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Walter F. Murphy

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Civil Law, Common Law, and Constitutional Democracy

Walter F. Murphy*

Table of Contents

I. Introduction.....	91
II. Constitutional Democracy	100
A. Democratic Theory.....	101
B. Constitutionalism.....	104
C. Constitutional Democracy.....	109
III. Concepts of a Constitution.....	113
A. What Does the Constitution Include?.....	114
B. How Authoritative is the Constitution?	116
C. What Are the Constitution's Functions?	117
IV. Constructing a Constitution	121
A. Why a Text?.....	121
B. Drafting the Text	129
1. The New Political Culture.....	129
2. Legitimizing the Legitimitor.....	129
3. The Necessity of Compromise.....	131
V. The Civil Law & Constitution Making	133

I. INTRODUCTION

In the beginning, Genesis tells us, chaos reigned: "the earth was without form and void, with darkness over the face of the abyss, and a mighty wind that swept over the surface of the waters."¹ Operating at a macro-level, the deity needed only six days to fill the galactic void, then sculpt from the abyss a planet for human habitation. But, we

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* McCormick Professor of Jurisprudence, Princeton University. This article is part of a larger study of constitutional democracy sponsored by the American Council of Learned Societies through a grant from the Ford Foundation. The Boesky Family Fund and the Peter B. Lewis Fund of the Center of International Studies of Princeton University have also provided support. I am indebted to Martin di Santos of the Princeton Class of 1993 for research assistance and to Prof. Mark E. Brandon of the University of Oklahoma and Judith Lynn Failer of Princeton University for critical readings of earlier versions of this manuscript.

1. Genesis 1:1-2. Translations vary, of course, but the picture of initial chaos is common. I have used *The New English Bible: The Old Testament*, published jointly by Oxford and Cambridge University presses in 1970.

might speculate, Yahweh was not into micro-management.² Millennia later, we mere mortals are still trying to cope with residual chaos and to impose form on ourselves and our world. "Getting it all together" is even more difficult on a national or international scale than it is at a personal level. Indeed, much of what we do inside and outside of politics attempts to calm the mighty wind of human passion that constantly threatens to sweep mankind away.

Law, of course, is among the more obvious efforts to channel passion, and the study of law tries to aid that campaign by outlining coherent strategies. Constructing constitutions and creating theories to explain and justify those constitutions are products of that larger legal project. These operations are, however, both more specific and more general—more specific, because constitutions typically proclaim themselves part of the genus "law"; more general, because constitutions are much more than law. They are also exercises in practical politics. And theories that account for and justify constitutions rest, ultimately, on arguments from political philosophy.

Thomas Hobbes sneered at efforts to use language to tame passion's power: "[C]ovenants being but words and breath, have no force to oblige, contain, constrain, or protect any man, but what it has from the publique Sword"³—an instrument, he believed, that could be effectively wielded only by a despot who was close to omnipotent over his subjects. Three and a half centuries later, we still share much of Hobbes's cynicism. Common experience shouts out that people often lie when pledging their individual or collective honor, and, even when they initially mean to keep their compacts, frequently succumb to temptations to violate vows in order to pursue what appears to be self-interest.

Thus willingly and seriously undertaking the task of forging a constitutional text seems to reflect either arrogant certainty in one's own ability or romantic trust in the goodness of human nature. Both alternatives suggest ignorance of the real world and naive faith in the magical power of words to stay "the lash of power."⁴ Yet we do have some successes. A political chemistry—or alchemy—can sometimes turn sheets of paper into hoops of steel. Therefore, we need a theory to account for this mixed record. What is it that happens, or does not happen, to make some constitutions effective and others unavailing?

The standard claim of constitutional texts to partake of law makes it reasonable to look to prevailing jurisprudential notions for the be-

2. This speculation is certainly contestable. "God," according to Mies van der Rohe, "is in the details." Quoted in Ash, *Poland After Solidarity* (Book Review), *N.Y. Rev. Books* at 49 (June 13, 1991). Perhaps She is where one finds Her.

3. T. Hobbes, *Leviathan*, Pt. II, ch. 18, at 123 (R. Tuck ed. 1991).

4. The phrase is Paul Carrington's. Carrington, *Of Law and the River*, 34 *J. of Legal Educ.* 222, 226 (1984).

ginnings of an answer. If, in fact, a legal system controls a wide network of human relations, it inevitably interacts with the broader culture, sometimes shaping it, sometimes shaped by it. The flows of influence vary over time; and, although they are not likely ever to be perfectly symmetrical, to the extent a legal system is effective, it will also infuse its norms into the values of the larger culture in which law is embedded. Most particularly, an effective body of law influences what most of its subjects view as substantively just in relations among citizens and between citizens and the state as well as what its subjects deem to be fair processes to resolve controversies at individual, societal, and governmental levels.

The preeminent constitution-making feat was pulled off more than two centuries ago in a backward but developing country whose nascent legal systems were offshoots of the Common Law. If we measure success by continuance over time, a pair of Common Law countries, Canada (1867) and Australia (1900), generated the other most "successful" constitutional democracies. And, of course, one can make a plausible, if not fully convincing, argument that Britain is a constitutional democracy and has been operating under a constitution for centuries.⁵ In any event, the English can take some comfort in the formal claim, embodied in the constitutional texts of Canada and Australia, that these were gifts from the "Queen's Most Excellent Majesty," even though colonials drafted each.

In stark contrast, Latin American countries—all consumers of the Civil Law—have changed their constitutions with a regularity analogous to that with which modern farmers rotate crops. Moreover, as was also the case in Meiji Japan and the Russian, German, and Austro-Hungarian empires, these "constitutions" have sometimes made scant pretense of trying to establish regimes that were either democratic or limited. And when constitutional democracy was the objective in other Civil-Law nations, as in Germany and Poland after World War I, the resulting polities were often unstable, providing only one phase in a sequence that quickly cycled back to authoritarian rule. Even the French, who spoke so eloquently of "liberty, equality, and fraternity," managed to go through two monarchies, two empires, and several republics between the adoption of the American constitutional text and the presidency of Dwight D. Eisenhower.

At the end of World War II, it appeared that creating and maintaining constitutional democracy were arts pretty much monopolized by

5. Britain's adhering to the Treaties of Rome establishing the European Economic Community and other agreements such as the European Convention of Human Rights, with its requirement of submission to judgments of the Court of Human Rights at Strasbourg, strengthen the case for that nation's *now* being a constitutional democracy.

those cultures that had been cohabitating with the Common Law. History since then has been more checkered. Nevertheless, a critic of the Civil Law might plausibly hypothesize that one basic reason for failures of constitutional democracy lies in that legal system. Not merely does its derivation from efforts to codify the Law of the Roman Empire taint it, but its modern reincarnation was the result of efforts by the Emperor of the French to bring order to his nation and its conquests. However facilely one transfers the system's concept of "sovereign legislator" from emperor to democratically chosen parliament, the image of sovereign legislator, whether a collective body or a single ruler, ill fits the norms of limited government.⁶

Perhaps even more damaging, the constitutionalist critic might continue, is the Civil Law's hubris: Tempted, like Adam and Eve, by pride and ambition, it tries to fill every void the deity left, eliminate all chaos, impose perfect form, and bottle up the great wind.⁷ When what has been called an "obsession for formal rules and procedures"⁸ escapes

6. Democratic theorists might look with less concern than would constitutionalists on the concept of popularly elected parliament as sovereign legislator. Still, democratic theorists might worry that the notion of unity that inheres in the term "legislator," especially in the context of Civil Law's own drive for a systemic wholeness and theoretical coherence, might impede what many democrats see as the necessary messiness of bargaining and compromising in a pluralistic society. Here, such theorists might fear, the Civil Law would move judges to interpret codes and free standing statutes as if they were the product of a single mind and thus overlook or even destroy the myriad of adjustments, not always logically symmetrical, that made governmental action possible. Insofar, however, as one can judge from the last four decades of parliamentary politics in Italy and the Federal Republic of Germany, compromise and bargaining have abounded, even as judges continue to speak of "the legislator." See, for example, the use of that term by the *Bundesverfassungsgericht*: Joint Income Tax Case, 6 BVerfGE 55 (1957) at 339; Bavarian Party Case, 6 BVerfGE 84 (1957) at 578; Homosexuality Case, 6 BVerfGE 389 (1957) at 351; Party Contribution Tax Cases, 8 BVerfGE 51 (1958) at 581; Volkswagen Denationalization Case, 12 BVerfGE 354 (1961) at 280; Party Finance Cases, 20 BVerfGE 56, 119, and 134 (1966) at 583; Privacy of Communications Case, 30 BVerfGE 1 (1970) at 659; and Abortion Reform Law Case, 39 BVerfGE 1 (1975) at 422. On occasion, the FCC has also carried over this penchant for the singular in speaking of "the framer" of the Basic Law: Socialist Reich Party Case, 2 BVerfGE 1 (1952) at 602. These cases are translated and reprinted in edited versions in W. Murphy and J. Tanenhaus, *Comparative Constitutional Jurisprudence* (1977); for other examples, see D. Kommers, *Constitutional Jurisprudence of the Federal Republic of West Germany* (1989).

7. Prof. Robert A. Pascal argues that the French model of an all inclusive code is not the only paradigm that Civil Law need or even does follow. He is, of course, correct; but it remains true that Napoleon's efforts at codification have provided the dominant model not only for Europe but for Latin America and, when it first began to modernize, Japan. See Pascal, *A Report on the French Civil Code Revision Project*, 11 *La. L. Rev.* 261 and 25 *Tul. L. Rev.* 205 (1951) (joint publication).

8. A. Christelow, *Muslim Law Courts and the French Colonial State in Algeria* 38 (1985). Christelow was speaking of the French legal system, but his remarks might apply, *a fortiori*, to Switzerland and Germany and, to a lesser extent, even to Italy.

from the courtroom to wider political arenas, what its proponents claim are the system's greatest virtues become mortal sins. Orderliness, rationality, and comprehensiveness might hone effective intellectual instruments to settle disputes between private citizens or issues of traditional criminal law. When, however, political leaders apply those mental sets to complex problems such as the reach of legislative power, the ambit of rights to privacy and religious freedom, or the quest for compromises among the interests of a dozen competing groups, difficulties multiply, for these sorts of issues are far less amenable, if they are amenable at all, to rule-bound solutions.

The Civil Law, the critic might continue, encourages its people to undertake tasks of constitutional engineering that lie beyond human capability. As the bloody agonies of Iraqi Shi'a and Kurds reminded George Bush in 1991 in the aftermath of Operation Desert Storm, most decisions have consequences that their makers do not, perhaps even cannot, foretell. No single person or group of persons, however brilliant or methodical, can accurately predict the future or provide rules for that future. Only in the most general and perhaps even *a*principled way can political leaders hope to conquer unforeseen obstacles. The Civil Law's prompting leaders to attack the unknown with tightly reasoned logic and rigid adherence to formal rules and abstract principles is likely to be counterproductive, if not disastrous; it proliferates rather than eliminates chaos. In sum, the critic might charge, when the Civil Law infects constitutions, its mentality invites rigidity and inspires policies that are principled but impractical.

Worse, the constitutional critic might continue, the Civil Law's tense commitment to order leaves judges no respectable room to maneuver when confronted by authoritarian rule. Unable to reconcile defending constitutional democracy with their role in a fixed legal system, Civil-Law judges have often become panderers to power. Not only did professional German judges form a corps of prostitutes for Naziism,⁹ but, during the Occupation, French judges offered similar services at discount prices.¹⁰

When Civil-Law judges have demonstrated flexibility, they have often done so for self-advancement, not for the common weal. For instance, since World War II, Italian judges have managed to turn the protections that constitutional democracy accords an independent judiciary to great private profit, setting their own salaries, running for elective office or serving in administrative agencies (with the option of returning to the

9. See especially I. Müller, *Hitler's Justice: The Courts of the Third Reich* (D. Schneider trans. 1991).

10. See Weisberg, *Legal Rhetoric Under Stress: The Example of Vichy*, 12 *Cardozo L. Rev.* 1371 (1991).

bench with full credit toward seniority and retirement), and harassing critics.¹¹

In contrast, the critic might contend, the Common Law grew up as an effort to curb the monarch's arbitrary power. Where the Civil Law looks first to sovereign prerogative, the Common Law looks to individual liberty. Its technical centerpiece is habeas corpus, the great writ of liberty,¹² not the will of a sovereign legislator.

Equally important, the Common Law avoids the Civil Law's arrogance. Its methodology subtly instructs lawyers, litigants, and judges to live with some rather than attempt to remove all chaos, to walk around rather than try to fill in the abyss, to hunker down when the great wind blows rather than to attempt to contain it. In short, the Common Law begins from a presumption that reason has limited capacity to understand and control passion. Perhaps wimpishly but certainly prudently, the Common Law recognizes and avoids rather than attempts to solve the unsolvable. By preferring the inductive case-by-case approach to announcing general principles then deducting from them, it places heavier weight on experience than on logic as "the life of the law."¹³

Essential to Common-Law statesmanship is a willingness, perhaps even an insistence, that judges and other public officials rise above principle. This choice of flexibility over consistency and supple pragmatism over tight logic, as well as the experience of living with incoherence in law, our critic might assert, spills over into broader political arenas and encourages not only judges but all public officials to work around and within the messiness of constitutional politics. It warns them against attempting to purge life of all disorder.¹⁴

11. For the massive problems Italy has been having with judges, see the work of G. di Federico: *Crisis of the Justice System and the Referendum on the Judiciary*, in *Italian Politics: A Review*, III, at 25 (R. Leonardi and P. Corbetta eds. 1989); *The Italian Judicial Profession and its Bureaucratic Setting*, 21 *Jurid. Rev.* 40 (1976); Introduction to F. Zannotti, *Le Attività Extragiudiziarie dei Magistrati Ordinari* (1981); *Le Qualificazioni Professionali del Corpo Giudiziario*, 1985 *Rivista Trimestrale di Scienza dell'Amministrazione* 21; *Costi e Implicazioni Istituzionali dei Recenti Provvedimenti Giurisdizionali e Legislativi in Materia di Retribuzioni e Pensioni dei Magistrati*, 1985 *Rivista Trimestrale di Diritto Pubblico* 331; and his edited volume, *Preparazione Professionale degli Avvocati e dei Magistrati* (1987). See also the remainder of Zannotti's volume, cited above; C. Guarnieri, *L'Indipendenza della Magistratura* (1981); and *Pubblico Ministero e Sistema Politico*, especially chs. 4-5 (1984).

12. The recent rulings of the United States Supreme Court in *McCleskey v. Zant*, 111 S. Ct. 1454 (1991), and *Coleman v. Thompson*, 111 S. Ct. 2546 (1991), cast a shadow on the continued efficacy of the Great Writ.

13. O. Holmes, *The Common Law* 1 (1881).

14. See, for example, the recent attacks on systematic theories of constitutional interpretation by critics as politically separated as R. Bork, *The Tempting of America* (1990); H. Wellington, *Interpreting the Constitution* (1990); and L. Tribe and M. Dorf, *On Reading the Constitution* (1991).

It is easy, perhaps too easy, to fault the constitutionalist critic. She simultaneously vilifies the Civil Law and idealizes the Common Law, performing each task with marvelously selective evidence.¹⁵ Her view of the structures of the two legal systems is simplistic. The Civil Law is not so principled as she claims, nor the Common Law so free wheeling.

Although Latin America has historically been a graveyard for constitutional democracy, that continent's problems run far deeper than its legal system. On the other hand, Sweden and Switzerland have long maintained stable democracies, even, one can reasonably claim, stable *constitutional* democracies, and, except for the period of Nazi conquest, so have Belgium, Denmark, Holland, and Norway. Since World War II, the Federal Republic of Germany and Italy have been resolute constitutional democracies. Despite sputtering through three republics since 1871—again except during the Nazi conquest—France has not wavered in its commitment to democracy and, in recent decades, has moved closer toward constitutional democracy. A dozen years ago Spain and Portugal threw off authoritarian regimes and have been following the same path as other nations of Western Europe. Thus it is patently false to assert that the Civil Law has contaminated constitutional democracy.

Moreover, as despicable as was the record of Civil-Law judges during the years of Naziism and as shabby as the readiness of many Italian judges to take advantage of their special status, the record of Common-Law judges has not always been a thing of constitutional beauty. An American need only go back to *Dred Scott*.¹⁶ *Korematsu v. United*

15. One might note, parenthetically, that the critic, if she is the product of a Common Law culture, barely skirts ethnocentrism. Her reply might well be that, if the facts bespeak an ethnic predilection for constitutional democracy, the analyst's task is, first, to record that "fact" and then account for it. She would also respond that her critique is cultural and institutional and thus transcends lines of ethnicity, though in particular instances, these divisions may follow the same fault lines. In contrast, Prof. John W. Burgess, one of the great nineteenth-century pioneers of American political science, drew overtly racial conclusions:

If we regard for a moment the history of the world from the point of view of the production of political institutions, we cannot fail to discern that all the great states of the world, in the modern sense, have been founded and developed by three branches of the Aryan race . . . Indian America has left no legacies to modern civilization; Africa has as yet made no contributions; and Asia, while producing all of our great religions, has done nothing, except in imitation of Europe, for political civilization. We must conclude from these facts that American Indians, Asiatics and Africans cannot properly form any active, directive part of the political population which shall be able to produce modern political institutions and ideals. They have no element of political civilization to contribute. They can only receive, learn, follow Aryan example. Hence my proposition that the ideal American commonwealth is not to be *of* the world, but *for* the world—is to be national in its origin, but cosmopolitan in its application. Burgess, *The Ideal of American Commonwealth*, 10 Pol. Sci. Q. 404, 405 (1895).

16. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

States,¹⁷ with its validation of the imprisonment, without any semblance of a trial, of more than 100,000 citizens merely because their parents or grandparents had been born in Japan, also provides a sufficiently grotesque reminder. Canadian judges also turned blind eyes toward the incarceration of Japanese-Canadians,¹⁸ though with less moral blame since their nation had not yet added a bill of rights to its constitutional texts. British judges, of course, had no difficulty rationalizing war-time internment or, more recently, denying people accused of being members of Irish Republican Army even the semblance of due process.¹⁹ In all these instances, it was probably not the pressure of government *on* these judges but the same pressure *within* the judge as on the public officials they were supposed to check.

But churlish and sophistic as the constitutionalist critic might be, her claims deserve a fuller response, for it is clear that in some important respects many of the new Civil-Law constitutional democracies—Austria, Germany, Italy, Portugal, and Spain, for example—have departed from the classic model of that legal system. They have recognized, for instance, that defendants in criminal cases are entitled to some rights that have been historically more closely associated with the Common than the Civil Law. More significantly, by adopting forms of judicial review, they have all violated one of the Civil Law's central tenets—a restricted role for judges as essentially skilled bureaucrats who apply the legal rules the sovereign legislator has created.²⁰ For constitutional interpretation has inevitably drawn judges, once supposedly politically neutral experts, into the bear pit of policy making.

17. 323 U.S. 214, 65 S. Ct. 193 (1944).

18. Co-Operative Committee on Japanese-Canadians v. The Attorney-General for Canada, [1947] A.C. 87 (P.C.) (Can.).

19. For World War II, see especially *Liversidge v. Anderson*, [1942] A.C. 206. For a dispassionate description of the so-called "Diplock courts" the British operate in the Six Counties of Ireland, see J. Finn, *Constitutions in Crisis*, chs. 2-3 (1991); for more impassioned analyses, see generally *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland* (A. Jennings ed. 1988).

20. One might also make a plausible argument that, although Quebec's quarrel with the rest of Canada is basically rooted in cultural clashes, those differences manifest themselves, perhaps are even in part caused by, different attitudes toward the roles of law and judges. Quebec's politics have historically demonstrated a suspicion of constitutionalism insofar as it would protect minorities *within* Quebec, though not outside that province. When, for instance, the Supreme Court of Canada invalidated part of a provincial regulation banning use of signs except in French, *Allan Singer Ltd. v. Quebec*, [1988] 2 S.C.R. 790, as a violation of Art. 2 of the Constitution Act, which included among "fundamental freedoms" rights to "expression" and "communication," Quebec responded by invoking Art. 33 of the Constitution Act. This provision allows parliament, provincial or national, to exempt from judicial scrutiny for as long as five years laws touching on certain kinds of rights.

As the nations of Central and Eastern Europe—all historic consumers of the Civil Law—begin to reconstitute their collective selves as constitutional democracies, their leaders might well wonder how much there is to the critic's argument. Even if one grants that neither the Civil Law nor its radiations exclude stable constitutional democracy, a prudent person might still be intensely concerned about lesser effects. If that system substantially reduces constitutional democracy's chances of success, political leaders would be wise to consider alternatives. If the Civil Law is in fact a hindrance, three basic choices seem available: (1) opt for constitutional democracy and restructure the legal system, eradicating the Civil Law and adopting the Common Law wholesale; (2) opt for constitutional democracy, keep much (or some) of the Civil Law intact, and selectively borrow from Common-Law nations' concepts, processes, and institutions; (3) opt for limited political reform well short of constitutional democracy by mitigating the old regime's more oppressive aspects and retaining the familiar Civil Law.²¹

An academic has a less burdensome task, for, assuming tenure, he or she does not have to take responsibility for either the evaluation of the Civil Law or the constitutionalist implications of that evaluation. Nevertheless, any intelligent analyst who addresses this critique of the Civil Law should be prudent enough to pretend to the virtue of humility and concede that he or she is unlikely to be able to offer a definitive answer. The methodological obstacles are enormous, and the critic's selective history highlights rather than conceals them.

First, as John Stuart Mill pointed out, crossnational comparisons are scientifically shaky and explanations for differences are likely to be, at best, incomplete.²² Many factors, or "variables," as social scientists prefer, influence political stability and development, their effects are complex, and the number of nations is rather small. In truth, we have more variables to put into any explanatory "equation" than we have cases to which to apply them—an invitation, statisticians warn, to intellectual disaster. Second, those variables are likely to be, as Mill said, so "inextricably interwoven with one another"²³ that we cannot disentangle the effects each has on the others, much less isolate the impact any one has on the problem to be explained. Thus we are apt to encounter a classic case of the intellectual infirmity statisticians call "multicollinearity."

More substantively, there is also serious doubt that any single analyst or small group of analysts can truly understand the complexities of

21. It may be that this third option, mild reform, will become known as the "Romanian solution."

22. *A System of Logic Ratiocinative and Inductive* VII, especially ch. 10, *The Collected Works of John Stuart Mill* (J. Robson ed. 1973).

23. *Id.* at 452.

several dozen nations, their histories and traditions as well as their cultural, political, legal, and economic systems. If we possess only a limited capability to recognize all the forces at work, we can place scant confidence in our ability to offer valid explanations for the successes and failures of those systems.

These methodological and substantive difficulties are sufficiently serious to tempt scholars to ignore problems the Civil Law presents for stable constitutional democracy. But, even if we accept that we cannot provide an answer that convinces beyond a reasonable doubt, we might still be able to construct credible analyses of broader relations between the two by "wondering"—the sort of reflection, Socrates claimed, in which "philosophy begins."²⁴ Wondering out loud or in print might yield useful insights into Civil- and Common-Law systems and, more importantly, into the nature of constitutions and constitutional democracy.

So, buoyed by Socrates' encouragement, we begin; but that sense of orderliness dear to the Civil Law's heart cautions against leaping at the throat of the problem, for there are definitional issues to address before being able to reflect profitably. The first relates to the polity we call constitutional democracy, the second to that "thing" we call a constitution.

II. CONSTITUTIONAL DEMOCRACY

It is commonplace in the rhetoric of every-day politics to speak of nations of the west and of such non-western countries as India and Japan as "democracies" or, in the literature of law and political science, as "representative democracies." Appeals to the people as "the only legitimate fountain of power"²⁵ evoke such enthusiastically positive reactions that even Stalinist regimes baptized themselves People's Republics or Democratic Republics. However useful the word "democracy" may be in garnering popular support during electoral campaigns, rallying citizens during crises, or concealing the true nature of the government, that term probably obfuscates more often than it accurately describes.

Most western "democratic" nations have tried, though seldom systematically, to operationalize a pair of political theories: democratic theory and constitutionalism. In some respects the two complement each other. They share, for example, belief in the same fundamental value: the equal and large amount of dignity, respect, and autonomy due to

24. 2 The Dialogues of Plato 157 (M. Jowitt, trans. 1892, reissued 1937): "[P]hilosophy begins in wonder."

25. The Federalist, No. 49 (J. Madison).

all human beings.²⁶ Yet in other ways the two theories compete, most especially in the manner in which they address the authority of the people and/or their freely chosen representatives.

A. *Democratic Theory*

The world is already overpopulated with differing definitions of democracy, but we might still offer some useful and valid generalizations.²⁷ Democratic theory's central claim is that the most feasible way to recognize and protect individual dignity and autonomy is for the people to govern themselves by electing representatives. "No right is more precious in a free country," Justice Hugo L. Black wrote, "than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."²⁸

But democratic theory demands more than elections. Citizens must also have the right to participate in self-government by running for public office themselves or helping other candidates. To make these rights meaningful, all citizens must enjoy a bevy of closely related freedoms, such as freedom to speak, write, and publish, as well as to associate and assemble with others to bring about peaceful change. As the German Constitutional Court said, quoting the U.S. Supreme Court:

[T]he basic right of free expression is one of the principal human rights For a free, democratic order it is a constituent element, for it is free speech that permits continuous intellectual discussion, the battle of opinions that is its vital element In a certain sense it is the basis of any freedom at all, "the

26. One might use another more practical (economic) basis for democracy: because, in the long run, it is very inefficient (costly) to govern a society that does not wish to be governed, it is wiser to allow the community to govern itself. There are traces of such an argument in many of the justifications for democracy. Many rulers, however, have found it worth the cost to govern without, indeed against, the consent of the governed. One need look no further back in history than June 1989 to the bloody massacre in Tianamen Square; August 1990 to the Iraqi annexation of Kuwait; or the spring and summer of 1991 for Kuwait's imposition of harsh martial law on its citizens whom Operation Desert Shield "liberated."

27. The most sophisticated discussion of democratic theory is R. Dahl, *Democracy and Its Critics* (1989), which builds on but adds to Dahl's earlier analyses, cited *infra*, in note 34. See also P. Herring, *The Politics of Democracy* ch. 1 (1940); Kateb, *The Moral Distinctiveness of Representative Democracy*, 91 *Ethics* 357 (1981); C. Lindblom, *The Intelligence of Democracy* (1965); C. MacPherson, *Democratic Theory* (1973); H. Mayo, *An Introduction to Democratic Theory* (1960); J. Pennock, *Democratic Political Theory* (1979); G. Sartori, *Democratic Theory* (1965); G. Sartori, *The Theory of Democracy Revisited* 2 vols. (1987); J. Schumpeter, *Capitalism, Socialism, and Democracy* (1950); Y. Simon, *Philosophy of Democratic Government* (1951); T. Thorson, *The Logic of Democracy* (1962); Walzer, *Philosophy and Democracy*, 9 *Pol. Theory* 379 (1981).

28. *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535 (1964).

matrix, the indispensable condition of nearly every other form of freedom."²⁹

Democratic theory also sanctifies rights ancillary but necessary to political participation, such as a certain degree of privacy so that a person may join or support unpopular causes without fear of sanctions imposed either by government or fellow citizens.³⁰

Democratic theorists argue that the people, as both authors and subjects of the law, are not apt to tyrannize themselves. They will try to choose officials who will not enact oppressive laws and will vote out of office those who do. The "mass of citizens," Thomas Jefferson once claimed, "is the safest depository of their own rights."³¹ The probability of defeat at the next election deters officials from even seeming to infringe on civil rights. Thus democratic theory enshrines popular participation not only for its positive effect of allowing expression of individual dignity and autonomy, but also for its negative effect of limiting governmental incursions into substantive rights. It was because of this negative function that the U.S. Supreme Court referred to voting as "a fundamental political right, because preservative of all rights."³²

For democratic theory, it is a particular set of processes that make governmental decisions morally binding: the people's freely choosing their representatives, those representatives' proposing, debating, and enacting policy (and later standing for reelection), and then executive officers' enforcing that policy according to directives from the people's representatives. Whether embodied in statutes or reflected in officials' actions, public policy draws its legitimacy from being the product of authority delegated by the sovereign people exercising their right to act as autonomous human agents.

Some democratic theorists concede that these processes offer little protection, beyond what free and meaningful political participation requires, for putative rights either of individuals or groups. Thus the

29. *Movie Boycott Case*, 7 BVerfGE 198 (1958); in W. Murphy and J. Tanenhaus, *supra* note 6, at 529. See also the Court's comments in the *Schmid-Spiegel Case*, 12 BVerfGE 113 (1961), in D. Kommers, *supra* note 6, at 378.

30. I make this point in some detail in W. Murphy, *The Right to Privacy and Legitimate Constitutional Change*, in *The Constitutional Bases of Political and Social Change in the United States* 213 (S. Slonim ed. 1990).

31. Letter to John Taylor, May 28, 1816 in 11 *The Works of Thomas Jefferson*, 527 (P. Ford ed. 1905).

32. *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 1071 (1886). In the context of that case, this statement was merely a dictum, but the Court has since adopted it as ruling law. See *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535 (1964); and *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S. Ct. 1362, 1382 (1964).

specter of "the tyranny of the majority"³³ haunts the dark corners of democratic power. But, in several important ways, this admission may sell arguments for democracy short.

First, some theorists make the empirical claim that in democracies whose populations are ethnically, religiously, economically, and socially diverse, political cleavages are rarely cumulative.³⁴ Because alliances organize and dissolve as issues change, the same interest is not likely to find itself continually allied with one set of groups against another

33. Even for those who take their democracy neat, undiluted by constitutionalism, majority rule is a problematic concept, as Dahl demonstrates (R. Dahl, *supra* note 27, at chs. 10-11), one that democracy does not necessarily require. On this issue, Walzer, *supra* note 27, opts for a Rousseauian solution. To be legitimate, the popular will and thus the will of its representatives must will generally. That is, a valid law cannot simply reflect prejudices against minorities either by imposing burdens only or principally on them or by not including their interests in framing that statute. Such a limiting principle may flow from the premise that it is the people as a whole who are sovereign and thus majority rule is no more than a decision-making arrangement. This sort of reasoning also raises interesting questions about: (1) how to determine when a law merely makes distinctions—as almost all complex statutes must—and when it invidiously discriminates; and (2) who shall make such determinations: the people, their elected representatives, or non-elected officials such as judges. J. Ely, *Democracy and Distrust* (1980), makes a similar argument and contends that, in the American context, judges have paramount obligations both to protect minorities and also to keep channels of political communication open. Walzer does not offer an institutional solution to either question, but the general tenor of his argument evidences a reluctance to rely on judges. For those who accept democracy only as modified by what we now term constitutionalism, majority rule is even more problematic. Cf. also Madison's comments in *The Federalist*, No. 49 about the necessity of constructing institutions to help reason control passion, and his letter to Jefferson, October 17, 1788, see *infra* text accompanying note 49. See also his letter to Jefferson, February 4, 1790:

On what principle is it that the voice of the majority binds the minority? It does not result, I conceive, from a law of nature, but from compact founded on utility. A greater proportion might be required by the fundamental Constitution of Society, if under any particular circumstances it were judged eligible. Prior, therefore, to the establishment of this principle, *unanimity* was necessary; and rigid Theory accordingly presupposes the assent of every individual to the rule which subjects the minority to the will of the majority.

The Mind of the Founder: James Madison 233 (M. Meyers ed. 1973) (emphasis in original). In 1833, Madison wrote an extended essay on "majority Government" in which he defended majority rule in the context of federal-state relations against a challenge by those favoring interposition. *Id.* at 521.

34. Robert A. Dahl has done much theoretical and empirical work here. In addition to his *Democracy and Its Critics*, *supra* note 27, see R. Dahl, *A Preface to Democratic Theory* (1956); Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *J. of Pub. L.* 279 (1957) (now Emory L.J.); R. Dahl, *Polyarchy: Participation and Opposition* (1971); and R. Dahl, *Democracy in the United States: Promise and Performance*, especially ch. 18 (4th ed. 1976). See also David Truman's classic work, *D. Truman, The Governmental Process* (1960). J. Greenstone analyzed much of the relevant literature in *Handbook of Political Science* 2, at 243-318 (F. Greenstein and N. Polsby 1975).

permanent coalition. The limited scope and lifespan of these common interests, some theorists assert, force democratic politics to play according to the principle the Russian Foreign Minister gave John Quincy Adams in 1815 about diplomacy: Always hate your enemy as if tomorrow he may be your friend, and always love your friend as if tomorrow he may be your enemy.³⁵ Overall, such checks push public officials who wish to be reelected to act as brokers and compromise clashes rather than adjudicate, or themselves contest in, winner-take-all struggles. In sum, officials will be wary of oppressing any group for fear it will be part of tomorrow's winning coalition and exact revenge.

What has been called a "federalist theory of tolerance" for minorities may increase protection for minorities; the majority of the community may agree that certain groups deserve discrimination, but disagree over which groups should be so honored. The claim is that when the hostility of the community or its political elites "is dispersed, ordinary politics will moderate mass sentiments of intolerance, given the practical necessity to forge a majority on other issues."³⁶

A second set of protections is cultural. Both for the population as a whole and more particularly for professional politicians, true democracy attempts to build up, through opposing groups' negotiating and compromising with each other, an intellectual and emotional environment—a political culture—that fosters moderation. Success in the labyrinthine passages of bargaining and negotiation requires actors to internalize certain "rules of the political game" that demand respect for the rights of all participants. Even if initially based on self-interest rather than general moral principles, those "rules" are likely to foster intellectual habits that will influence behavior. Robert A. Dahl claims that "the democratic process is itself a form of justice: It is a just procedure for arriving at collective decisions."³⁷ Prudential or moral acceptance of the maxim that, in a democratic context, "some things simply aren't done" is likely to include among those "some things" trampling on individual rights and treating classes of people unfairly.

B. Constitutionalism

"Constitutionalism" is not an immaculate conception.³⁸ Its etymological kinship with the word "constitution" begets confusion. It is

35. Quoted in S. Bemis, *John Quincy Adams and the Foundations of American Foreign Policy* 188 (1949).

36. J. Sullivan, J. Piereson, and G. Marcus, *Political Tolerance and American Democracy* 22 (1982). See also J. Sullivan, J. Piereson, and G. Marcus, *Political Tolerance in Context: Support for Unpopular Minorities in Israel, New Zealand, and the United States* (1985).

37. R. Dahl, *supra* note 27, at 164, 175, and Part IV, generally.

38. It is more correct to call constitutionalism a concept than a conception, as Ronald Dworkin would remind us. R. Dworkin, *Taking Rights Seriously*, ch. 5 (1977).

important to keep in mind that, as most European and North American scholars³⁹ define the two terms, the closeness of their linguistic connection does not necessarily spark an intimate political relation. Constitutionalists typically want their nation to have a constitutional text, but they recognize both: (a) a constitution need not employ a written text, and indeed, probably is never fully encapsulated in a document; and (b) if such a document exists, it might, either by its own terms or as authoritatively interpreted, reject democracy and/or constitutionalism.

These two theories display a common defect: Neither has a supreme pontiff who can definitely distinguish orthodoxy from heresy. Most constitutionalists,⁴⁰ however, would concur with Carl J. Friedrich's identification of their "core objective" as "protect[ing] the *self* in its dignity and worth," guarding "each member of the political community as a political person, possessing a sphere of genuine autonomy."⁴¹ Constitutionalism agrees with Jefferson's assertion that "[o]ne hundred and seventy-three despots would surely be as oppressive as one An *elective despotism* was not the government we fought for"⁴²

It is not unreasonable to argue that "Pure Constitutionalists," if such people existed, would have a lot of anarchism in their souls, for they are acutely suspicious of all authority. They assume that people are by nature free; solely to protect their rights should (and do) they give permission for others to rule them, and that permission is (or should be) limited in scope and time. "Governments are instituted among

39. In attending conferences in Latin America, I have found that many scholars in that region treat constitutionalism as only meaning fidelity to whatever text, however contemptuous of individual rights, is currently in force. I would prefer the admittedly awkward term "constitutionism" for this Latin American usage.

Many European and North American scholars treat constitutionalism as "Liberalism's political theory." Although there is certainly an historical linkage between the two, and they share profound respect for individualism, it is a mistake, I believe, to equate them. Moreover, what people mean by Liberalism is so varied and vague that assuming unity increases the already multiple images that both "constitutionalism" and "democracy" generate.

40. For analyses, see Casper, *Constitutionalism*, in *Encyclopedia of the American Constitution* 2, at 473-80 (L. Levy, K. Karst, and D. Mahoney eds. 1986); C. Friedrich, *Constitutional Government and Democracy* (4th ed. 1968); C. Friedrich, *Constitutional Reason of State* (1957); C. Friedrich, *Transcendent Justice* (1964); Hamilton, *Constitutionalism*, in *Encyclopaedia of the Social Sciences* IV, 255 (E. Seligman et al. eds. 1931); C. McIlwain, *Constitutionalism: Ancient and Modern* (1940); *Constitutionalism* (J. Pennock and J. Chapman eds. 1979); *Liberal Democracy* (J. Pennock and J. Chapman eds. 1983); Schram, *A Critique of Contemporary Constitutionalism*, 11 *Comp. Pol.* 483 (1979); Wheeler, *Constitutionalism*, in F. Greenstein and N. Polsby, *supra* note 34, vol. 5, at 1-95; and *Constitutionalism: The Philosophical Dimension* (A. Rosenbaum ed. 1988).

41. *Transcendent Justice*, *supra* note 40, at 16-17.

42. Notes on Virginia, in *The Writings of Thomas Jefferson* II, 163 (A. Lipscomb ed. 1903).

Men," so the Declaration of Independence asserts, solely to protect basic rights and maintain their legitimacy only so long as they offer that protection. For constitutionalists, Edward S. Corwin argued, legitimate government is

a trust which, save for the grant of it effected by the written constitution, were non-existent, and private rights, since they precede the constitution, gain nothing of authoritativeness from being enumerated in it, though possibly something of security. These rights are not, in other words, fundamental because they find mention in the written instrument; they find mention there because fundamental.⁴³

To validate governmental actions touching individual rights, constitutionalists contend, even a democracy must point to clear terms in a prior agreement—whether or not a constitutional text—granting the power officials assert.

At root, constitutionalists tend to be more pessimistic than democratic theorists about human nature. They are constantly concerned, perhaps obsessed, with mankind's penchant to act selfishly and abuse public office.⁴⁴ "From the nature of man," George Mason purportedly told the Convention at Philadelphia, "we may be sure, that those who have power in their hands . . . will always when they can . . . increase it."⁴⁵ In *Federalist* No. 6, Hamilton was even more candid: Although the best of men are amenable to reason, by nature they "are ambitious, vindictive, and rapacious." Jefferson was similarly suspicious: "In questions of power . . . let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."⁴⁶

43. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 Mich. L. Rev. 247-248 (1914); reprinted in Corwin on the Constitution III, 27 (R. Loss ed. 1988).

44. For an empirical study of one period of political oppression in the United States that throws some doubt on many of these democratic protections, see Gibson, *Political Intolerance and Political Repression during the McCarthy Red Scare*, 82 Am. Pol. Sci. Rev. 511 (1988). See also M. Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* (1949). Constitutionalists also have ample cause for embarrassment over the imprisonment of the Nisei: *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193 (1944). For the early period of American history, when political restraints did not prevent restraints on political expression, see L. Levy, *The Emergence of a Free Press* (1985), and J. Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (1956).

45. So Madison reports in his Notes, *The Records of the Federal Convention of 1787*, I, 578 (M. Farrand ed. 1911; reissued, 1966, J. Hutson ed.). I say "purportedly" because we have no shorthand transcription of the proceedings, only notes taken by several participants who were themselves engaged in a heated debate. For a brief discussion of some of the problems here, see Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 Tex. L. Rev. 1 (1986); and L. Levy, *Original Intent and the Framers' Constitution*, ch. 1 (1988).

46. *Kentucky Resolutions* (1798); reprinted in 8 *The Writings of Thomas Jefferson* 475 (P. Ford ed. 1897).

On a normative level, constitutionalism rejects the primacy of process. Where individual rights are concerned, the legitimacy of public policy depends not simply on the authenticity of decision makers' credentials as the people's freely chosen representatives, but also on substantive criteria. There are some fundamental rights that government may not trample on, even with the enthusiastic acceptance of a massive majority of the nation, for it was to guard those rights that people subject themselves to government. Constitutionalists would deny legitimacy to a law that violated human dignity, even if it had been unanimously enacted according to proper procedures by a legislature chosen after full, open public debate, followed by a free election, then enforced by an elected executive scrupulously observing all relevant administrative rules.

Democratic theorists would chant "amen" to a paean to human dignity and autonomy, but they balk at delegating authority to define the scope of such values to institutions not responsible to the people. As Dahl writes: "Just as a majoritarian democratic system offers no constitutional guarantee of minority rights and privileges beyond the primary political rights of all citizens, so nonmajoritarian democratic arrangements by themselves cannot prevent a minority from using its protected position to inflict harm on a majority."⁴⁷ For their part, constitutionalists believe that allowing popularly elected officials to determine "the rules of the game," especially where the rights of individuals or minorities are concerned, is, as the Italian proverb puts it, "to make the goat your gardener."

The differences here are epistemological as well as practical. Both theories agree that the difficulties in defining exact boundaries of rights and powers are immense. The general response of democratic theorists is to move toward moral relativism. They believe that reason may be of great use in silhouetting general outlines, but of limited utility in drawing precise lines. These latter lines, democratic theorists maintain, are likely to be quite arbitrary, heavily infected by considerations of self interest. Thus they are best left not to principled judgments by public philosophers, but to adjustments made by elected officials who are both in close touch with the citizenry and able to bargain and compromise.

Constitutionalists do not deny the difficulties in making defensible judgments about boundaries. But they have greater, though far from total, faith in reasoned inquiry to solve such problems as well as in the capacity of men and women who are insulated from what Jefferson

47. R. Dahl, *supra* note 27, at 156-57.

termed "the perverse demands of citizens"⁴⁸ to employ that reason dispassionately. In short, constitutionalists believe that, where questions of basic rights are involved, it is the quality of reasoned argument that should prevail, not numbers of votes; and, for reason to have a fighting chance, it must operate through institutions that are shielded from the shifting moods of public opinion.

Constitutionalists suspect that democracy's lack of institutional restraints on the people's representatives will lead to an authoritarian system. They grant that such a result would violate democratic norms, as probably would the means by which it came about. Still, they fear that leaving "all power to the people" will produce democratic despotism, not democratic justice. As Madison wrote Jefferson:

In our Governments the real power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.⁴⁹

While accepting the necessity to free government of open elections, societal divisions, crosscutting rivalries, and the favorable political culture that democratic processes inspire, constitutionalists doubt the efficacy of these forces to protect unpopular minorities or nonconformist individuals. "The democratic process obviously could not exist," Dahl concedes, "unless it were self-limiting."⁵⁰ And it is precisely agreement with democratic theorists on this point that breeds concern among constitutionalists. They simply do not believe that, over the long haul, democracy is capable of effective "self-limiting" and so insist on the necessity of additional institutional barriers to limit what even democratically responsible government can do.

A bill of rights replete with biblical "thou shalt nots" and enforced by judges who are politically insulated and authorized to invalidate legislative and executive action they believe to violate those rights is the classic constitutionalist institution, but it is by no means the only one. Distinguishing among powers to legislate, execute, and adjudicate and requiring separate institutions to share those powers are also common, as are versions of bi-cameralism and federalism.⁵¹ To splinter the power

48. Letter to James Madison, March 15, 1789, in 14 *The Papers of Thomas Jefferson* 659 (J. Boyd ed. 1958); Jefferson gave the phrase in Latin: "civium ardor prava jubentium."

49. Letter to Thomas Jefferson, October 17, 1788, in *The Mind of the Founder: James Madison* 206 (M. Meyers ed. 1973).

50. R. Dahl, *supra* note 27, at 154.

51. Australia, Canada, Germany, India, Switzerland, and the United States have utilized federalism to limit central power, as has the Czech and Slovak Federative Republic

of majorities into smaller chips, the United States also employs a system of staggered elections for the two houses of its national legislature; no party can gain a majority of both at single election. Furthermore, when the United States chooses its President, it does so indirectly and at an election at which only one-third of senators face the voters.

C. *Constitutional Democracy*

In sum, constitutionalism tries to limit risks to liberty and dignity by lowering the stakes of politics. Democratic theory tries to limit those risks by promoting, directly and indirectly, the right to participate in governmental processes. The basic differences between the two theories lie not in any dispute about the importance of human dignity and autonomy, but in how best to express as well as protect those twin values.

One might argue that the two theories need each other, not only to clarify their mutual objectives but also to supplement the restraints of each on abuses, whether of over- or under-use of public power.⁵² The "moral fact is," George Kateb claims, "that, at bottom, the electoral system and constitutional restraint serve the same value or cluster of values. Each needs the other not only for practical durability and efficacy, but also to fill out the other's moral meaning. The strain between them is an indication of their affinity."⁵³

On the one hand, when basic issues are ultimately resolvable by votes of officials whose jobs depend on satisfying a majority of their constituents, minorities may well be in trouble. Furthermore, as Bruce Ackerman⁵⁴ reminds us, the concept of representation is itself highly problematic. That governmental officials are chosen by the people should not cause us to confuse these officials with their constituents. The people and their representatives are physically, legally, and morally different. Precisely what messages the people have sent their representatives is seldom obvious, though it is in public officials' interest to pretend that message is one of capacious delegation of discretion. In the absence of constitutionalism's institutional restraints, government by the people may degenerate into government for a small segment of the people.

and most probably will the Russian Federal Republic. Yugoslavia, of course, has had a federal arrangement for some decades, though in the fall of 1991, it is, in the argot of social scientists, disaggregating.

52. For an argument to this effect, see Stephen Holmes's two essays, *Holmes, Gag rules or the politics of omission*, 19 and *Holmes, Precommitment and the paradox of democracy*, 195 in *Constitutionalism and Democracy* (J. Elster and R. Slagstad eds. 1988), as well as Cass Sunstein's response, *Sunstein, Constitutions and democracies: an epilogue*, id. at 338-42.

53. Kateb, *supra* note 27, at 361.

54. Ackerman, *Discovering the Constitution*, 93 *Yale L.J.* 1013 (1984).

On the other hand, the dangers of constitutionalism lie in its propensity to paralyze government and allow a different kind of tyranny, that of wealthy private citizens over their more numerous but poorer fellows. Even partial paralysis may substantially and unfairly affect allocations of costs and benefits within a nation. Preserving the status quo may not only serve particular groups, it may also injure others; and there is no way to determine, *a priori*, if even a mild form of *immobilismo* benefits the nation as a whole.⁵⁵

Insofar as constitutionalism allows officials who are not responsible to the people to set rules for the political game, it runs a severe risk of establishing an oligarchy of men and women who, no matter how intelligent and honest, will put into play their own perceptions, prejudices, and predilections. If the peril of unrestricted rule by elected officials is that they will construe the political system to advance their interests by advancing what they deem to be the interests of the major portion of their constituents, the peril in delegating authority to officials not responsible to an electorate is that they will construe the system to permit only what they themselves, perhaps peculiarly, believe is proper.

The burned-out hulks of unsuccessful efforts at constitutional democracy littering recent African, Asian, and Latin American history testify to the fragility of this kind of polity. Not only do competing political theories strain the system, so do efforts to operationalize either theory.

Designing institutions, whether democratic, constitutionalist, or partly both, poses delicate problems of political architecture. It is hardly easy to fashion institutions that respond to and accurately reflect what the people want government to do about complex problems. And even democratic theorists dispute how much elected officials should reflect and how much they should refract public opinion.⁵⁶ Furthermore, in democratic policy making, an indistinct line separates compromise from betrayal, concession from cowardice, and advocacy from coercion. Like conflict among political institutions, continuous concern with accom-

55. See Sunstein, *supra* note 52.

56. The classic works, of course, were Edmund Burke's *Speech to the Electors of Bristol* (1774), and John Stuart Mill's *Considerations on Representative Government* (1861). For a substantive and bibliographic analysis, see, *inter alia*: Miller and Stokes, *Constituency Influence in Congress*, 57 *Am. Pol. Sci. Rev.* 45 (1963); H. Pitkin, *The Concept of Representation* (1967); J. Wahlke, H. Eulau, W. Buchanan, L. Ferguson, *The Legislative System* (1962); Eulau, Wahlke, Buchanan, Ferguson, *The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke*, 53 *Am. Pol. Sci. Rev.* 742 (1959); de Grazia, *Representation: Theory in International Encyclopedia of the Social Sciences XIII*, 461-65 (D. Sills ed. 1968); and J. Pole, *Political Representation in England and the Origins of the American Republic* (1966). For controversy about the "representativeness" of judges, see *Chisom v. Roemer*, 111 S. Ct. 2354 (1991); and the discussion in W. Murphy and J. Tanenhaus, *The Study of Public Law at 37-38* (1972).

modating competing interests may produce governmental paralysis and popular frustration, yielding sterile, patchwork policies rather than effective solutions to vexing social or economic problems.

It is, perhaps, even more difficult to construct constitutionalist institutions that are insulated from outside pressures and able to protect the polity's fundamental values from the intemperate judgment of *all* public officials. The ancient question "[w]ho guards the guardians?" remains relevant. Political insulation may breed irresponsibility as well as protect integrity. The arrogant judge is no stranger to constitutionalist institutions.

To survive and prosper, constitutional democracy needs, perhaps more than any other kind of political system, leaders who have both patience and wisdom, virtues that have never been in great supply. Constitutional democracy also needs a political culture that simultaneously encourages citizens to respect the rights of fellow citizens even as they push their own interests and hold their representatives accountable for advancing those interests—a culture whose force cannot diminish when private citizens become public officials. That such a political culture will pre-exist constitutional democracy is unlikely, making it necessary for the polity to pull itself up by its own boot straps by helping to create the very milieu in which it can flourish. Turning that paradox into a *fait accompli* is likely to require generations.

Given difficulties of creation and maintenance as well as frequent manifestations of constitutional democracy's fallibility in creating public policies to cope with critical problems, the question may be why any people would try to establish such a system. The answer, insofar as there is one that can be defended by reason, cannot be that that sort of polity spawns prosperity, for surely an accounting on this score would be mixed. However much contrasts in 1989 between the Marxian economies of Central and Eastern Europe and those of the West enraged people in the former satellites, constitutional democracies have not been immune from either painful recessions or catastrophic depressions.

During the 1930's, it was tempting to look to Fascism and Stalinism as much more efficient ways of coping with economic problems.⁵⁷ A great deal of conventional wisdom still maintains that authoritarian regimes are better able than constitutional democracies to cope with economic crises.⁵⁸ Mikhail Gorbachev has used such arguments to justify

57. For Naziism's economic success before World War II, see A. Barkai, *Nazi Economics: Ideology, Theory and Policy* (1990).

58. For a discussion, see Remmer, *Democracy and Economic Crisis: The Latin American Experience*, 42 *World Pol.* 315 (1990). After an intense analysis of available data, she concludes that in Latin America, at least, the recent record of democratic regimes is

interrupting his push toward democracy in the Soviet Union to cope with economic crises. And, when Boris Yeltsin, one of Gorbachev's harshest "democratic" critics, became prime minister of the Russian Republic, one of his first acts was to persuade the Republic's parliament to delegate to him nearly plenary power to deal with its economic difficulties.

The data linking regimes to economic performance do not reveal truths that hold across time and space. At very least, however, those data show that: (a) neither "the market" nor the State can guarantee prosperity or even a full stomach; (b) "the market's" performance in *already developed* nations is, on the whole, much better than the State's; but (c) without effective governmental restraints, capitalism can operate on the poor with a brutality that would redden a commissar's cheeks. "The iron law of wages" that economic theorists announced, was, after all, a justification for keeping workers' incomes at a level barely above starvation.

The chronicles of constitutional democracies in promoting peace sing both a hymn and a dirge. These nations may seldom if ever go to war with each other,⁵⁹ but hallowing self-government and praising individual rights of their own citizens do not, apparently, preclude colonialism, or use of mass violence to carve out and retain spheres of influence, or even prevent fear of foreign enemies from turning into paranoia in domestic politics and rationalizing oppression at home.⁶⁰

A reasoned justification for constitutional democracy must mainly rest on its commitment to political freedom and individual liberty. Like ancient Israel, constitutional democracies have often violated the covenant the people made with themselves and their posterity, adding to the chancey nature of attachment to such a system. Again like ancient Israel, however, constitutional democracies have almost as often renewed that covenant.

hardly worse than military dictatorships:

The experience of Latin America countries since the outbreak of the debt crisis [ca. 1982] establishes no basis for asserting that authoritarian regimes outperform democracies in the management of economic crisis. When we control for the magnitude of the debt burden at the outbreak of the crisis, no statistically significant differences emerge between democratic and authoritarian regimes or between new democracies and more established regimes Despite debt burdens that were significantly higher than those of more established regimes, the supposedly fragile new Latin democracies performed just as effectively as their authoritarian counterparts in managing the debt crisis.

Id. at 333.

59. See Michael W. Doyle's two part article in which he speaks of "liberal regimes" rather than constitutional democracies: Doyle, Kant, Liberal Legacies, and Foreign Affairs, 12 Phil. & Pub. Aff. 205 and 323 (1983); and more generally, M. Doyle, *Empires* (1986).

60. See, for example, the United States during the McCarthy Era: Gibson, *supra* note 44.

One might argue that the purpose of constitutionalism is not to keep people from dying in the streets but from dying in jail for the crime of being different.⁶¹ It is democracy's task, operating within constitutionalist restrictions, to allow the people to choose among economic options—or, at minimum, among officials who will spawn economic policies.⁶² Whether the people or their representatives will choose wisely is a question whose answer can be judged only *ex post*. Constitutional democracy's pledge does not imply the end of economic and political struggle, but the beginning, or continuation, of a politics conducted in peace, through clearly marked and more or less open processes, for limited goals that always include respect for the interests of opponents as well as allies. It is the "pursuit of happiness" constitutional democracy promises, not happiness itself.

III. CONCEPTS OF A CONSTITUTION

The normative aspects of constitutionalist and democratic theory lead to inquiry about the concept of a constitution itself. A systematic analyst immediately faces a series of difficult questions: What is a constitution? What does any particular constitution include? What is its authority? What are its purposes? How can a nation maintain and validly change that sort of political system?

These queries are tightly linked, the first two perhaps even more than the others. To constitute means to make up, order, or form; thus a nation's constitution should, by definition, contain the state's most basic ordering—a step, but only one step, toward understanding. Early in *The Politics*,⁶³ Aristotle defined a constitution as "the organization of a polis, in respect of its offices generally, but especially in respect of that particular office which is sovereign in all issues." Later, he widened the term's meanings: "an organization of offices in a state, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association

61. I paraphrase a remark by Fabio Konder Comparato at the Latin American Regional Institute of the American Council of Learned Societies' Comparative Constitutionalism Project, held in collaboration with the Centro de Informaciones y Estudios del Uruguay (1988) at Punta del Este, Uruguay. See his paper, *The Constitutional System of Liberalism and the New Functions of the Modern State*, available from the ACLS, 228 E. 45th St., New York, NY 10017.

62. See J. Schumpeter, *supra* note 27, at 269: "the democratic method is that institutionalized arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." Schumpeter thought that capitalism was essential to democracy and was deeply fearful that "the people" would eventually opt for socialism and thus destroy the basis of their free society.

63. *The Politics of Aristotle*, Bk. III, ch. VI, § 1 (E. Barker trans. 1946).

and all its members is prescribed."⁶⁴ Still later,⁶⁵ his definition further broadened, linking a constitution, as Sir Ernest Barker pointed out, to "a way of life."⁶⁶

One need not look very far to see that constitutional texts as well as less formally mandated "ways of life" often violate central tenets of both constitutionalist and democratic theory, making the term "government by constitution" less useful than many scholars have supposed. A systematic analyst thus faces a difficult decision, whether: (1) to set up a definition of a *real* constitution, which would require that "thing" to meet certain normative criteria;⁶⁷ or (2) to utilize empirical criteria somewhat along the lines of one or more of Aristotle's definitions. The first option has great appeal in that it would deprive authoritarians of one cloak for tyranny, but it would create additional problems of nomenclature. What would one call "a constitution" that, in fact, ordered an authoritarian state? The second option causes less confusion and still allows us to classify constitutions in intellectually useful ways.

A. *What Does the Constitution Include?*

Canadians long ago took a second step to aid understanding. They distinguished between the constitutional document and the larger constitution.⁶⁸ Indeed, the Canadian Constitution Act, 1982, lists a series of other texts imbued with constitutional status,⁶⁹ and the Canadian Supreme Court has accepted that the broader constitution includes custom and tradition.⁷⁰ In the United States, however, scholars, judges, and other public officials seldom speak so clearly. Often "the constitution" to which they refer seems coterminous with the text of 1787 as amended. Almost equally as often, however, "the constitution" implicit in their arguments goes far beyond that document to include interpre-

64. *Id.* at Bk. IV, ch. I, § 10.

65. *Id.* at Bk. IV, ch. XI.

66. *Id.* at 180.

67. John E. Finn defends and utilizes this approach with some success. See J. Finn, *supra* note 19, especially ch. 1.

68. See, for example, R. Dawson, *The Government of Canada* ch. 4 (N. Ward rev. 4th ed. 1963). For general discussions of the problem in the United States, see especially H. Horwill, *The Usages of the American Constitution* (1925); Grey, *Do We Have an Unwritten Constitution?*, 27 *Stan. L. Rev.* 703 (1975); Moore, *Do We Have an Unwritten Constitution?*, 63 *S. Cal. L. Rev.* 107 (1989); and W. Murphy, *The Nature of the American Constitution, The James Lecture* (1989).

69. Schedule I, Canadian Constitution Act (1982).

70. In the Matter of § 6 of The Judicature Act, [1981] S.C.R. 753. For a bitter dispute in American constitutional interpretation on the role of tradition and how and where interpreters can discover it, see the debate between Justices Antonin Scalia and William J. Brennan, Jr., in *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S. Ct. 2333 (1989).

tations, practices, traditions, and "original understandings" conveniently, if not always accurately, ascribed to founders or emendators.

Generations of beginning students in universities across the United States have spent time vainly poring over the American text in a quest for such constitutional doctrines as judicial review,⁷¹ executive privilege, interstate commerce, presumption of innocence, "one person, one vote," or even the interpretive significance of original understanding. It is probable that these students, along with many others, have thought it strange that interpreters typically ignore such apparently straightforward terms as those of the ninth amendment, which, in language reminiscent of the Ten Commandments, forbids officials to construe the text's listing of rights as exhaustive.

It is possible to observe similar additions to and subtractions from the constitutional documents of almost every other constitutional democracy. In an early case, for example, the *Bundesverfassungsgericht* announced the doctrine of *Bundestreue* or "loyalty to the federation," which it has since followed:

In the German federal state all constitutional relationships between the whole state and its members and the constitutional relationships among members are governed by the unwritten constitutional principle of the reciprocal obligation of the Federation and the Laender to behave in a pro-federal manner.⁷²

Indian judges have created the constitutional principle that they may determine the substantive legitimacy of amendments to the constitutional text.⁷³ It appears to be inevitable that some interpretations and practices

71. Compare Senator John Breckenridge's question about judicial review while *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), was pending: "Is it not extraordinary, that if this high power was intended, it should nowhere appear [in the constitutional text]?" 11 *Annals of Cong.* 179 (1803).

72. The *Television Case*, 12 BVerfGE 205 (1961), in W. Murphy and J. Tanenhaus, *supra* note 6, at 213-14. See also the *Concordat Case*, 6 BVerfGE 309 (1957), *id.* at 225; and *Atomic Weapons Referenda*, 8 BVerfGE 105 (1958), *id.* at 229. The FCC has imbedded other principles in the "constitution:" The Basic Law's ordaining a rule of law requires "the principle of proportionateness," which "demands that, where basic rights are restricted, a law may provide for only that . . . which is absolutely necessary for protection of the legal interest recognized by the Basic Law It also follows . . . that any governmental encroachment upon a citizen's freedom or property must at least be subject to effective judicial control." *Privacy of Communications Case*, 30 BVerfGE 1 (1970), *id.* at 660-61; see also the *Mephisto Case*, 30 BVerfGE 173 (1971), *id.* at 538; and the *Abortion Reform Law Case*, 39 BVerfGE 1 (1975), *id.* at 425.

73. Americans may think their constitutional law is complex, but it is relatively simple when compared to India's. See, generally, H.M. Seervai's three-volume work, *Constitutional Law of India* (1983-88). The most notable and dramatic instance of interpretive accretion began with *Golak Nath v. Punjab*, [1967] A.I.R. (S.C.) 1643, in which the Supreme Court of India invalidated a constitutional amendment on grounds that the

will fasten onto an authoritative text, and some portion of these will significantly affect distributions of power and rights. Like the sacred scriptures of Judaism, Christianity, and Islam, a constitutional document that endures is likely to gather barnacles. Sooner or later, and usually sooner, some of those encrustations erode parts of the text, while others insinuate themselves into the canon. In sum, although "constitutional doctrine" may be conceptually different from "the constitution," at least for limited periods of time, some doctrines will melt into the constitutional text.

Collectively, these interactions help shape a political culture, bringing Aristotle's broadest concept of a constitution as "a way of life" into being. What we witness is, in effect, a constant process of constitutional creation disguised, even to its operators, as interpretation or administration. Insofar as a political theory, whether constitutionalist, democratic, or other, is latent in the document and that document is authoritative, the theory(ies) and the text are likely to act on each other and on the people and their government. In turn, the people, their government, and their problems act on that document and its pre-textual theories and post-textual interpretations and practices. To complicate life, neither of these sets of forces necessarily push or pull in the same direction, as is evident when constitutionalist and democratic theory collide or when cultural beliefs solemnly and simultaneously affirm the sanctity of human life and a woman's right to control her own body.

B. How Authoritative is the Constitution?

One of the essential qualifications for effective interaction among text, interpretations, practices, and people is that the text be authori-

Constitution could not be amended so as to abridge fundamental rights. When the Indians further amended their constitutional document to declare that courts could not invalidate amendments on such grounds, Art. 31C, the 25th Amendment (1971), the justices accepted this reversal of *Golak Nath*; but they retreated from rather than repudiated all that *Golak Nath* stood for. The Court substituted for its earlier doctrine a new claim that judges could legitimately strike down amendments that changed the basic structure of the political system. *Kesavananda Bharati's Case*, [1973] S.C.R. 1 (Supp.) (Ind.). (The separate opinion of Justice H. R. Khanna is especially interesting.) A few years later, the court held unconstitutional several clauses of a new amendment designed to eliminate this less extensive judicial power over constitutional change. *Minerva Mills v. Union of India*, [1980] S.C.R. 1789, striking down clauses 4 and 5 of the 42nd Amendment, changing the terms of Art. 368, which is entitled Power of Parliament to amend the Constitution and procedures therefor. Cl. 4 read: "[n]o amendment of this Constitution (including the provisions of Part III [dealing with fundamental rights] made or purporting to have been made under this article . . . shall be called in question in any court or on any ground." Cl. 5 stated: "For removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."

tative. Obviously, neither Stalin's nor Mao's document reflected "the state's basic ordering." In fact, although most constitutional texts either explicitly or implicitly proclaim themselves to be "supreme law,"⁷⁴ few are authoritative in the sense of receiving full obedience. To cite only an American example, no Congress or President has ever taken seriously the constitutional document's requirement that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."⁷⁵ This not-so-benign neglect has often made reelection easier even as it has raised serious questions of accountability for democratic theory.

C. *What Are the Constitution's Functions?*

As with authority, one can speak accurately about functions only in nuanced terms, for a constitution can simultaneously play several roles in its polity theater. Moreover, there is no reason to believe, *a priori*, that it will speak each part with the same degree of effectiveness. Those functions vary from oppressing citizens and expanding a state's physical boundaries to spreading a gospel of peace, justice, and love within and beyond national boundaries.

A constitutional document has important tasks in these dramas. It may serve as a fig leaf to cloak cruelty with gracious rhetoric. To some extent, most constitutional texts, not simply those of Juan Peron, Augusto Pinochet, or assorted African military dictators, perform such a function, as blacks and women in the United States could have testified about the force of the fourteenth amendment for most of its first century. Indeed, the Critical Legal Studies Movement asserts that the entire American legal structure is a charade, masking the exploitation of various minorities for the benefit of white males.⁷⁶

74. For explicit claims, see, *inter alia*, the Constitution of Australia, Preamble; the Canadian Constitution Act, 1982, Art. 52; the Constitution of Italy, Art. 1; the Constitution of Ireland, Art. 6 (though amended before entry into the European Economic Community, to allow the Treaties of Rome to take precedence); the Constitution of Japan, Art. 98; and the Constitution of the United States, Art. 6. For implicit claims, see, *inter alia*, the Constitution of India, Arts. 251 and 254; the Basic Law of Federal Republic of Germany, Arts. 20(3), 23, 28(1) and (3), 37, 56, 64(2), 70, 87a(2), 98(2), and 142.

75. U.S. Const. art. I, § 9, cl. 1, 7. The Supreme Court has held that provision outside the reach of judicial enforcement. *United States v. Richardson*, 418 U.S. 166, 94 S. Ct. 2940 (1974).

76. It is difficult to generalize about a group that includes neo-Marxists, superliberals, and avid deconstructionists, especially when that loose association is going through the throes of a generational change. For a lengthy bibliography of the Critic's writings, see Kennedy and Klare, 94 *Yale L.J.* 461 (1984). The Symposium, *Critical Legal Studies Movement*, 36 *Stan. L. Rev.* 1 (1984), contains articles by Critics and Counter-Critics. The variegated composition of the movement is also well illustrated in *The Politics of*

A text may come to symbolize this sort of exploitation precisely because it is not authoritative. On the other hand, a document that speaks with authority may also operate as a symbol, but of the values to which its society aspires to foster.⁷⁷ Among the primary functions of such texts is to provide the standards by which officials and citizens can judge the legitimacy of governmental action. Insofar as that text embodies a set of aspirations for its people and is not fully authoritative, its rhetoric must fall short of reality and open itself and its people to charges of hypocrisy.

It is possible, though barely so, to conceive of a constitutional text as solely ordering offices. Thus it would not try to enshrine any value, democratic or otherwise, beyond fidelity to its own provisions. This task of ordering offices is the minimum a document would have to assay to be called a constitutional text, but it is hardly probable it could do so without relying heavily on some normative ideas if, for no other purpose, than to justify the ordering.

Easier to imagine is a text that would attempt to arrange offices to carry out particular kinds of norms, perhaps those of democratic theory. The most obvious example would be a document that did no more than (1) spell out the processes for electing and reelecting a parliament on the British model, and (2) list as protected only the rights directly and indirectly necessary to achieve free and open electoral contests.⁷⁸

A constitutional text would become more constitutionalist by attempting to catalogue a series of group and/or individual rights that extended beyond political participation. Probably, that sort of document would incorporate electoral prescriptions along democratic lines, for by and large constitutionalism's quarrel with democracy lies in what the latter does not try to do rather than what it tries to do.

It is very likely that a constitutional text that embodies constitutionalist and/or democratic theory will also articulate a set of aspirations. An authoritative text purporting to speak in the name of a people might

Law: A Progressive Critique (D. Kairys ed. 1982); and the very different attitudes displayed by two leading members of CLS, R. Unger, *The Critical Legal Studies Movement* (1986); and M. Kelman, *A Guide to Critical Legal Studies* (1987). Although CLS began in the United States, it is no longer strictly an American phenomenon. For essays by British "critters," see *Critical Legal Studies* (P. Fitzpatrick and A. Hunt eds. 1987); and an English scholar has written one of the more trenchant critiques: Finnis, *On "The Critical Legal Studies Movement,"* 30 *Am. J. of Jurisp.* 21 (1985).

77. See especially Corwin, *The Constitution as Instrument and as Symbol*, 30 *Am. Pol. Sci. Rev.* 1071 (1936); reprinted in Loss, *supra* note 43, at I, 168-79 (1981).

78. The constitutionalist question immediately arises: Who would enforce such rights if incumbents in parliament decided to violate them? Perhaps the response that would least clutter the polity's theoretical underpinnings would be a version of Ely's "reinforcing representative democracy." J. Ely, *supra* note 33, especially chs. 4-6.

well sketch the sort of community its authors/subjects are or would like to become, not only their governmental structures, procedures, and basic rights, but also their goals, ideals, and the moral standards by which they will judge their community and wish others, including their own posterity, to judge it. Certainly the basic documents of most constitutional democracies proclaim such purposes.⁷⁹

79. For example:

Canada:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

1. *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can demonstrably be justified in a free and democratic society.

Federal Republic of Germany:

The German people . . . Conscious of their responsibility before God and men, Animated by the resolve to preserve their national and political unity and to serve the peace of the world as an equal partner in a unified Europe, Desiring to give a new order to political life for a transitional period, Have enacted, by virtue of their constituent power, this Basic Law for the Federal Republic of Germany. They have also acted on behalf of those Germans to whom participation was denied. The entire German people are called upon to achieve in free self-determination the unity and freedom of Germany.

Ireland:

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We the People of Eire . . . seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, and the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution.

Italy:

Art. 1. Italy is a democratic Republic founded upon work. Sovereignty is vested in the people and shall be exercised in the forms and within the limits of the Constitution.

Art. 2. The republic recognizes and guarantees the inviolable rights of man, both as an individual and in the social organizations wherein his personality is developed, and it requires the performance of fundamental duties of political, economic, and social solidarity.

Art. 3. All citizens have equal social standing and are equal before the law, without distinction of sex, race, language, religion, political opinion, or personal conditions. It shall be the task of the Republic to remove obstacles of an economic or social nature that, by restricting in practice the freedom and equality of citizens, impede the full development of the human personality and the effective participation of all workers in the political, economic, and social organization of the country.

Japan:

We, the Japanese people . . . determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited

How the constitutional text and the larger constitution of any particular nation fit and function together is typically a hotly contested issue. The American debate in 1987 over the nomination of Robert H. Bork for the Supreme Court raised the issue of the extent to which that constitution, writ large or small, functions as a protector of substantive rights. Like Chief Justice William H. Rehnquist,⁸⁰ Bork has contended that the American constitution—a term he typically but not always restricts to the text⁸¹—includes much democratic theory (and therefore great protection for participational rights) but very little constitutionalism (and thus small protection for substantive rights beyond what free elections demand).⁸² The United States Constitution is, he asserted, primarily a charter laying out governmental powers. Individuals whose putative rights public policy threatens must either elect new representatives or point to a specific textual provision protecting in clear-cut terms⁸³ their putative right. Government need not justify its exercise of power vis-à-vis private citizens beyond showing that it has followed

with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we . . . recognize that all peoples of the world have the right to live in peace, free from fear and want. We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations. We, the Japanese people, pledge our national honor to accomplish these high ideals and purposes with all our resources.

80. See, e.g., Rehnquist, *The Notion of a Living Constitution*, 54 *Tex. L. Rev.* 693 (1976); reprinted in W. Murphy, J. Fleming and W. Harris, II, *American Constitutional Interpretation* (1986).

81. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1 (1971); R. Bork, *Foreword*, to G. McDowell, *The Constitution and Contemporary Constitutional Theory* (1985); Bork, *The Struggle Over the Role of the Court*, *National Review* 1137 (September 17, 1982); Bork, *Styles in Constitutional Theory*, *Yearbook 1984: Supreme Court Historical Society* 53; R. Bork, *Tradition and Morality in Constitutional Law*, *The Francis Boyer Lectures on Public Policy*, *American Enterprise Institute for Public Policy Research* (1984), reprinted in *Courts, Judges, & Politics* 635 (4th ed. W. Murphy and C. Pritchett eds. 1986); and R. Bork, *The Tempting of America* (1990).

82. See *supra* note 81.

83. Actually Bork takes a more restrictive view of rights: claimants must not only show the plain words of the constitutional text support their claim, but also that "the framers" of the original document or later amendment being invoked meant to include that right.

textually prescribed processes.⁸⁴ Bork's defeat marked a significant, though hardly a final, victory for a vision of the United States Constitution as a guardian of a wide orbit of fundamental rights.

IV. CONSTRUCTING A CONSTITUTION

Although many scholars and public officials may have misunderstood the differences between written and unwritten constitutions,⁸⁵ the decision to utilize or live without a constitutional text may still have immense effects on the polity. Anthropologists tell a story that illustrates the problem. The president of a new university was examining plans for the campus and noticed there were no paths among the buildings. She asked the dean of the school of architecture why, and he replied "Because that's a decision only the president can make." Her next question was the inevitable "Why me?" "Because," the dean explained, "there is a fine philosophic point at issue. Some of us want to lay out the paths we think most efficient, others want to wait and see what routes the students choose before putting in pavement."

A. *Why a Text?*

One would expect, then, that among the first questions founders would address is whether to lay down the hard paths of a constitutional text. There are at least three very strong arguments against such an effort. First, tradition and existing legal and political systems may provide norms that are adequate to achieve and maintain, if not full constitutional democracy, at least as much as the people want or can currently maintain. New Zealanders could thus follow the British model; enough citizens were content with their parliamentary system and Common Law that the colonists were able to avoid enacting a constitutional document.⁸⁶

84. There is an alternative and perhaps stronger grounding for Bork's position: the U.S. Constitution does, indeed, serve as a charter for fundamental rights, but it places in the hands of elected legislators, executives, and their subordinates—not in the hands of judges—responsibility for defining and protecting those rights. In sum, one might, though to my recollection Bork never has, defend his view as based on a theory of *who* shall interpret much more than on *what* the Constitution is.

85. For a discussion, see M. Foley, *The Silence of Constitutions*, especially ch. 1 (1989).

86. Like the United Kingdom, New Zealand still has in place a set of quasi-constitutional texts labelled as constitution acts or amendments to constitution acts. Despite these formal titles, these documents are subject to modification or repeal by a simple act of Parliament. In 1986, Parliament considered a proposal "to bring together into one enactment certain provisions of constitutional significance," but, as of May, 1991, had not enacted this bill into law. Judges in New Zealand do not claim judicial review. See R. Clark, *New Zealand* (1987), one of the volumes in the series *Constitutions of the Countries of the World* (A. Blaustein and G. Flanz eds.).

Many observant Jews have offered a similar reason for not drafting a constitutional document for Israel; for millennia the Torah has provided Jews with their fundamental law.

A second and very different reason for not preparing a constitutional text is that there may be insufficient agreement over form and content to achieve any sort of consensus. Many non-observant Jews claim this condition exists in Israel: "Jews" of assorted national, cultural, linguistic backgrounds, professing a variety of religious views, including atheism, and holding widely differing opinions about the political implications of a "Jewish state" have emigrated to live with Sabras and Arabs, people who are not only politically and religiously divided from each other but also among themselves.

Despite certain surface similarities, in 1787 the United States was in a much different position. We must be careful not to impose the image of the ethnically, religiously, and culturally diverse America of the twentieth century onto the more homogenous colonists of the eighteenth century. And, although debates over ratification show that sharp divisions existed among Americans, those splits centered less on cultural heritages and fundamentals of political theory than on the extent to which the new text would carry out a widely shared, if not minutely defined, ethos. The rapidity with which Federalists agreed to a Bill of Rights and Anti-Federalists accommodated themselves to the "new order for the ages" supports this interpretation. The truly divisive issue, Madison claimed, was slavery.⁸⁷ Seeing the dilemma as one nation with slavery or two nations, one with and the other without slavery, neither the framers nor the ratifiers allowed religion, humanity, or simple mo-

87. The states, Madison claimed to have told his colleagues at Philadelphia, "were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from (the effects of) their having or not having slaves." Madison's Notes, M. Farrand, *supra* note 45, vol. I at 486. John Rutledge of South Carolina told the Convention about the slave trade: "[r]eligion & humanity had nothing to do with this question—Interest alone is the governing principle with nations—The true question at present is whether the Southn. States shall or shall not be parties to the Union." *Id.* at II, 364. Pierce Butler and Charles Cotesworth Pinckney, also from South Carolina, expressed the same sentiments. See Butler's speech of July 3, *id.* at I, 605, and Pinckney's of August 22. *Id.* at II, 371. Despite being both an undergraduate and graduate alumnus of Princeton, Madison persistently misspelled Pinckney's name as "Pinkney" and Rutledge's as "Rutlidge." Of course, the art of orthographic orthodoxy was, at that time, more difficult to practice. Noah Webster's *American Spelling Book*, which became popularly known as "the Blue-backed speller," had only been published in 1783. The unabridged version of his *American Dictionary of the English Language*, the first full-scaled dictionary on this side of the Atlantic, did not appear until 1828. In the interim, John Breckenridge of Kentucky, one of Jefferson's leaders in the Senate, was apparently unsure of the correct spelling of his own name.

rality to stand in the way of political compromise.⁸⁸ As the White House chief of staff put it in one of Lawrence Sanders' novels: "Oh, Jesus! John, morals come and go, but politics go on forever."⁸⁹

A third strong reason not to try to construct a constitutional text is that leaders and citizens may have insufficient experience to be competent (or feel themselves competent) to fashion a suitable document. They may well need or believe they need to gather wisdom from their own experience about how to function in a constitutional democracy before committing to the relative permanence of fundamental law what may turn out to be grievous, though well intentioned, mistakes.

This reluctance is understandable. Constructing a new constitutional text is among the most daunting of political tasks, "as dangerous almost as the exploration of unknown seas and continents," Machiavelli, writing in the age of Columbus, claimed.⁹⁰ The murkiness of the past, the confusion of the present, the multiple voices with which the future simultaneously promises bonanzas and threatens disasters should arouse fear in the heart of any sensible man or woman.

Furthermore, all intelligent and self-reflective human beings understand that their perceptions of reality, no less than their remedies for its ills, are fogged by personal, possibly idiosyncratic, and perhaps even subconsciously held anxieties, longings, and values. Framers of constitutions do not operate behind a Rawlsian "veil of ignorance." They understand their social and economic positions and can make reasonably informed guesses about how particular constitutional arrangements will directly and intimately affect their fortunes.⁹¹ "Ambition, avarice, per-

88. Among the compromises constitutional historians generally overlooked was southern acquiescence in the Continental Congress's passage of the Northwest Ordinance of 1787, which, *inter alia*, outlawed slavery in those territories. For details on this and other compromises, see S. Lynd, *Class Conflict, Slavery, & the United States Constitution*, especially ch. 8 (1967). It is probably true that many people of the time thought that slavery would die out. Moreover, there was some belief that the commerce clause would allow the federal government to regulate the movement of slaves across state lines and even ban the domestic slave trade—a plausible interpretation of Art. I, § 9, as well. See Berns, *The Constitution and the Migration of Slaves*, 78 *Yale L.J.* 198 (1968). Indeed, John Randolph of Roanoke thought that *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), would sustain congressional authority to emancipate the slaves. See A. Beveridge, *The Life of John Marshall IV*, at 309 (1919).

89. L. Sanders, *Capital Crimes* 264 (1990).

90. N. Machiavelli, *Introduction, Discourses on the First Ten Books of Titus Livius* (C. Detmold trans. 1940).

91. Charles A. Beard laid, of course, the most famous charge of the framers of the Constitution of the United States as serving their own personal interests, C. Beard, *An Economic Interpretation of the Constitution of the United States* (1913). Many historians have attacked the substance and methodology of Beard's work. See especially R. Brown, *Charles Beard and the Constitution* (1956); Hofstadter, *Beard & the Constitution: The History of an Idea*, 2 *Am. Q.* 195 (1950); Hutson, *The Constitution: An Economic*

sonal animosity, party opposition, and many other motives not more laudable than these," Alexander Hamilton conceded as he opened his defense of the work of the American Constitutional Convention of 1787, "are apt to operate as well upon those who support as those who oppose the right side of a [constitutional] question."⁹²

Awareness of the awful responsibility of creating a constitutional text and of one's own—and, even more acutely, of one's colleagues'—frailties must inevitably tempt any but the hyperarrogant to ask "what right do we have to bind future generations by our particular beliefs in society's goals and our possibly crabbed theories about how best to achieve these goals?" The answer "wait for more experience and wisdom" is likely to be seductive. *Pace*, our constitutionalist critic of the Civil Law, playing Yahweh, even for a single nation, is apt to be an attractive role only to unattractive men and women.

Again the American experience may be misleading. The generation of 1787 stood in a long line of framers of political covenants, dating back to the Mayflower Compact of 1620 through dozens of charters for individual colonies and constitutions for states. More important, colonists had operated those agreements with some degree of success.⁹³ The bulk of white, adult, American males alive in 1787 had for all or much of their lives been functioning in systems that had tried, with shortcomings as obvious as they were serious, to combine respect for fundamental rights with a significant measure of democratic government. And the men who gathered at Philadelphia were mostly old hands at politics within such systems. Of the fifty-five delegates who were supposed to attend the convention, twenty had already participated in drafting state constitutions, forty-two had served or were then serving in Congress under the Articles of Confederation, thirty were or had been members of state legislatures, and seven were former governors of their states.⁹⁴

Document?, in *The Framing & Ratification of the Constitution* 259 (L. Levy & D. Mahoney eds. 1987); and Nore, Charles A. Beard's Economic Interpretation of the Origins of the Constitution, *this Const.*, 39-44 (Nov., 1987).

92. The *Federalist* No. 1 (A. Hamilton). He continued: "My motives must remain in the depository of my own breast. My arguments will be open to all, and may be judged of by all."

93. See, especially Elazar, *The Political Theory of Covenant: Biblical Origins and Modern Developments*, 10 *Publius* No. 4 at 3 (1980); Lutz, *From Covenant to Constitution in American Political Thought*, *id.* at 101; and D. Lutz, *The Origins of American Constitutionalism* (1988).

94. Two delegates were also college presidents, an office that, even then, required some political skill. Thirty members were lawyers, though it is not clear if that biographical datum was functional or dysfunctional. For details, see M. Farrand, *The Framing of the Constitution of the United States* ch. 2 (1913).

The contrast with the former satellites of Central and Eastern Europe is stark. The velvet revolution came in 1989, after more than forty years of communist domination. Except for a very brief period after the end of the Second World War, few of these countries had known life under anything like a constitutional democracy. Indeed, one can make a sound argument that, before World War II, only Czechoslovakia and Germany could have been so classified. The German experiment with constitutional democracy ended in 1933 after the Nazis took charge, and Czechoslovakia's in 1939 when that nation vanished into the belly of the Third Reich.

Thus, in 1990, when the newly formed governments of Central and Eastern Europe took up constitution making, hardly anyone under sixty-five had first-hand experience as either a citizen or an official under nonauthoritarian rule. "In this part of [East] Germany," the Prime Minister of Saxony remarked in 1991, "you have no one of working age who has lived under conditions other than a command society or dictatorship. This is a very big difference with 1948 and West Germany."⁹⁵ What most of those people know about what constitutional democracy requires of citizens comes from books and radio broadcasts (some or even most of which had been subsidized by the CIA), television, a smattering of conversations with tourists, and, for a precious few, visits (or exile) to the West.

Fortunately, intelligent men and women can learn rapidly from the experience of others. It is one thing, however, to master academic political science or legislative drafting; it is quite another to convert an entire population into a people who have internalized a new set of attitudes about relations toward government, the state, society, and themselves as citizens, who not only possess rights but are responsible for their own condition. Most denizens of socialist democracies were, as individuals, accustomed to obey, not to demand from, bureaucrats. "Voting the rascals out" was as impractical an option as going to court to challenge the constitutionality of governmental action.

Until the last days of the old regimes, the most common forms of opposition were conducted *en masse* through political strikes, mass protests, or riots—all in the context of a threat of revolt. This legacy of docile obedience or bared fangs does not translate easily into democratic processes of negotiation and compromise.

Moreover, the state had been the great parent who provided not only many goods and services, such as water, electric power, garbage collection, and mass transit, but also determined who would work where doing what for how much and how long, where and how well children

95. Tagliabue, *As the East Hunts for Its Bootstraps, He's Helping*, N.Y. Times, May 3, 1991, at A4, col. 6.

would be educated and adults would live, what kinds of food and clothing—how much and at what prices—would be available, and what was news and how much of it along with what kinds of entertainment people could receive through legal media of communications.

For men and women who lived all their lives under such regimes, understanding constitutional democracy would be difficult enough. Generating the sense of self-reliance a successful constitutional democracy requires of its citizens demands additional, and enormous, efforts from them—and skilled political leadership for them. Echoing comments heard from hundreds of scholars and public officials, an East German mayor noted:

We are moving from a controlled society to a free society based on personal initiative. Many people find that very difficult. Not just unemployment, but concepts like the competitive economy, the variety of options, and the need to make choices are completely new here.⁹⁶

Accepting the obligations as well as the benefits of autonomy is probably something few people can learn from other than doing.

Among the chief reasons for drafting a constitutional text is the hope of reducing conflict. Spoken words quickly evanesce. After the lapse of a few years, practice and history tend to fuse into legend and propaganda, and neither the content nor meaning of tradition is ever obvious. In apparent contrast, words embossed onto paper convey an impression of permanence. All who run can read, both 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, and the inclination of both the Civil and Common Law to put agreements onto paper offers additional reinforcement.⁹⁷

Biblical and literary scholars, however, might warn that written words possess less lucidity, exactness, and permanence than drafters expect. Texts typically create new problems as they resolve old ones, and the new may be as serious as the old. For centuries Jews have quarrelled with Jews over the meaning of the Torah, Muslims have feuded with other Muslims and done a great deal of killing over the correct interpretation of the *Qur'an*, and Christians have shown they can more than hold their own in competition over who can shed the most blood for the privilege of declaring the true message of an all merciful Deity.

The American framers recognized the difficulties here. When congratulated on the excellence of the text of 1787, Gouverneur Morris

96. Waldemar Kleinschmidt, Mayor of Cottbus, quoted in Kinzer, *Unity Brings Many Traumas to What Was East Germany*, N.Y. Times, March 10, 1991, at L12, col. 1.

97. *Clara pacta, boni ami*, as the Romans used to say.

replied that the document's worth "depends on how it is construed."⁹⁸ Madison was less terse in explaining why the new text would require interpretation:

[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.⁹⁹

The sources of confusion, Madison explained, were the complexity of political relations, the "imperfection" of human conceptualization of those problems, and the corruption that self-interest brought to people's creating rules. He might have added another pair of sources: (1) the frequent necessity for framers of constitutional texts to compromise among competing interests, values, and aspirations; and (2) the failure of those framers to think through political problems and carefully rank the values they seek to promote.

Nevertheless, that a text, even a beautifully designed text, does not offer a panacea does not necessarily mean that a text cannot be useful. After thousands of years Jews may still be disputing what the Torah means, and for shorter periods Christians the New Testament and Muslims the *Qur'an*, but those documents still define Judaism, Christianity, and Islam. Without them—or similar writings—it is highly improbable that any of those religions would have persisted through the centuries. In the secular realm, it is difficult to contest that the American document, despite its near catastrophic failure in 1861 and its lesser but still significant failures before and since, has helped identify what the United States, as a polity, is all about. Indeed, it is the centerpiece of that identity. That constitutional text, Hans Kohn claimed, "is so intimately welded with the national existence itself that the two have become inseparable."¹⁰⁰

98. Quoted in E. Corwin, *Court Over Constitution* 228 (1938).

99. The *Federalist* No. 37 (J. Madison). Justice Hugo L. Black remained unshaken in his faith that the written word, at least of the American constitutional text, conveyed a clear and permanent meaning: ". . . I shall not at any time surrender my belief that that document itself should be our guide I prefer to put my faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges." *Re Winship*, 397 U.S. 358, 377-78, 90 S. Ct. 1068, 1079-84 (1970) (Black, J., dissenting).

100. H. Kohn, *American Nationalism* 8 (1957). Historians and political scientists frequently point to that text as one of the primary reasons why ideologically based political parties in this country have had little attraction: "The Constitution" seems to settle most basic political issues. For example, W. Murphy and M. Danielson, *American Democracy* 187-88 (9th ed. 1979). For one of the best recent discussions of the Constitution and American political identity, see S. Huntington, *American Politics: The Promise of Disharmony*, especially ch. 2 (1981).

Furthermore, however audacious the role of framer of a constitutional text, it may be a role that needs to be played, at least by an orchestral performance,¹⁰¹ for time does little to dim the allure of a temporizing response. And what begins as a provisional solution may settle into permanency, as happened with the Basic Law of the Federal Republic of Germany. More fundamentally, it may well be wiser to construct a nation's politics by reason rather than accident.¹⁰² Founders must address the question Alexander Hamilton posed in the opening paper of *The Federalist*: "whether 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."

The very process of drafting a constitutional document may itself teach citizens and officials about constitutional democracy's implications for their own and their children's lives. Those processes may also supply equally worthwhile experience in learning how to operate such a system. Openly and self-consciously confronting such critical problems as what it means to try to bind the future by the principles and words of the present can educate participants. And, although during its early stages constitution making may be a monopoly of a rather small elite, that group, if it has much collective wisdom, will grasp the necessity of drawing larger segments of society into the activity. For, if a constitution will truly constitute a people as citizens of a constitutional democracy, their consent to such a status is essential.¹⁰³ Popular participation in the articulation of the principles for the new polity may not be the only means to obtain such consent, as the examples of the post-War constitutions of Germany and Japan indicate, but it is surely the way most consonant with democratic theory.

101. The phrase is Felix Frankfurter's describing how the United States Supreme Court produces its official opinions. F. Frankfurter, *The Commerce Clause under Marshall, Tancy and Waite* 43 (1937).

102. Hungary offers a third option, a constitution for a period of transition from authoritarian rule to constitutional democracy. This choice allows mistakes without the relative permanence of a western style constitution. The United States, after all, had a dozen years under a transitory constitution, the Articles of Confederation. This option, however, also runs risks. It may encourage people to think of a constitution as not governing the future, most especially as not being a form of higher law to which government must conform. Indeed, in the first year of Hungary's transition, the parliament amended the document several dozen times—a deed requiring only a two-thirds vote, with no submission to any other institution or to the people. A more general danger is particularly acute under this third option as exercised in Hungary. A parliament makes a poor drafting committee for a constitution. Its members may have the expertise, but they are already in power and the temptation to structure a polity to preserve that status is very strong.

103. The Philadelphia Convention debated this issue several times; see especially Madison's notes on his own speech of June 5 and George Mason's of July 23. M. Farrand, *supra* note 45, at I, 122-23; and at II, 88-89.

B. *Drafting the Text*

If founders decide to prepare a constitutional text, they will have taken more responsibility on themselves than if they had decided to let the polity proceed along whatever lines "naturally" developed over one or more generations. This assumption of responsibility should cause founders to face up to a set of interlocking problems.

1. *The New Political Culture*

Because of a commitment to individual liberty, a constitutional democracy can tolerate very little coercion and, perhaps more than any other successful political system, requires a people to acquire a set of attitudes and habits of action that range far beyond casting votes on election day. In short, constitutional democracy can survive only within a particular kind of political culture. Its people must cease being mere denizens and become citizens. The goal of a constitutional text must, therefore, be not simply to structure a government, but to construct a political system, one that can guide the formation of a larger constitution, a "way of life" that is conducive to constitutional democracy. If constitutional democracy is to flourish, its ideals must reach beyond formal governmental arrangements and help configure, though not necessarily in the same way or to the same extent, most aspects of its people's lives.

Thus, it would help a society new to constitutional democracy if the text would not only lay down rules for a government but also articulate at least some of the principles, values, and hopes that will reconstitute its people. As Madison prophesied about a bill of rights as part of the American constitutional document: "The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government; and as they become incorporated with the National sentiment, counteract the impulses of interest and passion."¹⁰⁴

2. *Legitimizing the Legitimator*

The wisdom of almost any important governmental policy will be controversial and often so will the authority of government to make the particular policy it has chosen. Constitutional texts can impart a great deal of wisdom about general principles of law and politics but very little about the relative efficacy of specific options to cope with day-to-day problems. On the other hand, if a constitutional text is authoritative, one of its primary functions will be to mark the boundaries

104. M. Meyers, *supra* note 49, at 207.

of governmental authority, either by its own terms or through its relation to the broader constitution.

A constitutional text is thus a source and a measure of legitimacy. But to confer legitimacy, the legitimator must itself be legitimate. And what confers legitimacy varies from culture to culture and time to time within any single culture.¹⁰⁵ Every society has its own special ideals, traditions, customs and values. William Graham Sumner was wrong to claim that stateways cannot fundamentally change folkways;¹⁰⁶ but it would be equally wrong to believe that a people and their culture are infinitely malleable.

Founders have to be aware that they operate in a situation of severely restricted choice. They are trying to change people as well as an abstract social and political system. The values and aspirations founders announce in the text are likely to violate some of what popular culture currently treasures and to push beyond other societal tenets, for the goal, after all, is fundamental change. There is, however, likely to be a limit on the number of old beliefs and customs that the new order can persuade people to reject, and there is a smaller number of deeply and widely held beliefs and customs that founders can persuade their people to renounce.¹⁰⁷

To maximize the constitutive enterprise's chances of success, founders must take their own past into account. Men and women who would create a new constitution cannot use either artificial insemination or a surrogate mother. One cannot simply transpose a constitutional text from one state to another, no matter how successfully that document has operated in its original context. A nation has its own history and sets of collective, if typically fuzzy, inaccurate, and conflicting memories of that history. Founders cannot erase and replace these myths. It is highly probable that if a people are to accept a constitution as legitimate, it must reflect some of their history, perhaps even retain some familiar institutions, processes, and proximate ends.

To make matters more complicated, if reconstituting the polity is the founders' goal, the constitutional text must do much more than

105. Max Weber's treatment of political legitimacy is still among the most useful: *The Theory of Social and Economic Organization* (A. Henderson and T. Parsons trans. 1947). See also D. Easton, *A Systems Analysis of Political Life* chs. 1, 10-15 (1965); and Easton, *A Re-Assessment of the Concept of Political Support*, 5 *Brit. J. Pol. Sci.* 435 (1975).

106. This assertion is the central thesis of W. Sumner, *Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals* (1940 [orig. pub'd 1906]) and, of course, was a central tenet in his larger philosophy of *laissez faire*.

107. This kind of restriction makes establishment of constitutional democracy in Islamic cultures extremely difficult, though not impossible. For an interesting approach, see A. An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (1990).

reflect the nation's past. Founders will have to destroy and replace some existing institutions and processes. In so doing, they will probably find it useful to substitute institutions and processes of other nations. Founders, however, will first have to adapt, naturalize, and blend these borrowings into familiar forms.

Similarly, founders are likely to have to attack some prevalent customs and even their underlying values as they try to operationalize ideas their history would deem unorthodox. To minimize trauma, the language in which framers phrase new or revised values and aspirations must show respect for what the society has historically cherished. It would also be helpful were founders to make a plausible case that constitutional democracy's ideals have at least some roots in the people's traditions. Those new ideals must remain clear, even if the history is hazy.

In sum, the document must make it easier for its people to follow the path of constitutional democracy. The text should neither plant emotional minefields along that way nor obscure the fact that the path is new and requires different values, attitudes, and actions.

3. The Necessity of Compromise

Practical considerations will force each framer to tailor his or her vision of the re-formed polity in light of what his or her colleagues may want. Founders must also keep in mind that "the people," or politically powerful groups within "the people," are apt to have their own diverse versions, none of which is likely to be internally consistent and few of which are likely to be fully consistent with each other. It would be normal for a founder at times to envy the autocrat who, like Rousseau's legislator, could will constitutional democracy into existence.

In the real world, however, not only will society's broader culture, its legal system, their mutual contagion, and the short-sightedness, and even pigheadedness, of others restrict founders' options, so will a host of additional factors such as climate, economics, demography, education, geography, and technology. Political, economic, and social arrangements that were conducive to constitutional democracy in developed industrialized nations may yield disaster in the Third World. Furthermore, the power and interests of foreign nations are seldom irrelevant; indeed, they may be determinative. In the closing decade and a half of the eighteenth century, neither Spain nor France, nor, after Yorktown, Britain, threatened the establishment of constitutional democracy in the United States. On the other hand, from the end of World War II until the Russians decided they could no longer afford either an empire or a cold war, did constitutional democracy have any chance whatever in Central and Eastern Europe.

One potential source of strength for founders is that the oppression of previous regimes might encourage people, even those whose first hand

knowledge of constitutional democracy is small, to profess its principles as their own. Such was the case for Germans and Italians after World War II, Spanish and Portuguese in the 1970s, and Argentines, Brazilians, Chileans, and Uruguayans¹⁰⁸ in the 1980s. Central and Eastern Europeans experienced the same reaction in 1989. The far tougher task is to help a people transform rejection of an oppressive system into a positive acceptance of a new political faith.

A catastrophic national shock, such as bloody and overwhelming defeat in war, may give founders wider opportunity to re-form. When a nation has collapsed and its older system of values has unravelled, its people may be ripe for radical political, economic, and social transformation. One immediately thinks of Germany and Japan in 1945; but in each case the mutation, dramatic as it was, built on as well as broke from the past.

General Douglas MacArthur and his staff changed much and tried to change even more in Japanese government and society, but shrewdly they built on existing institutions.¹⁰⁹ The emperor lost his divinity, not his throne. The Great White Shogun breathed new life into the parliament the Meiji had created and made it responsible to a national electorate. The administrative and judicial bureaucracies remained largely intact, as did most of the existing legal system, a cousin of the Civil Law. And the occupiers found enough Japanese politicians who had opposed the military regime to staff the re-structured governing apparatus.

In the western zones of Germany, the British, French, and Americans provided an outline but not a blueprint for a new constitutional text. The Allies were able to put greater distance between themselves and constitution makers than in Japan because many of the German's framers had been refugees from Naziism and partisans of constitutional de-

108. Most Chilean and Uruguayan adults had lived for many years—and Argentine adults for a few—in nations that had had real claims to being constitutional democracies, giving these people some advantage over their Iberian cousins.

109. There is a huge literature in English on the making of the Japanese constitution and the influence, often heavy-handed, of The Supreme Commander Allied Powers. See especially W. Cummings, *Education and Equality in Japan* (1980); K. Inoue, *MacArthur's Japanese Constitution: A Linguistic and Cultural Study of Its Makings* (1991); T. Nishi, *Unconditional Democracy: Education and Politics in Occupied Japan 1945-1952* (1982); K. Kawai, *Japan's American Interlude* (1960); A. Oppler, *Legal Reform in Occupied Japan: A Participant Looks Back* (1976); Takayanagi, *Some Reminiscences of Japan's Commission on the Constitution*, in *The Constitution of Japan: Its First Twenty Years, 1947-67* at 71 (D. Henderson ed. 1968); Ward, *The Origins of the Present Japanese Constitution*, 50 *Am. Pol. Sci. Rev.* 980 (1956); Ward, *Reflections on the Allied Occupation and Planned Political Change in Japan*, in *Political Development in Modern Japan* (R. Ward ed. 1968); Williams, *Making the Japanese Constitution: A Further Look*, 59 *Am. Pol. Sci. Rev.* 665 (1965); and U.S. Department of State, *Report of the United States Education Mission to Japan* (1946).

mocracy. The Allied High Commissioner often intervened in proceedings, but usually his "suggestions" were of marginal significance.¹¹⁰

The new document retained much that was old, though little that had been unique to the Third Reich. The Basic Law drew on the ideals of Kant rather than Hitler, reinstated a federal arrangement whose bloodlines flowed back to the Holy Roman Empire, kept a modified form of proportional representation from Weimar, and retained variations of the institutions of parliament and chancellor that had existed under both Weimar and the Kaiser. Perhaps most important in building on the past, the Preamble looked to the day when the divided nation would again be one: "The entire German people are called upon to achieve in free self-determination the unity and freedom of Germany."

V. THE CIVIL LAW AND CONSTITUTION MAKING

Having walked several crooked miles, we are now ready to return to the task we set out: to "wonder" about the relationships between the Civil Law and the building of a constitutional democracy. The gist of our churlish constitutionalist critic's argument was: (a) The Civil Law's systematic, tightly principled approach to jurisprudence encouraged a mind-set too rigidly principled to create a workable constitution; and (b), even if somehow a miracle occurred, that same rigidity would doom constitutional democracy to a short and unhappy life.

We can now, I hope, more accurately assess the Civil Law's potential contributions to constitution making. First of all, some reforms will, no doubt, be possible, and probably should be tried in order to make the political and legal systems more congruent with each other and with constitutional democracy, but discussion of founders' restricted choice indicates that they are not likely to have the luxury of replacing the Civil Law on a wholesale basis, at least not at the same time as they are trying to construct a new polity.

From a constitutionalist's perspective, a prime candidate here might be some version of the Common Law's habeas corpus. It is not necessary to recite a panegyric to this process to acknowledge its potential, in the hands of independent judges, to curb arbitrary power. In Chile during General Pinochet's dictatorship, Solidarity, the organization for civil rights led by the politically conservative Auxillary Bishop of Santiago, filed hundreds of petitions for the analogous writ of *amparo* in the name of people secretly arrested. Those lawsuits did not secure the

110. The standard work in English on the making of the Basic Law remains J. Golay, *The Founding of the Federal Republic of Germany* (1958). See also L. Clay, *Decision in Germany* (1950); *The Papers of General Lucius D. Clay: Germany 1945-1949* 2 vols. (J. Smith ed. 1974); and D. Bark and D. Gress, *A History of West Germany* I, part 3. (1989).

prisoners' freedom, but they usually forced the government to concede it was holding the prisoners and prevented their winning the General's special prize—a one-way helicopter flight over the Pacific.

Judicial review, a second obvious constitutionalist reform, has become common among Civil Law constitutional democracies: Austria, Belgium, Chile, the Federal Republic of Germany, Greece, Hungary, Italy, Portugal, Spain, Turkey, and, to a limited extent, Switzerland, are among the Civil Law nations that have adopted variations on Hans Kelsen's plan for a constitutional court.¹¹¹ Argentina has historically modeled its supreme court on that of the United States, while France has its own idiosyncratic institution for constitutional review.¹¹²

Whatever the need to tinker with the Civil Law, the question remains whether that system hampers constructing a constitution for a constitutional democracy. For all the methodological reasons offered earlier, it is impossible to give a definitive answer. The critic listed, albeit in exaggerated fashion, the major dangers the Civil Law poses. A defender can offer a partial response by pointing to advantages that system accords a constitution's founders and interpreters.

Most immediately apparent is the Civil Law's historic tenderness toward private property. Constitutional democracy does not presuppose a capitalistic economy. It began in the United States before that nation knew capitalism, and it has survived in the mixed economies of western industrial nations and in the quite different economic *milieux* of India and Japan. What a constitutional democracy does require is the practical availability of and strong legal protections for means through which its citizens can achieve a significant degree of economic autonomy. And, without a widely ranging right to private property, they are likely to exist as wards of the state, as the histories of Maoist China, Central and Eastern Europe, and the Soviet Union amply demonstrate.

More fundamentally, the core of the constitutionalist critic's argument may be wrong. What she alleges as the Civil Law's major fault—its insistence on completeness, its reliance on logically ordered principles and rules to order not merely a set of specific regulations but to structure an entire system—may be an immense political virtue for a nation in the process of reconstituting itself as a constitutional democracy. It is certainly true that intellectually rigid men and women influenced by the Civil Law could transform the word of the critic's nightmare in flesh.

111. For a broad overview of this institution, see M. Cappelletti, *Judicial Review in the Contemporary World* (1971); and *Cours Constitutionnelles Européennes et Droits Fondamentaux* (L. Favoreu ed. 1982).

112. See especially L. Favoreu and L. Philip, *Les Grandes Décisions du Conseil Constitutionnel* (4th ed. 1986); Morton, *Judicial Review in France: A Comparative Analysis*, 36 *Am. J. of Comp. L.* 89 (1988); and Vroom, *Constitutional Protection of Individual Liberties in France: The Conseil Constitutionnel Since 1971*, 63 *Tul. L. Rev.* 265 (1988).

But, by definition, prudent men and women are neither blind fanatics nor rigid ideologues who mechanically apply set formulas to life. Indeed, the characteristics of the "Civil Law mind" could push founders, and later interpreters, to think through the implications of what they are constructing. Explicit statements of principles need not prevent their adaption to unforeseen problems. On the contrary, clear enunciation of principles might facilitate adaption to changing circumstances by ranking values and objectives and arranging processes to foster those ends.

Process and substance are not cleanly separable; the two inevitably influence each other. This relationship may seem plain to people of common sense, but it has sometimes escaped extraordinarily able scholars and judges in Common Law systems.¹¹³ The Civil Law would not necessarily infuse founders or interpreters with greater wisdom, but that system's intense concern with ordering and ranking principles and values would thrust before these officials the claim that substance and process, principles and rules, like rights and powers, are intricately related, and ignoring those relations strengthens the ancient enemy, chaos.

Americans are accustomed to hearing that the success of their founders was due to a genius for setting down broad principles that their successors could adapt "to the various *crises* of human affairs."¹¹⁴ But contributing to the success of the framers' strategy was their good fortune in operating in a society that by and large shared their goals and, at a general level, approved their means.¹¹⁵ The flexibility of the Common Law, with its apparent inattention to principle the American framers supposedly put into political practice, may be precisely what is needed for a society that has already internalized many of constitutional democracy's values.

But what of societies like those of Central and Eastern Europe who lack those traditions and do not wish to wait generations before obtaining the "blessings of [ordered] liberty"? Consciously and carefully trying to define and rank goals, organize principles into a logical whole, and

113. E.g., J. Ely, *supra* note 33. Laurence H. Tribe makes this point most emphatically in Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *Yale L.J.* 1063 (1980). For a spirited defense of process as the best defense of constitutional democracy, see Linde, *Due Process of Lawmaking*, 55 *Neb. L. Rev.* 197 (1976), who took his cue from Alexander M. Bickel's claim that "[t]he highest morality is almost always the morality of process." Bickel, *Watergate and the Legal Order*, 57 *Commentary* 19, 25 (1974). This message echoed Bickel's argument in *The Supreme Court and the Idea of Progress* (1970), and *The Morality of Consent* (1975), if not *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

114. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

115. Many other factors, of course, contributed to the success of this constitutional endeavor, not least among which was the great wealth within the huge space of the American commonwealth. For analyses of some of these linkages, see D. Potter, *People of Plenty: Economic Abundance and the American Character* (1954).

fit procedure to substance may be an essential way of teaching private citizens and public officials who are new to constitutional democracy. The more the roots of constitutional democracy lack depth in a culture, the more foundational documents must function as "Republican schoolmasters," clearly articulating the principles on which the polity is built and the values it serves. Order, coherence, and clarity—these are, critics and defenders agree, the Civil Law's greatest strengths.

It is difficult to miss the contrast on this point between the United States and the Federal Republic of Germany. The Declaration of Independence sets forth the basic principles of the American polity, but it is contained in a document separate from the constitutional text. And most judges in the United States refuse to utilize the Declaration as a basis for constitutional interpretation. In Germany, on the other hand, the text of the Basic Law explicitly sets out the polity's fundamental principles: Article 1 begins: "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority." Article 20 lays down additional principles:

- (1) The Federal Republic of Germany is a democratic and social federal state.
- (2) All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs.
- (3) Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice.¹¹⁶

Article 79 forbids constitutional amendments that would change the terms of Articles 1 or 20¹¹⁷ or abolish federal arrangements.

Does a nation need such explicit statements of principle? The answer, of course, must be "it depends." For Americans of 1787, probably not, though even that issue is not closed. Even though the United States has survived more than two centuries, the country may have avoided a bloody Civil War had the founding generation tried to resolve the problem of slavery rather than placate slaveholders. For Germans after World War II, and Eastern and Central Europeans, the response is probably yes.

116. In 1968, the Germans added a fourth paragraph: "All Germans shall have the right to resist any person or persons seeking to abolish that constitutional order, should no other remedy be possible."

117. This prohibition raises an interesting question about the validity of the fourth paragraph that the amendment of 1968 added to Art. 20.