

The “Design Sciences” and Constitutional “Success”

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We all know the rule of umbrellas—if you take your umbrella, it will not rain; if you leave it, it will.

—Ralph Waldo Emerson (American philosopher)¹

Design can be art. Design can be aesthetics. Design is so simple, that’s why it is so complicated.

—Paul Rand (American graphic designer)²

The literature on constitutional design is vast. Its essentials are well-known to participants of this expert forum and need not be reproduced here.³ In a nutshell, it suggests that desirable social and political outcomes may be accomplished through optimal institutional planning and implementation. It often engages in a quest to find the “best” or most suitable constitutional rule across cultures in order to suggest the “best practice” in a given polity or an optimal combination of rules and institutions for a given polity or regime. In democratic settings, the purported normative goal of such design may be the enhancement of the political system’s democratic credentials (e.g., participation and representation), the increase of accountability and transparency, and the balancing of the principles of majority rule with the idea that democracy may have more to it than mere adherence to those principles. At the more practical level, such design may aim at enhancing the quality and effectiveness of public policy making and, by extension, supporting political, cultural, and economic development in a given polity. Effective constitutional design is also said to positively affect economic growth, most notably via increasing a given regime’s international credibility vis-à-vis foreign investors.⁴ In

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1. Ralph Waldo Emerson, Journal Entry (1873), in 16 THE JOURNALS AND MISCELLANEOUS NOTEBOOKS OF RALPH WALDO EMERSON 293 (Ronald A. Bosco et al. eds., 1982).

2. FRANK W. LIOU, RAPID PROTOTYPING AND ENGINEERING APPLICATIONS 48 (2007).

3. A few recent notable contributions to the field include DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN (2006); WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY (2007); EDWARD SCHNEIER, CRAFTING CONSTITUTIONAL DEMOCRACIES (2006); and ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY (2007).

4. The literature on this point is vast. See Alvaro A. Montenegro, *Constitutional Design and Economic Performance*, 6 CONST. POL. ECON. 161, 169 (1995) (arguing that constitutional design can be predictive economically; in particular, longer constitutions indicate less stability and shorter

transition settings—most commonly, transitions from an authoritarian regime to a democratic or at least quasi-democratic regime—constitutional design is aimed at ensuring effective transition while maintaining the incentives of major stakeholders to uphold the transitional pact and accomplish its stated goals. Finally, with respect to conflict-ridden settings, constitutional design is often viewed as a means for mitigating deep tensions in polities torn along ethnic, linguistic, religious, or cultural lines. In this context, the short- to medium-term goal of constitutional design is to reduce the level of violence; increase credibility and trust among pertinent stakeholders, coalitions, and oppositions; and ultimately set the foundations for a nexus of political institutions and procedures that would allow for long-term unity, peace, and stability. To that extent, the literature on constitutional design of this kind, often referred to as “consociationalism,” emphasizes the significance of joint-governance institutions, mutual veto points, power-sharing mechanisms, and the like.⁵ In its more sophisticated “integrationist” guise, this brand of scholarship advocates the adoption of institutions that would make the political process more attractive to recalcitrant stakeholders, encourage moderation, and diffuse the causes for strife by providing incentives to vote across group lines.⁶

All of these approaches to constitutional design share in common a belief that constitutional provisions, institutions, and arrangements can and should be optimized so as to induce, support, or allow social and political change. While by idealist accounts constitutions evolve organically and are said to reflect the authentic people’s will or a polity’s enduring values, constitutional design advocates a second-order, pragmatic vision of constitution making as a response to concrete problems and challenges. Constitutions may be engineered so as to accomplish these goals. In that respect, the enterprise of constitutional design shares the core elements of what may be termed the “modernist narrative.” Destiny may be averted and passions controlled, for man has the ability to tame nature and shape and reshape reality through rational, goal-oriented data gathering, planning, and implementation. And while nature is fearsome and possibly chaotic, careful institutional engineering can introduce order, help overcome challenges,

constitutions should therefore stimulate better economic performance); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 806, 805–06 (1989) (arguing that constitutions play a critical role in establishing “rules that foster long-term growth”); *infra* notes 129–31 and accompanying text.

5. E.g., Arend Lijphart, *Constitutional Design for Divided Societies*, J. DEMOCRACY, Apr. 2004, at 97, 99–107 (defining the term “consociationalism,” and with regard to constitutional engineering for divided societies, suggesting joint selection of important political posts, minority veto on important issues, and other power-sharing mechanisms).

6. A good summary of relevant works on these two threads of constitutional design literature can be found in Sujit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 3 (Sujit Choudhry ed., 2008).

solve problems, and ultimately create better opportunities in order to serve the public good.

In this Article, I engage in a brief thought experiment concerning two important yet not often addressed aspects of constitutional-design theory. First, I place constitutional design in the broader context of what I call the “design sciences”—the many disciplines, domains, and activities from urban planning to space exploration—that rely on design to accomplish big, noble goals. Second, I address the question of “success” in constitutional design, namely how to define and assess the actual impact of constitutional structures in accomplishing desirable objectives. Among the possible criteria I examine are time horizon and endurance; actual implementation of constitutional aspirations; constitutional design’s contribution in accomplishing substantive goals such as democracy, prosperity, and human development; the real success rate of constitutions in mitigating existential tensions in conflict or post-conflict settings; and the (in)ability of constitutions to address some of the world’s biggest challenges, from health pandemics or climate change to widening social and economic gaps, forced migration, proliferation of weapons of mass destruction, or persisting large-scale crimes against humanity—all of which require global cooperation and therefore lie largely beyond the reach of constitutions.

I. The “Design Sciences”

Alongside constitutional design, a variety of other design sciences have emerged over the past two centuries. Modern political theory, from Bentham’s panopticon to Marx’s proletariat state, frequently engaged in macropolitical design.⁷ The twentieth century saw the spread of capitalist democracy in the West—arguably the grandest of all macropolitical planning exercises of modern times. The combination of universal suffrage, institutional checks and balances, individual freedoms, and market economy is said to yield long-term political stability and economic prosperity. Communism in the former Soviet Union, at least in its first few decades, was a mega-exercise in social design. It was not too long before the foundations of this experiment began to crack, but the aspiration to advance an egalitarian notion of social justice to all through central planning certainly make it qualify as one of the most ambitious political designs in recent history. The accomplishments of centralized megaplanning in terms of human development in traditionally underdeveloped places such as China cannot be

7. See, e.g., SHLOMO AVINERI, *HEGEL’S THEORY OF THE MODERN STATE* 176–93 (1974) (discussing Hegel’s macroconception of the modern state and its connection to his broader philosophical ideas and other spheres of life); KARL MARX & FREDERICK ENGELS, *THE MANIFESTO OF THE COMMUNIST PARTY* 12 (Frederick Engels ed. & trans., Charles H. Kerr & Co. 1906) (1848) (introducing the conception of the proletariat and casting history as a perpetual class struggle); NIKOLAS S. ROSE, *POWERS OF FREEDOM* 187 (1999) (describing the panopticon as a “diagram of political technology”).

taken lightly. Meanwhile, the more specialized area of public policy has emerged with the presumption that planning serves as an effective way to accomplish desirable goals. Today almost every aspect of public policy, from health care to forestry, is based at least in part on expert planning (e.g., budgeting, target setting, performance monitoring, etc.). Macroeconomic planning is perhaps the most obvious manifestation of this trend. The public education system likewise aspires to train and prepare tomorrow's citizens for productive life. It is arguably one of the most ambitious megadesign socialization and indoctrination mechanisms of all time. In the private sector, the rise of developed capitalism brought to the fore domains such as large-scale business planning and strategy.

And with the rise of the modern state and massive movements of people, spatial design was brought to the fore. Regional and urban planning emerged as an academic and practical field in an attempt to design regional development and urban life—North and South—in a thoughtful, rational way.⁸ Issues such as the provision of necessary services on a large scale (e.g., infrastructure and transportation, commerce, sanitation, education, and culture), districting and neighborhood development, or even how cities can cater to specific industries and become effective magnets to certain social strata and professionals have become matters of planning and design.⁹ New capital cities such as Brasilia, Abuja, and Islamabad have been designed and constructed from scratch. And from Tokyo to Dubai, artificial islands built at sea now carry entire airports or world-class tourist resorts. Space exploration meanwhile became one of the grand design arenas of the twentieth century, with incredible technological ingenuity and endless financial resources invested in conquering the unknown, at times with great success and at other times ending in utter fiasco.¹⁰

Planning and design have also become prevalent at the micro level. Architects and civil engineers; interior, landscape, or custom designers; marketing experts and computer programmers; nutritionists and plastic surgeons; film directors and military platoon officers; tax evaders and bank robbers; and travel agents and wedding planners all draw and rely on detailed, micro-level planning. Agricultural products are engineered so as to increase their shelf lives, mutate their shapes and colors, and allow crops to grow outside of their natural habitat or season. And yes, those of us amateur cooks who are not Jewish or Italian grandmas often draw on recipe books to come up with a decent dinner entrée or a sophisticated dessert. In fact, when we pause for a minute and think about this, we plan many aspects of our lives with variable degrees of success. So planning and design are everywhere—they are an absolutely essential aspect of modern life. In fact, they are the

8. John Friedmann, *The Future of Comprehensive Urban Planning: A Critique*, 31 PUB. ADMIN. REV. 315, 315–16 (1971).

9. *Id.* at 316.

10. *See infra* notes 28–32 and accompanying text.

epitome of modernity itself, in all its variety—from the largest scale of enterprises to the atomic or molecular scale of nanotechnology, from the most noble and ambitious of social experiments to the most trivial and mundane aspects of everyday life. Design well, implement carefully, and success is on its way.

Granted, reality may strike back. There was the collapse of communism—arguably one of the largest social experiments ever—and there was the unanticipated power outage that, regardless of the best of fruit-pie recipes, left the oven in Casa Hirschl nonoperational. And as the colossal failures of 9/11, the slow Katrina relief operations, and the mortgage-market meltdown suggest, planning deficiencies and false risk assessments can bog down even the strongest of nations. But the overall tone of the design sciences remains utterly optimistic. They resent destiny and fatalism. Technology and science are transformative forces. And so, bad genes or brute luck may be overcome. Structural, organic processes may be controlled. And the effects of less than dazzling political realities—micro or macro—can be mitigated and perhaps even reversed via careful, rational institutional planning.

The design sciences raise questions concerning the gap between planning and implementation. What counts as “success”—actual implementation of the plan or accomplishment of its stated goals? How “rational” is the design process to begin with and how much is it driven by (or insulated from) values, ideas, institutions, and interests? What is the effect of intervening factors and contingencies on implementation? Do we have adaptation techniques or self-learning mechanisms built into the program that allow for on-the-go learning, modification, and adjustments? And what about unintended consequences, often negative, unforeseeable at the time of planning but which loom large once the plan moves from the drawing board to the ground? What may be loosely termed here the design sciences provide a rich, cross-discipline comparative context to assess these and other related problems pertaining to constitutional design.

So what do the design sciences tell us about constitutional design? First, size and scope matter. The chances of a small-scale, focused, and tightly designed plan being successful are distinctly higher than those of large-scale, megadesign enterprises such as constitutional engineering. The number of possible intervening factors and unforeseen impediments in such a broad design exercise is immeasurable. Statistically speaking, other variables being equal, the likelihood that such a large-scale design will succeed is small. While the small-scale egalitarian experiment of the kibbutz worked quite well for many years without harsh indoctrination, secret services, showcase trials, or gulags, the same social experiment on a far larger scale in the communist world proved much harder to maintain.¹¹ So small is better.

11. See DANIEL GAVRON, *THE KIBBUTZ* 152 (2000) (explaining how the early kibbutz movement worked well on a small communal scale but also noting that establishing an entire nation

The ultimate example of a successful small-scale design is the Polgár sisters experiment. The Polgár sisters are three world-class chess players from Hungary; they were products of a unique and carefully-thought-out attempt by their father, a diehard chess aficionado and a home-schooling advocate, to prove that children could perform exceptional achievements if trained in a specialist subject from a very early age.¹² The Polgár girls were educated at home from a tender age, with emphasis on chess and Esperanto.¹³ “Geniuses are made, not born” was their motto.¹⁴ Eldest sister Susan became the top-ranked woman player in the world at the age of fifteen.¹⁵ She was the first woman to earn the title of Grandmaster in regular competition, and she was the Women’s World Chess Champion from 1996 to 1999.¹⁶ Middle sister Sofia stunned the chess world at the age of fourteen with her stellar performance in a tournament in Rome in 1989 that became known in the history of chess as the “sack of Rome.”¹⁷ Youngest sister Judit Polgár is by far the strongest female chess player in history.¹⁸ In 1991, she achieved the title of Grandmaster at the age of fifteen years and four months, at that time the youngest person to do so.¹⁹ She is the only woman currently on the Top 100 Players list and has been ranked as high as number 8.²⁰ To understand the success of the Polgár sisters experiment, one could imagine Michael Phelps’s two hypothetical siblings, John and Jane Phelps, each reaching the same level of international accomplishments in swimming as their famous real brother. Incredible!

At the other end of the spectrum, the number of things that can go wrong at the various stages of implementation is far larger. This has been widely documented in public-policy studies. The classic pieces look at how good intentions at the federal level get bogged down during their actual implementation on the ground.²¹ Since the 1970s there have been many

as “one large kibbutz” was impractical because the “kibbutz way of life” was not “suitable for the majority”).

12. CATHY FORBES, *THE POLGAR SISTERS* 14, 24 (1992).

13. *Id.* at 24–25.

14. *Id.* at 13.

15. *Id.* at 49.

16. Tex. Tech Univ., Susan Polgar Inst. for Chess Excellence, Grandmaster Susan Polgar, http://www.depts.ttu.edu/spice/Susan_Polgar.php.

17. *See* FORBES, *supra* note 12, at 120–21 (recounting Sofia’s performance at the 1989 open event in Rome).

18. Robert Byrne, *A Spirited Polgar Pushes a Fist Through Chess’s Glass Ceiling*, N.Y. TIMES, Nov. 2, 2003, at N34.

19. *See* FORBES, *supra* note 12, at 162, 171 (recording Judit’s successful push to break Bobby Fischer’s previous record).

20. Byrne, *supra* note 18 (recording Judit’s ascendance to the number 8 ranking); FIDE World Chess Federation, Top 100 Players April 2009, <http://ratings.fide.com/top.phtml?list=men> (identifying Judit Polgar as the thirty-seventh-ranked chess player in the world).

21. *E.g.*, EUGENE BARDACH, *THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW?* 3 (1978) (analyzing various causes of public-policy failures); JEFFREY L. PRESSMAN & AARON WILDAVSKY, *IMPLEMENTATION: HOW GREAT EXPECTATIONS IN*

other studies that look at the issue through various lenses: quantitative, qualitative, bottom-up, top-down, etc.²² All reach the same conclusion: the number of veto points along the implementation chain is often large enough to create non-trivial hurdles, at times insurmountable, on the road to full implementation.²³ A similar argument is advanced in Gerald Rosenberg’s *The Hollow Hope*²⁴—one of the most influential works on the question of the impact of landmark court rulings.

A second insight to be learned from the design sciences is that although careful designs are better than loose ones, even the tightest of designs—and let us exclude cooking from a recipe book for now—can go astray. Boston’s Big Dig, arguably one of the foremost projects of modern civil engineering in the United States, has been marred with numerous problems, lengthy delays, countless leaks, substandard materials, and a fatal collapse.²⁵ Robert F. Scott lost the race to the South Pole despite believing that he had planned his conquest of Antarctica to perfection.²⁶ The history of Hollywood is filled with multi-million-dollar, megastar films that have turned out to be complete busts; alongside these failures there have been many humble productions that have blossomed into international blockbusters.²⁷ NASA’s numerous

WASHINGTON ARE DASHED IN OAKLAND, at xx–xxiv, 69 (3d ed., 1984) (arguing that the multiple steps and decision points necessary in implementing public policy may create significant obstacles to achievement).

22. E.g., Marie-Louise Bemelmans-Videc, *Introduction: Policy Instrument Choice and Evaluation*, in CARROTS, STICKS AND SERMONS 1 (Marie-Louise Bemelmans-Videc et al. eds., 1998) (introducing a series of quantitative and qualitative studies on policy implementation); Paul A. Sabatier, *Top-Down and Bottom-Up Approaches to Implementation Research: A Critical Analysis and Suggested Synthesis*, 6 J. PUB. POL’Y 21, 21 (1986) (reviewing top-down and bottom-up approaches to the study of implementation); Malcolm Gladwell, *Wrong Turn: How the Fight to Make America’s Highways Safer Went Off Course*, NEW YORKER, June 11, 2001, at 50, 52–54 (discussing a study of car accidents that takes a passive approach to implementation).

23. See, e.g., Richard F. Elmore, *Backward Mapping: Implementation Research and Policy Decisions*, 94 POL. SCI. Q. 601, 607 (1979) (“Even when the probability of a favorable result is high at each step, the cumulative product of a large number of transactions is an extraordinarily low probability of success.”).

24. See GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 35–36, 420–22 (2d ed. 2008) (positing that courts face significant extra-judicial constraints and conditions for their contested decisions to be fully and effectively implemented).

25. See Pam Belluck & Katie Zezima, *4 Ceiling Panels in Boston’s Big Dig Fall, Killing Woman in Car*, N.Y. TIMES, July 12, 2006, at A16 (recounting the accident and mentioning the Big Dig’s previous problems).

26. ROBERT FALCON SCOTT, *SCOTT’S LAST JOURNEY* 114 (Peter King ed., 2000).

27. For example, Oliver Stone’s *Alexander*, featuring stars such as Colin Farrell, Angelina Jolie, and Val Kilmer, is considered a box-office flop. See A.O. Scott, *A Territory Alexander Couldn’t Conquer*, N.Y. TIMES, Dec. 26, 2004, § 2, at 18 (noting that the film cost over \$150 million to make and grossed less than \$35 million in the United States in its first month and a half). By contrast, *The Blair Witch Project*, an independent film with an unknown cast made by unknown filmmakers in around eight days, achieved blockbuster status despite its extremely low budget. See Richard Corliss, *The Blair Witch Project, 1999—Top Ten Sundance Hits*, TIME, http://www.time.com/time/specials/packages/article/0,28804,1871821_1871830_1871842,00.html (reporting that the film was made for only \$35,000 and grossed about \$140 million in the United States and another \$108 million internationally).

accomplishments in space exploration are well-documented.²⁸ But the record also includes the Challenger shuttle mission accident of 1986 and the Columbia shuttle accident of 2003.²⁹ More generally, several of NASA's (or its Russian counterpart's) planned attempts to reach Mars, for example, have been unsuccessful.³⁰ Whereas Pathfinder (1997), Spirit (2004), and Opportunity (2004) have delivered the goods,³¹ other megaprojects have proven to be far less successful.³² London's Docklands financial district project started as a complete bust before picking up momentum and turning into the glossy, fashionable place it has become a decade later.³³ Brasilia, designed by the legendary architect Oscar Niemeyer, is a paradigmatic example of near-megalomaniac urban planning that, with the exception of a couple of monumental government buildings, has not reached most of its stated goals.³⁴ In fact, urban planning as a field has been characterized by mixed results when it comes to actual on-the-ground success.³⁵ Whereas in civil engineering and architecture—both targeted, concrete domains—the implementation rate is very high, the ratio of implementation per design in macro-urban or regional planning is inevitably lower.

28. See ROGER E. BILSTEIN, *TESTING AIRCRAFT, EXPLORING SPACE: AN ILLUSTRATED HISTORY OF NACA AND NASA* 37–40, 98–102, 128–31 (4th ed., Johns Hopkins Univ. Press 2003) (1965) (recounting NASA's groundbreaking aerospace achievements in the post-World War II era).

29. William J. Broad, *The Shuttle Explodes: 6 in Crew and High-School Teacher Are Killed 74 Seconds After Liftoff*, N.Y. TIMES, Jan. 29, 1986, at A1; David E. Sanger, *Loss of the Shuttle: The Overview; Shuttle Breaks Up, 7 Dead*, N.Y. TIMES, Feb. 2, 2003, § 1, at 1.

30. See, e.g., R. Cowen, *Reviewers See Red over Recent Mars Programs*, 157 SCI. NEWS 212, 215 (2000) (citing a review by a NASA-appointed panel that attributed the failure of several U.S. Mars missions to insufficient funding, inexperienced management, and inadequate testing); Todd S. Purdum, *Russia's Mars Craft Fails and Crashes in Southern Pacific*, N.Y. TIMES, Nov. 18, 1996, at A3 (reporting the failed launch of a Russian probe to Mars).

31. See H.R. Res. 67, 111th Cong. (2009) (enacted) (recognizing and commending the success of the Spirit and Opportunity rovers); Richard A. Kerr, *Pathfinder Strikes a Rocky Bonanza*, 277 SCI. 173, 173–74 (1997) (describing the early successes of the Pathfinder mission).

32. In 1999, for example, both the \$125 million Mars Climate Orbiter and the \$165 million Mars Polar Lander were lost. William J. Broad, *Experts Warn of Mars on the Cheap*, N.Y. TIMES, Dec. 8, 1999, at A19 (reporting on how mistakes caused the failure of the first mission and frantic overcorrections then doomed the second). The robotic spacecraft Phoenix landed successfully on Mars's polar region in May 2008, but the mission was brought to an abrupt conclusion when contact was lost in November 2008. *NASA Loses Contact with Mars Lander and Ends Its Mission*, N.Y. TIMES, Nov. 11, 2008, at A19.

33. See JANET FOSTER, *DOCKLANDS: CULTURES IN CONFLICT, WORLDS IN COLLISION* 152–57, 209–11 (1999) (summarizing the negative reactions to the Docklands Project in the 1990s).

34. See JAMES HOLSTON, *THE MODERNIST CITY: AN ANTHROPOLOGIST CRITIQUE OF BRASILIA* 14–23, 89 (1989) (chronicling Brasilia's architectural design plans and the government's failure to fully implement those plans); JAMES C. SCOTT, *SEEING LIKE A STATE* 117–28 (1999) (describing the shortcomings of the Brasilia design and its failed attempt to initiate broad transformation throughout Brazil).

35. Compare PETER HALL, *GREAT PLANNING DISASTERS* 1–4 (1982) (providing an overview of several failed urban planning initiatives), and SCOTT, *supra* note 34, at 117–28 (documenting the failures of Brasilia), with ALICE M. COLEMAN, *UTOPIA ON TRIAL: VISION AND REALITY IN PLANNED HOUSING* 8 (1985) (suggesting that some city experiments may succeed if the design aligns with contemporary trends).

A third lesson is that when it comes to institutional design, Lamarckism may be a more powerful idea than Darwinism.³⁶ Unlike nature, where Darwinism seems to reign, Lamarckism often makes for better urban design. Whereas Darwin’s theory of evolution emphasizes the value of random mutations in overcoming exogenous shocks (with species that lack these beneficial features becoming extinct),³⁷ Lamarck’s theory of “inheritance of acquired characters” suggests that learned experience may be incorporated and transformed into organic features.³⁸ Reflexive designs with effective, built-in self-adjustment and autolearning mechanisms work better than rigid designs without such adaptation mechanisms. Science itself, arguably the ultimate modernist domain, is a dynamic enterprise with a built-in commitment to self-correction and constant development; at times this development is linear, and at times it takes quantum leaps. By contrast, fixation and rigidity—institutional or ideological—lead to amnesia, backwardness, and ultimately an inability to predict problems or respond effectively. Military history of the twentieth century, from Pearl Harbor to the Yom Kippur War, is filled with examples of such fiascos. So, rigidity and inability to change are often bad things. Why, therefore, should they be considered good things when it comes to constitutionalism?

A related problem is the tendency of applied design science to address today’s or even yesterday’s problems but seldom tomorrow’s problems. This is driven in part by political pressure to resolve the burning problems of the day and in part by the genuine difficulty in predicting pertinent future trends. At any rate, it leads to a catch-up circle that many ambitious public-works projects and high-tech start-ups grapple with: in the time it takes to complete a new subway line or a new highway to ease traffic congestion, the traffic volume has often already reached new heights that the brand-new transportation system cannot cope with. Continuing with our space exploration anecdotes, New Horizons is a hypersonic robotic spacecraft launched in January 2006.³⁹ It is scheduled to reach its destination—the dwarf planet of Pluto and its moons Charon, Nix, and Hydra—in July 2015, nearly a decade after its launch.⁴⁰ And this is the fastest man-made object ever created, with

36. The term “Lamarckism” comes from the name of eighteenth-century French biologist Jean-Baptiste Lamarck, who is known for the evolutionary theory that acquired characters are inheritable, or that “modifications resulting from an organism’s development of particular habits may be passed on to that organism’s offspring under the appropriate conditions.” RICHARD W. BURKHARDT, *THE SPIRIT OF SYSTEM 1* (2d ed. 1995). Lamarck’s theories have been severely criticized at times by Darwinists, despite the presence of Lamarckian ideas in Darwin’s own writings. Abigail Lustig, *Introduction: Biologists on Crusade*, in *DARWINIAN HERESIES* 1, 10 (Lustig et al. eds., 2004).

37. See CHARLES DARWIN, *THE ORIGIN OF SPECIES* 93–94 (Collector’s Library 2004) (1859) (introducing the concept of natural selection, in which small hereditary variations in individuals contribute to their survival or destruction).

38. BURKHARDT, *supra* note 36, at 1–2.

39. S. Alan Stern, *The New Horizons Pluto Kuiper Belt Mission: An Overview with Historical Context*, 140 *SPACE SCI. REV.* 3, 3 (2008).

40. *Id.*

a speed of over 36,000 miles per hour (10 miles per second or approximately Mach 50).⁴¹ But a decade is near eternity when it comes to cutting-edge technology. Velocity aside, some or even most technologies that will be used by New Horizons to actually explore Pluto and its vicinity in 2015 will be 2005 technologies.

One among many manifestations of this problem in constitutional design is the silence of most pre-twentieth-century constitutions with respect to urbanization and the emergence of the megacity. Whereas principles of federalism in a two-layer system were usually set out, local government was often overlooked by constitutional framers. The metropolis phenomenon was not known to framers of the U.S. Constitution nor to the loyalists who adopted the British North America Act in 1867 (Canada's confederating document). This means that megacities, such as Los Angeles, New York, or Toronto, are required to provide a vast array of services to their residents while their independent taxation and legislative authority is very limited.⁴² And the problem extends beyond taxation. Because the city is not recognized as an autonomous constitutional entity, it is often not represented at pertinent public-policy bargaining forums (e.g., forums dealing with welfare, child support, housing, health care, and labor).⁴³ At the same time, because the megalopolis is home to so many people, it inevitably carries the brunt of governmental (in)action with respect to crime, poverty, homelessness, etc. Even more acute is the state of megacities in the developing world, where migration to the city and urban sprawl have long exceeded reasonable capacity.⁴⁴

41. See Press Release, Dwayne Brown et al., NASA's Pluto Mission Launched Toward New Horizons, Jan. 19, 2006, available at http://www.nasa.gov/mission_pages/newhorizons/news/release-20060119.html (“[New Horizons] is the fastest ever launched, speeding away from Earth at approximately 36,000 miles per hour . . .”).

42. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1064 (1980) (pointing out that a city's power to tax is severely limited by state approval restrictions and by the Dormant Commerce Clause).

43. See *id.* at 1062–63 (describing how, due to a lack of constitutional protection, local governments' powers are inhibited by the broad scope of federal and state powers).

44. Newer constitutions (e.g., Brazil, India, Germany) recognize the problem and assign extended authority to local government. E.g., CONSTITUIÇÃO FEDERAL [C.F.] art. 30 (Braz.), translated in 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Rüdiger Woltrum & Rainer Grote eds., 2009) (enumerating the powers of municipalities); INDIA CONST. arts. 243W–243X (allowing states to devolve power to municipalities, including the power to tax); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Constitution] art. 28(2) (F.R.G.), translated in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* (“The communes must be guaranteed the right to regulate on their own responsibility the affairs of the local community within the limits set by law.”). Some other big cities enjoy the status of an independent federal district (e.g., Mexico City). CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CONST. MEX.], art. 44, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.), translated in 12 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*. Others are recognized as a separate region (e.g., Tokyo). See KENPŌ [Constitution] arts. 92–95 (Japan), translated in 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* (providing for the authority of “local public entities” in accordance with the principle of local autonomy); Local Public Entities—Tokyo Metropolitan

The closest constitutional designs get to addressing these issues is by having self-adjustment mechanisms such as amending formulae, designated residual powers to fill newly created lacunae, and "living constitution" interpretive approaches. As is well known, the amending procedures of some constitutions (e.g., the United States) are distinctly rigid and thus quite ineffective in allowing for self-adjustment.⁴⁵ Amending formulae elsewhere (e.g., Germany) are more flexible, thereby allowing for adjustments while still entrenching the basic rules of the political game.⁴⁶ As the U.S. example illustrates, overrigid constitutions may lead to fierce debates concerning interpretive approaches (e.g., the living constitution vs. originalism), as interpretation, not amendment, becomes the main constitutional adjustment mechanism.⁴⁷ In fact, one could argue that a main reason why the domain of religion, for example, has seen so many internal interpretive wars over the centuries is precisely because sacred texts may be easy to interpret or distort but are impossible to amend.

The organic difficulty of rigid constitutional designs to allow for change is perhaps best illustrated in settings described by Jacobsohn as suffering from "constitutional disharmony."⁴⁸ This may be caused by a polity's commitment to apparently conflicting values.⁴⁹ Consider Ireland's Catholicism and EU membership. Israel's self-definition as a Jewish and a democratic state also appears to establish such an organically disharmonious constitution.⁵⁰ There may also be a disharmony between the values protected in a country's constitution and the values prevalent among its populace. Think of Turkey's strict separation of religion and state despite the fact that

Government, <http://www.metro.tokyo.jp/ENGLISH/PROFILE/overview05.htm> (explaining that Tokyo is a metropolitan prefecture, which is a unique type of local public entity).

45. See U.S. CONST. art. V (requiring two-thirds of both houses of Congress to propose an amendment and three-fourths of the states to ratify it); see also SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 21 (2006) ("[T]he U.S. Constitution is the most difficult to amend of any constitution currently existing in the world today.").

46. See GG art. 79 (allowing laws to amend the constitution if (1) the law expressly states that it amends or supplements the constitution, (2) two-thirds of each legislative house approves, and (3) the law does not alter the basic structure of the federal government or change fundamental rights).

47. See Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623, 630 (2009) (arguing that American constitutional interpretation is divisive, political, and emotional).

48. Gary J. Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEXAS L. REV. 1763, 1773 (2004).

49. See *id.* ("The salient contradictions will vary from place to place, but inherent in the constitutional condition, whether subtle or dramatic, is a disharmony manifest either in the disjuncture between a constitution and a society or between commitments internal to a constitution."); see also Gary J. Jacobsohn, *Constitutional Identity*, 68 REV. POL. 362, 380 (2006) (arguing that a polity's constitutional identity can be at odds with the values favored by contemporary society in that polity).

50. See Walter F. Murphy, *Designing a Constitution: Of Architects and Builders*, 87 TEXAS L. REV. 1303, 1327–30 (2009) (describing Israel's inability to draft a conventional constitutional text because of conflicting views as to the role Jewish Law should play in the new government).

the vast majority of Turks define themselves as devout Muslims.⁵¹ Quite ironically, the starker a given polity's constitutional disharmony is, the greater the likelihood of judicial entanglement with high politics in that country. As a result of the disharmony, a systemic reliance on the court's authority and interpretive skills may emerge. And so, a disharmonic constitution leads to reliance on a constitutional creation—the courts—to resolve it.

Finally, the question of genuine benevolence in (constitutional) design is worth discussing. Most design sciences are driven by a genuine attempt to overcome challenges and improve life, writ small or large. But whereas some constitutions are likewise meant to reflect, protect, or enhance the public good, some constitutional designs are meant to preserve the power of the few or to insulate certain worldviews and policy preferences against the vicissitudes of democratic politics. Canonical constitutional theory advances noble, perhaps arguably naive, stories of first-order constitutionalization as people and governments accept the idea that, in a thick democracy, majority rule ought be balanced against other equally important values, most notably minority rights.⁵² Pre-commitment accounts of constitutionalism portray it as a self-binding contract or a Pareto-optimal, public-choice solution that rational people would select under conditions of uncertainty.⁵³ Constitutional engineering suggests a more pragmatic, less idealistic account of constitutions as negotiated pacts among rival parties, aimed at mitigating tensions in polities torn along ethnic, religious, or linguistic lines.

51. See Gerrit Steunebrink, *Liberalism and Nationalism in Europe and Turkey: On the Reception and Application of Modern European Ideas in a New Historical and Cultural Context*, in CIVIL SOCIETY, RELIGION, AND THE NATION 153, 168 (Gerrit Steunebrink & Evert van der Zweerde eds., 2004) (“In new Turkey, . . . a large majority of traditional Muslims was confronted directly with secularism in its most acute form.”).

52. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE* 172 (1992) (asserting that constitutional law allows the government to “play different factions off against one another so that they do relatively little damage to the rights of citizens and the permanent interests of the community”); CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 114 (2001) (listing a variety of nonexclusive reasons to develop a constitution, including the solution of “problems posed by collective action,” as well as the facilitation of “the protection of rights central to self government; the creation of fixed and stable arrangements; the removal of especially charged or intractable questions from the public agenda; [and] the creation of incentives for compromise, deliberation, and agreement”); John Ferejohn et al., *Editors' Introduction* to *CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE* 25, 25 (John Ferejohn et al. eds., 2001) (“[A] constitution may also permit government to do justice to individuals and minority groups, even in the face of momentary political passions pointing in another direction.”).

53. E.g., JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 93 (1988) (“[F]ormal requirements of unambiguous and constant laws are in many respects more important than the need for just laws, because if you can predict the decisions of the court you can take precautionary measures that will protect you from unjust laws.”); STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* 272 (1995) (“[A] democratic citizenry will submit itself voluntarily to enforceable restrictions on its own whim in order to ensure that its reason will outweigh its passion in the public realm.”).

But constitutional design may also reflect power struggles and political maneuvering within the body politic. As the seminal works of Robert McCloskey, Robert Dahl, and Martin Shapiro (among others) established, constitutional courts and their jurisprudence—to pick merely one aspect of the constitutional order—are integral elements of a larger political setting and cannot be understood in isolation.⁵⁴ Taking the notion of courts as political institutions even further, recent political science scholarship suggests that judicial review is often politically constructed and that elected officials may have political and policy reasons for pursuing constitutionalization and judicial empowerment.⁵⁵

In relatively open political settings, judicial empowerment may reflect the competitiveness of a polity’s electoral market or governing politicians’ time horizons. According to the “party alternation” model, for example, when a ruling party expects to win elections repeatedly, the likelihood of an independent and powerful judiciary is low.⁵⁶ When a ruling party has a low expectation of remaining in power, it is more likely to support a powerful judiciary to ensure that the next ruling party cannot use the judiciary to achieve its policy goals.⁵⁷ Scholars draw on this “insurance” logic to explain

54. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 187–88 (1991) (discussing the judiciary’s role in providing quasi-guardianship within the democratic process); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 10–11 (Sanford Levinson ed., 4th ed. 2005) (recognizing a division of labor between the legislature and the judiciary); MARTIN M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 6 (1964) (highlighting the political jurisprudence movement, which seeks to analyze the Supreme Court, in the political context, as one of many government agencies).

55. See, e.g., Howard Gillman, *Courts and the Politics of Partisan Coalitions*, in *THE OXFORD HANDBOOK OF LAW & POLITICS* 644, 645–47 (Keith Whittington et al. eds., 2008) (discussing courts as policy-making partners of the current majority party or governing coalition); Tom Ginsburg, *The Global Spread of Constitutional Review*, in *THE OXFORD HANDBOOK OF LAW & POLITICS*, *supra*, at 81, 90–91 (recounting the insurance and hegemonic accounts of judicialization, both of which believe that electoral uncertainty serves as the primary motivator for the adoption of constitutional review as an institutional structure); Mark A. Graber, *Constructing Judicial Review*, 8 *ANN. REV. POL. SCI.* 425, 427 (2005) (“Judicial review is established and maintained by elected officials. Adjudication is one of many means politicians and political movements employ when seeking to make their constitutional visions the law of the land.”); Georg Vanberg, *Establishing and Maintaining Judicial Independence*, in *THE OXFORD HANDBOOK OF LAW & POLITICS*, *supra*, at 99, 114 (“[S]trategic judges may anticipate the interests of powerful political actors in specific decisions and accommodate those interests in order not to provoke a direct confrontation.”); Keith E. Whittington, *“Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 *AM. POL. SCI. REV.* 583, 583 (2005) (“Though federal judges are protected by such securities as lifetime tenure and guaranteed salaries from political retaliation for their decisions, the judiciary as a whole is still vulnerable to politics. Most routinely, the political appointments process creates regular opportunities for elected officials to bring the Court into line with political preferences.”).

56. See Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 *FORDHAM L. REV.* 721, 746 (2006) (providing further discussion on this subject).

57. *Id.*

the variance in judicial power between Japan and the United States;⁵⁸ between different periods in the late nineteenth-century United States;⁵⁹ between three post-authoritarian Asian countries (South Korea, Mongolia, and Taiwan);⁶⁰ between several polities in Eastern Europe and between new democracies in Southern Europe (Spain and Portugal),⁶¹ and between two Argentine provinces.⁶²

More generally, what I have termed elsewhere the “hegemonic preservation” logic may be at work here.⁶³ The threat of losing control over pertinent policy-making processes and outcomes may be a significant driving force behind constitutionalization. Politicians are more likely to divert policy-making responsibility to a relatively supportive judiciary when present or prospective transformations in the political system seem to threaten their own political status and policy preferences. Influential sociopolitical groups fearful of losing their grip on political power may support the judicialization of megapolitics, the establishment of judicial review, and the empowerment of constitutional courts more generally as a hegemony-preserving maneuver. Such groups and their political representatives are more likely to support the judicialization of formative nation-building and collective-identity questions when their hegemony, worldviews, and entitlement to disproportional perks and benefits are being increasingly challenged in majoritarian decision-making arenas.⁶⁴

In short, it is the potential or actual arrival of credible political competition, or the emergence of new constituencies or constellations of power, that leads threatened elites to discover the charms of constitutional protections and judicial review. More than any other design science, then,

58. See J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 722, 722–23 (1994) (surveying modern Japan, the modern United States, and imperial Japan to “illustrate the electoral market logic to judicial independence”).

59. See Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 512, 511–12 (2002) (examining “American political development” and asserting that the late nineteenth-century expansion of federal judicial power “is best understood as the sort of familiar partisan or programmatic entrenchment that we frequently associate with legislative delegations to executive or quasi-executive agencies”).

60. See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 90–91 (2003) (contending that the insurance theory of design is an important factor in explaining the variable strength of judicial review in South Korea, Mongolia, and Taiwan).

61. See Pedro C. Magalhães, *The Politics of Judicial Reform in Eastern Europe*, 32 COMP. POL. 43, 45 (1999) (arguing that in contrast to judicial regimes in Southern Europe, progress in Eastern Europe “has been seriously constrained by norms, attitudes, and structural conditions inherited from the Communist regime”).

62. See Rebecca B. Chavez, *The Construction of Rule of Law in Argentina: A Tale of Two Provinces*, 35 COMP. POL. 417, 418 (2003) (comparing San Luis and Mendoza to demonstrate “that electoral democracy can yield the rule of law under conditions of party competition”).

63. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 11–12 (2004).

64. See Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 107 (2008) (providing a further discussion of these points).

the authenticity and benevolence of what drives constitutionalization in the first place is often questionable, as bottom-up “We the People” constitutionalism lives alongside top-down “change[] . . . everything so that everything remain[s] the same” self-interested constitutional overhauls.⁶⁵

II. What Counts as “Success” in Constitutional Design?

The question of “success” and how to define and measure it is central to any design enterprise. Unfortunately, it has not been thoroughly addressed in the canonical constitutional-design literature. Endurance may be an intuitive criterion by which to measure the relative success of a given constitution.⁶⁶ Akin to a reliable vehicle, the longer a given constitution is able to withstand the test of time, the stronger the indication, so the argument may go, that it is a good or suitable constitution. So by that criterion, the U.S. Constitution is a stunning success story. But the continued existence of a constitution may reflect path-dependence factors as well as the dominant ideological ambience and constellations of power that are conducive to its endurance. The longest standing constitution is the U.S. Constitution, with several other constitutions also surpassing or approaching their first centennial anniversary.⁶⁷ In their empirical study of the lifespan of constitutions worldwide, however, Elkins, Ginsburg, and Melton report that only half of all constitutions last more than nine years.⁶⁸ Thus, according to Ginsburg, “the average citizen outside of North America should expect to see her country cycle through six or seven constitutions in her lifetime.”⁶⁹ Enduring constitutions emerge under a

65. Michael Mandel, *A Brief History of the New Constitutionalism, or ‘How We Changed Everything So that Everything Would Remain the Same,’* 32 *ISR. L. REV.* 250, 251 (1998).

66. See generally ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (forthcoming 2009) (manuscript on file with Texas Law Review) (compiling the initial results from the Comparative Constitutions Project, examining longevity trends among constitutional texts, and offering a variety of arguments and observations derived therefrom); Tom Ginsburg, *The Lifespan of Written Constitutions* (Univ. of Cal., Berkeley Law & Economics Workshop, Paper No. 3, 2008) available at http://repositories.cdlib.org/berkeley_law_econ/Spring2008/3/ (offering other initial observations on the interaction between constitutional design and constitutional lifespan).

67. The original Constitution of Norway, for example, was adopted in 1814. KONGERIGET NORGES GRUNDLOV [KN GRUNDLOV] [Constitution] (Nor.), translated in 14 *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, *supra* note 44. The current Mexican Constitution was adopted in 1917. CONST. MEX. One of the two centerpieces of the Canadian Constitution, the British North America Act, was adopted in 1867. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985) (Can.). The constitutions of several other countries include core “old” documents that have been amended numerous times (e.g., the Austrian B-VG adopted in 1920), alongside new constitutional documents supplementing it. E.g., BUNDESVERFASSUNGSGESETZ [B-VG] [Constitution] BGBl No. 1/1930 as last amended by Bundesgesetz [BG] BGBl I No. 100/2003, art. 147, ¶ 2 (Austria), translated in 1 *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, *supra* note 44.

68. ELKINS, GINSBURG & MELTON, *supra* note 66 (manuscript at 1).

69. Ginsburg, *supra* note 66 (manuscript at 50).

relatively open process, tend to be specific, and tend to be flexible.⁷⁰ But a constitution is supposed to accomplish, or at least facilitate, the accomplishment of substantive goals. The proof of its success is in the pudding itself, not in its lifespan. So unlike with toys, cars, or homes, durability is not necessarily an indication of success in the constitutional context.

A second, more substantive way to define and measure the “success” of a given constitutional design is by its ability to deliver, independently or in association with other factors, the substantive goods it purports to advance. An obvious methodological difficulty here is the question of multiple causality: disentangling the contribution of a constitutional order from that of other societal, political, and institutional factors is an almost impossible task. Even in those cases where it seems a given constitutional pact has had a significant impact, it is difficult to tell how far intervening variables have distorted any measurable effect. To point out the complexities of measurement is not to say, however, that an empirical measurement of the impact of constitutional design on policy outcomes or social change is of no value. If, as advocates of constitutional design argue, the adoption of, say, a constitutional catalogue of rights provides a significant advantage for disadvantaged minorities in a polity, then this advantage should be identifiable. Conversely, the fewer domains in which such links can be found, the less likely it is that the effects of constitutional design are as significant as suggested by the conventional view.

Skeptical views as to the real impact of constitutional design on social change may be traced back to the debates preceding the adoption of the U.S. Constitution. In his critique of bills of rights in the *Federalist Papers*, U.S. founder Alexander Hamilton argued that securing free expression, “whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.”⁷¹ In the same spirit, Judge Learned Hand of the U.S. Second Circuit once stated:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.⁷²

70. See ELKINS, GINSBURG & MELTON, *supra* note 66 (manuscript at 1) (concluding that although some outside forces may be uncontrollable, the features of flexibility, specificity, and inclusion all help to improve the chances of constitutional survival).

71. THE FEDERALIST NO. 84, at 514 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

72. Learned Hand, The Spirit of Liberty, Address at the “I Am an American Day” Ceremony in New York City’s Central Park (May 21, 1944), in THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189, 189–90 (Irving Dilliard ed., 3d ed. 1960).

In other words, some of the early framers of the U.S. Constitution, as well as a few of the Bill of Rights' more recent interpreters, believed that a rights-supportive culture, in addition to a written bill of rights, is a necessary condition for the actual protection of civil liberties.

Robert Dahl suggests that in maintaining democratic political institutions, constitutional arrangements—and bills of rights in particular—are less important than the existence of favorable sociocultural conditions.⁷³ Responding to Riker's constitution-centric approach, Dahl asserts that "constitutional rules are not crucial, independent factors in maintaining democracy."⁷⁴ "To assume that [the United States] has remained democratic because of its Constitution seems to me an obvious reversal of the relation; it is much more plausible to suppose that the Constitution has remained because our society is essentially democratic."⁷⁵

Along the same lines, Charles Epp suggests that the impact of constitutional catalogues of rights may be limited by individuals' inability to invoke them through strategic litigation.⁷⁶ Hence, bills of rights matter to the extent that a support structure for legal mobilization—a nexus of rights-advocacy organizations, rights-supportive lawyers and law schools, governmental rights-enforcement agencies, and legal-aid schemes—is well developed.⁷⁷ In other words, while the existence of written constitutional provisions is a necessary condition to effective protection of rights and liberties, it is certainly not a sufficient condition. The effectiveness of rights provisions in planting the seeds of social change in a given polity depends largely upon the existence of a support structure for legal mobilization and, more generally, hospitable sociocultural conditions.

The rights-supportive-culture argument is also complemented by the more general "social capital" argument. According to Robert Putnam and others, sociocultural factors (e.g., the existence of a vibrant civil society and a democratic civic tradition), rather than institutional factors, are the most

73. See Robert A. Dahl, *Thinking About Democratic Constitutions: Conclusions from Democratic Experience*, in 38 NOMOS: POLITICAL ORDER 175, 178 (Ian Shapiro & Russell Hardin eds., 1998) (arguing the following conditions are more important to the endurance of democracy than a constitution: a military force controlled by elected leaders; high rates of economic growth and high levels of education; and cultural homogeneity). See generally DAHL, *supra* note 54, at 220–64, for a discussion of the social conditions favorable to the existence of a "polyarchy"—a political order where citizenship is extended to a high proportion of adults and citizenship includes the right to vote for the highest government officials.

74. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 137 (expanded 50th anniversary ed., 2006).

75. *Id.* at 143.

76. See CHARLES R. EPP, THE RIGHTS REVOLUTION 14 (1998) (arguing the guarantees found in bills of rights are ineffective without a well-developed support structure for legal mobilization to invoke them); Charles R. Epp, *Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms*, 90 AM. POL. SCI. REV. 765, 766 (1996) (postulating that the greatest weakness of a bill of rights is that it "creates no automatic institutional resources for its own enforcement").

77. See Epp, *supra* note 76, at 767 (emphasizing the importance of organized group support, financing, and the structure of the legal profession in facilitating access to the legal system).

important variable in understanding why democracy works better in specific places.⁷⁸ The implications of the Dahl–Putnam thesis for the “transitology” debate on what constitutional design is most suitable for promulgating and cultivating democracy in postauthoritarian settings are obvious. In order for a democracy to endure in a given polity it is more important to develop a vibrant civil society and a rights-supportive culture in the polity than to structure the institutional setting in that polity correctly.⁷⁹ Hospitable civic traditions and sociocultural conditions, not formal institutional settings, are the crucial factors in making constitutional democracy work.

Constitutions are often said to advance democracy. How well do they achieve this goal? While an exhaustive empirical study of this question is beyond the scope of this Article, some valuable information is easily available. The *Democracy Index* conducted by *The Economist* focuses on five general categories of democracy: electoral process and pluralism, civil liberties, functioning of government, political participation, and political culture.⁸⁰ Regimes are assigned a score on a 0–10 scale, where 10 is the closest a country can get to full democracy.⁸¹ According to *Democracy Index 2008*, North Korea scored the lowest with 0.86, while Sweden scored a total of 9.88 (the highest result).⁸² The rest of the top dozen countries were Norway, Iceland, the Netherlands, Denmark, Finland, New Zealand, Switzerland, Luxemburg, Australia, Canada, and Ireland.⁸³ The United States was ranked eighteenth with a score of 8.22.⁸⁴ The countries are categorized into “Full Democracies” (score of 8–10); “Flawed Democracies” (score of 6–7.9); “Hybrid Regimes” (score of 4–5.9); and “Authoritarian Regimes” (score of less than 4).⁸⁵ Of the 167 countries studied, 30 were designated Democracies, 50 Flawed Democracies, 36 Hybrid Regimes, and 51 Authoritarian Regimes.⁸⁶ Judging by this study, Western countries—primarily Northern European, plus Canada, New Zealand, and Australia—all with relatively small populations (up to 30 million or so), developed market economies, central regulation in most key policy areas (e.g., education, health care, transportation, banking, etc.), and a relatively generous Keynesian-welfare-state tradition, are clearly the most democratic countries

78. See ROBERT D. PUTNAM ET AL., MAKING DEMOCRACY WORK 99, 91–99 (1993) (presenting data suggesting that the regions of Italy with “many civic associations, many newspaper readers, [and] many issue-oriented voters” have more successful regional governments).

79. See *id.* at 181–85 (reporting that the success of regional governments in Italy appeared more related to local structures than national initiatives).

80. LAZA KEKIC, THE ECONOMIST INTELLIGENCE UNIT, INDEX OF DEMOCRACY 16 (2008), <http://a330.g.akamai.net/7/330/25828/20081021195552/graphics.eiu.com/PDF/Democracy%20Index%202008.pdf>.

81. *Id.* at 18.

82. *Id.* at 8 tbl.2.

83. *Id.* at 4.

84. *Id.*

85. *Id.* at 4–8.

86. *Id.*

in the world. And yet, none of the top twelve countries on the list sport a long tradition of American-style written constitutionalism, active judicial review, or a culturally engrained constitutional sanctity. In other words, American-style constitutional faith is not a necessary precondition for democracy.

More detailed studies of the U.S. Constitution (e.g., by Robert Dahl or Sanford Levinson) go even further in questioning its democratic credentials.⁸⁷ Levinson presents readers with two questions intended to illustrate these shortfalls. First: "Even if you support having a Senate in addition to the House of Representatives, do you support as well giving Wyoming the same number of votes as California, which has roughly seventy times the population?"⁸⁸ And second: "Are you comfortable with an Electoral College that, among other things, has regularly placed in the White House candidates who did not get a majority of the popular vote and, in at least two cases over the past fifty years, who did not even come in first in that vote?"⁸⁹ This is hardly the recipe for a republic that reflects the needs and wants of today's Americans, argues Levinson. Too many of the Constitution's provisions promote either unjust or ineffective government. Under the existing blueprint, we can neither rid ourselves of incompetent presidents nor assure continuity of government following catastrophic attacks.

And even on the freedom-enhancing aspect of the U.S. Constitution, the evidence is not entirely clear. The United States is perhaps the clearest contemporary example of a long and established tradition of constitutional protection of freedoms and active judicial review that does not disturb the polity's basic political and economic organization. It has one of the most unequal distributions of income among advanced industrial societies, it has vast social and economic disparity, and it is controlled to a large extent by the sheer power of corporate capital.⁹⁰ Norway and Sweden—two of the most developed and prosperous nations on earth—have long adhered to a relatively egalitarian conception of democracy while being less than enthusiastic (to put it mildly) toward the American notion of rights and judicial

87. See generally ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001) (lamenting how the Constitution does not sufficiently embody the democratic ideal and should be amended); LEVINSON, *supra* note 45 (scrutinizing the adequacy of today's Constitution from a variety of perspectives).

88. LEVINSON, *supra* note 45, at 6.

89. *Id.*

90. See ROBERT PERRUCCI & EARL WYSONG, *THE NEW CLASS SOCIETY* 147 (2007) (reporting that expenditures by corporations and trade associations on lobbying the federal government reached \$2.2 billion in 2005); U.N. DEV. PROGRAMME [UNDP], *HUMAN DEVELOPMENT REPORT 2007/2008* at 281–84 tbl.15, U.N. Sales No. 07.III.B.1 (2007), available at http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf (presenting the Gini coefficients for 177 countries, with the United States having a higher inequality score than most other developed nations).

review.⁹¹ Has this come at the expense of disregard for individual liberties in these countries? Hardly. The status of individual freedoms in the Netherlands⁹²—one of the few European countries that until recently had stringently opposed the idea and practice of judicial review—has certainly not been lower than in the United States, which has had more than two centuries’ use of a widely celebrated Bill of Rights and two centuries of active judicial review.⁹³ As Robert Dahl skeptically observes: “No one has shown that countries like the Netherlands and New Zealand, which lack judicial review, or Norway and Sweden, where it is exercised rarely and in highly restrained fashion, or Switzerland, where it can be applied only to cantonal legislation, are less democratic than the United States, nor, I think, could one reasonably do so.”⁹⁴

Another way of assessing “success” of constitutional design is by testing its contribution to human development. A common definition of that concept emphasizes access to an adequate standard of living, basic needs, services, protections, and meaningful life opportunities. It is premised on the notion that no one can fully enjoy or exercise any classic, negative civil liberty in any meaningful way if she lacks the essentials for a healthy and decent life in the first place.⁹⁵ According to this notion, basic needs such as access to food and safe water, housing, education, and health care are both morally and practically more fundamental than any given classic, negative right. One’s ability to live a decent life, to be adequately nourished, and to have access to basic health care, education, and shelter are essential preconditions to the enjoyment of any other rights and freedoms.

According to many sources—such as Nobel laureate Amartya Sen, the Universal Declaration on Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the United Nations

91. See Louis Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS 38, 48 (Louis Henkin & Albert J. Rosenthal eds., 1990) (stating that while the Scandinavian countries have adopted judicial review, they have not done so as fully as the United States); Nina Witoszek, *Moral Community and the Crisis of the Enlightenment: Sweden and Germany in the 1920s and 1930s*, in CULTURE AND CRISIS: THE CASE OF GERMANY AND SWEDEN 48, 62 (Nina Witoszek & Lars Trägårdh eds., 2002) (“[I]n Sweden, . . . the notions of the rights of man stemming from the natural law tradition never properly took root.”).

92. Martin Shapiro & Alec Stone, *The New Constitutional Politics of Europe*, in 2 COMPARATIVE POLITICS: CRITICAL CONCEPTS IN POLITICAL SCIENCE 83, 96 (Howard J. Wiarda et al. eds., 2005) (contending that although the Netherlands is one of only four Western European nations without judicial review, the courts have begun to enforce a “sort of nascent charter of rights” when national laws conflict with European agreements).

93. See KEKIC, *supra* note 80, at 3 (ranking the Netherlands as third in overall democracy, and the United States seventeenth). In the evaluation of civil liberties, the Netherlands scored 10 out of 10, while the United States scored an 8.53. *Id.*; see also Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71, 76 (2004) (providing further discussion of this subject).

94. DAHL, *supra* note 54, at 189.

95. See ALAN G. SMITH, HUMAN RIGHTS AND CHOICE IN POVERTY 21 (1997) (arguing that the provision of security and subsistence is necessary to the enjoyment of civil-political rights).

Human Development Program (UNDP)—assessing human development in terms of decent living conditions, substantive equality, and access to real opportunities for education, health care, income, employment, and so forth is quite germane.⁹⁶ Indeed, what these authorities demonstrate is that it is as analytically justifiable for studying the effects of constitutionalization on human development as any other definition of the ultimate indicators of human development, including the prevalent liberal mix of procedural justice, formal equality, and classic civil liberties (often bundled with the libertarian addition of property rights).

The Human Development Index (HDI) is a widely recognized index combining normalized measures of life expectancy, literacy, educational attainment, and GDP per capita for countries worldwide.⁹⁷ The basic use of the HDI is to rank countries by level of “human development” on a scale of 0 to 1 (based on a complicated-yet-reliable formula) that usually also implies whether a country is a developed, developing, or underdeveloped country.⁹⁸ The most recent Human Development Report (December 2008) ranks Iceland and Norway at the top, both with a score of 0.968, followed by Canada, Australia, Ireland, the Netherlands, Sweden, Japan, Luxemburg, Switzerland, France, Finland, Denmark, Austria, and the United States at fifteenth place with a score of 0.950.⁹⁹

Other countries in the top thirty include the European powerhouses (Germany, Spain, Italy, and Britain) alongside smaller polities such as Greece, Portugal, Belgium, Cyprus, Slovenia, Israel, Singapore, New Zealand, and Hong Kong.¹⁰⁰ With the exception of Japan (humble constitutionalism and limited judicial review)¹⁰¹ and the United States (extravagant constitutionalism and great judicial visibility), none of the world’s most populated countries are among the world’s leaders in terms of

96. See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (recognizing rights to health care, education, and a living wage); Universal Declaration of Human Rights, G.A. Res. 217A, art. 25, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (declaring the right to a sufficient standard of living, including the right to health care); Sudhir Anand & Amartya Sen, *Concepts of Human Development and Poverty: A Multidimensional Perspective*, in READINGS IN HUMAN DEVELOPMENT 228 (Sakiko Fukuda-Parr & A.K. Shiva Kumar eds., 2003) (contrasting “conglomerative” and “deprivational” perspectives in measuring human development).

97. See UNDP, *supra* note 90, at 225–27 (explaining the measures that go into calculating the HDI).

98. *Id.* at 222.

99. UNDP, HUMAN DEVELOPMENT INDICES: A STATISTICAL UPDATE 2008, at 29 tbl.2 (2008), available at http://origin-hdr.undp.org/en/media/HDI_2008_EN_Tables.pdf.

100. *Id.*

101. See David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEXAS L. REV. 1545, 1574–87 (2009) (characterizing the Japanese Supreme Court as conservative because it almost never goes against the government, with only rare and obscure exceptions); Jun-ichi Satoh, *Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court’s Constitutional Oversight*, 41 LOY. L.A. L. REV. 603, 603–06 (2008) (describing the Japanese Supreme Court’s limited role in enforcing Japan’s Constitution).

human development.¹⁰² Highly populated countries such as Mexico, Nigeria, Brazil, Indonesia, Bangladesh, and Pakistan, let alone India and China, make strides but do not excel in terms of HDI.¹⁰³ Alongside population size and stable electoral processes, the existence of a developed market economy combined with centralized planning that cherishes public investment in science, education, and health care appears to be the winning formula here.¹⁰⁴ A large middle class and a well-developed civil society are key societal factors.¹⁰⁵ And what is the impact of the variance on the constitutionalism axis? Quite negligible, frankly.

Rights alone certainly do not do the trick when it comes to human development. The dominant notion of rights as negative freedoms is based upon a simplistic view of society as composed of unencumbered individuals operating within an autonomous and self-sufficient private sphere.¹⁰⁶ While such a form of rights discourse is big on individual freedoms, it does not prioritize substantive equality or equality of outcome; redistribution of material resources; or access to an adequate standard of living, basic needs, services, protections, and meaningful life opportunities. In fact, the canonical interpretation of rights within the potentially richer framework of the “new constitutionalism” order has done little to block the widening disparities in fundamental living conditions within and among polities.¹⁰⁷ It failed to promote the notion that no man, woman, or child can fully enjoy or exercise the classic civil liberties in a meaningful way if they lack the basic essentials for a healthy and decent life in the first place. In most postcommunist countries, for example, the constitutionalization of rights has been associated with precisely the opposite ethos, placing private ownership and other economic

102. UNDP, *supra* note 99, at 29–32 tbl.2.

103. *Id.* at 25–28 tbl.1.

104. See Christoph F. Beuchtemann & Eric Verdier, *Education and Training Regimes: Macro-Institutional Evidence*, 108 REVUE D’ECONOMIE POLITIQUE 291, 299–300 (1998) (Fr.) (linking underperformance in U.S. and U.K. educational institutions to low levels of standardization and centralization).

105. See William Easterly, *The Middle Class Consensus and Economic Development*, 6 J. ECON. GROWTH 317, 317 (2001) (arguing that the existence of a large middle class, combined with a lack of ethnic conflict, is tied to better education, health, and infrastructure, and generally to a more robust democracy); Osman Mohamed Osman, *Preface* to UNDP, EGYPT HUMAN DEVELOPMENT REPORT 2008: EGYPT’S SOCIAL CONTRACT: THE ROLE OF CIVIL SOCIETY, at ix (2008) http://hdr.undp.org/en/reports/nationalreports/arabstates/egypt/2008_Egypt_nhdr_en.pdf (describing civil society as “a third crucial sector” that contributes both to the development process and “a range of other issues that directly affect the well-being and livelihood of citizens and society”).

106. See SMITH, *supra* note 95, at 21 (contending that the positive provision of basic necessities is a prerequisite to enjoying negative rights).

107. HIRSCHL, *supra* note 63, at 100–48; see also Marius Pieterse, *Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, 29 HUM. RTS. Q. 796, 797 (2007) (“[T]he transformative potential of rights is significantly thwarted by the fact that they are typically formulated, interpreted, and enforced by institutions that are embedded in the political, social, and economic status quo. This is so even in relation to socioeconomic rights . . .”).

freedoms beyond the reach of majoritarian politics and state regulation. This has the seeds for greater, not lesser, disparity in essential life conditions.¹⁰⁸

Although theoretically the formal constitutional protection of positive social rights is supposed to advance their actual status, there appears to be no simple correlation between constitutional status and de facto protection of such rights. Some countries (e.g., Brazil) have unqualified subsistence-rights provisions in their constitutions,¹⁰⁹ whereas other countries (e.g., South Africa) have qualified provisions (progressive realization, subject to available resources, etc.).¹¹⁰ In yet other countries (e.g., India), such rights have been protected under more generic provisions such as those of human dignity and security of the person.¹¹¹ Despite these differences, measurements of income and wealth inequality are roughly similar in Brazil, South Africa, and India.¹¹² And these gaps are no smaller than in other developing-world countries such as Mexico, where no subsistence rights are granted constitutional status.¹¹³

Consider Canada, where an inexplicable gap exists between the polity’s long-standing commitment to a relatively generous version of the Keynesian-welfare-state model and the outright exclusion of subsistence social rights from the purview of rights provisions.¹¹⁴ This anomaly is quite telling in terms of constitutional design. During national and provincial election campaigns, Canadians consistently refer to health care as one of the public policy issues about which they care the most.¹¹⁵ Moreover, a viable, publicly funded health-care system is repeatedly cited by Canadians as one of the

108. HIRSCHL, *supra* note 63, at 151.

109. *See, e.g.*, C.F. art. 6 (guaranteeing unqualified access to “[e]ducation, health, work, habitation, leisure, security, social security,” and other social rights).

110. *See, e.g.*, S. AFR. CONST. 1996 § 25(5) (“The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”).

111. *See, e.g.*, INDIA CONST. arts. 38–39: amended by the Constitution (Forty-second Amendment) Act, 1976 and the Constitution (Forty-fourth Amendment) Act, 1978 (requiring the government to protect the social welfare and rights of all people equally).

112. UNDP, *supra* note 90, at 281–84 tbl.15.

113. CONST. MEX.

114. *Compare* ALLAN MOSCOVITCH ET AL., *THE WELFARE STATE IN CANADA*, at iii–iv (1983) (describing the emergence and development of a robust welfare system in Canada from the 1890s to the 1970s), *with* HIRSCHL, *supra* note 63, at 127–28 (indicating that notwithstanding permissive constitutional language, Canadian courts have not protected subsistence social and economic rights).

115. *See* Ran Hirschl & Christopher L. Eisgruber, *Prologue: North American Constitutionalism?*, 4 INT’L J. CONST. L. 203, 210 (2006) (providing a more extensive discussion of the role of healthcare in the Canadian collective consciousness). For polling data that reflects healthcare’s primacy to Canadians, see for example THE STRATEGIC COUNSEL, 2008 FEDERAL PRE-ELECTION: WHAT ARE THE PERCEPTIONS OF CANADIANS ON THE EVE OF A POSSIBLE OCTOBER ELECTION? 17 (2008), [http://www.thestrategiccounsel.com/our_news/polls/Pre-Election%20Baseline%20-%20Sep%201%20\(with%20second%20choice\).pdf](http://www.thestrategiccounsel.com/our_news/polls/Pre-Election%20Baseline%20-%20Sep%201%20(with%20second%20choice).pdf) and Press Release, Ipsos, Environment Tops the List of Priorities for Canadians—First Time Since July 1990 (Nov. 6, 2006), (on file at <http://www.ipsos-na.com/news/pressrelease.cfm?id=3252>).

most important and distinctive markers of Canadian collective identity, compared with the lack of such a system in Canada's neighbor to the south.¹¹⁶ The Canada Health Act enjoys near-sacred status in public discourse.¹¹⁷ This status was reiterated by the overwhelming public reaction to the landmark Supreme Court of Canada ruling in *Chaoulli v. Quebec (A.G.)*¹¹⁸ concerning the provision of private health care services in Quebec.¹¹⁹

Yet, despite the centrality of this issue on Canada's public agenda, as well as Canada's long-term commitment to a relatively generous version of a Keynesian welfare state, subsistence social rights are not protected by the Canadian Charter of Rights and Freedoms¹²⁰ and have been altogether excluded from its purview by pertinent Supreme Court of Canada jurisprudence. The Supreme Court has repeatedly rejected claims that would have required the state to provide benefits to rights holders, either directly through a social program (e.g., health care and unemployment benefits) or indirectly through social legislation that imposes obligations on private actors (e.g., minimum wage, pay equity, and rent control).¹²¹ And it was not until June 2007, after twenty years of a distinctly neoliberal approach to the matter, that the Court recognized the right to collective bargaining as

116. See Robert Steinbrook, *Private Health Care in Canada*, 354 NEW ENG. J. MED. 1661, 1661 (2006) (stating that Canada's system of health care "is often championed as a reflection of Canadian values and as an alternative that the United States might emulate").

117. Canada Health Act, R.S.C., ch. C 6 (1985); see also Hon. Monique Bégin, Professor Emeritus, Univ. of Ottawa, Revisiting the Canada Health Act (1984): What Are the Impediments to Change?, Address at the Institute for Research on Public Policy 30th Anniversary Conference 3 (Feb. 20, 2002) (transcript available at <http://www.irpp.org/events/archive/020218e.pdf>) ("Outside of its strict legal role and of its existence as a piece of legislation, good or bad, the *Canada Health Act* also certainly played an important role in rooting our public, universal health insurance system in the Canadian psyche. Medicare became deeply entrenched in our national identity.").

118. [2005] 1 S.C.R. 791, 2005 SCC 35 (Can.).

119. The Court ruled that limits on the delivery of private health care in Quebec violated Quebec's Charter of Human Rights and Freedoms. *Id.* at 860. Three of the judges also ruled that the limits on private health care violated Section 7 of the Canadian Charter of Rights and Freedoms. *Id.* The decision could have significant ramifications on health care policy in Canada and may be interpreted as paving the way to a "two-tier" health care system.

120. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

121. See, e.g., *British Columbia (A.G.) v. Christie*, [2007] 1 S.C.R. 873, 2007 SCC 21 (Can.) (holding that there is no right to counsel in cases where rights or obligations are at stake); *Auton (Guardian ad litem of) v. British Columbia (A.G.)*, [2004] 3 S.C.R. 657, 659, 2004 SCC 78 (Can.) (determining that the government's decision not to fund a medically required treatment did not infringe on the petitioners' equality rights); *Newfoundland (Treasury Board) v. N.A.P.E.* [2004] 3 S.C.R. 381, 382, 2004 SCC 66 (Can.) (rejecting a labor union's appeal, brought under the Charter of Rights and Freedoms, and holding that the government was allowed to disregard the union's pay equity agreement); *Gosselin v. Quebec (A.G.)*, [2002] 4 S.C.R. 429, 430, 2002 SCC 84 (Can.) (dismissing appellant's claim that a different welfare base payment for individuals above and below the age of thirty violated the Charter of Rights and Freedoms and the Charter of Human Rights and Freedoms).

protected by the Charter.¹²² In other words, unlike Mark Tushnet’s speculation about the potentially better chances of subsistence rights in weak-form judicial review regimes,¹²³ a paradigmatic model of weak-form protection of rights has failed to yield effective constitutional protection of social welfare rights.

More puzzling still is the difference that judicial interpretation, not formal constitutional protection or institutional features of judicial review, makes. Section 7 of the Canadian Charter of Rights and Freedoms reads: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”¹²⁴ Article 21 of the Constitution of India reads: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”¹²⁵ Despite the near identical wording of these provisions, two very different paths with respect to constitutional protection of subsistence rights have been taken in their interpretation. Such rights are appreciated in Canadian public discourse but have been consistently pushed beyond the purview of Section 7 by the Supreme Court of Canada.¹²⁶ India, by contrast, features vast socioeconomic gaps; yet, its Supreme Court has consistently declared claims for subsistence social rights justiciable and enforceable through constitutional litigation that draws on Article 21.¹²⁷ The extent of constitutional protection of subsistence rights in a given polity does not necessarily reflect the prevalence of such rights in that polity’s public discourse. And the debate over the real independent contribution of

122. See *Health Servs. & Support-Facilities Subsector Bargaining Ass’n v. British Columbia*, [2007] 2 S.C.R. 391, 392, 2007 SCC 27 (Can.) (holding elements of the Health and Social Services Delivery Improvement Act unconstitutional because they “invalidated important provisions of collective agreements then in force”).

123. MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 264 (2007) (asserting that with regards to the enforcement of social and economic rights, “weak-form judicial review is *generally* attractive” and “[n]ervousness about extending weak-form review to first-generation rights is misplaced”).

124. Part I of the Constitution Act § 7.

125. INDIA CONST. art. 21.

126. *Gosselin*, 4 S.C.R. at 437 (Can.) (remarking that neither the language of Section 7 nor common law jurisprudence warrants an application of the statute “as a basis for a positive state obligation to guarantee adequate living standards”).

127. See, e.g., *Unni Krishnan, JP v. Andhra Pradesh* (1993) 1 S.C.R. 594, 706 (India) (pronouncing that the right to life conferred by Article 21 encompasses “all those rights which courts must enforce because they are basic to the dignified enjoyment of life”); *Olga Tellis v. Bombay Mun. Corp.* (1985) 2 S.C.R. 51, 55 (India) (stressing that the right to life conferred by Article 21 includes the right to livelihood, which is “[a]n equally important facet of [the] right” because “no person can live without the means of living”). Note that in 2002, a new Article 21A was added to the Indian Constitution. It warrants that “[t]he State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.” INDIA CONST. art. 21A: amended by the Constitution (Eighty-sixth Amendment) Act, 2002.

constitutional design to human development may very well amount to what Tushnet describes in another of his books as “noise around zero.”¹²⁸

A fourth possible criterion by which to assess “success” of constitutional design is its (in)ability to deal with some of the most burning challenges facing humanity. The net contribution of constitutions appears quite modest in mitigating, let alone resolving, core global issues such as pollution and global warming; health pandemics and the spread of antibiotic resistant diseases; natural disasters; proliferation of weapons of mass destruction or their unchecked accumulation by the world’s superpowers; mass atrocities and crimes against humanity; widening global gaps in living conditions and life opportunities; population growth and food supply; large-scale forced migration; the risks and opportunities of the genetic revolution in the life sciences; or intertwined financial markets and global economic crises—all of which require serious international collaboration to avoid or overcome. Given that an increasing number of problems are precisely of such nature, the relevance of constitutional design at the national level in, say, the twenty-second or twenty-third century would seem minimal. In that respect, constitutions and constitutional design may be a dated tool responsive to mid-twentieth-century circumstances and needs (e.g., the WWII era and its aftermath); they may be limited in their capacity to address early-twenty-first-century global challenges.

Constitutional design appears to have more bite with regard to national challenges: limiting governments to a degree, establishing electoral processes, enhancing awareness of rights and liberties, and possibly providing for some institutional predictability, which in turn may promote economic growth. The idea that institutions and constitutions are key to understanding and promoting economic development has “a long and honored tradition among historians, political scientists, and economists.”¹²⁹ As Max Weber famously noted, the fundamental building block of every successful capitalist market is a secure predictability interest based on a formal, unambiguous, and trustworthy legal system premised on predictable rules (as opposed to arbitrary, ad hoc norms), as well as on rational (as opposed to traditional or charismatic) political authority.¹³⁰

In a similar fashion, Douglass North and Robert Thomas argue in *The Rise of the Western World* that “[e]fficient economic organization is the key to growth; the development of an efficient economic organization in Western

128. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 153 (1999).

129. TORSTEN PERSSON & GUIDO TABELLINI, *THE ECONOMIC EFFECTS OF CONSTITUTIONS* 63 n.7 (2003).

130. See 2 MAX WEBER, *ECONOMY AND SOCIETY* 1094–96 (Guenther Roth & Claus Wittich eds., 1978) (comparing the patrimonial and feudal systems with capitalist development and concluding that predictability, as provided by rational rules, is indispensable for economic growth in industrial capitalism).

Europe accounts for the rise of the West.”¹³¹ “Efficient organization entails the establishment of institutional arrangements and property rights that create an incentive to channel individual economic effort into activities that bring the private rate of return close to the social rate of return.”¹³² Based on this foundation, they conclude that “if a society does not grow it is because no incentives are provided for economic initiative.”¹³³ The West’s rationality and efficiency have led it to adopt legal mechanisms that enhance investors’ trust, mainly through the constitutional protection of property rights; in turn, these have led to economic growth in various historical contexts. Douglass North, for example, has illustrated how legal limitations on rulers’ arbitrary power in early capitalist Europe increased legal security and predictability for external lenders, who were protected by law from the seizure of their capital.¹³⁴ This allowed polities where such limitations existed to borrow capital and to better their position vis-à-vis their rival polities where the arbitrary power of the ruler (“irrational systems,” in Weber’s terminology) had not been restricted by law. More recent empirical studies have established a positive correlation between the existence of institutional limitations on government action (constitutional provisions and judicial review, for example) and economic growth.¹³⁵

Constitutional design may also contribute to effective regulation. Take the role of central regulation in preventing or mitigating exogenous economic shocks. Canada withstood the 2008 economic crisis much better than the United States.¹³⁶ Considering the two countries have so much in common, this is quite striking. But whereas securities regulation in Canada is

131. DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD* 1 (1973).

132. *Id.*

133. *Id.* at 1–2.

134. Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 804–05 (1989); see also Barry Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 286, 293–94 (1993) (explaining how limits on the Crown’s power over the domestic economy helped foster the Industrial Revolution in England).

135. See, e.g., Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, Q.J. ECON. 1193, 1224 (2002) (noting the possible efficiency implications of decentralized and centralized forms of adjudication); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1116–17 (1998) (discussing the negative correlation between ownership concentration of publicly traded companies and the quality of legal protection of investors); Rafael La Porta et al., *The Quality of Government*, 15 J.L. ECON. & ORG. 222, 222 (1999) (demonstrating that good government has been shown to contribute to economic development); Paul Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 503–04 (2001) (referring to findings that countries with legal systems derived from common law traditions have provided superior investor protections).

136. See Erik Heinrich, *Why Canada’s Banks Don’t Need Help (But Got It Anyway)*, TIME, Nov. 10, 2008, <http://www.time.com/time/business/article/0,8599,1855317,00.html> (observing that due to Canada’s choice of a regulatory system that enforced stricter regulations on investment dealers, Canadian banks have fared better in the current economic crisis).

provincial, regulation of the banking industry is a federal stronghold.¹³⁷ Strict rules and regulations accompanied by close monitoring prevent high-risk investments or wild mortgage markets. The oft-cited reason for Canada's better weathering of the financial storm is the strict government regulation of the banking industry, as compared to the deregulation of the mortgage market in the United States that was driven by greedy, self-interested bankers and aided by reckless economic libertarians in Washington.¹³⁸

A final criterion by which to assess "success" of constitutional design is to measure its contribution to ethnic integration in general or its actual pacifying effect in conflict or post-conflict settings. Arguably one of the most admirable functionalist or result-oriented perspectives on constitutions sees constitutional design as establishing an institutional framework for democratic deliberation and, by extension, as an effective mechanism for nation building.¹³⁹ Unlike Bruce Ackerman's idealist notion of constitution making that is shaped by and reflects the authentic people's will,¹⁴⁰ a pragmatic vision of constitution making sees it as constituting the demos and providing a framework for its establishment and evolution. (It is little wonder that this view of constitutionalism has been popular among advocates of an E.U. constitution.)¹⁴¹ In its more practical guise, a big body of literature on constitutional design and engineering has evolved. Its canonical tenor suggests that when constitutionalization is seen as a pragmatic second-order measure—as opposed to instances of constitutionalization involving a more principled, first-order "We the People" outlook—it may help institutionalize attempts to mitigate tensions in ethnically divided polities through the adoption of federalism, secured representation, and other trust-building, power-sharing mechanisms.¹⁴² Here, constitutions are considered a "good

137. See Constitution Act §§ 91–92 (denoting that banking falls exclusively under the legislative authority of the Canadian Parliament while securities regulation is encompassed within the provisions of the provincial legislatures).

138. See Vincent DiLorenzo, *Mortgage Market Deregulation and Equity Stripping Under Sanction of Law* 2–3 (St. John's Sch. of Law Legal Studies Research Paper Series, Paper No. 08-0146, 2008) (concluding that federal banking regulators preferred a free-market approach following deregulation even in the face of abusive lending practices by market participants); Heinrich, *supra* note 136.

139. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 127–28 (William Rehg trans., MIT Press 1996) (1992) (discussing how the embodiment of the discourse principle through the medium of law shapes the development of a system of rights).

140. See ACKERMAN, *supra* note 52, at 4–5 (contending that the Constitution represents the people's solemn commitments and principles, which are not to be undermined by politicians).

141. See PHILIPP KLIVER, *THE NATIONAL PARLIAMENTS IN THE EUROPEAN UNION: A CRITICAL VIEW ON EU CONSTITUTION-BUILDING* 5–6 (2006) (debating the benefits of the involvement of national parliamentary bodies in the construction of the E.U. constitution).

142. The works that propose various versions of this "consociational" approach are too numerous to cite here. A prominent exponent of this line of thought is Arend Lijphart. See, e.g., AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES* 1 (1977) (positing that plural societies are capable of achieving and sustaining a stable, democratic government). *But see* DONALD L.

thing” to the extent that they promote compromise and establish an entrenched and enforceable bi- or multi-party political pact in a hitherto strife-ridden polity. We are told by constitutional engineers that the key to resolving conflicts via constitutionalism is either through compromise (no kidding) and power-sharing mechanisms (e.g., consociationalism à la Lijphart)¹⁴³ or through the creation of incentives to collaborate and resolve differences (e.g., Horowitz).¹⁴⁴ The aspiration is to create institutional incentives that appeal to all parties, do not disperse over time, and thus offer a permanent basis for aligning ethnic-group interests.

It is difficult to assess the independent contribution of constitutions and constitutional arrangements in promoting ethnic integration. But even by most generous assessments, constitutional design’s record is not great here either; in polarized settings, a forced constitution alone will not bring the disparate groups together. Granted, constitutional wisdom is credited with mitigating linguistic tensions in Canada, although my own hunch is that Canadians’ good temper and civility has been at least as crucial in the successful containment of the Quebec issue.¹⁴⁵ The Good Friday Agreement (1998) in Ireland¹⁴⁶—an honorary member in the constitutional-design hall of fame—was signed by political elites on both sides and, while it has been implemented in part, it has not been able to bring the two sides together.¹⁴⁷ Federalism has so far been able to contain the ever-increasing support for principles of theocratic governance in Malaysia and Nigeria, two other former darlings of constitutional design literature.¹⁴⁸ But things have gone from bad to worse in other places. Walloon–Flemish integration in Belgium—one of consociationalism’s golden boys of the 1970s—is crumbling.¹⁴⁹ In Lebanon—another former poster child of the consociational literature—Hezbollah (the “party of God”) now threatens to overthrow the

HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 573 (2000) (providing a more skeptical view of consociational power-sharing models).

143. LIJPHART, *supra* note 142, at 5.

144. HOROWITZ, *supra* note 142, at 573–78.

145. See Sujit Choudhry, *Does the World Need More Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory*, in *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION?*, *supra* note 6, at 141, 145 (stating that the Canadian constitutional documents have prevented the English-speaking majority from evading “unilaterally the protection offered to Quebec by federalism”).

146. Agreement Reached in the Multi-Party Negotiations, U.K.-Ir., Apr. 10, 1998, 37 I.L.M. 751 (1998).

147. See John MacGarry & Brandon O’Leary, *Consociation and Its Critics: Northern Ireland After the Belfast Agreement*, in *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION?*, *supra* note 6, at 369, 407–08 (reflecting on the deep political divides that persist in Northern Ireland even after the Good Friday Agreement).

148. See, e.g., Ran Hirschl, *The Theocratic Challenge to Constitution Drafting in Post-conflict States*, 49 WM. & MARY L. REV. 1179, 1209 (2008) (“In Malaysia and Nigeria, . . . national high courts have drawn upon federal/provincial jurisdictional boundaries to override legislative manifestations of popular religious drift at the provincial/state level.”).

149. See *The BHV Question: Belgium’s Governmentlessness*, *ECONOMIST*, Nov. 10, 2007, at 38 (reporting on the inability of Belgian politicians to form a consensus government).

state's fragile multiparty coalition.¹⁵⁰ The struggle between the nationalist Fatah movement and the religious Hamas movement has effectively split the Palestinian people.¹⁵¹ Ivory Coast is effectively split into two countries.¹⁵² The situations in Afghanistan and Iraq are far from being settled,¹⁵³ their recent constitutional renewal (Afghanistan in 2004; Iraq in 2005) notwithstanding.¹⁵⁴ Very few things, and certainly not constitutionalism, could have prevented or stopped the mass atrocities in Rwanda, the Congo, and Darfur.¹⁵⁵ Constitutional design per se was hardly a factor in resolving the Sinhalese–Tamil decades-long dispute in Sri Lanka.¹⁵⁶ Even in India, one of the more successful examples of constitutionalism in the postcolonial world, the concept of Hindutva (“Hinduness”) has been reestablished as a major political force,¹⁵⁷ while a vicious circle of Muslim-versus-Hindu communal violence has escalated considerably.¹⁵⁸

150. See *Lebanon: Peace for a While*, ECONOMIST, May 24, 2008, at 67 (discussing Hezbollah's destabilizing role amidst the current coalitions of Christians, Druze, Sunnis, and others).

151. See *Lift the Siege of Gaza: Israel and the Palestinians*, ECONOMIST, Dec. 20, 2008, at 16 (describing the divide between the nationalist Fatah movement and the Islamist Hamas movement).

152. See *Cote d'Ivoire: Country Outlook*, EIU VIEWSWIRE, Mar. 1, 2009, at 2, available at 2009 WLNR 4572534 (explaining the continued instability of the power-sharing arrangement between the government and northern rebels).

153. See Johanna Mendelson Forman, *Striking Out in Baghdad: How Postconflict Reconstruction Went Awry*, in NATION-BUILDING: BEYOND AFGHANISTAN AND IRAQ 196, 208–09 (Francis Fukuyama ed., 2006) (emphasizing the importance of multilateral initiatives to stabilize and rebuild Iraq in the wake of a failed American effort); Margin G. Weinbaum, *Rebuilding Afghanistan: Impediments, Lessons, and Prospects*, in NATION-BUILDING: BEYOND AFGHANISTAN AND IRAQ, *supra*, at 125, 125 (lamenting Afghanistan's rebuilding troubles and positing that its lack of success is due to an insecure environment and deep ethnic divisions).

154. See Barnett R. Rubin, *Crafting a Constitution for Afghanistan*, J. DEMOCRACY, July 2004, at 5, 5, 10 (conveying uncertainty about the long-term democratic prospects for Afghanistan despite adopting a newly written constitution); Edward Wong, *Iraqi Officials Declare Charter Has Been Passed*, N.Y. TIMES, Oct. 26, 2005, at A1 (describing how the Iraqi Constitution passed by a surprisingly narrow margin).

155. See John F. Clark, *The Collapse of the Democratic Experiment in the Republic of Congo: A Thick Description*, in THE FATE OF AFRICA'S DEMOCRATIC EXPERIMENTS, 96, 99–100 (Leonardo Alfonso Villalón & Peter Von Doepp eds., 2005) (describing the violence that followed the adoption of Congo's 1992 Constitution); Filip Reyntjens, *Constitution-Making in Situations of Extreme Crisis: The Case of Rwanda and Burundi*, 40 J. AFR. L. 234, 235–36 (1996) (pointing out that the 1993 Arusha Peace Accords between the Rwandan government and the rebel groups resulted in a constitutional amendment but ultimately failed to prevent the resumption of the civil war). The 2002 Machakos Protocol in the Sudan amounted to constitutional negotiations between Khartoum and the southern rebels. Christina Murray & Catherine Maywald, *Subnational Constitution-Making in Southern Sudan*, 37 RUTGERS L.J. 1203, 1207–08 (2006). This did not, however, stop the crisis in the western region of Darfur in the following year. Samantha Power, *Dying in Darfur: Can Ethnic Cleansing in Sudan Be Stopped?*, NEW YORKER, Aug. 30, 2004, at 56, 60–61.

156. See *Sri Lanka Says Leader of Rebels Has Died*, N.Y. TIMES, May 18, 2009, at A4 (discussing the Sri Lankan government's proclamation of final victory in the conflict after a battle in which 250 rebel fighters were killed, including the rebel leader).

157. See, e.g., Dibyesh Anand, *The Violence of Security: Hindu Nationalism and the Politics of Representing 'the Muslim' as a Danger*, 94 THE ROUND TABLE 203, 203–04 (2005) (discussing the

In fact, as I have argued elsewhere, the theocratic challenge has become a significant factor in world politics as well as constitutional law.¹⁵⁹ It stretches well beyond current media hot spots like Iran, Iraq, and Afghanistan, and any attempt to examine the complexities of constitution drafting in postconflict settings without paying close attention to the ever-more-relevant secular/universal versus religious/particularist divide is bound to come up short. The reemergence of religion onto the political landscape questions the effectiveness (and indeed the very applicability) of consociational power-sharing mechanisms in adequately addressing the theocratic challenge. The canonical consociational literature rests on five main ideal-type presumptions, the factual validity of which is questionable: territorial concentration and demarcation of groups; social and demographic cohesiveness among members of a given group; fixed, genuine, non-instrumentalist identities; unified interests, world views, and policy preferences among group members; and an underlying vision of constitutionalism as a viable forum of compromise.¹⁶⁰ Although these assumptions provide a plausible set of working hypotheses with respect to dividing factors such as nationality, ethnicity, or language, they are less relevant in capturing the realities of the secular-religious divide. Of particular significance here are the inherent tensions between principles of modern constitutionalism and the rule of law on the one hand, and fundamentals of theocratic governance on the other.

The main pro-reconciliation and collaboration vectors that seem to have worked relatively well in this context are joint interests of rival parties that lead them to work together for their mutual benefits (e.g., mutual dependence in profitable production processes) and the existence of an effective exogenous incentive structure that sanctions violence and rewards collaboration. Interfaith cooperation may emanate, for example, from the existence of a joint rival (e.g., interfaith collaboration in Southern Sudan against the hegemonic North). Likewise, joint suprareligious affiliation may support collaboration; Christianity and Islam have both thrived simultaneously among the Yoruba in Nigeria, without splitting the community, as joint

Hindu-Muslim rioting in the state of Gujarat that led to over 2,000 deaths and theorizing that the Hindutva discourse is only fueling the cycle of violence).

158. The major religion-related attacks on several hotels in Mumbai (November 2008) and the turmoil surrounding the demolition of the Babri Mosque in Ayodha (December 1992) are two notable examples. See *Not Just About Terrorists*, *ECONOMIST*, Dec. 13, 2008, at 51, 51–52 (reflecting on the Mumbai attack and discussing how the Hindu-nationalist Bharatiya Janata Party is already attempting to exploit it for political advantage); Celia W. Dugger, *Hindu Justifies Mass Killings of Muslims in Reprisal Riots*, *N.Y. TIMES*, Mar. 5 2002, at A4 (reporting on a fresh outbreak of Hindu-Muslim violence and discussing the decade of back-and-forth reprisals that followed the destruction of the Mosque by a mob).

159. Hirschl, *supra* note 148, at 1179–81, 1184–85.

160. I elaborate on these shortcomings of consociational models in RAN HIRSCHL, *SACRED JUDGMENTS: THE CHALLENGE OF CONSTITUTIONAL THEOCRACY* (forthcoming 2010) and in Ran Hirschl, *Constitutional Theocracy*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* (Stephen Macedo & Jeffrey Tulis, eds.) (forthcoming 2010).

ethnic identity has been perceived as stronger than religious affiliation.¹⁶¹ Or it may be the case that intrafaith class stratification is stronger than interfaith tensions. Hindu nationalists in India often attempt to incite attacks on Muslims, but they rarely succeed in the southern states of Kerala and Tamil Nadu, where caste affiliations amongst Hindus have more resonance than the Hindu–Muslim polarity.¹⁶² And the calculus of interfaith cooperation may be even more straightforwardly economic. Electoral politics may lead certain parties to emphasize religious or ethnic differences to maximize voter support. However, interfaith or sectarian violence has been shown to be significantly reduced in situations where the joint economic interests of otherwise rival parties lead them to work together for their mutual benefits (e.g., mutual dependence in profitable production processes whereby each group controls at least one key aspect of the production process).¹⁶³ In regions of India where the cooperation of Hindus and Muslims has been essential for sustaining a mutually beneficial economic enterprise or industry, sectarian violence has been distinctly lower than in regions where the marketplace is less interrelated.

The big prospective prize of joining the European Union or the preference to avoid the economic and political wrath of the European Union's powerhouse members provides a strong exogenous incentive for rival sides in the postcommunist world to collaborate or at least keep their tensions on a low heat.

A good yet seldom-cited illustration is Macedonia, which is ethnically divided between Macedonians and Albanians.¹⁶⁴ The two communities were embroiled in a vicious civil war following the flight of numerous ethnic Albanians to Macedonia during the Kosovo conflict, and subsequently in Macedonia there arose a call for a "greater Albania" that would encompass Kosovo and Albania.¹⁶⁵ Macedonians were vehemently opposed to this

161. See DAVID LAITIN, *HEGEMONY AND CULTURE: POLITICS AND CHANGE AMONG THE YORUBA*, at x–xi (1986) (claiming that the sociocultural division between Christian and Muslim Yoruba has not resulted in a political division between the two religious groups).

162. STEVEN I. WILKINSON, *VOTES AND VIOLENCE: ELECTORAL COMPETITION AND ETHNIC RIOTS IN INDIA 17–18* (2006).

163. See, e.g., ASHUTOSH VARSHNEY, *ETHNIC CONFLICT AND CIVIC LIFE: HINDUS AND MUSLIMS IN INDIA 14–15*, 173–80 (2002) (contrasting the cities of Hyderabad and Lucknow, and positing that the economic symbiosis that exists between Hindus and Muslims in Lucknow helps explain the relative lack of communal tension and violence in Lucknow compared to Hyderabad); *id.* at 259, 261 (concluding that the "integrated character" of business organizations in the old city of Surat was "highly effective in keeping riots confined to the shantytowns"; "Hindu and Muslim businessmen, who had worked together for years, were able to call on each other's time, contacts, and goodwill" in order to quash incendiary rumors that would have otherwise incited communal violence).

164. I thank Gaurav Toshniwal for bringing the following examples to my attention.

165. See John R. Schindler, *Europe's Unstable Southeast*, 14 *NAVAL WAR C. REV.* 15, 29 ("The desire of ardent Albanian nationalists for union with Kosovo is hardly secret, and it took tangible and violent form in late 2000 with the emergence in Macedonia of an Albanian insurgent

plan.¹⁶⁶ A vicious civil war erupted, and it ended only under immense international pressure with the signing of the Ohrid Agreement in 2001.¹⁶⁷ It included several key power-sharing mechanisms, the devolution of power to subnational units, and granted Albanian an official-language status alongside Macedonian.¹⁶⁸ But the main incentive for both communities was the possibility of eventual EU membership if the two communities were able to maintain the Ohrid Agreement and build a stable, joint polity.¹⁶⁹ And so “from the brink of an all-out civil war in 2001, ethnic Albanians and Macedonians have worked together in government largely because of their common hopes of joining the EU.”¹⁷⁰

Conversely, in Cyprus, where Greeks and Turks have long been locked in a bitter dispute, no such collaboration incentive exists, as most of the international community does not recognize the self-determination rights of Turkish-Cypriots.¹⁷¹ Also, perhaps more importantly, Greek-Cypriots were given EU membership before the conclusion of their constitutional

force, the National Liberation Army, which promptly launched attacks on Macedonian security forces.”).

166. *See id.* (asserting that Macedonia is a nation “[c]onceived by most citizens as a state by and for Slavic Macedonians, who align more with the Serbs and Bulgarians than with the Albanian minority).

167. *See* Ian Fisher, *Macedonia Peace Signed, but Soon After, Artillery Booms*, N.Y. TIMES, Aug. 14, 2001, at A3 (reporting that “[t]he bitter and distrustful leaders of Macedonia’s two main ethnic groups” finally signed the peace deal, ending months of fighting and putting Macedonia “a major step closer to a deployment of 3,500 NATO troops”).

168. *See* Ohrid Framework Agreement §§ 3.1–3.3, Aug. 13, 2001, *available at* http://faq.macedonia.org/politics/framework_agreement.pdf (providing for a decentralized government by granting more power to local officials, redistricting municipalities to accord with the census, and allowing municipal councils to select their own police chiefs); *id.* § 6.5 (“Any other language [in addition to Macedonian] spoken by at least 20 percent of the population is also an official language.”).

169. In March 2001, during the early stages of the conflict and only a few months before the Ohrid Agreement, the European Community signed the Stabilisation and Association Agreement with Macedonia, which focused on promoting regional peace, stability, free trade, and general cooperation among the signing parties. Stabilisation and Association Agreement, E.C.-Maced., pmb1., Mar. 26, 2001, *available at* http://ec.europa.eu/enlargement/pdf/the_former_yugoslav_republic_of_macedonia/saa03_01_en.pdf. The Agreement also stipulated that Macedonia was a “potential candidate for EU membership” upon implementation of the Agreement. *Id.* The fulfillment of that goal, however, has not yet occurred. *See* Knaus Gerald et al., *The Political Economy of Interethnic Relations: Ahmeti’s Village or the Macedonian Case*, in NATIONALISM AFTER COMMUNISM: LESSONS LEARNED 101, 102, 144 (Alina Mungiu-Pippidi & Ivan Krastev eds., 2004) (documenting the impact of “diminishing resources and collapsing lifestyles” on Macedonia’s ethnic divisions and arguing that if the European Union wants there to actually be a stable, joint polity, it will require a serious commitment to break the “zero-sum” dynamic between the two groups).

170. *Approaching Europe: The Balkans*, ECONOMIST, Nov. 5, 2005, at 55.

171. *See* S.C. Res. 541, ¶¶ 1–2, U.N. Doc. S/RES/541 (Nov. 18, 1983) (calling on “all states to withhold recognition from any Cypriot state other than the Republic of Cyprus”); S.C. Res. 550, ¶ 2, U.N. Doc. S/RES/550 (May 11, 1984) (identifying the Turkish Republic of Northern Cyprus as a secessionist entity and calling on all states to refuse to facilitate or assist the TRNC in any way).

bargaining with the Turkish-Cypriots.¹⁷² Not surprisingly, the U.N.-sponsored referendum on constitutional settlement (2004) was accepted (65% to 35%) by the Turkish-Cypriots—a community left out of the European Union, alongside its motherland, Turkey—while it was rejected (76% to 24%) by the Greek-Cypriots—a community that had already secured their EU membership.¹⁷³

III. Conclusion

Constitutional design is a modernist exercise. Akin to most other design sciences, it rests on utterly optimistic, albeit not always empirically substantiated, predispositions towards order over chaos, reason over passion, and evidence-based planning over improvisation and instincts. At the same time, it assumes a rather Hobbesian human nature. People are essentially self-interested and so may join a restraining pact mainly if it serves their interests to do so. Members of a given polity may not be amenable to signing onto a social contract voluntarily and so may find themselves caught up in a vicious circle of disorder, violence, and decay. This may be averted through careful institutional design, which is assumed capable of changing human behavior, by enlightenment and education, deterrence and enforcement, or by creating meaningful incentives for people (or groups) to behave in a desirable way. Constitutionalism is said to provide a rational, effective way of organizing public life. This involves balancing the common good and individual freedoms; fundamental democratic governing principles with realities of very large numbers of participants and inputs; serious disagreements among participants on values, worldviews, identities, policy goals, and methods; and inevitable gaps between aspirations and realities.

A quick look at other design domains, macro and micro, suggests that factors such as detailed schemes, manageable size and scope, a low number of intervening factors, effective control mechanisms, built-in self-learning and adjustment mechanisms, and above all, sheer devotion and genuine benevolence may enhance the chances of success of many planning experiments. But when it comes to constitutional design, most of these lessons of the trade are overlooked or prove difficult to achieve. Even more fundamentally, factors such as manageable population size, high education and human capital, a developed market economy alongside a functional social safety net, and strong state capacity account for democracy, prosperity, and human development more than the institutional factors that often occupy constitutional engineers' vocabulary.

The story of constitutional design may be told as an optimistic story or as a pessimistic one. Big aspirations alongside engineering ingenuity

172. VAN COUFOUDAKIS, *CYPRUS: A CONTEMPORARY PROBLEM IN HISTORICAL PERSPECTIVE* 36, 57 (2006).

173. Amberin Zaman & Phillip Mark, *Greek Cypriots Quash Plan to Reunify Island*, L.A. TIMES, Apr. 25, 2004, at A3.

brought about exceptional accomplishments such as ancient Egypt’s pyramids and Hannibal’s march through the Alps. The scientific and technological advancements of the last two centuries are beyond comprehension. The global average life expectancy at birth has nearly doubled from the early twentieth century (about 35 years) to the early twenty-first century (over 66 years).¹⁷⁴ If man has been able to overcome all hurdles and send a self-navigating rover to Mars (some 300 million miles away), land it at precisely the spot it was meant to land (chances for that happening are distinctly lower than shooting a basketball from downtown Los Angeles and making a basket in New York’s Madison Square Garden without touching the rim), and receive live, high-resolution photos from that distant planet within less than ten minutes of landing, there are very few things man cannot do.¹⁷⁵ The political advances of the last two centuries—most notably the breakdown of ties between property ownership and political voice, and the subsequent triumph of universal suffrage—may be less spectacular but are equally impressive. So maybe there is something to the constitutional-engineering metanarrative, even if on-the-ground evidence of its success in illuminating some of the darker spots on our lonely planet is mixed at best.

When I first met my late father-in-law—a notable urban-planning professor at the Hebrew University in Jerusalem—I asked him what was the correlation between plans for urban development and the actual implementation of these plans. He paused for a brief second and said:

Anything that has a probability of happening greater than zero, can and will happen. No exceptions. So when Murphy said “Whatever can go wrong, will go wrong,” he must have thought about urban planning. At the very best we can reach about 40% implementation overall; much less when we measure long-term substantive success. But even if we control a meager 5% or 10% of how cities actually develop, that’s infinitely more than nothing.

One could have easily said the same about constitutional design, to be sure.

At the same time, the discovery of penicillin—a complete fluke that may not be attributed to any *ex ante* planning—seems to have done more good to humanity than constitutional design. The ability of traditional constitutional engineering to address some of the core challenges we face in the twenty-first century seems quite limited, mainly because these challenges are global in nature and require large-scale collective action and global collaboration to resolve. Widening economic- and life-opportunities gaps worldwide, global freshwater reservoirs and patterns of food production,

174. Thomson Prentice, World Health Org., Health, History and Hard Choices: Funding Dilemmas in a Fast-Changing World, Presentation at the Center on Philanthropy at Indiana University Symposium: Health and Philanthropy: Leveraging Change 7 (Aug. 24–25, 2006), http://www.who.int/global_health_histories/seminars/presentation07.pdf.

175. ROVING MARS (Walt Disney Pictures 2006).

massive forced migrations, global climate change, health pandemics and antibiotic-resistant diseases, and proliferation of weapons of mass destruction all go well beyond the boundaries of a single polity, and we thus find ourselves increasingly unable to tackle these issues successfully via constitutionalism. And this is without even saying a word about unforeseeable transformations—think of the sudden discovery of intelligent life on another planet. No presidentialism, proportional representation, judicial review, power sharing, or veto points can or will address that. So we had better embrace that meager 5% or 10% before we discover that even that may be too much to ask for.