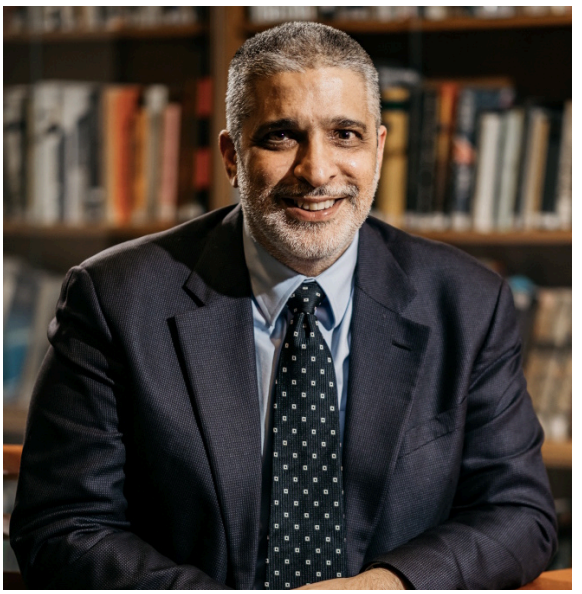
About the Author



Dr. Ofir Haivry is the Vice-President of the Herzl Institute of Jerusalem and a co-founder of the Edmund Burke foundation of Washington DC. He has a PhD from University College of London. His fields of research are the history of political thought, and especially the Anglo-American tradition as well as Jewish political thought. He has published his book "John Selden and the Western Political Tradition" (Cambridge University Press), as well as chapters in academic books and numerous essays in journals and Magazines, in the US, Israel, UK, Italy, France and Hungary. Dr. Haivry is currently a Visiting Fellow at the Danube Institute, researching traditions of European conservatism.

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Abstract

This paper is based on a presentation on Constitutionalism & National Identity that was delivered at a Symposium on 7-8 Dec. 2022. It describes in detail three models of constitutions that may be found across Europe. Those models are the Charter (or National Covenant), the League (or Confederation), and the Administrative Unitary State. The paper also puts forward a fourth model (or quasi-model) - the Anti-Constitution, designed to prevent the recurrence of a specific political catastrophe. The paper explains the implications of the Anti-Constitution model for Germany, France and Italy - the three largest member states of the European Union. The paper concludes by explaining lessons for European conservatives from the differing constitutional models.

Introduction

A constitution always reflects, whether implicitly or explicitly, principles upon which a state is founded. Even where constitutions are not written down as a single document, we will find some fundamental constitutional documents, reflecting the ideas upon which it functions.

Within European history, we can clearly identify at least three main historical models of constitutionalism, which although having roots in the Middle Ages, are very much still active and present to our own days. Indeed, it could be argued that most current constitutions are versions of the three models, or some kind of (sometime dysfunctional) mix between them. I am not arguing that no models other than the main three exist, and in fact I will propose at the end of this essay, a possible fourth model, founded more on a negative principle than a positive one.

For conservatives, it is vital to look at these constitutional practices and models, in order to consider to what degree they support or undermine, the values that we believe in, and accordingly derive our stance towards them.

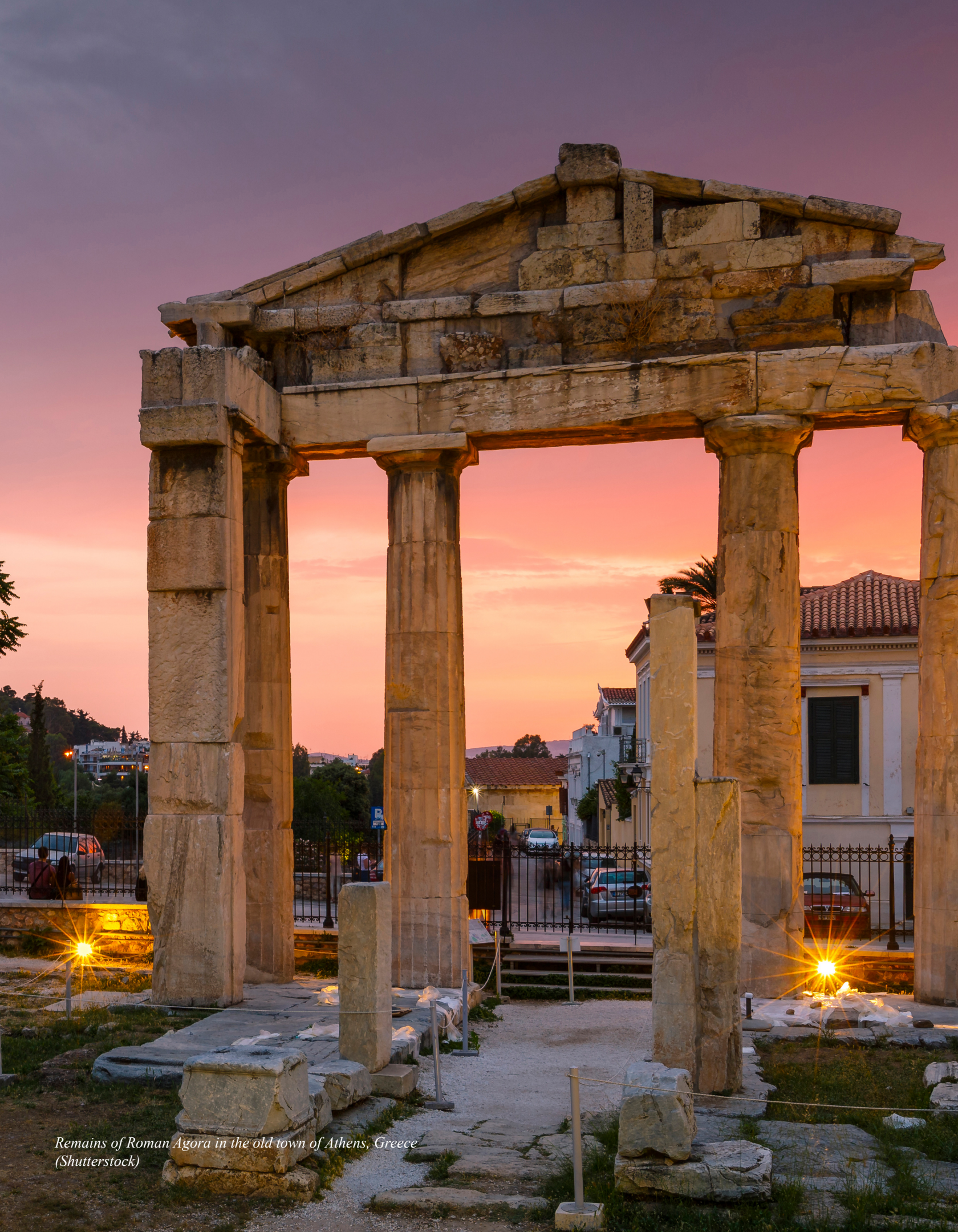
I will not discuss here a-priori constitutional structures or ideals: rather, I will describe historical constitutional practices and documents, from which I draw the principles and models I describe. In other words, I will describe constitutions as they are, not as they may be.

I will present the three models briefly, drawing a very quick historical sketch of each to our days, as well as propose a fourth possible model, the Anti-Constitution. I will then conclude by offering lessons that these constitutional models might impart for today's constitutional debates at the state and European levels.

Several distinct constitutional models arose in Europe between the 12th and 13th century. Constitutional ideas certainly existed before this period, and we can find them from the Bible to Ancient Greece and Rome as well as in the early Middle Ages. However, it is my argument that the systems of states and political ideas which solidified about 800 years ago, were far more sophisticated and stable than anything that went on before. Moreover, the political and institutional history of Europe was stable and continuous enough, so that despite historical upheavals, they fostered exceptionally long-lived political and judicial institutions, some of which survive to our day.

The three models of constitutionalism I want to look at first are:

1. The Charter or National Covenant
2. The League or Confederation
3. The Administrative Unitary State



Remains of Roman Agora in the old town of Athens, Greece (Shutterstock)

The Charter as National Covenant

This first type of constitutional outlook emerges from the idea that a nation and its traditions exist independently from the state, and that the state as well as its political and judicial arrangements, should reflect the national traditions. Such an outlook was most evident in cases where a foreign conqueror took possession of a country, but nevertheless granted to its inhabitants the keeping of their old laws. The most famous example of this pattern is probably England, in the 11th century. First the Scandinavian conqueror Knut around 1015 and then the Norman conqueror William in 1066, after having captured the English state, granted to the conquered English the preservation of their old laws from the days of the Anglo-Saxon Kings. This outlook about preserving the traditional legal and political traditions became so ingrained in English political history, that there always remained great opposition to introduction of laws regarded as foreign. Even when the United Kingdom (UK) was created, the legal and religious framework for England and Scotland remained (and remains) separate, and when later on the British joined in 1974 what was to become the European Union, resentment at the imposition of European laws always simmered and eventually mounted, until in 2016 the UK left the Union.

In this context, a national charter is a document that is intended to conserve or restore historical rights and duties - even when some innovations of structure and practice are introduced. Charters appeal to the authority of national tradition and history, infusing them with an enduring relevance, one that may be reactivated at a future date, even centuries later. Two classic examples of a national charter of this kind, are the English "Great Charter" (Magna Carta) of 1215 with its many later reissues until 1299; the Hungarian "Golden Bull" (Aranybulla) of 1222 and its later reissues. A somewhat similar instrument, was the Danish "Hand Binding" (Haandfæstning) of 1282, that later became the basis for the regular coronation charter of Danish Kings, until 1660.

Charters are important public documents that during the Middle Ages came to be recorded on large sheets and affixed with formal seals certifying the issuing authority. Such documents came to be addressed as charters from the sheet (carta) upon which they were written, or bulls denoting the seal (bulla) upon them.

The certification was necessary because such documents were public in the most immediate sense: issued in several copies, they were then distributed to various political centers, to be read publicly to congregations as well as to be consulted when necessary. Often, they included signatures of various eminent persons, both lay and churchmen, witnessing the exact terms of the charter.

In England, several Norman Kings issued such charters, usually committing to rule according to traditional laws and constitutional practices. An important one was issued by Henry I upon his accession in 1100, but the most famous one came to be the charter first issued in 1215 at Runnymede by King John, which came to be known retrospectively as the Magna Carta or the Great Charter (because of its large size relative to other charters). This charter was granted by the King, after a wide opposition front forced him to restore and guarantee to his subjects, historical rights that had been infringed. The charter was reissued with some changes by John's successors several times in the following decades, until 1299, after which time it came to be confirmed by parliament. Indeed, it was confirmed in parliament as fundamental law, more than 70 times in the succeeding centuries, the last time being in 1423 under Henry VI. Moreover, as late as 1628, more than 400 years after Runnymede, when the English parliament issued the Petition of Right, one of the most important constitutional documents in English history, it included explicit restatement of articles from the Magna Carta as well as other ancient laws. Although most of the provisions of the Great Charter have been expanded and replaced by later legislation, to this day, more than 800 years after it was first issued, three central provisions of the Magna Carta are still recognized as established laws in England.

Thus the essential features of national charters, are an appeal to older traditions which the charter is supposedly restoring, the view of the legal and political order expressed in the charter as a national one, and the public issuing of the charter so that it becomes witnessed by the whole community – therefore establishing a connection of the charter with an assembly representing the whole national community, as the only institution that could amend or change its terms.

As the story of Magna Carta is rather well known, I will expand here a bit more on a far less familiar example of a national charter – the Hungarian Golden Bull.

The name of the charter derives from the practice in the Byzantine empire, to issue important edicts with the attached seal made of gold, by which the documents came to be named "Chrysobulla" (golden seal). This style was later adopted by some European Medieval rulers on their charters, including in Hungary.

In early 13th century Hungary, a situation had developed that was similar in some respects to what was happening in England. King Andrew II, while striving to create new financial and political instruments, found himself confronted by a wide opposition of groups who argued their historical rights had been infringed by new royal practices. Instead of the typical clashes of this period between a king and the great nobility, at this particular time the clash was mainly between the crown and the lesser tenants-in-chief – those nobles that without being especially rich or powerful, nevertheless held land directly from the king. In England such men came to be known as "knights of the shire" in Hungary as "royal servants".

The political point in both cases was the same, in financial and social terms, small independent landholders were the medieval equivalent of a middle class. Proud of their independence and local status in the counties, they feared being relegated to a secondary status, in which instead of direct access to the King that they formally enjoyed as holders of land from the crown, a new structure would be created in which they would be forced to access the crown only through intermediaries, such as great nobles or royal favorites. By the early 1220s King Andrew was gifting whole counties to his supporters, there grew an increasing concern among the local tenants-in-chief that they would become subordinate to these favorites rather than the King. This caused a widespread rebellion, and by 1222 the King was forced to issue the charter that came to be known as the Golden Bull (Aranybulla) at a great national assembly in Fehérvár.

This charter was similar in several aspects to the Magna Carta: King Andrew was forced to accept a number of principles enumerated in the charter, among them that the nobles as well as the church, were guaranteed that they may be regularly taxed only with their consent, and the same principle was applied to the obligation to finance or fight a war outside of Hungary, even going as far as asserting a "right to resist" (jus resistendi) the King, if he acted contrary to the law or tried to undo this settlement.

Another important aspect of the charter was that it set down a principle of equality before the law for all the nation's nobility, permitting even the smallest nobles to bring judicial matters to be tried directly before the king. Instead of a feudal gradation of rights, the charter put the lowliest person with a noble title legally on a par with the great of the land.

Of course, this formal legal parity between the great and small did not reflect reality: it never does. But the principle of legal parity was introduced into the legal system, and similarly to the right granted by Magna Carta, for a noble to be judged "by his peers", it would have a crucial influence on later European history. Although at that time in both England and Hungary, the charters extended this parity principle only to nobles and their families, in the long run it had what we might call, a "cascading effect". It became a right in constant expansion, because the numbers of people who had some degree of "noble" descent was ever growing. In every generation, more people could be found, with some distant claim to be judged by their peers, be they petty Hungarian nobles or English knights of the shire, which in social and economic status were increasingly indistinguishable from successful farmers or merchants. In this way, the equality before the law was granted to ever growing circles, first to nobles then gentlemen, then prominent commoners and eventually to all free men.

As was the case with Magna Carta, the Golden Bull too was issued not merely as a political accord, but as a public and national document, with formal copies being distributed in various places across the country, so that the King could not renege on it, or try to physically destroy or falsify it. Seven copies of the Bull were sent to each of the following institutions: The Hungarian king himself, the Pope, the Knights Templars, the Knights Hospitaller, the two most important Archbishops in Hungary, (those of Esztergom and of Kalocsa) and to the Palatine of Hungary (the highest royal official, similar to the English Chancellor).

Another significant aspect of the Bull was that, like in England, a national assembly (Országgyűlés) emerged in connection to its ratification and upholding. The Golden Bull was confirmed at a 1222 meeting termed "Parlamentum Generale" (in later centuries becoming known as Diet) and with some variations, several times in later years by similar assemblies, the first being in 1231 at a Parlamentum held by King Andrew himself.

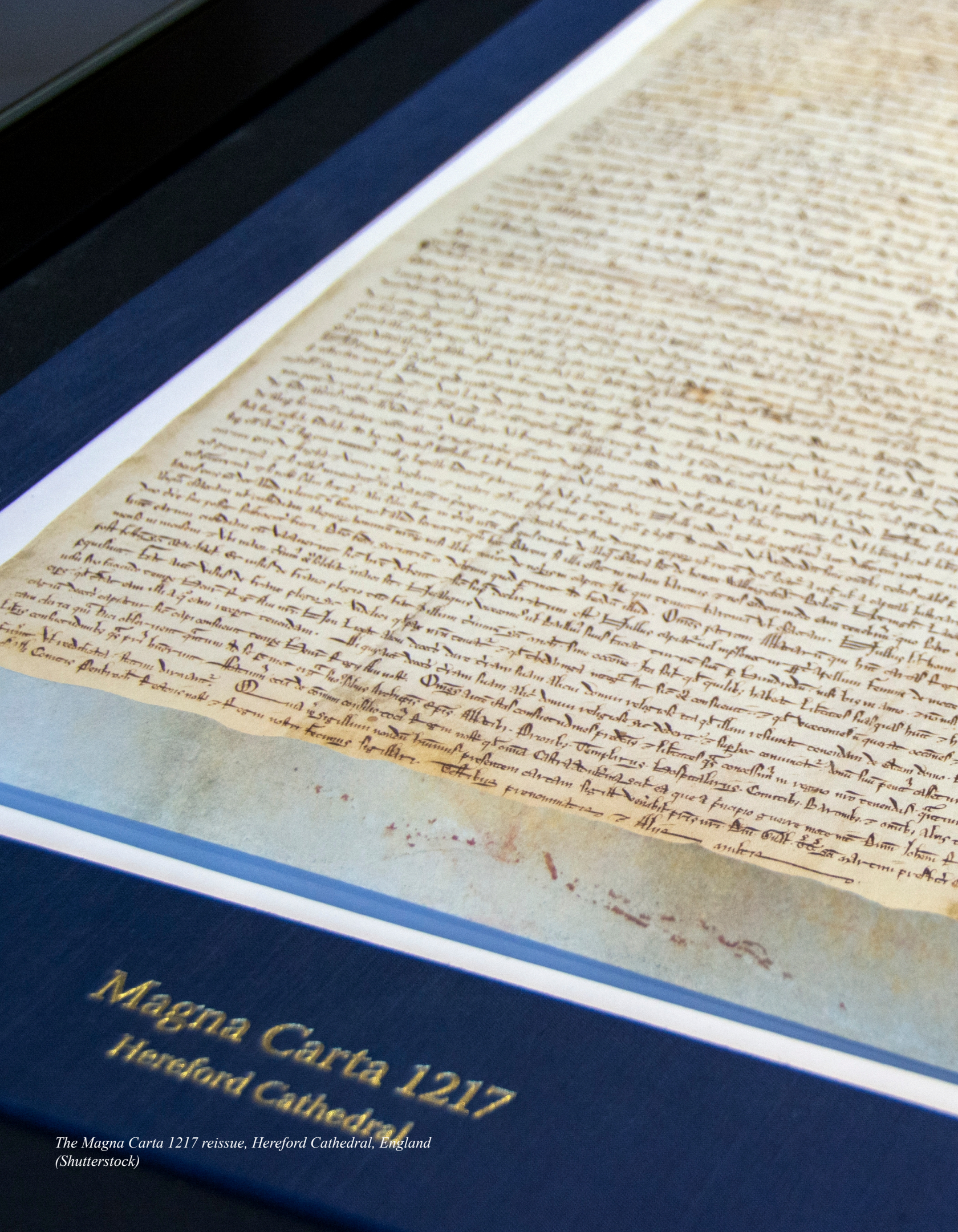
Unlike England where by the end of the 13th century, parliaments were held almost annually, the Hungarian "Parlamentum" sessions remained a relatively infrequent event, with only eight sessions held in the 13th century after 1231, and 14 more held during the whole of the 14th century (an average of about once every seven years).

Thus, the Hungarian "Parlamentum" never became an ordinary component of the Hungarian government in these centuries, but neither did it follow the fate of the French States General assembly, which gradually became obsolete, while its judicial functions devolved on local "Parlements" which were local courts rather than national ones. The Hungarian "Parlamentum", albeit summoned infrequently, always retained its role and symbol as the supreme assembly of the nation. Strong Hungarian monarchs preferred to avoid assemblies that might curtail their power and sometimes went on for decades without calling a Parlamentum.

However, in periods of national crisis, when a King needed to gain wider support for his policies, sessions became far more frequent, so that it was held on average every two or three years, between 1267-1277 and 1289-1310 and almost annually between 1382-1387.

Similarly when southern Hungary came under Ottoman rule after the 1526 battle of Mohács, the Habsburgs, who had retained control of the northwestern areas which came to be known as "Royal Hungary", ensured the support of the Hungarian population by holding parliaments (now called Diets) with increasing frequency, so that for a century and a half between 1527 and 1662, parliaments were held on average at three years intervals. As the Ottoman threat gradually receded and the Habsburgs secured control over all of Hungary, the frequency of parliaments dropped - but the idea of a national assembly representing the traditions reflected in the Golden Bull, was already well established, and remains part of Hungarian political heritage, to this day.

Therefore, while liberal writers like Francis Fukuyama (in *The Origins of Political Order*, 2011), sometimes mention the Golden Bull in their histories about development of liberal institutions, as a false start towards liberalism, it was in fact the very opposite of that, a real reflection of enduring national traditions. National charters like Magna Carta and the Golden Bull have nothing to do with liberal individualist and abstract ideas, but everything to do with collective national identity and preserving historical constitutionalism.



The Magna Carta 1217 reissue, Hereford Cathedral, England (Shutterstock)

The League or Confederation

The second model we look at, is of a union of several groups and communities, into a permanent League or Confederation. Like any alliance, leagues are born as an answer to some common external threat. However, unlike a simple alliance, a League or Confederation creates enduring structures for state-like common decision-making. Such structures can persist for decades and even centuries. Nevertheless, and unlike a unitary state, in a League the components always remain separate entities, who do not fully fuse into one. Some historical examples of this model are the Lombard League of 1167-1250, the Italic League of 1454-1494 and the Albanian League of 1444-1450. But the classic and most successful example is of course the league born of the "Eternal Alliance of the League of the Three Forest Cantons" of 1291, better known as the Swiss Confederation, which exists to this day.

Significantly, permanent leagues of independent communities first emerged in Europe in the same period as the national charters did. This has probably to do with the rising of regular and centralizing state power in the High Middle Ages, which had been far narrower and sporadic until then, so that the charter and the leagues were among various attempts to address this development. Not coincidentally, it was within the territory of the Holy Roman Empire which at the time included, at least nominally, Germany and Italy, that the Leagues mostly emerged: they served as permanent structures of mutual support against imperial encroachment of local autonomies.

For about a century, while Emperors were busy shoring up their control of Germany, imperial rule over Italy remained mostly nominal. But after 1158 the energetic Emperor Frederick I "Barbarossa" claimed a right of directly ruling Italian city-states and started to replace in various places the existing Podesta (chief city magistrate) with his own appointees. To oppose imposition of Imperial control on northern Italy, an initial League of Verona was created in 1164 by cities in the northeast. Then in 1167 a wider Lombard League was formed at Pontida near Bergamo, comprising 20 city-communes as well, as well as a few great lords, and significantly with the backing of the Pope. The supporters of the Imperial side came to be called Ghibellines, while the supporters of the anti-Imperial coalition, backed by the Pope, were called Guelfs.

After nine years and several rounds of armed clashes, the Imperial troops were decisively defeated in a great battle of 1176, and the danger finally subsided after Barbarossa's death in 1190. The League was renewed several times during the reign of Barbarossa's successors, to counter further attempts at reasserting imperial power in the peninsula. Eventually, under Emperor Frederick II who on top of his German support was also hereditary ruler of the Norman kingdom of southern Italy, a new attempt to assert imperial control over all of Italy ensued. After a string of military victories, when the emperor seemed close to final triumph, he refused all attempts to find a compromise settlement, insisting on a complete capitulation to his authority. This pushed the League to continue the war for another decade, with alternating results. However, a surprise assault in 1248 by League troops near Parma not only completely routed the Imperial army, but also seized the Imperial treasure, depriving Frederick of the means of overcoming his enemies. At his sudden death in 1250, any real danger from Imperial power rapidly subsided under his weak successors: without a common enemy, the League eventually dissolved.

Apart from its military functions the League also had a confederal form of civic government. It had a political council called "Universitas" with representatives from the various members, voting by majority. With time, the authority of the Universitas grew, attaining more powers in the fields of taxation and judiciary authority, as well as establishing a customs union. It represented a model of confederal association and alliance for resistance against an attempt to impose Imperial authority and may very well have developed into some kind of regular confederal structure, if the Imperial danger had not disappeared.

In the 15th century, long after Imperial power from Germany had declined, the growing power of France and Spain started to threaten the Italian states. The latter, having found a working equilibrium between themselves, agreed to establish in 1455 the Italic League – with the goal of both repelling foreign attempts at gaining power in the peninsula, as well as keeping the internal peace in the peninsula. It remained in place until 1494, after which French and Spanish intervention in Italian affairs became endemic.

However, the confederation idea survived in Italy and beyond, so that in the 1540s, Francesco Burlamacchi, leader of the small republic of Lucca, attempted to unite a group of smaller cities in central Italy to break up the hegemony of Florence. Much later, in 1791, Piedmontese civil servant Gian Francesco Galeani Napione, proposed a confederation of Italian powers.

Notions of a permanent league were by no means restricted to Italy. In the Balkans, for example, the Albanian nobleman George Castriota nicknamed "Skanderbeg", steered the creation in 1444 of the "League of Lezhë" aka the Albanian League, which started as an alliance of regional Albanian chieftains and nobles against the Ottoman Empire. The League was born at a meeting known as the "Generalis Concilium" or "Universum Concilium" at which Skanderbeg was proclaimed "Chief of the League of the Albanian people". However, by 1450 the League had mostly disintegrated under massive Ottoman pressure. While Skanderbeg continued to fight with a smaller group of loyalists, his sudden death in 1468 put an end to that effort and Albania gradually returned to Ottoman rule.

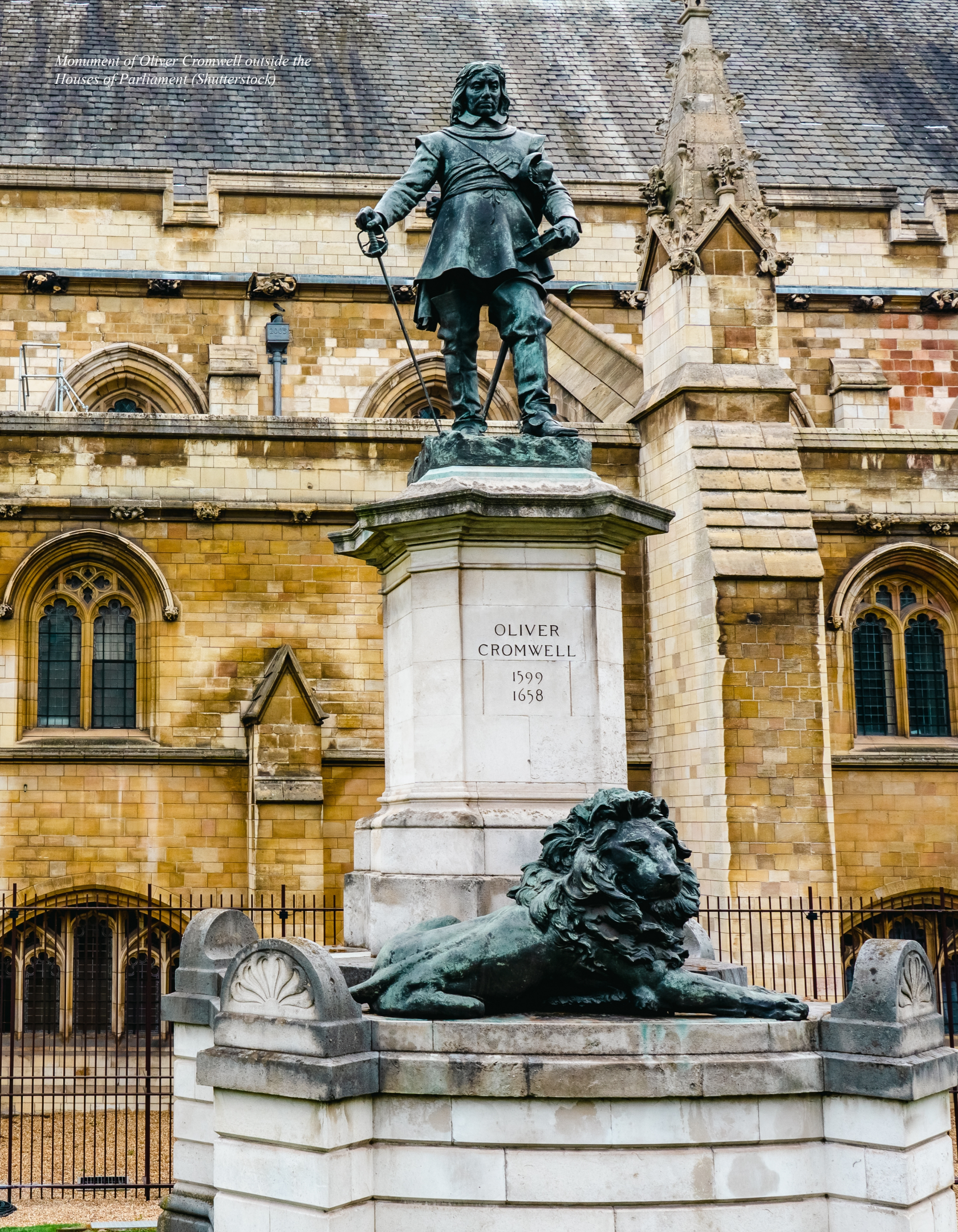
While the leagues mentioned up to this point started as a confederation of several political entities within a nation against a common foe, there are also leagues which did not entail a national dimension. One such example was the "Federation of the Seven Communes" which united seven small communities in northeastern Italy between 1310 and 1810. From 1405 it was a protectorate of the Venetian Republic, but it enjoyed internal self-government until it was suppressed by Napoleon I. Another more famous example of a defensive confederation was the Hanseatic League, a medieval commercial and defensive confederation of market towns in Northern Europe, which grew from a few German towns on the Baltic Sea in the late 12th century to some 200 settlements in the 16th century ranging from Estonia in the north and east, to the Netherlands in the west, and Poland, in the south, and only disintegrated in the 17th century.

Another case, which lacked a national dimension at its outset, but saw one emerging with the passage of time, is also the most successful and long-lived confederation, Switzerland. Born in 1291 as the "Eternal Alliance of the League of the Three Forest Cantons" of Uri, Schwyz and Unterwalden, it was a defensive confederation of communities in the valleys in the central alps against Habsburg encroachment on their rights.

The alliance is also recorded on a charter although it is very different from the national charters that were discussed above. Crucially, it is not a charter of a nation, but rather a league of several communities that remain separate. This first alliance was followed by several more with more cantons and city-states in the early 14th century, so that by 1353 an alliance of eight communities came to be called "the Old Eight" (Bund der Acht Orte).

It was neither a homogeneous state nor a single pact, but rather a conglomerate of independent cities and valleys, held together by a net of several different pacts, none of which included all eight, while only the three original forest cantons were part of all the treaties. After several victories over Imperial attempts to regain control of the area, by the second half of the 14th century, the loose net of alliances was reinforced by additional agreements which gradually made it into a stable confederation. By 1370, it referred to itself as a territorial confederation, and by the end of the century it had become a stable political entity.

As the confederation added more areas, French and Italian-speaking areas also joined. In the Reformation some communities became protestant while others remained Catholic - increasing even more its diversity, so that it never coalesced into anything like a unitary nation state. However, by 1450, the members of this confederation were increasingly regarded by themselves as well as by outsiders, as something akin to a nation: they were collectively referred to as Swiss. They were known especially throughout Europe for their highly regarded soldiers: indeed, since 1505, Popes have been protected by the Swiss Guards.



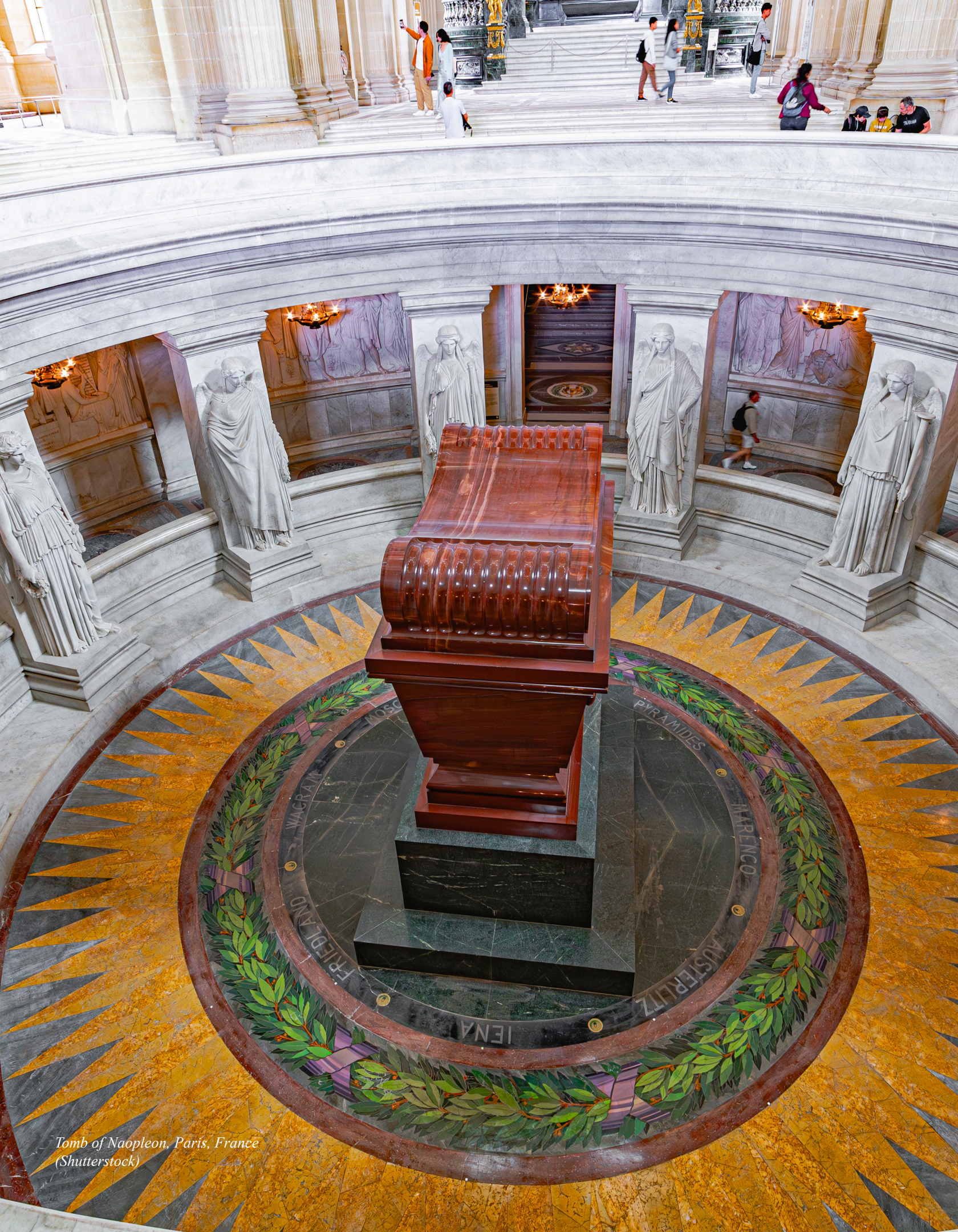
Monument of Oliver Cromwell outside the Houses of Parliament (Shutterstock)

The principle of a league or confederation, is obviously of a high degree of cooperation and even integration in military, diplomatic and economic affairs - while at the same time maintaining ultimate independence of each member. Such leagues or confederations are distinguished from simple alliances by their timeframe and the fact that they develop permanent communal bodies. The question is of course at what point such a confederation becomes what today is called a Federation - where the components, although retaining some independent powers, ultimately lose their independence to the central identity and authority?

The current divergence in meaning between the originally synonymous terms of Confederation and Federation, was actually devised during the writing of the American constitution, when the writers substituted the term "Federal" at every place that the term "National" had appeared in the original draft, and thus Federal came to mean one nation divided into independent states or provinces (but ultimately subject to national authority), while Confederal meant a political union where the components remain independent and do not submit to a national authority.

In some cases confederations have moved towards more uniformity eventually becoming federal states: however, in other cases the movement was in the opposite direction. The Dutch Republic of the Seven United Provinces (Northern Netherlands) was a confederation between 1581–1795, while in the aftermath of Napoleonic conquest it became a far more unitary, federal state, headed by a King. Elsewhere, the United States of America began as such a loose collection of independent states between 1776-1790, ruled by the Articles of Confederation, that it reached the verge of collapse prior to the adoption of its current, federal constitution.

So, there is the possibility of confederations and even federations loosening and even dissolving (as almost happened to the United States during the civil war). In Europe today there are several federal states - among them Germany, the Netherlands, Spain and Belgium. While the first two look fairly stable in their constitutional settings, the latter two seem to be in the process of loosening the hold of the center, leading to increasing threats of secession.



Tomb of Naopleon, Paris, France (Shutterstock)

The Administrative Unitary State

The third model is best defined as the Administrative Unitary State. It can also find its foundations as back as the 13th century, in a series of laws called Assizes or Constitutions, issued by the aforementioned Emperor, Frederick II. While attempting as emperor to subdue the cities of northern and central Italy, Frederick also wore the crown of the Kingdom of Sicily, which comprised the southern third of the peninsula. As King he issued a series of laws culminating in the 1231 "Constitutions of Melfi" which came to be known as the "Augustan Book" (Liber Augustalis). This document, reflecting a centralizing view of government, set up many principles that can be seen as rational and even egalitarian: however, these goals were pursued by accumulating all power in the hands of the monarch and his bureaucracy - and at the expense of any other powers in the land, be they nobles or communities or even the Church.

On the one hand, the Constitutions affirmed equality of all free men before the law, banned trials by ordeal or battle (duel), and made an attempt to follow the model of Roman law, and the use of reason and logic to establish guilt or innocence. However, this strategy also left the King's subjects at the sole mercy of a centralized judicial system, arbitrarily controlled by the crown and its appointed judges. The instruments by which subjects in other places in Europe could participate or address the judicial process, from trial by jury, through localized traditions and judges, to legislative assemblies, simply do not exist in the Augustan Book. Justice was theoretically equal for all, but subjects had no means by which to voice their concerns and interests.

Similarly, all political and economic power in the country was also centralized in the hands of the King and his ministers. Not only the feudal nobles were affected by this, but also cities, which therefore had no opportunity to become self-governing communes like those in northern and central Italy. Other groups and institutions, like the assembly of the barons, the universities and the landowners, instead of developing into some kind of political assembly, representing at least parts of the population, lost any legislative authority. Law was the King's to make and unmake: consequently, the assembly became merely an advisory body, receiving and promulgating legislation, but unable to debate or vote on it.

Perhaps most consequential was that neither the assembly nor other formal bodies retained any authority upon taxation, which became a sole royal prerogative. Further, state monopolies were imposed on goods such as silk, iron, and grain. The Constitutions also prohibited the bearing arms without royal permission. Meanwhile, a standing mercenary army was created, precluding the population from any responsibility for its own defense. In this manner, the Kingdom of Sicily erased all of the traditional liberties enjoyed by at least some segments of the population in many other areas of Europe, like local self-government, traditional laws or the right to bear arms – putting in their place an arbitrary centralist administrative rule. The Augustan system remained the basis for Sicilian law until the unification of Italy, six centuries later, and in many ways a precursor to similar systems elsewhere. Indeed historian Ernst Kanterowicz termed the Constitutions of Melfi as the birth of the "modern administrative state."

This case was unusual but not unique in Europe. Many European states moved towards a more centralized, arbitrary and administrative government in later centuries. In 1660 for example, after Denmark (which at the time also ruled Norway) was catastrophically defeated by Sweden in the Dano-Swedish War, an assembly of the estates of the realm ("stænderforsamling)" was summoned to Copenhagen, by King Frederik III. The kingdom had been until that time ruled by a King that was bound by the traditional coronation charter mentioned above (Haandfæstning) and by the assembly of the estates.

However, King Frederik argued that this system was now outdated and unable to address modern challenges, with the implication that it should be replaced by "modern" means of government. With the shock of the great defeat, and under intense pressure from the King, who also had the support of the rich merchants of the capital, the Danish estates capitulated and formally transferred absolute power to the crown. A new constitution of Fundamental Law ("Lex Fundamentalis") for Denmark-Norway was issued giving the King absolute power. Not coincidentally this law was also termed the Lex Regia ("King's Law") the Latin term by which in Roman Law the people had allegedly transferred all legislative and executive powers to the Emperor.

This fundamental King's Law was regarded as the Danish constitution and thus the only law superior to the king's immediate will. It defended the established Protestant religion and (following Bodinian absolutist theory), property laws, so that they remained outside of the absolute authority of the King. Outside of these two areas, however, he ruled as he willed. The King's Law governed Denmark for almost two centuries and was replaced only in 1849.

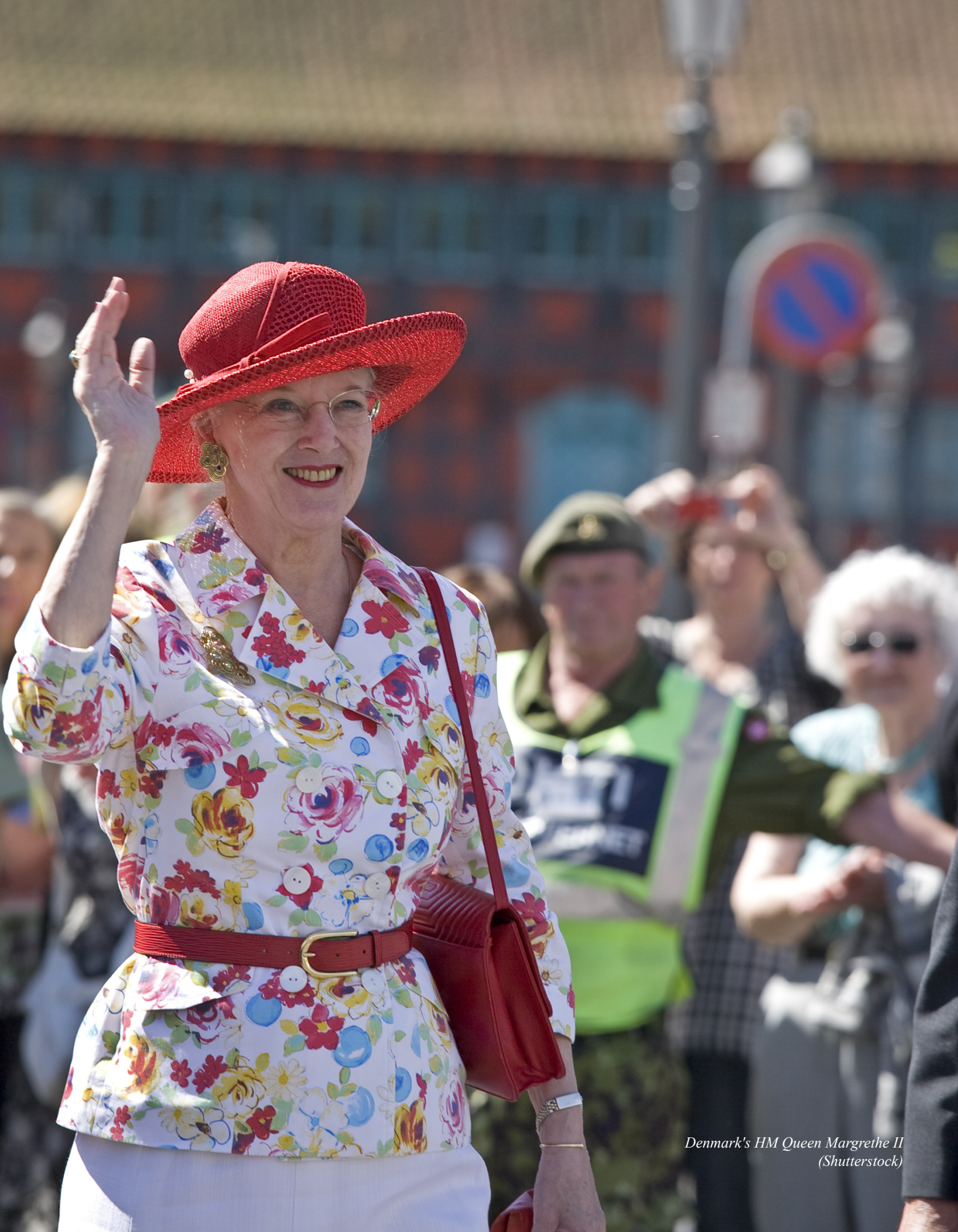
Many other European governments exhibited similar tendencies in this period, most notoriously in France, where the Kings increasingly accrued arbitrary power and effectively suspended the Estates General (without being formally abolished) between 1614 and 1789. However, such early-modern endeavors should be regarded as merely partial and timid attempts at administrative centralization, which still left many of the traditional structures in place. The real attempt at complete administrative takeover really emerged only after the French Revolution brought with it the passion to sweep aside all past structures and experience.

In 1804, the French Napoleonic Code came into force. It was drafted by a commission of four eminent jurists, and only the members of the Emperor's Council of State were consulted. There was no public debate, and no vote took place in a legislature or referendum: it was simply enacted by the will of the Emperor. It erased at one sweep French historical traditions and particularities, in favor of a clear, rationalist and centralist system. It was so universal that it was later on easily introduced into the various European countries which Napoleon turned into French dependencies, to be ruled by one of his brothers or generals.

It was a law formed with a pan-European scope, to apply across the European Empire.

The examples I have given of the Administrative Unitary State, although very different in period and geography, have some common characteristics. They are on the one hand, very rationalistic and even egalitarian in tendency, leaning towards establishing a meritocracy of civil servants where everyone is legally equal under the sovereign's rule. For this very reason, liberals for the most part found the Napoleonic state a very compelling model. The Administrative Unitrary State with its universalizing tendencies is embraced by many as the best method of preventing conflicts and differences - and particularly when it is being applied to peoples from differing traditions and religions.

However, this system is not only very centralized and bureaucratic in character, but it also destroys self-rule even at the most local level and, of course, is the opposite of representative government. Moreover, it is by its very nature opposed to traditions, seeing in them unnecessary impediments to the rationalization and efficiency of its rulings. In today's political environments, the use of new technologies - from centralized CCTV face recognition to authorization of sweeping data gathering - is being harnessed to justify further expansion of administrative oversight into ever more private areas of life. This is particularly true in countries of the European Union (EU).



Denmark's HM Queen Margrethe II
(Shutterstock)

A Discussion of Anti-Constitutions

The three models presented above do not neatly cover all political regimes. Even in Europe there are countries that were originally clearly within the tradition of one model, yet have since drifted towards some mix between them. The UK, for example, is a constitutional monarchy whose constitution originates in a National Charter. Meanwhile it unites several countries with many differences in the way they are governed. Scotland, Wales and Northern Ireland each have their own legislative assembly. (So too do the Isle of Man, Jersey and Guernsey - the Crown Dependencies that, for historic reasons, are not part of the UK). Conversely, England - by far the largest component of the UK - does not have its own assembly. Moreover, the rulings of the European Court of Human Rights prevail over UK law even though the country now lies outside the EU. In other words, the constitution of the UK has elements of the National Charter, mixed with confederal and administrative aspects.

There are also some states where it is unclear if any historical model really applies. This may be because their constitutions are relatively new ones. Examples include Ireland and Finland. Conversely, some are older nations that have had enormous constitutional changes in the last few decades. Examples include all the states that were previously part of the former Yugoslavia, Soviet Socialist Republics in the former Soviet Union, or satellites of the Soviet Union.

Therefore, it is worthwhile considering another model (or perhaps quasi-model) of constitutions. These are what I call Anti-Constitutions. These are documents that were created in response to some catastrophe that befell a country and that were designed principally to prevent a recurrence of the disaster - rather than to promote a positive national vision.

In fact the three largest countries of the EU - Germany, France and Italy - may be said to have Anti-Constitutions. To a lesser degree, this may also be true of Spain and Portugal. The constitutions of both Germany and Italy were created not so much with a positive vision of the country in mind, but rather to ensure that a return to the totalitarian regimes which preceded them is impossible.

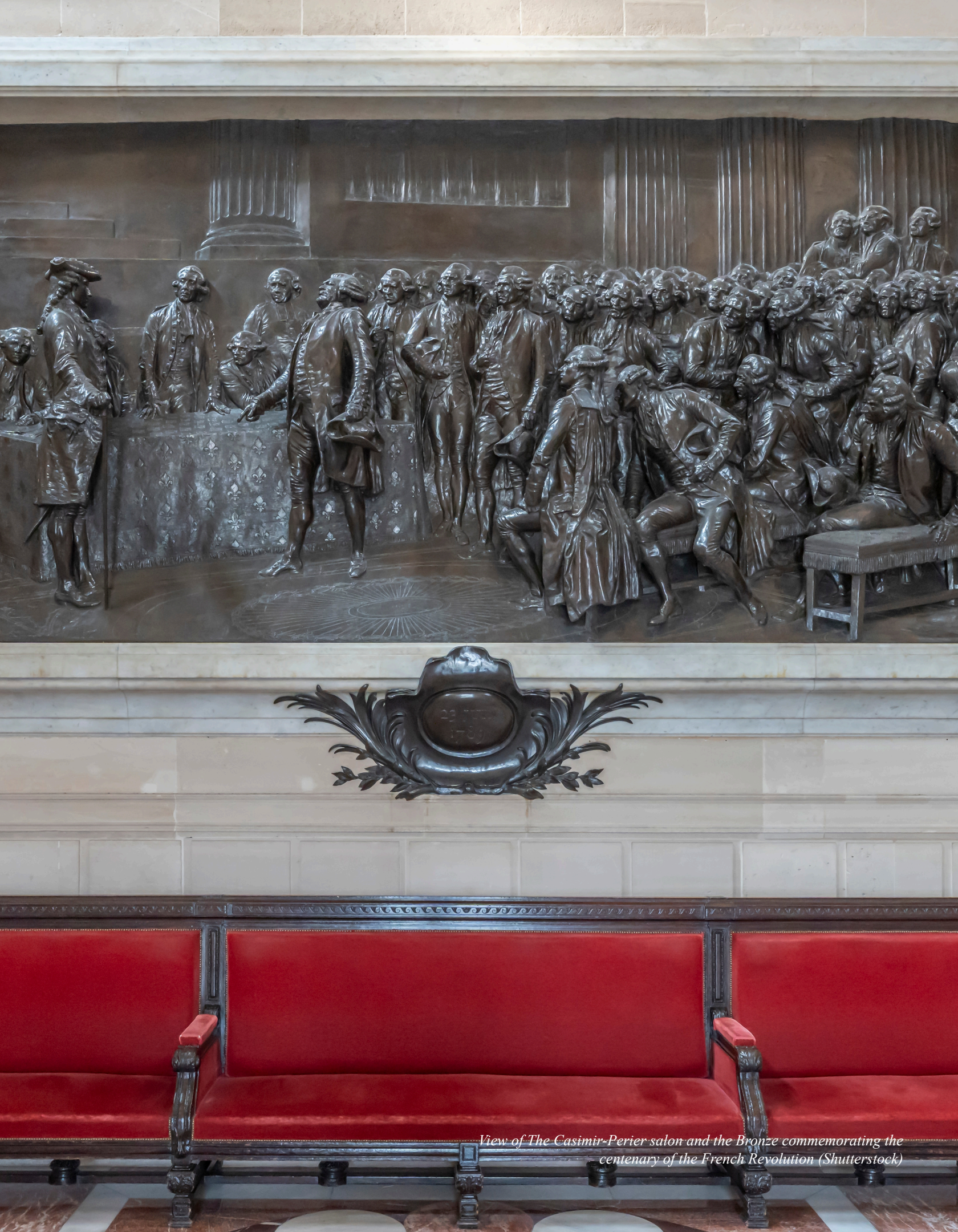
As the danger of a return to the previous regime becomes more remote, the lack of a positive national vision in these constitutions comes more starkly to the fore. In the Italian case, the constitution makes the executive relatively weak, thus producing a marked tendency to short-lived governments.

In Germany the governance problem is less marked, because its constitution rests to some extent on the historical traditions of the pre-union German states, which make the local government effective: in addition, there is a wide political consensus opposed to short-term governments. However in Germany a high electoral threshold, combined with the great ease by which political forces regarded by the administrative apparatus as “extreme” can be excluded from the political process, currently exacerbates the volatility and disaffection of the electorate.

The result of all this is actually greater political instability rather than less. In aiming to prevent a return to totalitarianism, the constitutions intentionally ignore positive national identity or its safeguarding. Consequences include problems such as, for instance, limits on the ability of the governments to deal with issues such as illegal mass immigration.

In France the catastrophe that the constitution tries to address is much further back in the past. It dates not from 1945 but from 1789. In a sense the French Revolution is still going on. In the last 200 years, there have been no fewer than 11 different constitutions in France that have sought to define a new model of governance that successfully reflects the country’s national identity. It is not clear that even the latest version does this.

As noted above, we might perhaps add Spain and Portugal to the same list. These are countries that have adopted constitutions written less than half a century ago, as a response to the authoritarian regimes that preceded them. In the Spanish case, the granting of extensive autonomy to various regions seems to be leading the country from order and stability towards anarchy and possible break-up.



View of The Casimir-Perier salon and the Bronze commemorating the centenary of the French Revolution (Shutterstock)

Concluding Remarks

To conclude, it appears that there are several constitutional models. They recognize different conceptions of what the state is for: to reflect and protect national traditions (National Charter model), to safeguard the independence of the several components of the state (Confederation model) to ensure the dominance of the administration over all aspects of the state (Administrative model), or to obstruct the return to a dangerous precedent (Anti-Constitution quasi-model).

For a conservative it is important to understand the nature and function of the constitution in his/her country, and to consider how it can be made to work towards fostering national goals, or amended if it is failing to fulfill its role. In cases where the constitution is mainly based on a negative vision of the dangers it should obstruct, a more positive vision could be sought either in piecemeal alterations, or even a wider constitutional overhaul: in some countries, this increasingly looks necessary.

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