

Designing a Constitution: Of Architects and Builders

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This Article offers a prolegomenon to the basic problems of constitutional design rather than prescribes any particular values, institutional arrangements to secure those values, or means to obtain the best fit between a larger culture and a given political order.¹ My purpose is to illuminate questions that confront constitutional architects who would strengthen an existing constitutional order, thoroughly revise that order, or found a new political system. I make no effort to solve more specific difficulties facing builders trying to carry out the architects' general plans. Thus, my objective is to clarify choices for designers of a constitutional order rather than to produce a blueprint.

I. Political Architects

Political creation, Niccolò Machiavelli claimed, is “as dangerous almost as the exploration of unknown seas and continents.”² As a subset of that form of creation, constitutional design ranks among the more daunting of human tasks, requiring great amounts of wisdom, heavily flavored with chutzpah and imagination as well as plain, old-fashioned luck. Halting attempts in the former American colonies from 1776 to 1787,³ disastrous efforts in Germany after World War I,⁴ unsuccessful governments in sub-Saharan Africa following World War II,⁵ persistent difficulties of forming a more perfect European Union,⁶ and the bloody fiasco in Iraq following the

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1. For an excellent effort to accomplish these aims for the United States, see SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006). For many insightful analyses, especially those by Donald L. Horowitz, see *DESIGNING DEMOCRATIC INSTITUTIONS: NOMOS XLII* (Ian Shapiro & Stephen Macedo eds., 2000). For a collection of essays on the study of constitutional design, see *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION?* (Sujit Choudhry ed., 2008). For a piece addressing problems of constitutional design from the broad comparative and historical perspectives of political theorists such as Jean Bodin and Montesquieu, see DONALD S. LUTZ, *THE PRINCIPLES OF CONSTITUTIONAL DESIGN* (2008).

2. NICCOLÒ MACHIAVELLI, *Discourses on the First Ten Books of Titus Livius*, in *THE PRINCE AND THE DISCOURSES* 103, 103 (Luigi Ricci trans., Random House 1950) (1513).

3. See *infra* notes 181–87 and accompanying text.

4. See *infra* note 109.

5. See *infra* note 195.

6. See Christopher J. Borgen, *Whose Public, Whose Order? Imperium, Region, and Normative Friction*, 32 *YALE J. INT'L L.* 331, 343 (2007) (describing the European Union as a “regional hegemon” that is comprised of “sovereign states that rarely agree completely on diplomatic and military issues” but nonetheless employs “decision-making structures which operate on a consensus basis”).

American invasion in 2003⁷—even when matched with successes in Germany, India, Italy, and Japan after the Second World War⁸—show that Machiavelli did not exaggerate the difficulties of constructing a constitution. Although sensible men and women should be daunted by the responsibilities of constitutional architects, they should take heart from Hannah Arendt’s assertion that constitution making is “the noblest of all revolutionary deeds.”⁹

Such work is typically begun by a small elite,¹⁰ but if it will effectively constitute (or reconstitute) a truly civil society,¹¹ that task must soon be joined by large sets of people, operating across decades, and possibly centuries. The “constitution” is not merely a “thing,” sitting immobile like a rock; it is also a set of ideas, as well as a continuing discussion about those ideas as they relate to a proper political order. As Walt Whitman asked, “Were you looking to be held together by lawyers? Or by an agreement on a paper? or by arms? Nay, nor the world, nor any living thing, will so cohere.”¹²

The charter, if a nation adopts a charter and if that document is authoritative, will always be a focus of the continuing constitutional debates. But these conversations (these quests for what Gary Jeffrey Jacobsohn terms “constitutional identity”)¹³ will not simply center on the words of that text, but also on continually changing demands on the political system, as well as on the constitution’s putative ideals and instruments. Thus, it is a critical point to understand that constitutional design is a process—an ongoing process—that will last at least as long as the political system that it is supposed to constitute.¹⁴ A functional constitution can never be a machine that goes by its own force. The men and women who govern under any constitutional order inevitably interpret it, inevitably adjust it, and so, inevitably change it. They usually do so incrementally, but sometimes

7. See *infra* note 131 and accompanying text.

8. See *infra* notes 192–95 and accompanying text.

9. HANNAH ARENDT, ON REVOLUTION 185 (1965).

10. See WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 149 (2007) (noting that the initial stages of constitutional construction typically require the participation of a talented and educated elite because, *inter alia*, constitutional architects must be able to persuade others of a constitutional democracy’s desirability).

11. I use this term to refer to a system in which people are free to live in peace to pursue the moral, social, and economic goals they have set for themselves as long as they respect similar rights of each fellow citizen.

12. Walt Whitman, *Over the Carnage Rose Prophetic a Voice*, in WALT WHITMAN: THE COMPLETE POEMS 340, 341 (Francis Murphy ed., 1975).

13. See, e.g., Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEXAS L. REV. 1763, 1773, 1773–86 (discussing Israel’s “[u]nresolved [d]ilemma of [c]onstitutional [i]dentity”).

14. Some theologians espouse a “theology of emergence,” arguing that their discipline displays similar evolutionary characteristics. See, e.g., PHILIP CLAYTON, MIND AND EMERGENCE: FROM QUANTUM TO CONSCIOUSNESS 18 (2004) (discussing the ongoing process of evolutionary emergence in the context of humans’ mental faculties).

momentously.¹⁵ “Finality,” Benjamin Disraeli contended, “is not the language of politics.”¹⁶ Many of its parts exist in a state of becoming, the product of ongoing creativity.¹⁷ And change, as John Randolph delighted in repeating, does not mean progress.¹⁸ A constitutional order may decay as well as develop.

II. Definitions

Let me define certain terms. First, I use “politics” as did Aristotle—“truly the master art,”¹⁹ whose goal is to maximize citizens’ chances to live what they consider to be good lives. Thus, “law” in any of its forms, including that of a constitution, is a creature of politics, and, as Felix Frankfurter once said, constitutional interpretation is “applied politics.”²⁰ Further, a constitution is not the same as a constitutional text. As Giovanni Sartori noted, every country has a constitution, most have a constitutional text, but very few have constitutionalism.²¹ In *The Politics*, Aristotle used several, progressively broader, definitions of a constitution. Book III referred to it as “the arrangement of magistracies in a state, especially of the highest of all.”²² Early in Book IV, his net widened: “[a] constitution is the organization of offices in a state, and determines what is to be the governing body, and what is the end of each community.”²³ Later in Book IV, his concept of a constitution became sweeping: the life of the city-state.²⁴

Aristotle’s broadest concept eliminates the confusion that results from conflating the often conflicting, as well as shifting, political values and arrangements under which a people live, with those values and arrangements their constitutional document specifies. Thus, I use “the constitution” interchangeably with what the Basic Law of the Federal Republic of Germany and the German Constitutional Court refer to as “the constitutional

15. Compare U.S. CONST. amend. XII (changing incrementally the procedure by which the President and Vice President are elected), with U.S. CONST. amend. XIII (abolishing slavery in a momentous manner after the conclusion of the Civil War).

16. Benjamin Disraeli, Speech in the House of Commons (Feb. 28, 1859), in WIT AND WISDOM OF THE EARL OF BEACONSFIELD 104, reprinted in THE WORKS OF BENJAMIN DISRAELI EARL OF BEACONSFIELD.

17. Compare the theology of emergence. CLAYTON, *supra* note 14.

18. RUSSELL KIRK, RANDOLPH OF ROANOKE: A STUDY IN CONSERVATIVE THOUGHT 134 (1951).

19. 2 ARISTOTLE, *Nicomachean Ethics*, in THE COMPLETE WORKS OF ARISTOTLE I.2.1094a26, at 1729, 1729 (Bollingen Series No. 71, Jonathan Barnes ed., 1984) (Revised Oxford Translation).

20. FELIX FRANKFURTER, *The Zeitgeist and the Judiciary*, in LAW AND POLITICS: THE OCCASIONAL PAPERS OF FELIX FRANKFURTER 3, 6 (E. F. Pritchard, Jr. & Archibald MacLeish eds., Capricorn ed. 1962).

21. Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 861 (1962). For a more detailed analysis, see GIOVANNI SARTORI, DEMOCRATIC THEORY (1965).

22. 2 ARISTOTLE, *Politics*, in THE COMPLETE WORKS OF ARISTOTLE, *supra* note 19, III.6.1278b9–1278b10, at 1986, 2029.

23. *Id.* at IV.1.1289a15–1289a16, 2046.

24. *Id.* at IV.11.1295b1, 2056.

order.”²⁵ Neither term is identical with constitutionalism, for neither need include any of constitutionalism’s norms. As with “constitutionism”—a term to be defined shortly—the referent may vary from a regime such as Augusto Pinochet’s in Chile,²⁶ on the one hand, to a more benign system such as that of Norway.²⁷

In contrast, “constitutional text” refers to the document or documents that supposedly spell out the nation’s basic political principles and goals, institutional arrangements, modes of selecting public officials, and rights and duties of private citizens. The authority of these charters varies widely. At one extreme would be Stalin’s and Mao’s constitutional scripts—pious fig leaves whose function was to impress foreigners.²⁸ Toward the other extreme are the documents of current constitutional democracies, whose terms public officials habitually claim to follow and, in fact, usually try to do so, though the meanings of even these more authoritative texts may shift over time.²⁹

Nevertheless, no constitutional text is completely authoritative. For example, the British North America Act of 1867, Canada’s principal constitutional charter until it was dramatically amended in 1982, explicitly says that the English Monarch directly (or indirectly through a Governor General) rules that country: “[T]he Executive Government of authority of and over Canada . . . continue[s to] be vested in the Queen,”³⁰ who makes laws “by and with the Advice and Consent of the [Dominion’s] Senate and House of Commons.”³¹ One can find only hints of a parliamentary system of

25. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Constitution] art. 2(1), 9(2), 20(3)–(4) (F.R.G.), *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Rüdiger Woltrum & Rainer Grote eds., 2009). Beginning with one of its earliest decisions, *The Southwest Case*, the Constitutional Court frequently repeats this term. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 23, 1951, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 14, 33–39 (F.R.G.), *reprinted in* WALTER F. MURPHY & JOSEPH TANENHAUS, *COMPARATIVE CONSTITUTIONAL LAW* 208–11 (1977).

26. *See* ROBERT BARROS, *CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION* 140–44 (2002) (discussing the ineffectuality of constitutional guarantees of individual rights).

27. *See* HARRY ECKSTEIN, *DIVISION AND COHESION IN DEMOCRACY: A STUDY OF NORWAY* 10–20 (1966) (attributing the stability of Norway’s democracy to social conceptions of democracy rather than to formal institutional systems).

28. *See* JUNE GRASSO ET AL., *MODERNIZATION AND REVOLUTION IN CHINA: FROM THE OPIUM WARS TO WORLD POWER* 251 (3d ed. 2004) (“While the Chinese constitution allows for freedom of speech, publication, and democratic elections, the actual meaning of such terms has always been defined by the party.”); MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 280 (1986) (discussing the “farce” of Stalin’s constitutional text of 1936 and its impression on foreigners).

29. *See generally* Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy, in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3, 6–7, 12–14 (Douglas Greenberg et al. eds., 1993) (discussing constitutional democracies and shifts of constitutional meaning over time).

30. Constitution Act, 1867, 30 & 31 Vict. Ch. 3, § 96 (U.K.), *as reprinted in* R.S.C., No. 5 (Appendix 1985) (Can.).

31. *Id.* § 91.

government that actually operates.³² References to the monarchy offer a fiction, symbolizing Canada's status, initially, as a dominion of the British Empire, and later, as an equal partner in the British Commonwealth of Nations. In the United States, of course, many clauses of the document have become hortatory rather than mandatory.³³

Then, too, no constitutional documents long remain coextensive with the constitutional order.³⁴ Michael Walzer's comment about religion applies to secular politics: Judaism "is not found in the text [of the Torah] so much

32. Besides the "by and with the consent" phrase, the clearest clue to a parliamentary system came in the Preamble, citing Canada's alleged desire to be governed by a "Constitution similar in principle to that of the United Kingdom." *Id.* pmbl. For a fascinating use of this statement to protect freedom of the press and an argument that the censorship of the Press Bill interferes with "the free working of the political organization of the Dominion," which is contrary to the language of the Preamble, see the opinion of Chief Justice Lyman Duff in *In re Alberta Statutes*, [1938] S.C.R. 100, 146, 142–47 (Can.). Duff's reasoning was remarkably similar to that of Justice Harlan Fiske Stone in his famous "footnote four," in *Carolene Products*. See *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (suggesting a higher degree of judicial scrutiny over legislation that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation").

33. For instance, Article I, Section Nine dictates that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7. As of early 2009, Congress has not seen fit to obey that command, and the Supreme Court has said it lacks authority to enforce the mandate. See *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974) (discussing "nearly two centuries of acceptance of a reading of cl. 7 as vesting in Congress plenary power to spell out the details of precisely when and with what specificity executive agencies must report the expenditure of appropriated funds and to exempt certain secret activities from comprehensive public reporting"). Section Two of the Fourteenth Amendment orders a reduction in the congressional representation of any state that discriminates against the voting rights of citizens over twenty-one. U.S. CONST. amend. XIV, § 2. Congress never enforced that mandate either. See Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 259–60 (2004) (asserting that despite the fact that "the conditions triggering invocation of Section 2 existed for the better part of a century . . . no discriminating state lost even a single seat in the House of Representatives when Congress reapportioned itself"). In addition, although Article One, Section Six says, "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office," U.S. CONST. art. I, § 6, cl. 2, many members of Congress continue to hold commissions as officers in the military reserve and earn "points" entitling them to retire from the military at sixty-three and receive pensions. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (holding that there is no standing to sue as taxpayers and citizens on the basis of a congressman's violation of Article One, Section Six, Clause Two: "To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature."). In contrast, Congress requires federal judges to resign their reserve commissions and thus lose any pension benefits they may have accrued. See MURPHY, *supra* note 10, at 384 n.12 ("[B]y statute, a federal judge must resign his or her commission in the reserves, a requirement that has compelled judges who have been in the military to lose retirement benefits for themselves and their spouses that they have accumulated for their service . . .").

34. Cf. Edward S. Corwin, *Constitution v. Constitutional Theory*, 19 AM. POL. SCI. REV. 290, 290–92 (1920), reprinted in 2 CORWIN ON THE CONSTITUTION 183 (Richard Loss ed., 1987) (arguing that the term "constitution" encompasses far more than the written text of the U.S. Constitution).

as in the interpretations of the text.”³⁵ Constitutional documents quickly become a palimpsest: The original words are soon overwritten by customs, usages, and interpretations—some crafted by one set of interpreters, and some by others.³⁶

The existence of a constitutional text does not mean that a political system is a constitutional democracy or even a constitutionalist state. As one of Shakespeare’s clowns put it, “*cucullus non facit monachum*.” “A cowl does not make a monk.”³⁷ Labeling a document “the constitution” does not thereby imbue it with any of the norms of constitutionalism, democracy, or, as just indicated, any authority whatsoever.

“Democracy,” “constitutionalism,” and “constitutionism” refer to different concepts.³⁸ The first is a cloak of many colors that stretches from the vicious “People’s Democracy” of countries such as North Korea,³⁹ to benign systems, such as that of the Netherlands.⁴⁰ The processes of selecting rulers in democracies also vary—from the choice of leaders through a lottery (as in ancient Athens),⁴¹ to periodic elections (as in Western European nations),⁴² to rigged plebiscites to affirm a dictator for life. Today most Western writers use the word democracy to refer to a political system in which adult citizens have equally weighted votes in the selection of legislative officials who enact and repeal binding laws.⁴³ These officials serve for limited terms and must, to continue in office, stand for reelection.⁴⁴ Either the legislature chooses the chief executive or the people do so directly.⁴⁵ The power of all officials, however chosen, is limited only by periodic free and open elections, augmented by cultural understandings.

35. MICHAEL WALZER, *EXODUS AND REVOLUTION* 144 (1985).

36. Customs and usages are—of course—themselves interpretations, only less self-consciously done.

37. WILLIAM SHAKESPEARE, *TWELFTH NIGHT* act 1, sc. 5.

38. For relevant bibliographies, see MURPHY, *supra* note 10, at 4–12.

39. *Id.* at 4.

40. *See id.* at 4–6, 84 (emphasizing the importance of representative processes to democracies and asserting that the Netherlands has such processes).

41. For an analysis of Athens’s voting system, see MOGENS HERMAN HANSEN, *THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES: STRUCTURE, PRINCIPLES, AND IDEOLOGY* 46 (J.A. Crook trans., 1999).

42. *See, e.g.*, GG art. 39, § 1 (requiring elections for the members of the Bundestag be held every four years); CONSTITUCIÓN [C.E.] art. 68, § 3 (Spain), *translated in* 17 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 25 (requiring elections for the members of the House of Representatives be held every four years).

43. *See, e.g.*, Murphy, *supra* note 29, at 3–4 (listing the institutional conditions necessary to a modern democracy: popular election of representatives, districts of approximately equal population, and universal adult suffrage).

44. *See id.* at 4 (teaching that the election of representatives “for limited terms, to institutions that allow those representatives to freely govern,” is a hallmark of a democratic system).

45. *See* ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 65 (2003) (discussing the choices facing the American Constitutional Convention regarding the method of selecting an independent executive).

Constitutionalism is a normative creed whose principal tenet is simple: Although government is necessary to a life that is truly human, every exercise of governmental power must be subject to important *substantive*, as well as procedural, limitations.⁴⁶ Constitutionalism agrees with versions of democratic theory that hold respect for equal human dignity, defined to include a wide degree of individual liberty, to be the fundamental value of a just society. All constitutionalists also agree that there are some things that government cannot do, no matter how precisely it follows procedures specified by a constitutional text or a larger constitutional order, even if those actions perfectly mirror the deliberate judgment of a charismatic leader, a benevolent junta, or the overwhelming majority of voters.⁴⁷

Just as there are many conceptions of democracy, so constitutionalists differ among themselves. First, although they agree that governmental power should be limited and public officials should act to enhance citizens' opportunities to live decent lives, constitutionalists do not universally agree on precisely what actions are forbidden or exactly what "the good life" includes and excludes. At one extreme is a negative version of constitutionalism that stresses restrictions on government, relegating public officials to night watchmen.⁴⁸ A more positive form argues that fostering human dignity also requires governmental action to promote, as well as safeguard, individuals' rights, especially their social and economic rights.⁴⁹ Governmental practices and the language of most constitutional texts adopted since World War II indicate that "positive constitutionalism" has become the dominant version.⁵⁰

Obviously, constitutionalism wars with totalitarianism and is also incompatible with most forms of authoritarian government. Moreover, it coexists uneasily with its usual bed partner, representative democracy, whose

46. The bibliography devoted to constitutionalism is almost as large as that explaining democracy. For citations to many of the better works, see Murphy, *supra* note 29, at 20.

47. See DAHL, *supra* note 45, at 6 (asserting that constitutionalists seek "institutional restraints on substantive matters to prevent lapses into an authoritarian or totalitarian system cloaked with populist trappings").

48. Richard Epstein is a prominent defender of such a system. See RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 2 (1998) (promoting laissez-faire as "the embodiment of principles [that], when consistently applied, will work to the advantage of all (or almost all) members of society simultaneously"); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 331 (1985) ("[T]he eminent domain approach, as applied both to personal liberty and private property, offers a principled account of both the functions of the state and the limitations upon its powers."). There is also a less simplistic defense of such a system. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 10, 9–10 (2004) (asserting that laws may "bind in conscience only if there is a reason to be confident that they do not violate the 'liberty rights' of the people" and that a clear conception of natural rights "helps to illuminate why and when there is a duty to obey the law").

49. See, e.g., SOTIRIOS A. BARBER, *WELFARE AND THE CONSTITUTION* 147–53 (2003) (making a systematic theoretical argument for positive constitutionalism).

50. See, e.g., MURPHY, *supra* note 10, at 204 (discussing the twentieth-century gravitation towards constitutional democracy by the peoples of Germany, Italy, Spain, Portugal, Argentina, Brazil, Chile, Uruguay, and various other Central and Eastern European countries).

underlying norm of popular sovereignty is hostile to substantive limitations on the people's freely chosen representatives.

Constitutionism, the final entry in this conceptual trinity,⁵¹ refers to adherence to the terms of the constitutional text and broader constitutional order (or simply one or the other). Many private citizens, public officials, and even professors equate fidelity to a particular constitutional text with constitutionalism. Reality, however, may differ. The basic values of both a constitutional order and a constitutional text can range from those of tight totalitarianism to loose libertarianism. Thus, officials might profess to be practicing constitutionalism while, in fact, they are only being true to a constitutional document or order that repudiates constitutionalism.⁵² It is possible that, if public officials and private citizens obey a charter's terms, constitutionism could limit government. Nevertheless, those limitations might not include respect for rights that most constitutionalist or democratic theorists consider fundamental. *Constitutionalism* differs from *constitutionism* in demanding adherence not to *any* given constitutional text or order, but to principles that center around respect for human dignity and obligate both private citizens and public officials.

Just as the worth of "the rule of law" as an instrument of free government depends on the content—substantive as well as procedural—of "the law," so too the worth of constitutionism depends on the values that a specific constitutional text or constitutional order advances, and how closely government and society follow those norms. We should evaluate "government by the people" by similar standards. It is a means—not an end itself. Even if perfectly operational, the value of a government responsive to the popular will depends on what "the people" want. The good such a government will produce if "the people" want freedom and justice for themselves and all other citizens will differ sharply from what will ensue if, for example, a majority of citizens want "their kind" to live in luxury paid for by the slave labor of others.

III. Preliminary Questions

The first questions designers confront are what sort of system they wish to construct and how much they should attempt to do at this point. Different

51. I take full blame for, as far as I know, coining this awkward neologism. My excuses are that the word expresses an important political concept and its use may avoid serious analytic confusion.

52. I differ from Robert Barros, who argues in a fine study of Chile that General Augusto Pinochet embraced constitutionalism. See BARROS, *supra* note 26, at 317 (contending that the creation of the Constitution in 1980 by Pinochet and other members of the Junta constituted a form of "self-binding," since they passed the document that limited their powers and went into force while they held office). In 1989, when I joined Professor John E. Finn of Wesleyan University and then-Judge Kenneth Starr in a tour of Chilean universities to debate Pinochet's supporters, I realized that they equated constitutionalism with fidelity to a text that authorized a ruthless, often murderous, dictatorship.

considerations from those that guide construction of a constitutional democracy come into play if the founding elite want to establish a military dictatorship. So, too, it makes a vast difference if designers attempt to modify an existing political system, erect a scaffold from which later designers can build a modified system, or fashion a new political system in intricate detail. If a constitutional text is to be more than what Woodrow Wilson referred to as “a mere lawyers’ document” and become “the vehicle of a nation’s life,”⁵³ it must either conform to the society’s prevailing norms or nudge those norms to include the values its terms endorse. That sort of change could be marginal or systemic, and “progress” swift or gradual. Jacobsohn classifies such constitutions as acquiescent or transformative.⁵⁴

We could construct a two-dimensional continuum here. One axis would measure time—how rapidly designers thought a new constitutional order would allow officials, working within its norms, to change society. Here, as elsewhere, considerations of what Aristotle called “practical wisdom,”⁵⁵ best captured by the term prudence, would be paramount. The second dimension would measure the degree of change, ranging from the adamantly acquiescent, aimed at preserving the social status quo, to militantly transformative, aimed at radically reshaping the existing social order⁵⁶ (as do India’s and South Africa’s efforts).⁵⁷

At any point on either continuum, the existing constitutional genre need not change. The new constitutional order might still be, for example, a constitutional democracy, but one restyled to promote different specific policies. Designers might substitute parliamentary for presidential government, or proportional representation for “first-past-the-post.” Ireland’s text of 1937⁵⁸ offers a classic case in point. It altered, but did not substantially change, the parliamentary system,⁵⁹ identified more rights as constitutionally protected,⁶⁰

53. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 157 (Read Books 2007) (1908).

54. GARY JEFFREY JACOBSON, *THE DISHARMONIC CONSTITUTION* (forthcoming) (manuscript at chs. 1, 5, on file with author).

55. 2 ARISTOTLE, *supra* note 19, I.2.1140b21–1140b22, at 1729, 1801.

56. JACOBSON, *supra* note 54 (manuscript at chs. 1, 5).

57. *See infra* notes 113–14, 116 and accompanying text.

58. BUNREACT NA HÉIREANN, 1937 [IR. CONST., 1937], art. 2, *translated in* 9 *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, *supra* note 25.

59. *See* Patrick Hanafin, *Constitutive Fiction: Postcolonial Constitutionalism in Ireland*, 20 *PENN ST. INT’L L. REV.* 339, 354, 353–54 (2002) (describing the way Ireland’s constitutional text of 1937 created a bicameral parliament, bureaucracy, and legal system that were all similar to the system that was previously in place, but the drafters of the constitutional text prefixed the institutions with “Irish” to “lead the citizens to believe that these institutions were new creations not adaptations of previous institutions”).

60. *See* Katherine Lesch Bodnick, *Bringing Ireland Up to Par: Incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 26 *FORDHAM INT’L L. J.* 396, 414 (2003) (stating that Articles 40–44 of Ireland’s constitutional document of 1937 list many fundamental rights afforded to the Irish people and that the judiciary interprets Article 40.3 as a source of unenumerated rights).

and modified judicial review.⁶¹ Yet, both the texts of 1922 and 1937 tried to establish a constitutional democracy, anchored in Catholicism's natural law.⁶² The most obvious difference was the latter's affirmation of separation from the British Commonwealth.⁶³

Before designers can intelligently weigh such matters, they need a nation to constitute—at least—a geographical space that contains people who have (or can be persuaded that they enjoy) a common history—if not ethnicity or ancestry—and share many fundamental values; even more if they share ideals. Transforming a congeries of clans or tribes into a “people” is likely to be the work of generations. Inhabitants must be persuaded that it is in their self- or group-interest to respect (although they need not accept) each other's basic values and be willing to live together in peace. Thus, Japan and Germany after World War II were easy cases, compared to Iraq or Afghanistan.⁶⁴ America's neglecting to build a nation while trying to design constitutional systems helps explain its failures.⁶⁵ Without a culture in which people can usually rely on others to keep their word and respect each other's rights, there can be no nation, no “people,” only an affiliation of tribes or

61. See Kathryn A. O'Brien, *Ireland's Secular Revolution: The Waning Influence of the Catholic Church and the Future of Ireland's Blasphemy Law*, 18 CONN. J. INT'L L. 395, 398 (2002) (noting that, unlike Ireland's previous constitutional text, the constitutional document of 1937 definitively gave the judiciary the power to strike down legislation).

62. See Hanafin, *supra* note 59, at 345, 352 (stating that the philosophical bases of Ireland's constitutional text of 1937 were the natural law teachings of Thomas Aquinas and the themes of Roman Catholicism, and that both were present but not as overt in the constitutional document of 1922).

63. See IR. CONST., 1937, art. 1 (“The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genus and traditions.”).

64. See Ziyad Motala, *Constitution-Making in Divided Societies and Legitimacy: Lessons from the South African Experience*, 15 TEMP. POL. & CIV. RTS. L. REV. 147, 148 (2005) (stating that the major problems in Iraq and Afghanistan in writing a constitution is the “lack of public embrace of the project” and the “ambivalence to the American presence and role in the constitution making process”); see also Feisal Amin Rasoul al-Istrabadi, *A Constitution Without Constitutionalism: Reflections on Iraq's Failed Constitutional Process*, 87 TEXAS L. REV. 1627, 1654 (2009) (identifying one of the factors that led to the failure of the Iraqi constitutional process as the “distrust amongst Iraq's nascent political elites”).

65. There is a vast literature on nation building, including some excellent older works. *E.g.*, BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1991); KARL DEUTSCH, *NATIONALISM AND SOCIAL COMMUNICATION* chs. 4–8 (1966); ERNST GELLNER, *NATIONS AND NATIONALISM* (1983); E. J. HOBBSBAWN, *NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY* (2d ed. 1992); LUCIAN W. PYE, *POLITICS, PERSONALITY, AND NATION BUILDING: BURMA'S SEARCH FOR IDENTITY* (1962); ANTHONY SMITH, *NATIONALISM AND MODERNISM* (1998). There are also more recent works that address this topic. *E.g.*, JAMES DOBBINS ET AL., *THE BEGINNER'S GUIDE TO NATION-BUILDING* (2007); W. J. NORMAN, *NEGOTIATING NATIONALISM: NATION-BUILDING, FEDERALISM, AND SECESSION IN THE MULTINATIONAL STATE* (2006); CONOR O'DWYER, *THE RUNAWAY STATE: PATRONAGE, POLITICS, AND DEMOCRATIC DEVELOPMENT* (2006); KENNETH M. POLLACK, *A PATH OUT OF THE DESERT: A GRAND STRATEGY FOR AMERICA IN THE MIDDLE EAST* (2008); STATE-BUILDING: THEORY AND PRACTICE (Adian Hehir & Neil Rudolph eds., 2007); UNITED STATES INSTITUTE OF PEACE, *STRATEGIC FRAMEWORK: FRAGILE STATES AND SOCIETIES EMERGING FROM CONFLICT* (2007).

clans, each of whose goal is the interest of its own group and whose ethic is “amoral familism.”⁶⁶ After a half-dozen years of American quasi-occupation, Afghanistan remains an arid wilderness of warring tribes, providing bloody support for Tocqueville’s claim that democracy’s success depends heavily on citizens’ willingness to engage in private associations based on mutual trust, and aimed toward a common goal.⁶⁷ This sort of trust is also necessary to most other forms of civil governance.

Paradoxically, architects of a new constitution usually purport to derive their authority from the people,⁶⁸ but such an entity may not exist until after designers have claimed to act in the “people’s” name. Yet, if the new system is to have a real chance of continuing, that people must exist, at least, in embryo. “We the People of the United States”⁶⁹ had to be a plausible possibility before the founders of 1787–1788 could formally constitute them. Lurking behind those framers’ inability to devise a solution to the issue of slavery was that the inhabitants of “these United States” did not yet form a single people. What came into being was less the constitution of one people than a treaty of commerce and mutual defense between two (or more) separate peoples. Almost seventy-five years later, millions of putative citizens, including Jefferson Davis and Robert E. Lee, graduates of West Point who had distinguished themselves in combat under the American flag,⁷⁰ still thought of themselves as, first, citizens of Mississippi or Virginia and only secondarily as citizens of the United States.⁷¹ Indeed, as Sebastian de Grazia

66. EDWARD C. BANFIELD WITH LAURA FASANO BANFIELD, *THE MORAL BASIS OF A BACKWARD SOCIETY* 10, 139 (1958). This book was a study of a life in a village in Potenza, the heart of the Mezzogiorno, the south of Italy, at a time when it was even less affluent and less in tune with the rest of the country than it is today. For a similar work, which combined literary elegance with anti-Fascist protest, see CARLO LEVI, *CHRIST STOPPED AT EBOLI* (Frances Frenaye trans., Noonday Press 1963) (1947).

67. Tocqueville’s use of political sociology was in the tradition of Montesquieu, and their collective influence remains strong in the social sciences. See Robert D. Putnam & Kristin A. Goss, *Introduction* to *DEMOCRACIES IN FLUX: THE EVOLUTION OF SOCIAL CAPITAL IN CONTEMPORARY SOCIETY* 3, 8 (Robert D. Putnam ed., 2002) (stating that social capital affects the health of democracies); see also ROBERT D. PUTNAM ET AL., *BETTER TOGETHER: RESTORING THE AMERICAN COMMUNITY* 1–5 (2003) (discussing the continued impact of social capital on community building); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 48–49 (2000) (noting the continued impact of Tocqueville’s views on modern social scientists); ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 11 (1992) (explaining how Tocqueville’s notions of society’s “mores” and political practices continue to be used in analysis of democratic institutions).

68. See, e.g., U.S. CONST. pmbl. (“We the People of the United States . . . do ordain and establish this Constitution . . .”).

69. *Id.*

70. See WILLIAM EDWARD DODD, *JEFFERSON DAVIS* 132–34, 251 (1907) (describing the military accomplishments of West Point graduates Jefferson Davis and Robert E. Lee).

71. See H. J. FENTON, *CONSTITUTIONAL LAW: AN INTRODUCTORY TREATISE DESIGNED FOR USE IN THE UNITED STATES NAVAL ACADEMY, AND IN OTHER SCHOOLS WHERE THE PRINCIPLES OF THE CONSTITUTION ARE STUDIED* 276 (1914) (noting that many Civil War era statesmen believed that they were citizens of states only, or alternatively, that their national citizenship resulted entirely from state citizenship).

demonstrated, before the Civil War, the United States was a country without a name.⁷² The term United States was plural, typically preceded by “these” not “the.”⁷³

The United States is not unique. Since 1792, France has had two kingdoms, five republics, and two empires.⁷⁴ Italy and Germany have had similar changes.⁷⁵ Furthermore, a nation’s baptism may come long after birth. Centuries before Frenchman had much political meaning, Norman, Burgundian, and Breton were politically freighted terms.⁷⁶ Even today, many inhabitants of southern Italy consider themselves as Neapolitans or Sicilians rather than Italians—a judgment in which the Northern League heartily concurs.⁷⁷ This paradox of a political system’s claiming to constitute a people, when the system’s legitimacy supposedly comes from a people yet to be constituted, indicates that successful designers of constitutions must operate not merely as parents and midwives, but also as psychologists, plastic surgeons, and genetic engineers. They must create, then model and remodel, political systems still in the womb.

A real possibility exists that a constitutional text, such as the Articles of Confederation of 1781, will not long constitute. The British North America

72. SEBASTIAN DE GRAZIA, *A COUNTRY WITH NO NAME: TALES FROM THE CONSTITUTION* (1997).

73. James M. McPherson argues that, in the antebellum debate over the character of the American federation, Southerners were correct insofar as they focused on the constitution as it had existed in 1787–1788. James M. McPherson, *Antebellum Southern Exceptionalism*, 23 *CIV. WAR HIST.* 230, 243 (1983) (“The South’s concept of republicanism had not changed in three-quarters of a century; the North’s had.”). Had American constitutional development stopped in its first few decades, the Southern argument would have been valid in 1861. *Id.* That evolution, however, continued, driven in part, as McPherson points out, by the revolution in the nineteenth century of transportation and the invention of the telegraph. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 11–13 (1988). These technological innovations made communication and transportation easier for Americans, which brought the country closer together. *Id.* During the same period, demands for federal aid for turnpikes, canals, and railroads as well as Southerners’ demands that the national government enact and enforce fugitive slave laws, and acquire Mexican and Cuban territory further fostered the importance of federal power. *Id.* at 42–43, 78, 104.

74. See JEREMY D. POPKIN, *A HISTORY OF MODERN FRANCE* 1–6 (2d ed. 2000) (tracing the developments in French national history).

75. See Shlomo Avineri, *On Problems of Transition in Postcommunist Societies*, 19 *CARDOZO L. REV.* 1921, 1922, 1926, 1935 (1998) (offering one description of some of the changes that occurred during the political development of Germany and Italy).

76. See Jeremie J. Wattellier, *Comparative Legal Responses to Terrorism: Lessons from Europe*, 27 *HASTINGS INT’L & COMP. L. REV.* 397, 410 (2004) (noting that there are longstanding ethnic and regional identities in France that desire autonomy).

77. See DARWIN PORTER & DANFORTH PRINCE, *FROMMER’S: SICILY* 60 (2007) (noting that its residents are quick to admit that “[w]e’re Sicilian—not Italian”); Anna Cento Bull, *Ethnicity, Racism and the Northern League*, in *ITALIAN REGIONALISM: HISTORY, IDENTITY AND POLITICS* 171, 171 (Carl Levy ed., 1996) (discussing the racism and antisouthern feelings by the Northern League).

Act of 1867⁷⁸ did not fully constitute as Canadians Quebecois, Anglophones, assorted recent emigrés, and various indigenous peoples. A cabinet minister in Quebec's government put it poignantly: "I know Quebec is my country. I'm not quite convinced Canada is."⁷⁹ Under the Constitution Act, 1982, and the strenuous efforts at compromise by various governments, the fires of separatism in Quebec have been dampened but not extinguished.⁸⁰ West Germany's Basic Law specifically said it would expire when Germany was reunited.⁸¹ In a related fashion, after very early stages of gestation, the zygote may split, as the Czech and Slovak Republic soon did,⁸² the West Bank and Gaza (for all practical purposes) did in the early twenty-first century,⁸³ the United States almost did in 1861,⁸⁴ and Chechnya has been trying to do since the birth of the Russian Federation.⁸⁵

78. See Constitution Act, 1867 (forming "One Dominion under the Name of Canada" from the British provinces of Canada, Nova Scotia, and New Brunswick and dividing this new entity into the four provinces of Ontario, Quebec, Nova Scotia, and New Brunswick).

79. EDWARD M. CORBETT, *QUEBEC CONFRONTS CANADA* 34 (1967).

80. Peter H. Russell carefully traced these separatist developments until they eventually calmed down in 2003. See PETER H. RUSSELL, *CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE?* 247 (3d ed. 2004) ("[M]ost Quebecers, like most Canadians everywhere, have had enough of this stuff for the time being."). During that time, the fortunes of the *Parti Québécois*, once the most powerful voice for separation, waxed—but mostly waned. See Clifford Krauss, *Quebec Result: Solidly for Canada*, N.Y. TIMES, Apr. 16, 2003, at A8 (discussing the landslide victory of the Liberal Party in Quebec's provincial elections over the *Parti Québécois*). In 1998, when asked by the Prime Minister of Canada for its opinion, the Supreme Court advised that the Constitution did not permit Quebec to secede from the nation, even if such a resolution were approved by a popular referendum held within that province. Any breakup of the federal union, the Justices said, had to be negotiated among all the provinces and the federal government. *In re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.). In strict legal terms, the government, either of the nation or provinces, may not be bound by such advisory opinions; but these officials have almost always followed the Justices' "advice." This practice is among the principal reason that most prime ministers have been reluctant to consult the Court on sensitive matters of public policy.

81. See GG art. 146 ("This Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force."). Instead of invoking this provision when the two Germanys reunited in 1990, the West German government chose to pretend that the East-German *Länder* would be admitted individually as new states into the Federal Republic. As part of a compromise, the Basic Law was also amended. For details, see PETER E. QUINT, *THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES AND GERMAN UNIFICATION* 115–23 (1997). As in so many matters German, I am indebted to Professor Donald P. Kommers, Emeritus, of the University of Notre Dame.

82. See Stephen Engelberg, *Czechoslovakia Breaks in Two, to Wide Regret*, N.Y. TIMES, Jan. 1, 1993, at A1 (reporting on the split of Czechoslovakia into the Czech and Slovak Republics).

83. See Isabel Kershner & Steven Erlanger, *Palestinian Split Deepens, with Government in Chaos*, N.Y. TIMES, June 15, 2007, at A1 (detailing the dissolution of the unity government).

84. See Sanford Levinson & Jack M. Balkin, *Constitutional Crisis*, 157 U. PA. L. REV. 707, 731 (2009) (mentioning the "secession crisis of 1860–1861" created by the "southern states").

85. See Steven Erlanger, *Behind the Bearhug: Chechnya's Case*, N.Y. TIMES, Dec. 22, 1994, at A14 (explaining Chechnya's quest for independence from Russia since the fall of the U.S.S.R.). It is quite possible that a constitutional text might specifically provide for secession.

A. *The Basic Options*

Designers who eschew a totalitarian system have four broad options for governmental arrangements: coercive (or guided) capitalism, consociational democracy, representative democracy, and constitutional democracy. I have discussed elsewhere, at some length, the pros and cons of each⁸⁶ and do not repeat all of those in this Article.

1. *Coercive (or Guided) Capitalism.*—Coercive (or guided) capitalism combines authoritarian governance with private ownership of property. Citizens surrender a large share of political freedom for economic growth. Government sets general economic policies, but allows entrepreneurs broad discretion within those rules and facilitates capitalists' retaining of profits. On the other hand, rulers brook little opposition. Workers' lives tend to be regimented, but more financially rewarding, than in less authoritarian capitalistic (or even mildly socialistic) nations.

The successes of coercive capitalism in the Tiny Tigers of Asia (Singapore, Taiwan, South Korea, and Hong Kong)⁸⁷ and more recently in Mainland China⁸⁸ make it attractive for a poor society that is trying rapidly and radically to improve its standard of living. Coercive capitalism may also allow transition to less authoritarian regimes, as happened in South Korea and Taiwan.⁸⁹ Although Singapore has provided the greatest degree of prosperity for coercive capitalism, it has done so without advancing either democracy or constitutionalism.⁹⁰ More massively Mainland China is following, to some extent, Singapore's model, but with utter contempt for human rights and a more skewed distribution of wealth.⁹¹

86. For hefty bibliographies, see MURPHY, *supra* note 10, at chs. 2–3.

87. See Walter F. Murphy, *Alternative Political Systems*, in CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 9, 26–32 (Sotirios A. Barber & Robert P. George eds., 2001) (discussing the Tiny Tigers, particularly Singapore, in the context of coercive capitalism).

88. See Omar Saleem, *Be Fruitful, and Multiply, and Replenish the Earth, and Subdue It: Third World Population Growth and the Environment*, 8 GEO. INT'L ENVTL. L. REV. 1, 23 n.127 (1995) (“China demonstrates the use of guided capitalism, in contrast to market capitalism.”). One might also make a case for including Chile during General Augusto Pinochet's rule.

89. See MURPHY, *supra* note 10, at 334 (discussing the use of coercive (or guided) capitalism and noting that South Korea “has taken on many of the indicia of constitutional democracy” and that Taiwan's guided capitalistic system has “peacefully made significant steps toward . . . a transition”).

90. See Murphy, *supra* note 87, at 27, 26–27 (discussing Singapore's use of coercive capitalism and observing that “Singapore's [‘soft’ authoritarian] policies have long yielded dramatic economic growth”).

91. See JUDITH F. KORNBERG & JOHN R. FAUST, CHINA IN WORLD POLITICS: POLICIES, PROCESSES, PROSPECTS 7, 84 (2d ed. 2005) (discussing China's incremental changes in its economic structure while noting China's “[g]rowing disparity in wealth and income” and “severe human rights violations”).

2. *Consociational democracy*.—Consociational democracy has been tried in several countries whose people are badly ethnically or ideologically fractured but have a history of trying to coexist peacefully. Here, elected leaders tell their constituents that they, the officials, are vigorously pushing the interest of that group. But, among themselves, chiefs of various factions try to mute conflict through a cooperative sharing of power. Consociationalism can be an effective mode of governance as it was for some decades in the Netherlands and Lebanon.⁹² Eventually, however, it failed in Lebanon,⁹³ and the Netherlands moved toward conventional representative democracy.⁹⁴ Consociationalism's defenders argue that Lebanon's political system was a victim of the Arab–Israeli wars and the country's own demographic shift from near numerical equality between Muslim and Christian Arabs to heavy Muslim majorities.⁹⁵ In the Netherlands, consociationalism provided a bridge from sharp ethnic divisions to mutual trust.⁹⁶

3. *Representative democracy*.—The classic model for representative democracy is the British parliamentary system from 1867 through the United Kingdom's joining the European Union.⁹⁷ That kind of regime is now most accurately identified with New Zealand.⁹⁸ A parliament, whose members are chosen through free elections after open debate, is omnipotent during its term in office, restrained only by a political culture requiring periodic, free, and open elections⁹⁹ and acknowledging that some things “are simply not

92. See Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, 95 AM. J. INT'L L. 86, 97 (2001) (“Consociationalism provided stable democracy in the Netherlands until economic development and social and geographical mobility allowed evolution into modern European consensus patterns.”); *id.* at 97–98 (stating that Lebanon employed a consociational form of governance between 1943 and 1975).

93. Ahmed T. el-Gaili, *Federalism and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan*, 45 HARV. INT'L L.J. 503, 512 n.62 (2004).

94. See Barnes, *supra* note 92, at 97 (explaining that the Netherlands is now following the more usual European political processes).

95. See Charles E. Ehrlich, *Democratic Alternative to Ethnic Conflict: Consociationalism and Neo-Separatism*, 26 BROOK. J. INT'L L. 447, 457 (2000) (“Lebanon's attempt at consociational democracy did not work . . . [because the] inflexible percentages which the diverse groups agreed on in 1943 did not reflect changing demographics.”).

96. See Barnes, *supra* note 92, at 97 (“Each segment of Dutch society maintained its own political party, trade unions, schools, [and] newspapers [with] virtually no interaction between [segments]. Individuals worked their way up the structure of each segment, and when they reached the top, they dealt with the elite leaders of other segments on matters of mutual concern.”).

97. See Louis Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1582, 1588 n.13 (1981) (using the United Kingdom as an example of a society with a highly developed representative democracy).

98. See Jason N. E. Varuhas, *Keeping Things in Proportion: The Judiciary, Executive Action and Human Rights*, 22 N.Z. U. L. REV. 300, 318 (2006) (“In New Zealand (as in the United Kingdom) we have a representative democracy . . .”).

99. See Andrew Geddis & Bridget Fenton, “Which Is to Be Master?”—*Rights-Friendly Statutory Interpretation in New Zealand and the United Kingdom*, 25 ARIZ. J. INT'L & COMP. L. 733, 737 (2008) (noting that in New Zealand and the United Kingdom, “parliamentary sovereignty” essentially “entails that a bare majority of the nation's elected representatives possesses legislative

done”—except perhaps to minorities such as Irish Catholics in the United Kingdom during the latter half of the twentieth century.¹⁰⁰ The British, however, later accepted institutional restraints imposed by participating in the European Community and the European Convention on Human Rights.¹⁰¹

4. *Constitutional democracy and representative democracy.*—Constitutional democracy and representative democracy, described above, have many common elements. In fact, when most people speak of “democracy,” they usually mean constitutional democracy. The latter accepts representative democracy’s requirement of free and open elections, and practically unlimited freedom of speech and press where matters of public concern are debated. Constitutional democracy, however, includes additional institutional checks on public officials. If representative democracy’s mantra is the people shall rule through their elected leaders, that of constitutional democracy is the people shall rule through their elected leaders, but not too much.

B. *Political Culture*

The relationship between a society’s general culture and its politics is both delicate and complex. Politics, however, need not play slave to culture’s master.¹⁰² The two interact in various, often synergistic, and sometimes convoluted ways. Social scientists, in their catchy jargon, refer to the protean product of this mating as “political culture”: the norms that the

power to make or unmake any law they choose, free from any substantive limits”); Lisa E. Klein, *On the Brink of Reform: Political Party Funding in Britain*, 31 CASE W. RES. J. INT’L L. 1, 2 (1999) (stating that in Britain “general elections are called at the discretion of the Prime Minister at some point within a five-year period”). One could reasonably classify this insistence on periodic, free elections as a malleable piece of political culture, in that it is formally prescribed only by statute that the legislature itself may repeal it at any time. During World War II the British Parliament did suspend elections.

100. See Ariel L. Bendor & Zeev Segal, *Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model*, 17 AM. U. INT’L L. REV. 683, 705 (2002) (“It is an unwritten rule in Britain that there are ‘certain things’ that Parliament will not do, including trampling on basic human rights.”).

101. See Robert Blackburn, *The United Kingdom*, in FUNDAMENTAL RIGHTS IN EUROPE: THE ECHR AND ITS MEMBER STATES, 1950–2000, at 935, 964 (Robert Blackburn & Jörg Polakiewicz eds., 2001) (explaining that, by adopting the European Convention on Human Rights, U.K. courts and tribunals are under a mandatory obligation to consider the materials from the European Court of Human Rights in making determinations regarding rights covered by the Convention).

102. Harry Eckstein linked political stability to congruence between a regime’s norms and those of the nation’s general culture. See ECKSTEIN, *supra* note 27, at 11–32 (discussing the political stability of Norway); HARRY ECKSTEIN, *A Theory of Stable Democracy* (1966), reprinted in REGARDING POLITICS: ESSAYS ON POLITICAL THEORY, STABILITY, AND CHANGE 179, 186–88 (1992) (discussing the congruence of authority patterns regarding political stability); Harry Eckstein, *Congruence Theory Explained*, in CAN DEMOCRACY TAKE ROOT IN POST-SOVIET RUSSIA? 3, 3–13 (Harry Eckstein et al. eds., 1998) (explaining that a core hypothesis of congruence theory is that “[g]overnments perform well to the extent that their authority patterns are congruent with the authority patterns of other units of society”). See generally HARRY ECKSTEIN & TED ROBERT GURR, *PATTERNS OF AUTHORITY: A STRUCTURAL BASIS FOR POLITICAL INQUIRY* (1975).

bulk of the public deploy to judge the politically relevant behavior of fellow private citizens as well as public officials.¹⁰³ Madison explained to the First Congress:

It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention. . . . [Y]et, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might otherwise be inclined.¹⁰⁴

Confusing matters, almost all economically developed nations have a diverse citizenry, composed of people of different religious and ethnic backgrounds, different economic statuses, as well as differing capacities and ambitions.¹⁰⁵ Thus, even if one particular culture predominates, subcultures will coexist, and not necessarily harmoniously. Often, the most politically important subculture will be that of professional politicians. This brand is likely to be both less vague and more complex than those of private citizens. For a constitutional or representative democracy to function successfully, the professional subculture must be in accord with at least that of the bulk of the population;¹⁰⁶ or again, professionals must persuade citizens that incongruities either do not exist, do not matter, or should replace traditional public values.

If a hyphenated democracy is to survive, it is absolutely essential that most political professionals share a common set of norms. (Leaders under a coercive capitalistic system such as that of Singapore or China can purge—or sometimes more accurately terminate—officials who do not hew to the party’s current line.)¹⁰⁷ In nonauthoritarian systems, professionals must be receptive to compromise. If every American president, senator, representative, and judge each insisted on exerting his or her own power and using all available weapons against rivals, the entire system would either

103. See GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 12 (illustrated ed. 1989) (defining political culture as “the specifically political orientations—attitudes toward the political system and its various parts, and attitudes toward the role of the self in the system”).

104. 1 *ANNALS OF CONG.* 437 (Joseph Gales ed., 1834).

105. For a study of the efforts to cope with the problems of having several large and diverse cultures, see the essays in *MULTICULTURALISM AND THE CANADIAN CONSTITUTION* (Stephen Tierney ed., 2007).

106. See ROBERT A. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* 316 (2d ed. 2005) (“[D]emocratic beliefs, like other political beliefs, are influenced by a recurring process of interchange among political professionals, the political stratum, and the great bulk of the population. The process generates enough agreement on rules and norms so as to permit the system to operate . . .”).

107. See, e.g., John Pomfret, *Chinese Leaders Purge Scholars They Accuse of “Westernization,”* *WASH. POST*, Apr. 12, 2000, at A1 (reporting on the ironic purge of Communist officials for failure to adhere to Marxist tenets despite a rapidly privatizing economy).

freeze or disintegrate. Similarly, in countries like Germany, Israel, and Italy (where one party seldom controls a majority of seats in parliament)¹⁰⁸ elected officials' unwillingness to accommodate many of each other's policy preferences would make effective governance impossible.¹⁰⁹

In choosing among systemic options (or variations thereof) discussed above, designers who want to establish an "acquiescent" constitutional order need only follow Montesquieu's counsel to construct those governmental arrangements most congruent with the people's (if a people exists) history and customs.¹¹⁰ Indeed, all constitutional designers must take culture into account. It may be malleable, but not infinitely so. Here, again, prudential judgments take priority. It would, for example, be as foolish for Australian architects to try to swiftly establish a political system based on the Shari'a¹¹¹

108. TOM LANSFORD, *DEMOCRACY: POLITICAL SYSTEMS OF THE WORLD* 80 (2007).

109. In the United States, deadlock has occurred. *See generally* James MacGregor Burns, *THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA* (1963) (writing on the structural features of American democracy that have produced political deadlocks throughout history). Between the world wars, proportional representation helped proliferate political parties in Europe, often leading to governmental paralysis. *See, e.g.,* F.A. HERMENS, *DEMOCRACY OR ANARCHY?: A STUDY OF PROPORTIONAL REPRESENTATION* 244, 244–45 (1941) (postulating that the rise of political parties in interwar Europe led to "political stagnation," which called into question the efficacy of democratic government"). In Germany, although Hitler did not control a majority in parliament, the President asked him to form a government, as Weimar's constitutional text permitted. *See* STANLEY G. PAYNE, *A HISTORY OF FASCISM 1914–1945*, at 168, 173 (1995) (recounting that when the Nazi party held only 33% of Reichstag seats, President Hindenburg acquiesced to an ill-fated plan to appoint Hitler to the chancellorship to lead a parliamentary coalition). Thus, Hitler came to power not only because of failures in the structures and processes of the constitutional system but also because various parties insisted on going their own ways. *See* HERMENS, *supra*, at 244–45 (noting that in interwar Germany "[i]t was unheard of for a number of parties to join forces for an electoral contest" and so "they went into the contest 'free from entangling alliances'"). Ferdinand A. Hermens linked political breakdowns in Germany, France, and Italy closely to proportional representation. *Id.*; FERDINAND ALOYS HERMENS, *EUROPE BETWEEN DEMOCRACY AND ANARCHY* (1951). Proportional representation certainly contributed to the demise of democratic regimes, but other factors were also at work. *See* WILLIAM BRUSTEIN, *THE LOGIC OF EVIL: THE SOCIAL ORIGINS OF THE NAZI PARTY, 1925–1933*, at 181 (1996) ("[M]any Germans calculated that of the competing Weimar political parties, the Nazis offered them the best prospects for a better life."); ECKSTEIN, *supra* note 27, at 197–200 (arguing that German society during the Weimar Republic was much more authoritarian in essence than its democratic government, thus creating an untenable incongruity); ELLEN KENNEDY, *CONSTITUTIONAL FAILURE: CARL SCHMITT IN WEIMAR* 155 (2004) (contending that "the [Weimar] constitution as the foundation of law, as the referent of legal and political discourse, and as the framework of political action had failed" by 1933); HANS MOMMSEN, *THE RISE AND FALL OF WEIMAR DEMOCRACY* 367, 367–68 (Elborg Forster & Larry Eugene Jones trans., Univ. of N.C. Press 1996) (1989) (noting that burgeoning unemployment in the early 1930s in Germany, especially among the young, "contributed to the rapid rise of social militancy"); DETLEV J. K. PEUKERT, *THE WEIMAR REPUBLIC: THE CRISIS OF CLASSICAL MODERNITY* 257 (Richard Deveson trans., Penguin Press 1991) (1987) (stating that for the Germans, the symbolic meaning of the Great Depression was that "the post-war period had brought about the devaluation of old certainties without creating new social and political values to take their place").

110. CHARLES DE SECONDAT, *BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS* bk. XIX, ch. 5 (Anne M. Cohler et al. trans. and eds., Cambridge University Press, 1989) (1750).

111. The Shari'a is a set of practices and unsystematic, unorganized, and sometimes conflicting opinions of jurists over the centuries. Westerners tend to equate it with the harsh procedures

as it would be for reformers to try *immediately* to impose on Iran constitutional democracy's full panoply of norms and processes.

It is patent, of course, that many constitutional architects' goals will require changing the existing culture. And with patience, skill, and—once more—luck, they can be successful. Cultural change was foremost in the minds of the founders of Japan's and Germany's new regimes after World War II,¹¹² India's in 1950,¹¹³ and South Africa's during the 1990s.¹¹⁴ Understanding the possibilities of—and limits on—cultural change should have had very high priority among the American commanders after Saddam Hussein's fall in 2003 as well as among those Iraqi leaders, if any, who were honestly committed to establishing a constitutional or representative democracy.

Constitutional architects who would transform an existing system face the enormous challenge of substantially modifying the current culture or cultures.¹¹⁵ Those designers must bring about a high degree of congruence between the values the larger culture(s) has (have) enshrined and those that the new regime will promote. In such circumstances, “political resocialization” requires citizens not only to learn new procedures and accept new values but also to *unlearn* old ways and reject old norms. Success here

followed in Islamic criminal law. In reality, Shari'a (literally “the path to the water”) is much broader, offering a way of life to help Muslims achieve salvation.

112. See Daniel P. Franklin & Michael J. Baun, *Conclusion* to POLITICAL CULTURE AND CONSTITUTIONALISM 219, 223 (Daniel P. Franklin & Michael J. Baun eds., 1995) (observing that the post-World War II constitutional regimes of Japan and West Germany were essentially imposed from without by liberal democracies “on weak historical and cultural foundations”).

113. See Pratap Bhanu Mehta, *Hinduism and Modernity*, in DEVELOPING CULTURES: ESSAYS ON CULTURAL CHANGE 279, 288 (Lawrence E. Harrison & Jerome Kagan eds., 2006) (“[T]he Indian Constitution has been rightly called a charter for the social reform of Hinduism”).

114. See Erin E. Goodsell, Note and Comment, *Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today's South Africa*, 21 BYU J. PUB. L. 109, 123 (2007) (“The 1996 South African Constitution expressly recognizes the injustices of apartheid and has as its overarching goal the promotion of unity, social justice, and equality in a torn nation . . .”).

115. Unless, of course, the old political system was incongruent with the old culture. This incongruence is unlikely unless the old order had been unstable. Italy provides an interesting case study here. Once World War II was over, with help from the CIA, Italians rejected communist authoritarianism. See WILLIAM BLUM, *KILLING HOPE: U.S. MILITARY & CIA INTERVENTIONS SINCE WORLD WAR II*, at 29 (2d ed. 2003) (noting that the CIA played a role in U.S. efforts to eradicate Italian communism). In 1922, the country had shifted from a budding representative democracy to Mussolini's authoritarian regime and then in 1945 to constitutional democracy without having fundamentally changed its culture either time. See SPENCER DI SCALA, *ITALY: FROM REVOLUTION TO REPUBLIC, 1700 TO THE PRESENT* 249–50, 297–98 (3d ed. 2004) (describing the circumstances surrounding Mussolini's rise and fall). That culture fit Mussolini's system even less well than it had the previous ineffectual representative democracy or, for some decades, constitutional democracy. After living and teaching in Italy, I came to believe that historically, Italian culture had probably been more compatible with modified anarchy than with authoritarian rule or constitutional democracy. But Italian culture has become much more congruent, first with the notion that a government should actually do some, if not very much, governing, and second with a belief that if real government is indeed necessary, constitutional democracy is probably the least evil regime.

may well take several generations, as India's heroic but still incomplete constitutional development indicates.¹¹⁶

As would be expected, Yahweh understood this problem. After liberating the Israelites from the Pharaoh, He forced them to wander in the desert for forty years, the life span of a generation.¹¹⁷ Thus, the people who entered the Promised Land did not have to unlearn the lessons of being slaves to a pagan tyrant but could start fresh, following—more or less—Yahweh's commands as translated by prophets such as Samuel and Nathan.

Lacking Yahweh's omniscience and omnipotence, modern constitutional architects must resort to other methods, utilizing not only rational arguments but also emotional appeals to a mystic (and perhaps mythic) past and promises of an Edenesque future. Foreigners listening to the debates regarding new constitutional orders in Eastern Europe in 1989–1990 could have been pardoned for thinking that Hungary's Golden Bull of 1222 had remained in effect until the Russian occupation,¹¹⁸ and that Poland's constitution of 1791 had only been suspended, not destroyed.¹¹⁹ In the United States, proponents of both constitutional change and stasis often invoke the ideals of the Declaration of Independence, the supposedly farseeing wisdom of the framers of 1787–1788, the precepts of Abraham Lincoln, or the amusing myth that the Magna Carta was a democratic document.

In the absence of some cataclysmic event, such as the catastrophic defeat that Germany and Japan suffered in World War II, this process of reasoned and emotional “education” is likely to be slow. After all, it took Americans nine decades to make their constitutional text congruent with the proclamation in the nation's founding document that “all men are created equal”¹²⁰ and another nine decades to respect the constitutional text's

116. See Gopal Guru & Shiraz Sidhva, *India's "Hidden Apartheid,"* UNESCO COURIER, Sept. 2001, at 27 (revealing that though the Hindu “untouchable” caste was abolished by the 1950 constitutional text, members of that caste nonetheless are “denied access to land, forced to work in humiliating and degrading conditions and are routinely abused by the police and upper-caste groups”).

117. *Numbers* 32:13.

118. See PETER F. SUGAR ET AL., *A HISTORY OF HUNGARY* 43 (1994) (explaining that the Golden Bull of 1222 was an edict issued by King Andrew II granting noblemen their privileges and was “considered to be the first and most important written guarantee of the nobles’ rights and freedoms”); European Commission for Democracy Through Law, *The Constitutional Heritage of Europe*, VENICE COMMISSION, Nov. 22–23, 1996, [http://www.venice.coe.int/docs/1996/CDL-STD\(1996\)018-e.asp](http://www.venice.coe.int/docs/1996/CDL-STD(1996)018-e.asp) (describing the Constitutional Accord of 1995 that arose from the post-Soviet constitutional discussions as analogous to the Golden Bull of 1222).

119. See LOUIS HENKIN & ALBERT J. ROSENTHAL, *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 287 (1990) (describing the renunciation of Poland's first modern constitution during the Russo–Prussian War).

120. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal . . .”); see also U.S. CONST. amend. XIV, § 1 (incorporating in 1868 the idea that all men are equal and that the states must provide “equal protection of the laws”).

guarantee that states would provide “equal protection of the laws” across racial lines.¹²¹ In 2009, the extent to which gays are entitled to full legal equality is still a divisive issue.¹²² And not all Americans are yet comfortable with the notion that women and people of nonwhite races are truly the equals of white males. India’s progress toward a casteless society over the past six decades has been little short of remarkable. Nevertheless, the electoral strength of the Hindu Nationalist Party demonstrates that the transformation is far from complete.¹²³

C. *Creating Citizens*

The typically less-than-rapid process of socialization makes political education of children critical. Most nations engage in such education on a massive scale. McGuffey readers show how these textbooks, widely used in nineteenth-century America, transmitted to generations of schoolchildren a creed different from that of the late twentieth and early twenty-first centuries, but one no less politically laden: McGuffey linked Protestantism with Americanism, extolled the sanctity of private property, and lauded political conservatism.¹²⁴

Civic education also takes forms more subtle than assigned readings. For instance, in the United States, schools stress competition between students, using such exercises as spelling bees to reinforce the individualism that America’s political system endorses;¹²⁵ while in China similar competitions are likely to be between teams,¹²⁶ thus encouraging students to think in terms of the group rather than the individual. So, too, opposition to prayers in public schools often reflects a commitment to personal freedom and emphasizes a desire for secular, rather than sectarian, political education. At the same time, campaigns for such prayers stress a putative need that a desirable constitutional order be based on traditional moral precepts.

121. See *Green v. New Kent*, 391 U.S. 430, 438 (1968) (requiring that segregated schools be dismantled “root and branch”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1953) (holding that segregation in public schools violated the Fourteenth Amendment).

122. See, e.g., Maura Dolan, *California Supreme Court Looks Unlikely to Kill Proposition 8*, L.A. TIMES, Mar. 6, 2009, at A1 (describing the “dueling demonstrators” that awaited the California Supreme Court’s decision on whether or not Proposition 8, which eliminated same-sex couples’ right to marry in California, was a permissible constitutional revision).

123. See ORNIT SHANI, *COMMUNALISM, CASTE AND HINDU NATIONALISM: THE VIOLENCE IN GUJARAT* 135–55 (2007) (explaining the rise of Hindu nationalism since the 1980s as a reaction to the changing character of India’s caste system and its relation to state policies and politics).

124. See RICHARD D. MOSIER, *MAKING THE AMERICAN MIND* 154–59 (1947) (discussing the underlying pattern of political conceptions on which the McGuffey readers were based).

125. See JOHN HOOKER, *WORKING ACROSS CULTURES* 343 (2003) (“The belief in individual initiative makes the United States [a society where] competition is encouraged. Learning to spell means competing in a spelling bee.”).

126. Cf. DAVID ARCHARD, *CHILDREN: RIGHTS & CHILDHOOD* 165 (1993) (describing Chinese education as a “collectivist” system with a group-based ethic that stresses group achievement through interdependent effort and discourages individual competition).

Constitutional designers who only wish to tinker with the existing political system can adopt Montesquieu's formula: fit the regime to the culture.¹²⁷ If, on the other hand, they want to establish a different kind of regime, their difficulties are both more complicated and more fundamental. Those designers face a critically important problem, corollary to that of generating a new political culture: How to create a new breed of citizens? How to instill a new "constitutional patriotism"¹²⁸ without destroying whatever national unity that exists?

For nonauthoritarian forms of government, remaking citizens' psyches may seem to betray the system's ideals. Nevertheless, this educational process is likely to be absolutely necessary. Here, constitutional designers often face yet another dilemma: Although all means to achieve necessary ends are not legitimate, designers must not only constitute en masse the people from whom they claim to draw their authority, but they must also help shape the moral character of the individuals who will compose this people.

Aristotle posed the basic problem when he asked his famous question: Is a good person the same as a good citizen?¹²⁹ The answer, he said, depends on the regime.¹³⁰ A good citizen of Nazi Germany would, if unreformed, have been a grossly dysfunctional, indeed a dangerous, misfit in the Federal Republic of Germany. On the other hand, the Sunni and Shi'ite Iraqis, who hated each other when Saddam Hussein ruled,¹³¹ needed few psychological adjustments to wage a bloody civil war after the American invasion. Although citizens' values may not be completely determined by the culture into which they are born and raised, they are heavily influenced by those norms. Without changing citizens' moral environment, designers cannot hope to make them functional members of the new society. Lenin, Stalin, and their henchmen were very much aware of this fact.¹³² Founders of other systems must be similarly attentive, though their methods of acculturation must radically differ. It remains a harsh fact of political life that architects cannot establish a new kind of constitutional order without also altering

127. MONTESQUIEU, *supra* note 110, at bk. XIX, ch. 5.

128. For an analysis of the concept of Janus-faced "constitutional patriotism," see JAN-WERNER MÜLLER, *CONSTITUTIONAL PATRIOTISM* (2007).

129. 2 ARISTOTLE, *Politics*, *supra* note 22, III.4.1276b16–1276b18, at 2025–26.

130. *Id.*

131. See LARRY DIAMOND, *SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ* 22 (2005) (explaining that the Shiites had been "marginalized and victimized" by the Sunni minority, which had monopolized "power and wealth" in Iraq).

132. See, e.g., RAYMOND A. BAUER, *THE NEW MAN IN SOVIET PSYCHOLOGY* 128–50 (1952) (discussing how the Soviet government used psychology to teach citizens new moral norms that emphasized the needs and interests of and duties to the state). For Soviet attempts to politically acculturate Muslims in the Russian political system through promoting the equality of women, see the marvelous study by GREGORY J. MASSELL, *THE SURROGATE PROLETARIAT: MOSLEM WOMEN AND REVOLUTIONARY STRATEGIES IN SOVIET CENTRAL ASIA* (1974).

society's norms and so replace some of the ways in which citizens perceive and judge the world.

Designers can immediately move society toward these goals through the ways in which they themselves proceed to establish the new political order. If, for instance, the regime is to become more, rather than less, authoritarian, leaders might simply announce to the population what the regime's general purposes will be, outline resulting governmental processes, and issue decrees regarding citizens' duties and rights, if any. On the other hand, when the shift is toward a more participatory system, designers would be wise to encourage popular participation at every stage of the processes of construction—from choosing architects themselves to accepting the final blueprint. Citizens probably learn more about democratic governance by doing rather than simply by reading and listening. Life in a polity, Robert A. Dahl has claimed, is itself a form of political education.¹³³

But whatever format public officials use, their pedagogical function can never cease to socialize younger members of society. Officials must do so either informally, by conforming governmental practices to the ideals that the system claims to endorse, or, more formally, by creating an educational system conducive to their goals and values. Political instruction is not a function that public officials can fail to perform. They may perform it badly, but even dysfunctional governmental actions teach. Government, as Louis Brandeis pointed out, is “the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.”¹³⁴

IV. To Write or Not to Write a Constitutional Text

Designers may or may not decide to script a constitutional charter, but in either case, “the constitution” they produce will soon encompass much more than a document or set of documents.¹³⁵ That political order will include certain understandings, interpretations, normative principles, and established as well as developing practices.¹³⁶

Histories of countries with constitutional texts (such as Australia, Canada, France, Germany, India, Ireland, and Italy) offer no reason to believe that practices, understandings, interpretations, or even underlying norms will remain fixed in time. Even assuming the improbable, that designers and their generation will have been united about the meaning of their document, future generations are apt to read many clauses in quite

133. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 15 (1989).

134. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

135. See MURPHY, *supra* note 10, at 488 (“It is also likely that, along with normative political theories, the broader constitution will encompass traditions as well as many social and governmental practices.”).

136. A constitutional order without a constitutional text would probably require as much interpretation as—perhaps more than—a political system with such a text, although in the absence of a formal charter, judges might well have a smaller role to play. *Id.* at 482–83.

different ways, not only from the founding generation but also from each other. Change is the common constant. Although some terms, such as those in the American charter prescribing dates for presidential elections and inaugurations, may be altered only by formal amendment,¹³⁷ the larger pattern is one of constitutional development rather than constitutional stasis. Some concepts—and even conceptions—endure, but words may change their meanings, as may rules of syntax and punctuation. As Dr. Samuel Johnson noted, “language is the work of man, of a being from whom permanence and stability cannot be derived.”¹³⁸ A modern expert in linguistics agrees: “The only languages that don’t change are the ones that are well and truly dead.”¹³⁹

Although designers cannot prevent change, they might be able to channel it. Here, sophisticated constitutional architects might view themselves as writers and directors of the first few scenes of a moving picture, understanding that they will soon be replaced by new generations of writers and directors.¹⁴⁰

A. *Designing a Regime Without Writing a Constitutional Text*

When considering whether to draft a constitutional charter, designers have three broad options. One is not to write such a text, but follow the British example and let the system develop over time, gradually incorporating such practices and documents as seem fundamental to the polity’s long-term benefit. There are great advantages here: first, if designers have little experience with the kind of political order they wish to establish,

137. See, e.g., U.S. CONST. amend. XX (altering the dates when elected federal officials begin and end their terms). Even here, practices requiring the incumbent President and Vice President’s cooperation could allow the newly elected official to take office in November.

138. SELECTIONS FROM THE WORKS OF SAMUEL JOHNSON 426 (Charles Grosvenor Osgood ed., 1909).

139. KATE BURRIDGE, BLOOMING ENGLISH: OBSERVATIONS ON THE ROOTS, CULTIVATION AND HYBRIDS OF THE ENGLISH LANGUAGE 113 (2004). For an introduction to studies of linguistic change, see JEAN AITCHISON, LANGUAGE CHANGE: PROGRESS OR DECAY? (1991); LAURIE BAUER, WATCHING ENGLISH CHANGE (1994) and OTTO JESPERSEN, GROWTH AND STRUCTURE OF THE ENGLISH LANGUAGE (10th ed. 1982). For the most relevant works about creating and maintaining a constitutional order, see *id.* at chs. 1–2 and JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (1984). For the effects of linguistic changes on the constitutional debates in the United States during the period before the Civil War, see MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE ch. 6 (1998).

140. Ronald Dworkin has compared development through constitutional interpretation with tag-team writing of a novel. Ronald Dworkin, *Law as Interpretation*, 60 TEXAS L. REV. 527, 542–43 (1982). For a critique of this trope and the interpretive methods it supports, see Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEXAS L. REV. 551, 551–62 (1982). For Dworkin’s response, see Ronald Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don’t Talk About Objectivity Any More*, in THE POLITICS OF INTERPRETATION 287 (W.J.T. Mitchell ed., 1983). Fish took up the cudgels once more. Stanley Fish, *Wrong Again*, 62 TEXAS L. REV. 299 (1983). Dworkin continued the debate. RONALD DWORKIN, LAW’S EMPIRE ch. 2 (1986). Theologians face similar problems of interpretations building upon earlier exegeses, and some of these scholars have been developing a “theology of emergence.” E.g., CLAYTON, *supra* note 14.

this process will allow them to accrue expertise through practice. Second, an evolving regime is likely to conform to society's values, or conversely, to adapt values that are compatible with the new system. In either case, this evolution could create close harmony between culture and regime and so generate political stability.

There are also disadvantages to not writing a charter. Most obvious is the possibility that the nation will lack the time and tranquility for its political system to evolve slowly. Furthermore, being unfamiliar with the developing constitution's requirements, and lacking a blueprint to guide them, private citizens, as well as public officials, may perceive the developing constitutional order in quite different ways—producing chaos. Furthermore, it takes time for practice to become a tradition. In the interim, a political culture that would nourish the system that designers want may not exist, or cannot be constructed in time to save the nation from disaster.

B. Designing a Regime by Utilizing Sequential Writing of a Constitutional Text

The second option is a more rapid version of the British system. Israel provides an example.¹⁴¹ Soon after independence, the Provisional Council of State called for a popularly elected Constituent Assembly to draft a constitutional charter.¹⁴² The country, however, was sharply divided about the shape a constitutional text should take and even whether to have a secular document at all.¹⁴³ Some Orthodox groups claimed that the *Halakhah* (Jewish Law) was the only proper governing instrument for the Land of Israel.¹⁴⁴ In the face of these obstacles, efforts to draft a constitutional text

141. One might argue that constitutional texts, such as India's, that are easily amended present a form of tag-team writing of charters. An assessment of the validity of this claim depends on many factors, including the relative strengths of competing political parties and the possibility that some officials will successfully claim authority to declare constitutional amendments void on substantive grounds. I have discussed this general problem of unconstitutional constitutional amendments:

Thus an "amendment" corrects or modifies the system without fundamentally changing its nature A proposal to transform a central aspect of the compact to create another kind of system—for example, to change a constitutional democracy into an authoritarian state, as the Indian Court said Mrs. Gandhi tried to do—would not be an amendment at all, but a re-creation of both the covenant and its people. That deed would lie outside the authority of any set of governmental bodies, for all are creatures of the people's agreement. Insofar as officials destroy that compact, they destroy their own legitimacy.

Murphy, *supra* note 29, at 14 (citation omitted).

Jacobsohn offers a sophisticated analysis of this problem. JACOBSON, *supra* note 54 (manuscript at ch. 2).

142. MURPHY, *supra* note 10, at 483–84.

143. *Id.*

144. *Id.*

failed.¹⁴⁵ The most the Constituent Assembly, reborn as the Knesset, accomplished was passage of the Harari Resolution of 1950¹⁴⁶:

The first Knesset charges the Constitutional Legislative and Judicial Committee with the duty to prepare a draft Constitution[al text] for the State. The Constitution[al text] shall be composed of individual chapters in such manner that each of them shall constitute a basic law in itself. The chapters shall be brought before the Knesset . . . and the chapters together will form the State Constitution[al text].¹⁴⁷

It was widely assumed, although the resolution does not so say, that it would take a two-thirds vote of the Knesset to give such legislation the status, as part of a developing constitutional document, that ordinary legislation could not override.¹⁴⁸

Between 1958 and 1992, the Knesset enacted nine statutes labeled “Basic Laws.”¹⁴⁹ For a time, however, the constitutional rank of some of them remained unclear: Not all proclaimed themselves constitutionally entrenched,¹⁵⁰ and some were adopted by simple majority vote.¹⁵¹ In 1992 the Knesset enacted the Basic Law: Human Dignity and Liberty.¹⁵² Sections 2 through 7 protected such rights as those to life, liberty, bodily integrity, privacy, and property, though only prospectively.¹⁵³ The Act did not mention judicial oversight; Section 11 said only, “All governmental authorities are bound to respect the rights under this Basic Law.”¹⁵⁴ Earlier, however, in *Bergman v. Minister of Finance*,¹⁵⁵ the Supreme Court had entered the text-writing game by holding that a similar clause in the Basic

145. Martin Edelman adds that some of the secular parties were unwilling to risk dividing the nation by offending the ultra-Orthodox. Martin Edelman, *The New Israeli Constitution*, MIDDLE E. STUD., Apr. 2000, at 1, 8 [hereinafter Edelman, *The New Israeli Constitution*]. See generally MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL (1994) [hereinafter EDELMAN, COURTS].

146. D.K. (1950) 1743.

147. GARY JEFFREY JACOBSON, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES 106 (1993).

148. MURPHY, *supra* note 10, at 484.

149. ROBERT L. MADDEX, CONSTITUTIONS OF THE WORLD 227 (3d ed. 2008).

150. Some Basic Laws, such as that enacted in 1992, Basic Law: Human Dignity and Liberty, operate only prospectively. CHUK YASUD: CVOD HAADAM VCHEEROOTO [CY: CVOD HAADAM] [Basic Law: Human Dignity and Liberty], 5752-1992, 45 LSI 150 (Isr.), *translated in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 25. Still, in *Ganimat v. Israel*, the Israeli Supreme Court stated that, when interpreting earlier statutes, it would give great weight to the purpose of the Basic Law of 1992. CrimA 2316/95 Ganimat v. Israel [1995] IsrSC 49(4) 589.

151. MURPHY, *supra* note 10, at 484.

152. CY: CVOD HAADAM.

153. *Id.* §§ 2–7.

154. *Id.* § 11.

155. H CJ 98/69 Bergman v. Minister of Fin. [1969] IsrSC 23(1) 693.

Law: The Knesset subjected later statutes and regulations to judicial review.¹⁵⁶

In 1995, the Court decided the *Mizrahi Bank Case*.¹⁵⁷ That dispute raised a question paralleling that in the *Minnesota Moratorium Case*.¹⁵⁸ Did a bankruptcy act that extended the time for repaying loans “take” the lending institution’s property, and so contravene the Basic Law: Human Dignity and Liberty, which had been enacted *after* the bankruptcy statute?¹⁵⁹ Section 3 of that Basic Law read: “There shall be no violation of the property of a person.”¹⁶⁰ The justices both reaffirmed their self-created authority to review the constitutionality of statutes and unanimously held the moratorium valid.¹⁶¹

This decision might have been notable only for that reaffirmation, had the Court not labeled the Knesset’s action in 1992 “a constitutional revolution.”¹⁶² For the majority, President Aharon Barak said that not only the first Knesset, but also all subsequent Knessets, wore “two hats.”¹⁶³ They

156. *Id.* at 693–97.

157. CA 6821/93 United Mizrahi Bank v. Migdal Coop. Vill. [1995] IsrSC 49(4) 1.

158. Home Bldg. & Loan Ass’n v. Blaisdell (*Minnesota Moratorium Case*), 290 U.S. 399 (1934). In the *Minnesota Moratorium Case*, Minnesota’s Mortgage Moratorium Law, which retroactively altered private mortgage terms to protect homeowners from foreclosure during the Depression, was challenged “as being repugnant to the contract clause . . . and the due process and equal protection clauses of the Fourteenth Amendment.” *Id.* at 416. In upholding the statute, the Supreme Court reasoned that there was no violation of the Contract Clause because the conditions of the Great Depression justified “the exercise of [the state’s] continuing and dominant protective power notwithstanding interference with contracts.” *Id.* at 437.

159. *United Mizrahi Bank*, IsrSC 49(4) at 23–24, 27–28.

160. CY: CVOD HAADAM § 3. Section 8 of the Basic Law qualified the protected rights and liberties, somewhat easing the Justices’ problems in deciding the specific case. *Id.* § 8.

161. *United Mizrahi Bank*, IsrSC 49(4) at 159. A cynic might note a certain similarity here with John Marshall’s strategy in *Marbury v. Madison*. 5 U.S. (1 Cranch) 137 (1803). In each case, the Court asserted its authority to invalidate governmental actions and did so without issuing an order that either the executive or legislature could flout. It may be worth noting that Aharon Barak, the President of the Israeli Supreme Court and author of the opinion of the majority, is quite familiar with American constitutional interpretation. See AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW*, at xvi (Sari Bashi trans., 2005) (discussing various approaches to interpretation, using Justice Scalia and Judge Posner as examples).

162. *United Mizrahi Bank*, IsrSC 49(4) at 297. There are scholarly discussions on this constitutional revolution. See, e.g., EDELMAN, *COURTS*, *supra* note 145, at 28–29 (discussing differing opinions on the place of judicial review in Israel); JACOBSON, *supra* note 147, at 124–33 (exploring the role of judicial review in post-*Bergman* Israel); Martin Edelman, *The Status of the Israeli Constitution at the Present Time*, 21.4 SHOFAR 1, 18 (2003) (acknowledging that while political circumstances currently support the judicially-created constitutional text, it remains subject to legislative reversal); Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 AM. J. COMP. L. 585, 601 (1996) (explaining that by adopting the doctrine of reasonableness, the Court changed its function from regulating the administrative bodies to substantively reviewing the content of decisions and policies); Gary Jeffrey Jacobson, *After the Revolution*, 34 ISR. L. REV. 139, 155, 153–55 (2000) (discussing this “landmark breakthrough” in Israeli jurisprudence).

163. *United Mizrahi Bank*, IsrSC 49(4) 1, 69.

were both ordinary legislative bodies and constituent assemblies.¹⁶⁴ The Basic Law: Human Dignity and Liberty was one chapter in a budding constitutional charter,¹⁶⁵ even though the Knesset had not included an entrenching clause,¹⁶⁶ appended any statement about the act's constitutional status beyond the title "Basic Law,"¹⁶⁷ nor made the law retrospective.¹⁶⁸ Moreover, it had adopted the act by a vote of only 32–21.¹⁶⁹

Among the more important advantages of the rolling writing of a constitutional text are that it is swifter than the British method and still allows leaders to learn from experience. Moreover, it could not only permit designers to build a wise architectural scheme, but also gradually to accustom citizens to the new constitutional order. Disadvantages are equally obvious. A script drafted over decades, by different people, confronting different problems, and representing different parties and interests, would probably lack coherence. Indeed, the product might well be a hodgepodge, replete with contradictions, rather than a fully articulated, internally consistent whole.¹⁷⁰

C. *Designing a Regime Utilizing a Constitutional Text*

The third option, of course, is to write a text that proclaims itself to be the authoritative basic law. There are at least five strong arguments against this option. First, the effort may be futile. Covenants, Thomas Hobbes sneered, "being but words, and breath, have no force to oblige, contain, constrain, or protect any man, but what it has from the [public] Sword," a weapon, he believed, that only a despot could effectively wield.¹⁷¹ Common experience shouts that humans often lie when pledging their individual or collective honor, and even when they mean to keep their word, they

164. *Id.*

165. *See id.* at 3 ("The three cases represented the first instances in which Israeli courts annulled a law passed by the Knesset on the grounds of unconstitutionality due to a violation of fundamental rights established in a Basic Law."); *id.* at 34 ("The innovation of the Basic Law was its establishment of criteria for the examination of the constitutionality and validity of a law. It created new, substantive criteria, unprecedented."); *id.* at 160 ("The constitutional revolution occurred in the Knesset in March 1992 [when it] endowed the State of Israel with a constitutional bill of rights [the Basic Law].").

166. *Id.* at 80.

167. *See id.* at 108 ("During the First Reading [of the draft Basic Law], the members of the Knesset voted on the status of the Basic Law as a constitution. However, this perception relied upon the rigidity provision that appeared in the draft law and was ultimately omitted from the Basic Law as enacted.")

168. *See id.* at 24 ("[T]he Basic Law provides that the Basic Law will not affect the validity of any law . . . in effect prior to the commencement of the Basic Law.")

169. *Id.* at 407.

170. For an argument that judges should cope with this problem by finding, or imagining, a hierarchy of values in a charter, see BVerfG Oct. 23, 1951, 1 BVerfGE 14, 32–33 (F.R.G.), reprinted in MURPHY & TANENHAUS, *supra* note 25, at 208, 209.

171. THOMAS HOBBS, LEVIATHAN 123 (Richard Tuck ed., Cambridge University Press 1991) (1651).

frequently forsake earlier vows in order to enjoy immediate pleasure or profit.¹⁷²

A second argument contends that tradition and existing legal and political systems provide norms adequate to achieve as much of any particular political system as a people want, or can currently maintain. White New Zealanders could thus follow the British model reflected in their own customs: Enough people who exercised both economic and political hegemony were content with their parliamentary system that the colonists could be politically stable and prosper economically.¹⁷³

Third, although the Romans used to say *clara pacta, boni amici*,¹⁷⁴ clear pacts are often less than pellucid. Moreover, when compromise is needed, calculated ambiguity can be useful. Some ambiguity, calculated or not, is inevitable. When congratulated on the excellence of the text of 1787, Gouverneur Morris, who was most responsible for that charter's prose, replied that the document's worth "depends on how it is construed."¹⁷⁵ Madison, hardly a postmodernist, spelled out the difficulties in the *Federalist No. 37*:

[N]o language is so copious as to supply words and phrases for every complex idea. . . . When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.¹⁷⁶

172. Okoth-Ogendo's analysis of the fate of constitutions in sub-Saharan Africa is relevant here. See H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, *supra* note 29, at 65, 71–72 (describing the "process of 'subverting' the constitutional order" for political gain in African countries by various means: the "total abrogation" of the basic law and the "cavalier disregard of constitutional niceties and processes").

173. New Zealand has in place a set of quasi-constitutional texts labeled as Constitution Acts or amendments to Constitution Acts. See GEOFFREY PALMER & MATTHEW PALMER, *BRIDLED POWER: NEW ZEALAND'S CONSTITUTION AND GOVERNMENT* 5–6 (4th ed. 2004) (mentioning several Constitution Acts that are or were part of New Zealand's constitution). But these documents are subject to modification or repeal by a simple act of Parliament. DEP'T OF THE PRIME MINISTER AND CABINET, *CABINET MANUAL* 6 (2008), <http://cabinetmanual.cabinetoffice.govt.nz/files/manual.pdf>. In 1986, Parliament considered bringing them together into one enactment provision of "constitutional significance" but as of early 2009 has not entrenched this bill. See PALMER & PALMER, *supra*, at 319 (discussing the debate and ultimate rejection in the mid-1980s over whether to entrench the Bill of Rights so that it could not be altered by a simple parliamentary majority). Although judges have not yet exercised judicial review, they have, in the British tradition, honed statutory interpretation into a sharp instrument. See Geddis & Fenton, *supra* note 99, at 734 (placing New Zealand and the United Kingdom among the jurisdictions that, "[w]hile stopping short of giving judges the final word on the constitutional permissibility of particular legislative provisions, . . . have sought to incorporate their substantive views on individual rights into the process of law making, interpretation and application").

174. Clear agreements, good friends.

175. EDWARD S. CORWIN, *COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT* 228 (1938).

176. THE FEDERALIST NO. 37, at 164–65 (James Madison) (Clinton Rossiter ed., 1961).

The sources of confusion, he explained, were the complexity of political relations, the “imperfection” of human conceptualization of those problems, and the corruption caused by people’s self-interest.¹⁷⁷ He might have added: (1) the necessity of drafters compromising among competing interests, values, and aspirations; and (2) the drafters’ failure to think through political problems and carefully rank the values they seek to promote.

Even meticulously crafted texts can create new problems as they address old ones. Biblical interpretation shows that written words have much less lucidity, exactness, and permanence than believers would like. For several thousand years, Jews have disputed (and occasionally killed) Jews over the meaning of the Torah, Christians have enthusiastically slaughtered other Christians to preserve Jesus’ gospel of love, and Muslims continue to murder each other, lest the message of Allah the All Merciful be corrupted.

A fourth argument contends that there may be insufficient agreement to endow such a document with the reverence a founding charter needs. Many Israelis claimed this condition occurred in their country: Jews of assorted national, cultural, and linguistic backgrounds, professing a variety of religious views (including atheism),¹⁷⁸ and holding widely differing opinions about the meaning of a “Jewish state” had emigrated to live with Sabras and Arabs—people who were not only politically and religiously divided from Jewish settlers but also among themselves.¹⁷⁹ Most Arabs are Muslims, but a significant minority are Christians—some are Protestants, but most are Greek Orthodox, as well as Maronites and Greek Catholics who take their doctrines from Rome.¹⁸⁰

A fifth argument concerns any group’s limited capacities to predict the future. Indeed, would-be authors often lack sufficient experience to fashion a document suitable even for their own time. Only very naive or arrogant men and women can have full faith either in their own political prescience or moral authority to impose their visions on later generations. Thomas Jefferson’s oft-repeated message was that each generation needs to live within its own wisdom about how to function politically.¹⁸¹ He could tolerate

177. *See id.* at 165 (finding that the problem stems from “imperfection of the organ of conception . . . the interfering pretensions of the . . . States . . . and citizens [with] contending interests and local jealousies”).

178. *See* JACOBSON, *supra* note 147, at 71, 92 (stating that many Israelis view Israel as a pluralist state like America and explaining that many Israelis believe that theirs is a Jewish nation with their members scattered all around the world, thereby suggesting that Israelis recognize the different backgrounds that constitute their citizenry).

179. MURPHY, *supra* note 10, at 187.

180. *See, e.g.*, JOHN MYHILL, LANGUAGE, RELIGION AND NATIONAL IDENTITY IN EUROPE AND THE MIDDLE EAST: A HISTORICAL STUDY 230–31 (2006) (discussing the religious diversity of the Arabs in the context of nationalism).

181. *See, e.g.*, Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 15 THE WRITINGS OF THOMAS JEFFERSON 32, 42 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) (“Each generation . . . has . . . a right to choose for itself the form of government it believes most promotive of its own happiness.”).

a constitutional text only if it included a bill of rights and did not survive the founding generation.¹⁸²

Prudence certainly counsels caution. The murkiness of the past, the confusion of the present, and the multiple voices with which the future simultaneously promises bonanzas and threatens disasters should give every sensible person pause. Self-reflective human beings understand that their perceptions of reality, and their remedies for its ills, are fogged by personal—and perhaps even subconsciously held—anxieties, urges, and values. “Ambition, avarice, personal animosity, party opposition, and many other motives not more laudable than these,” Alexander Hamilton conceded, “are apt to operate as well upon those who support as those who oppose the right side of a [constitutional] question.”¹⁸³ Awareness of the responsibility of creating a charter to organize and direct a constitutional order, as well as realization of one’s own (and one’s colleagues’) frailties, should tempt all but the superarrogant to echo Noah Webster’s claim that “[t]he very attempt to make *perpetual* constitutions, is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia.”¹⁸⁴

American experience may be misleading. The founders of 1787 stood in a long line of framers of political covenants dating from the Mayflower Compact through dozens of colonial charters and state constitutional texts.¹⁸⁵ White male colonists and their progeny had functioned reasonably well under agreements that had tried to combine respect for fundamental rights with a significant measure of popular government.¹⁸⁶ The men at Philadelphia were old hands at politics within such systems. Of the fifty-five delegates slated to attend the Convention, twenty had already participated in drafting state constitutional documents, forty-two had served (or were then serving) in Congress under the Articles of Confederation, thirty had been members of state legislatures, and seven were former governors.¹⁸⁷ Equally eager to

182. This theme ran through much of Jefferson’s writings. See, e.g., Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 7 THE WRITINGS OF THOMAS JEFFERSON 454, 459 (Albert Ellery Bergh ed., 1907) (“[I]t may be proved, that no society can make a perpetual constitution, or even a perpetual law.”). Still, on no occasion with which I am familiar did Jefferson relax his demand for a bill of rights.

183. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 176, at 34, 33–37.

184. NOAH WEBSTER, *Bills of Rights*, in COLLECTION OF ESSAYS AND FUGITIVE WRITINGS ON MORAL, HISTORICAL, POLITICAL AND LITERARY SUBJECTS 45, 47 (1790).

185. DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 6–7 (1988).

186. See *id.* at 32 (“The enunciation of values, self-definition, and common commitments was so important to the colonists in America that it came to occupy a larger and larger portion of their foundation documents.”); Daniel J. Elazar, *The Political Theory of Covenant*, 10 PUBLIUS 3, 29 (1980) (concluding that Americans’ notions of human rights, civic organization, and politics were shaped by the many uses of covenant through the settlement of the frontier); Donald S. Lutz, *From Covenant to Constitution in American Political Thought*, 10 PUBLIUS 101, 103 (1980) (asserting that early state constitutions contained elements of “the creation of government” and “a self-definition of themselves as a people, their common values, rights, and interests”).

187. MURPHY, *supra* note 10, at 188.

assume public office were hundreds of other seasoned politicians.¹⁸⁸ That storehouse of relevant political experience is likely to be as rare as it is valuable.

The principal reasons for a constitutional charter mirror those against. First, a claim that such texts are futile overlooks the many cases in which such documents have helped form and maintain political systems. Hobbesians can cite the political histories of sub-Saharan Africa and parts of Latin America, but they have to ignore evidence from Australia, India, Japan, South Korea, South Africa, North America, and Europe, as well as other parts of Latin America.¹⁸⁹

Second, tradition may be inadequate to sustain the system. It could, thus, be useful to specify the basic rules for, and limitations on, political choices. Spoken words quickly evanesce. After a few years, practice and history tend to fuse into legend and propaganda, and neither the content nor the meaning of tradition is ever obvious. In apparent contrast, words embossed onto paper convey an impression of permanence. All who run can read, now and in generations to come. When those compacts concern such fundamentals as governmental power and individual rights, the case for writing things down becomes very strong.

Third, where wide disagreement exists, writing (even in general terms, what most people can agree on, leaving the rest to be settled over time, according to specified rules and within set substantive limits) offers a better chance of success than merely persisting with disagreement. Sometimes calculated ambiguity translates as practical wisdom.

Fourth, the necessity of interpretation is ubiquitous. As British constitutional history attests, it obtains even where there is no single constitutional charter. In fact, interpretation may be even more necessary where no document proclaims itself to be the basic law than where such a charter so boasts.¹⁹⁰ The absence of such a text could make judicial pronouncements less important. But, as consequential as is any answer to the question “who interprets,” no response alleviates the necessity of interpretation by some person or by some institution.

Fifth, proponents of a constitutional text may cite experience itself to counter the claim of *necessity* of designers’ having experience. Intelligent men and women can learn from the experience of others. Before coming to the White House, Lincoln had no national political experience other than a single two-year term in Congress.¹⁹¹ After World War II, despite lacking much recent experience under either representative or constitutional democracy, Germans, Japanese, and Italians—albeit it with prodding from

188. *Id.* at 188–89.

189. *Id.* at 189.

190. *See id.* at 482–83 (describing the necessity of interpretation in particular circumstances).

191. LARRY D. MANSCH, ABRAHAM LINCOLN, PRESIDENT-ELECT: THE FOUR CRITICAL MONTHS FROM ELECTION TO INAUGURATION 75 (2005).

their conquerors—wrote charters to pilot flourishing polities.¹⁹² Indians have had similar success building on British ideals that conflicted with their own cultural heritages.¹⁹³ In 1989, few Eastern Europeans had known life under constitutional democracy. Poland, for example, survived the years between World War I and 1939 as a military dictatorship, not as any hyphenated form of democracy.¹⁹⁴ When Central and Eastern Europeans took up constitutional reform in 1990, few of them had lived as citizens under nonauthoritarian rule. Nevertheless, Poles, Hungarians, Czechs, and Slovaks drafted new constitutional charters and have become functional constitutional democracies, though Bulgarians, Romanians, Russians, and several former “Stan” republics of the old Soviet Union have enjoyed far less success.¹⁹⁵

Despite its audacity, the role of framer of a fundamental law may be a part that must be played. Time is not likely to dim temporizing’s allure, and what begins as accidental practice may settle into permanency. Much of what Americans naively consider parts of their constitution are usages whose systemic implications may not have been considered before they entered the political system. Whether or not architects chose to write a basic law, they still must address the question Alexander Hamilton posed in the first of the *Federalist Papers*: “[W]hether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”¹⁹⁶

A more positive reason for drafting a charter is that subsequent debates about adoption may teach citizens and officials alike about the new political system. Most basically, self-consciously confronting such critical problems as what it means for the present to try to bind the future may educate participants about the seriousness of the task at hand. Those discussions may

192. Cf. DONALD S. LUTZ, *PRINCIPLES OF CONSTITUTIONAL DESIGN* 14 (2006) (noting that even though Japan and Germany’s constitutional texts were imposed upon them after World War II, the prior constitutional experience of other countries helped Japan and Germany successfully amend and conform their constitutional texts to their societies).

193. See Tappan Raychaudhuri, *Constitutionalism and the Nationalist Discourse: The Indian Experience*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD*, *supra* note 29, at 197–210 (discussing the struggles accompanying the development of the Indian constitution resulting from indigenous politics and nationalism intersecting with imperial power).

194. See STEPHEN J. LEE, *EUROPEAN DICTATORSHIPS: 1918–1945*, at 18 (2000) (describing Poland between World War I and World War II as a dictatorship).

195. I do not mean to denigrate the importance of having politically experienced leaders available to operate a new political system. I believe much of the difference between the success of constitutional democracy in India and the failure of civil government in most of sub-Saharan Africa was due to the fact that the British had cultivated an educated, trained civil service in India, while they—like the French and Belgians—left behind, in Africa, few locals who were educated at all, and almost none whose governmental experience exceeded that of noncommissioned officers in the military. For details, see MURPHY, *supra* note 10, at ch. 4.

196. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 183, at 27.

themselves supply worthwhile experience in learning how to operate, or be operated by, the proposed system.

Although the question of drafting a text is important, it may have become moot for much of the economically developed world. Almost every such nation now has a formal constitutional charter.¹⁹⁷ With a people accustomed to following a constitutional script, it would be extremely difficult to begin a new political order without such a document.

Necessity, however, is seldom toll free. Unless the preexisting order has led to utter disaster—in that sense, Germany and Japan were fortunate after World War II—the new charter is likely to be a variation on an old theme. For the United States, Sanford Levinson's recent work provides both a compendium of earlier suggestions and his own imaginative ideas.¹⁹⁸ Effecting such changes for the United States (the country on which Levinson focuses) would be a daunting task, again, absent a horrendous governmental crisis. Still, even the most sweeping of his proposals, such as moving from a presidential to a parliamentary system, would effect a mutation in the species of the existing constitutional order, but remain within the genus of constitutional democracy. What Levinson proposes (and what the United States has experienced since 1787) is largely institutional tinkering rather than constitutional redesigning. Nevertheless, some pieces of that work, most notably the Thirteenth, Fourteenth, Fifteenth, and Seventeenth Amendments, have been of immense consequence for American constitutionalism. Levinson's suggestions could have comparable effects on the nation's commitment to participatory democracy by making citizens more aware of, and attentive to, both their power and duties.

That no text offers a panacea does not mean that a carefully crafted charter will not help preserve or change societal values. Jews may argue about what the Torah means, Christians the Gospels, and Muslims the *Qur'an*, but those documents transformed the cultures and organizations of Jewish and Arab tribes as well as the Roman world. Those documents continue to define Judaism, Christianity, and Islam, and to influence moral and political beliefs as well as political actions around the globe. It is doubtful that, without these texts, those religions would have endured for so many centuries. In the secular realm, it is difficult to deny that the American document, despite near catastrophic failure in 1861 (and lesser but still significant failures since), has helped identify what the United States is all about. Indeed, that charter, Hans Kohn claimed, "is so intimately welded with the national existence itself that the two have become inseparable."¹⁹⁹

197. See University of Richmond, Constitution Finder, <http://confinder.richmond.edu/> (providing access to constitutions, charters, amendments, and other related documents of the world's nations).

198. LEVINSON, *supra* note 1.

199. HANS KOHN, AMERICAN NATIONALISM 8 (1957). Using much weaker evidence, Owasi Masako claims the so-called MacArthur Constitution "has effectively become Japan's identity."

V. Reprise: Constructing a Constitution

This Article has focused on problems that constitutional architects confront, whether they recognize them or not. I have not addressed problems that builders must try to resolve. It is possible, of course, that designers and builders will be the same people, but the tasks of architect and builder are quite different, even if closely connected. It is only after designers have faced, and coped with, the kinds of issues that this Article has identified that builders can intelligently address such difficult questions as whether to opt for a parliamentary or presidential system, whether elections will run under some variant of proportional representation or first-past-the-post, whether to have a unitary or a federal arrangement, and if the latter, whether or not to provide procedures for peaceful dissolution.²⁰⁰

These specific problems of constitutional construction are immensely important, but they are subsets of the more basic problems of creating a nation and its people, adjusting constitutional goals and process so that they can be accepted by—even as they may change—the thinking of the current generation of citizens, and still helping members of the next generation live decent lives. There are few things more forlorn than a constitutional text in search of a nation to constitute. As Gouverneur Morris said about a charter that did not fit its people's values and needs, “[p]aper thou art and unto [p]aper thou shalt return.”²⁰¹ I would amend his statement to include the possibility that an expertly sculpted text could change its people's values, if not their needs.

The fit between a people and their new constitutional order need be only close enough that the people are attracted to, rather than alienated from, the new regime's goals and processes. Insofar as the projected constitutional order goes off in a direction different from that of the old, architects must re-educate current and future generations. Thus we return to the colossal difficulty of simultaneously creating a people, a nation, and a constitutional order for that people and nation. The difficulty of these tasks indicates that Machiavelli was guilty of understatement. Only men and women of enormous courage, ego, or a combination thereof, could dare to begin such a noble voyage.

LAWRENCE WARD BEER & JOHN MAKI, FROM IMPERIAL MYTH TO DEMOCRACY: JAPAN'S TWO CONSTITUTIONS 184 (2002).

200. Belgium, Canada, Pakistan, Russia, Spain, Turkey, the Union of Czechs and Slovaks, the United Kingdom, and Yugoslavia have each recently confronted demands for secession. MIODRAG JOVANOVIĆ, CONSTITUTIONALIZING SECESSION IN FEDERALIZED STATES: A PROCEDURAL APPROACH 3, 34, 88–89 (2007). Miodrag Jovanović argues that federal systems' charters should incorporate procedures for member states' peaceful separation. *Id.* at 79.

201. JAMES K. KIRSCHKE, GOUVERNOUR MORRIS: AUTHOR, STATESMAN, AND MAN OF THE WORLD 233 (2005).