

Texas Law Review

Volume 87, Number 7, June 2009

Symposium

What, If Anything, Do We Know About Constitutional Design?

Foreword: “I Read the News Today, Oh Boy”[†]: The Increasing Centrality of Constitutional Design

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Consider the lead sentence of a recent story in the *New York Times* on the aftermath of the rejection by the California electorate of a number of measures most political leaders deemed necessary to rescue the state from its present desperate economic situation: “Direct democracy has once again up-ended California—enough so that the state may finally consider another way by overhauling its Constitution for the first time in 130 years.”¹ The problem, however, is not only “direct democracy,” a reference to the constitutionally granted ability of the electorate in California to pass legislation and even constitutional amendments by initiative and referendum, but also, and just as importantly, to other aspects of the California Constitution. Thus the distinguished magazine, *The Economist*, in a pre-election article entitled “The Ungovernable State,” noted that “California has a unique combination of features which, individually, are shaped by other states but collectively cause dysfunction.”² The first is “the requirement that any budget pass both houses of the legislature with a two-thirds majority,” a requirement found in the constitutions of two other states, Rhode Island and

[†] THE BEATLES, *A Day in the Life*, on SGT. PEPPER’S LONELY HEART CLUB BAND (Capitol Records 1967).

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1. Jennifer Steinhauer, *California, Out of Money, Reels as Voters Rebuff Leaders*, N.Y. TIMES, May 21, 2009, at A1.

2. *The Ungovernable State*, ECONOMIST, May 16, 2009, at 33.

Arkansas.³ “But California, where taxation and budgets are determined separately, also requires two-thirds majorities for any tax increase. Twelve other states demand this. Only California, however, has both requirements.”⁴

It could be comforting, at least to those of us who neither live nor have friends in California, to believe that California is indeed “unique” and, therefore, has relatively little relevance for the rest of us. But Paul Krugman, responding to the same imbroglio in California, wondered if “America [will] follow California into ungovernability.”⁵ To be sure, he acknowledged that “California has some special weaknesses that aren’t shared by the federal government,” but he went on to suggest that at least some of “the problems that plague California politics apply at the national level too.”⁶ Perhaps he was thinking only of increasing hyperpartisanship, but perhaps this Nobel Prize-winning economist might be contemplating as well certain structural problems in the U.S. Constitution that generate our own national “democratic deficit”⁷ and dysfunctionality.⁸

More surprising, in some ways, was a story only several days later by *New York Times* reporter John Burns on the present political turmoil in Great Britain following disclosure of financial improprieties by Members of Parliament. “To speak of a ‘political revolution’ in Britain would seem chimerical,” Burns wrote, “were it not for the number of times the possibility has been raised these days, in precisely those terms, by politicians and the London-based commentariat. Suddenly, the talk is of a political system grown petrified and in urgent need of a root-and-branch overhaul that restores the accountability of politicians—and of the government—to the people.”⁹ It might also be worth noting that Great Britain is, of course, part of the European Union, which has had its own notable difficulties in design-

3. *Id.*

4. *Id.*

5. Paul Krugman, *State of Paralysis*, N.Y. TIMES, May 25, 2009, at A15.

6. *Id.*

7. See generally Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859 (2007) (setting out criticisms of the deficiencies of the Constitution and proposing actions Americans might take in response).

8. See generally SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 9 (2006) (calling for a new constitutional convention to replace the current U.S. Constitution, which is both “insufficiently democratic” and “significantly dysfunctional”). Some of the dysfunctions, to be sure, are not mandated by the Constitution in the way that California’s are. The use of the filibuster in the Senate to generate a de facto 60% requirement to pass most legislation is the result of rules adopted by the Senate itself and not a constitutional requirement, as is, for example, the requirement that two-thirds of the Senate acquiesce to a treaty in order for it to be ratified. This may be cold comfort, however, inasmuch as there is no obvious way to remove these, and other, hindrances to anything that might be described as democratic decision making in the U.S. Congress.

9. John Burns, *Beneath a Scandal, Deeper Furies*, N.Y. TIMES, May 24, 2009, at WK1.

ing a constitutional treaty that can gain the requisite approval from all of its now-twenty-six members.¹⁰

Moving eastward from Europe, one finds continuing concern about the degree to which the Iraqi Constitution is providing the basis for any kind of political resolution to the fissures present within that country among its various religious and ethnic groups. As Ambassador al-Israbadi argues in his contribution to this symposium, "the constitutional process" by which the present Iraqi Constitution was designed "nearly ripped the country apart and threatens still to do so."¹¹ Finally, as one moves to the heart of Asia, there is the ongoing "trial" in Myanmar of democratic activist (and Nobel Prize winner) Daw Aung San Suu Kyi for alleged violation of the terms of her many-years-long house arrest.¹² As David Williams argues in his extraordinary article,¹³ intermeshed with the intricacies of her situation and movement are the often-overlooked rebellions by countless ethnic splinter groups within the country, many of whom are engaged in ongoing attempts to draft their own constitutions. Even though most of these constitutions will never become law (the military junta recently solidified its own power through a constitution passed via a sham referendum),¹⁴ the mere process of drafting and thinking through constitutional issues has enabled these groups to recognize the compromises and cooperation that real democratic governance require—a foundation that provides true hope to the country.

The subject of "constitutional design," therefore, is of far more than "academic" interest, especially in the pejorative sense that term often suggests. All around us we can observe serious politicians confronting such

10. See, e.g., Steven Erlanger, *New Challenges for European Union's Next Presidency After the Defeat in Ireland*, N.Y. TIMES, June 19, 2008, at A10 (reporting on the shocked European response to the Irish rejection of the constitutional Lisbon Treaty). One might well ask what possessed the framers of the draft European constitution to adopt a unanimity rule akin to Article XIII of the Articles of Confederation in the United States, compliance with which would have undoubtedly doomed the efforts in Philadelphia in 1787 to equally inglorious defeat. As Bruce Ackerman has convincingly argued, perhaps the most important Article of the U.S. Constitution is the never-taught Article VII, which required the ratification of only nine states to bring the new Constitution into being. This effectively made the views of Rhode Island absolutely irrelevant with regard to displacing the Articles of Confederation with the new Constitution, stunning evidence of the importance of "constitutional design."

11. Feisal Amin Rasoul al-Israbadi, *A Constitution Without Constitutionalism: Reflections on Iraq's Failed Constitutional Process*, 87 TEXAS L. REV. 1627 (2009).

12. See Seth Mydans & Mark McDonald, *After Briefly Letting Diplomats in, Myanmar Locks Them out of Dissident's Trial*, N.Y. TIMES, May 22, 2009, at A8 (reporting on the closed-door trial of Daw Aung San Suu Kyi for allowing an American to stay at her home overnight, a violation of her house arrest).

13. David C. Williams, *Constitutionalism Before Constitutions: Burma's Struggle to Build a New Order*, 87 TEXAS L. REV. 1657 (2009).

14. See *Disaster in Myanmar*, N.Y. TIMES, May 7, 2008, at A6 (stating that, despite its democratic appearance, the referendum "will effectively leave the military in control anyway"); *When It Comes to Politics, Burmese Say, Government Is All Too Helpful*, N.Y. TIMES, May 28, 2008, at A6 (relating how, to a government-run company, employees did not have to vote because their ballots were marked for them).

fundamental issues as whether electoral systems should be constitutionalized (or left to the “normal” political process) and, if so, what particular system (or mix of systems) should be adopted; the comparative merits of presidentialism against parliamentarism (or the hybrid mixture called “semi-presidentialism”); the role of courts, including the desirability of confining judicial review, assuming it exists at all, to specially designated “constitutional courts”; the extent to which the possibility of “emergency” or “crisis” should be recognized within the constitutional text itself, with whatever modification of the “normal” constitutional order as might be appropriate; the creation of federal systems, with concomitant guarantees to states of autonomy over such volatile issues as religion or language; or, finally, the difficulty that should be placed in the way of those who desire to amend any given constitution. And, of course, this does not include discussions of specifying rights to be protected against governmental abridgement or, of increasing significance following World War II, guaranteeing certain “positive” rights that require for their realization the provision of goods or services by the state instead of merely being “left alone,” as may be the principal desideratum for more traditional “negative” rights. Decisions on these matters may literally become matters of life and death in a given political order (or, more accurately, in a state of political *disorder* in which constitutional design is presented as a potential solution).

Readers will find below a superb set of articles that examine these and other issues linked with the multiple challenges presented to “constitutional designers.” Though this is an occasion for joy in any event, it is, I think, especially wonderful to have this outstanding collection appear in the pages of the *Texas Law Review*. They were, of course, originally prepared as part of a symposium co-sponsored by the *Review*, together with the University of Texas School of Law and the Lyndon B. Johnson Presidential Library, on the general topic, “What, If Anything, Do We Know About Constitutional Design?” I had the privilege of being the principal organizer. I am extremely grateful, not for the first time, to all of these organizations for providing support, both financial and otherwise, to enable me to realize what at inception seemed an unrealistically hopeful aspiration.

Beyond my personal involvement in the symposium, why do I think this symposium is so important for the *Texas Law Review* and its legally oriented readers? I trust that the basic importance of the topic is adequately spelled out by the quick overview of “headline news” and its relevance to constitutional design. And, of course, it is not the case that only now is the importance of constitutional design manifesting itself. It has been a major reality all over the world since World War II, and, of course, it became especially prevalent in the aftermath of the collapse of the Soviet Union and its

satellite empire,¹⁵ as well, of course, of the demise of the apartheid state in South Africa.¹⁶ What does deserve comment, however, is the relative paucity of discussion regarding many of these topics within the American legal academy. The explanation is all too simple: American legal academics interested in "constitutional law," with some outstanding exceptions, tend to be almost pathologically fixated on a very small subset of issues that come before the appellate (usually federal) judiciary. In turn, this means that most academics who teach "constitutional law" or profess an interest in "constitutional theory" end up obsessing on ever more abstruse theories of "constitutional interpretation" that focus on those particular aspects of the Constitution—capitalized because for most Americans there is only *one* constitution, the Constitution of the United States—that gain the attention of the Supreme Court. Attacking this pathology has become a major focus of my recent scholarship (or what some might simply describe as rants delivered to my colleagues in the legal academy).¹⁷ I have come to believe that the "hard-wired" structural aspects of the Constitution—which are, precisely because we regard them as "hard-wired," never litigated—are considerably *more* important than the provisions that we *do* emphasize in our courses and casebooks, precisely because the latter are obviously open to different interpretations. Such provisions are therefore subject to often dramatic changes in doctrine upon the winning of presidential elections and the appointment of ideologically compatible judges, as distinguished from the "hard-wired" provisions that are basically impervious to change. Such "hard-wired" provisions almost always are the most important features of actual constitutions, as they constitute the institutionalist contexts within which ordinary politics will take place, with attendant triumphs and defeats of contending groups.

A major explanation for my zeal in organizing the symposium, therefore, and for my utter delight in the willingness of the *Texas Law Review* to "spend" so many of its scarce pages, as well as its time and effort, on this project, is my hope that this will have a genuine impact on the legal academy—and perhaps on the editors of other journals across the land—with regard to the importance of nonlitigated—and therefore all-too-often simply

15. See, e.g., RETT R. LUDWIKOWSKI, CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE 56–72 (1996) (describing the constitutional drafting process that occurred in Russia after the fall of the Soviet Union).

16. See, e.g., HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION 8, 69–92 (2000) (recognizing that constitutionalism "dominate[d] processes of political reconstruction at the end of the twentieth century and strategizing about constitutionalism in post-apartheid South Africa).

17. See, e.g., Sanford Levinson, *Our Schizoid Approach to the United States Constitution: Competing Narratives of Constitutional Dynamism and Stasis*, 42 IND. L. REV. (forthcoming 2009); Sanford Levinson, *What Should Citizens (As Participants in a Republican Form of Government) Know About the Constitution?*, 50 WM. & MARY L. REV. 1239, 1249 (2009) ("The fixation on the 'litigated Constitution,' as distinguished from . . . the 'hard-wired' Constitution [leads lawyers] to overestimate the importance of courts and judges, for good and for ill.").

ignored—aspects of constitutions. And, inevitably, any serious inquiry into constitutional structures and their importance must quickly become comparative. Rudyard Kipling once asked, “[W]hat should they know of England who only England know?”¹⁸ This is, of course, an all-purpose line. Although one should almost certainly read Kipling’s use of “should” as synonymous with a simple “do,” it might be useful to use it in its more standard sense with regard to thinking of how best to educate contemporary students and, indeed, those who have the primary responsibility for teaching students. Thus I believe that anyone interested in the U.S. Constitution should spend far more time not only on its nonlitigated aspects but also on what the study of other constitutional systems might tell us about the strengths and weaknesses of given constitutional structures or, ultimately, about the very project of constitutional design itself. And “comparative” constitutionalism most certainly need not confine itself only to “foreign” constitutions. Bruce Cain and Roger Noll’s article on constitutional design and transformation in California,¹⁹ which is obviously highly relevant to the very first of the newspaper headlines above, emphasizes what can be learned from a close look at America’s fifty state constitutions.²⁰ If one result of this symposium is to generate additional interest, by legal academics and law students alike, in state constitutions and their ramifications, then I will consider the symposium to be a great success, even if I would prefer that the turn “inward” be complemented by greater attention as well to foreign constitutions.

The overarching question of the symposium, after all, is whether we really do have adequate knowledge to be able confidently to ascribe any particular degree of causal significance to the choices that constitutional designers make, whether for good or for ill. Much ink has been spilled, for example, with regard to the ostensible importance of choosing a presidential as against a parliamentary system, and recent years have given us the added possibility of “semi-presidential” systems, as, most notably, in France and Russia. Yet one sobering conclusion of Professor Cheibub’s examination of the consequences of these choices is that we may seriously overestimate their overall importance and, concomitantly, underestimate the significance of structural decisions made *within* the respective systems (such as, for example, the consequences of different kinds of veto systems or the ability of

18. RUDYARD KIPLING, *The English Flag*, in *STORIES AND POEMS FROM KIPLING* 225, 225 (Mary E. Burt ed., A.L. Burt Co. 1909) (1899). Interestingly enough, this inspired the last line of Billy Bragg’s bitter song, *The Few*. See BILLY BRAGG, *The Few*, on DON’T TRY THIS AT HOME (Elektra Entertainment 1991) (“What do they know of England / Who only England know?”).

19. Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEXAS L. REV. 1517 (2009).

20. See generally JOHN DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 3 (2006) (undertaking a study of state constitutional convention debates to examine the ways in which they “addressed fundamental questions of the kind that were treated in the federal convention”).

the executive to control or influence the legislative agenda).²¹ Similarly, Professor Schor's and Law's articles²² demonstrate that a general decision as to adopting "judicial review" must be followed by many subsidiary choices that will ultimately affect the nature of judicial monitoring of decisions made by other branches of government.

Alexander Hamilton notably suggested in the very first *Federalist Paper* that the question before the American people—and, indirectly, before the entire world, was "whether societies of men are really capable or not of establishing good government from reflection and choice."²³ And his compatriot, James Madison, similarly spoke of the importance of learning the "lessons of their own experience."²⁴ But such aspirations presume that one can with some degree of confidence establish empirical fits between desired ends and chosen institutional means. If we cannot, then we should recognize that not only constitutional design, but much else about law (and public policy more generally), might simply be a fool's errand, where we make decisions in the almost literally blind hope that things will work out for the best.

I do not think it is necessary to offer summaries of the thirteen outstanding articles before you, and the mention of several of them in the paragraphs above should not in the least be taken as denigrating the importance of those left unmentioned. Each of them, I am confident, will provide challenging food for what will, for almost everyone, prove genuine new thought. I am sure, for example, that I am not alone in having never before given any thought to the particular challenges facing those who might be charged with designing a future constitution for Myanmar prior to reading Williams's remarkable article.

What, indeed, can one be said to know of the United States who knows nothing about Myanmar—or Iraq, or California, or Japan, and so on through the rich array of examples and discussions offered in this issue? When Robert Bork, perhaps ill-advisedly in context, spoke of potential service on the Supreme Court as offering an "intellectual feast,"²⁵ he was describing a kind of joy that anyone affiliated with the legal academy can certainly recognize. What follows, then, is just such an "intellectual feast" about

21. José Antonio Cheibub, *Making Presidential and Semi-presidential Constitutions Work*, 87 TEXAS L. REV. 1375 (2009).

22. David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEXAS L. REV. 1545 (2009); Miguel Schor, *The Strange Cases of Marbury and Lochner in the Constitutional Imagination*, 87 TEXAS L. REV. 1463 (2009).

23. THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1999). See generally Sanford Levinson, *Afterword: Do We Really Believe Any Longer in the Possibility of 'Government from Reflection and Choice'? A Dour Meditation on Our Present Situation*, 67 MD. L. REV. 281 (2007) (proposing a new constitutional convention comprised of representatives selected through a structured random process who would spend two years reflecting on and choosing new constitutional provisions).

24. THE FEDERALIST NO. 14 (James Madison), *supra* note 23, at 104.

25. *The Bork Hearings: An Intellectual Appetite*, N.Y. TIMES, Sept. 20, 1987, at A50.

issues of both the highest theoretical interest and, as illustrated by what is almost literally today's news, practical importance.