

Constitution-Making: An Introduction

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Alexander Hamilton's observation that the people of the thirteen colonies were the first to be given the opportunity to define their constitution "from reflection and choice" rather than "accident and force"¹ may have been accurate, but that opportunity now extends to people everywhere. The precise issues that constitution makers confront vary widely and depend on the specific historical circumstances under which they operate. Generalizations are difficult, perhaps impossible, to come by. Yet, we can identify some issues about constitutional design that arise repeatedly. Focusing on some of those issues, this Essay examines some of the more important conceptual and practical issues associated with modern constitution-making. Part I asks: Why make a constitution? Part II examines the definition of the people for and perhaps by whom the constitution is being made, and Part III turns to questions about the inclusiveness of the constitution-making process. Part IV takes up questions about the scope and comprehensiveness of the constitution.² The conceptual and practical role played by the "constituent power" in constitution-making is a pervasive theme.

I. Why Make a Constitution?

Why make a constitution? Consider first a "new" nation, perhaps one that has successfully struggled to secede from another, or one that emerges from deep intranational conflict. Such a nation might "need" a constitution for several reasons. The primary one is that in the modern world a constitution is probably regarded by the international community as a prerequisite to statehood,³ perhaps not as a matter of formal international law⁴ but as a matter of practical reality. Second, and perhaps only the

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1. THE FEDERALIST NO. 1, at 27 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

2. The Essay touches on some issues about the content of modern constitutions, when such issues intersect with the topics of primary concern, but does not explore questions of content in detail.

3. See David Landau, *The Importance of Constitution-Making*, 89 DENV. U. L. REV. 611, 614 (2012) (observing that, in the modern era, almost all new states have sought to implement constitutions quickly).

4. Formal international law may require not much more than effective control over a territory and, perhaps, some democratic means of governance, which need not, however, be instantiated by a constitution. See Pan American Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49

obverse of the preceding point, domestic actors may treat the existence of a constitution as establishing or symbolizing the nation's existence as a state.⁵ Third, constitutions are convenient ways of laying out the formal contours of the mechanisms for exercising public power.⁶ Finally, in nations with heterogeneous populations—an increasingly large proportion of the world's nations—a constitution can serve as an expression, perhaps the only one available, of national unity.⁷

Constitutions as maps of power may be somewhat inaccurate. The realities of power may not be fully reflected in a constitution. For example, a nation's constitution might adopt a presidentialist form of government, yet the formal powers conferred on the president might not correspond to the practical power that the charismatic leader for which it was written actually has.⁸ The inaccuracies can be even greater, as when constitutions purport to place limits on the exercise of public or private power in settings where that power is in practice unlimited. Standard usage is to describe constitutions where the inaccuracies are quite large as “sham” constitutions, with the so-called Stalin Constitution for the Soviet Union as the primary example.⁹ Yet, the category of sham constitutions is inevitably imperfect. Practice in almost every nation will fail to correspond with some aspects of each nation's formal constitution, at least from some perspective, and so we need a metric for determining when the shortfall is great enough to make the constitution a sham. That metric is again almost inevitably going to be a matter of

Stat. 3097, 3100 (“The state as a person of international law should possess the following qualifications: *a*) a permanent population; *b*) a defined territory; *c*) government; and *d*) capacity to enter into relations with the other states.”); see also JURE VIDMAR, DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW: THE EMERGENCE OF NEW STATES IN POST-COLD WAR PRACTICE (forthcoming 2013) (manuscript at 6), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2186496 (noting that the emergence of a new state depends chiefly on international acceptance of its existence rather than formal recognition by international law).

5. See, e.g., U.S. CONST. pmb. (stating explicitly that “the People” established the Constitution “to form a more perfect Union”).

6. See RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 87–88 (1999) (discussing how constitutions serve to coordinate basic societal functions).

7. See John L. Comaroff & Jean Comaroff, *Law and Disorder in the Postcolony: An Introduction*, in LAW AND DISORDER IN THE POSTCOLONY 1, 32 (John L. Comaroff & Jean Comaroff eds., 2006) (“[T]he flight into constitutionalism . . . embraces heterogeneity within the language of universal rights—thus dissolving groups of people with distinctive identities into aggregates of person [sic] who may . . . enact their difference under the sovereignty of a shared Bill of Rights.” (emphasis omitted)). I thank Dennis Davis for this reference. See also *infra* text accompanying note 20 (discussing the *demos* of a heterogeneous nation).

8. See Jonathan Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 HASTINGS INT’L & COMP. L. REV. 77, 79 (1997) (observing that a charismatic executive is likely to win battles with the judiciary in cases of legal uncertainty); William Partlett, *The Dangers of Popular Constitution-Making*, 38 BROOK. J. INT’L L. 193, 209–33 (2012) (providing examples of charismatic leaders who were able to circumvent constitutions or push through authoritarian constitutions).

9. See, e.g., Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEXAS L. REV. 1763, 1812 n.228 (2004) (referring to constitutions that do not resemble realities, “perhaps best exemplified by the old Soviet Constitution,” as “sham constitution[s]”).

controversy: How much weight should it give to shortfalls with respect to rights as against shortfalls with respect to government structure, for example? Further, consider a nation where the shortfalls are unquestionably large. That nation's constitution might not be a sham if power holders treat the constitution as aspirational, setting goals that they (sincerely) hope to achieve by pursuing the policies, concededly inconsistent with the formal constitution, they have adopted.

Constitution-making can occur in nations with established constitutions as well. Here we need to distinguish between amendments, which are routine,¹⁰ and the replacement in full of a constitution already in force.¹¹ Replacements can occur when the existing constitution has become outdated to the point where “merely” amending it would take a great deal of effort, particularly when specific desirable amendments might interact with existing arrangements in ways that require deliberate “reflection and choice.” Or, replacements can occur when those holding power under the existing constitution have become substantially discredited for reasons that critics associate with the constitution in place.¹² These latter replacements might be described as involving constitution-making in crisis conditions and so might be thought to resemble some postconflict constitution-making processes. But, as I will argue, there are sometimes important differences between postconflict and “discredited system” constitution-making.

II. The Foundation of Constitution-Making: The Constituent Power

In recent years the idea, originally articulated in the era of the French Revolution, that constitutions ultimately rest on a “constituent power” has become increasingly prominent in theorizing about constitutional fundamentals.¹³ Roughly speaking, the constituent power is the body of the

10. Amendments are routine at least conceptually, though the rules for placing amendments in the constitution may vary in their stringency. Stringent amendment rules, of course, reduce the rate at which amendments are successfully added to an existing constitution.

11. The line between amendments and replacements is blurred in nations whose courts are committed to the doctrine that some amendments are substantively unconstitutional and in nations whose courts enforce a distinction, written into an existing constitution, between constitutional amendments and constitutional replacements. For additional discussion, see *infra* subpart IV(B).

12. See Catherine Dupré & Jiunn-rong Yeh, *Constitutions and Legitimacy over Time*, in *ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW* 45, 52–53 (Mark Tushnet et al. eds., 2013) (discussing how a country might prefer to replace an old constitution that deals with past wrongs as a means of breaking with the past regime).

13. See, e.g., Damian Chalmers, *Constituent Power and the Pluralist Ethic*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 291, 293–98 (Martin Loughlin & Neil Walker eds., 2007) (discussing the origins of the concept of “constituent power” and its role in constitution settlement).

people from whom the constitution's authority emanates.¹⁴ That rough statement conceals many complexities, though.¹⁵

One paradoxical way of identifying the core difficulty is this: The constituent power sometimes is called into being by the very process of constitution-making that presupposes the existence of the constituent power. Sometimes this is expressed in the proposition that constitution-making presupposes a *demos*—a people—for whom the constitution is to be a constitution.¹⁶ This appears not to be universally true, though. The United States may be an example of a nation that was created by the very act of constitution-making—whether that act occurred with the adoption of the Declaration of Independence, the Articles of Confederation, or the U.S. Constitution.¹⁷ And, more generally, sometimes constitution-making involves nation *building*, the creation of a single nation unifying previously diverse entities. Perhaps the creation of the Federation of Malaysia out of various distinct Malay states each under British control is an example.¹⁸ Constitutions created for the purpose of unifying a heterogeneous nation might be understood as vehicles for the creation of a *demos*.¹⁹

Normative and practical difficulties arise even when there is a preexisting *demos* that can exercise the constituent power. Consider first postconflict constitution-making, where the conflict has involved deep ethnic or religious divisions. The question of who constitutes the nation is likely to be at issue in the constitution-making process. This can have intensely practical aspects. Those participating in the process will have to decide from what territory the constitution drafters will be drawn. Drawing the boundaries in one or another way will sometimes explicitly and almost always implicitly determine who the *demos* is in a setting where the parties

14. *Id.* at 293.

15. I discuss one such complexity—whether the constituent power can be regulated by law—below in connection with the question of whether existing mechanisms for replacing a constitution are legally binding and with the question of including purportedly unamendable provisions in a constitution. See *infra* text accompanying notes 29–33 and subpart IV(B).

16. See Chalmers, *supra* note 13, at 293 (noting that the idea of constituent power “suggests a collective subject—be it a Nation, *demos*, public or people—which has some originary power to give birth to the constitutional settlement and which stands transcendental and normatively pre-eminent over it”). This is an important theme in contemporary discussions of whether it is possible to write a constitution for Europe in the (claimed) absence of a European people. See, e.g., J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos, and the German Maastricht Decision*, 1 EUR. L.J. 219, 228–31 (1995).

17. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 462–87 (1994) (examining the relationship between the Constitution and the Declaration of Independence, the Articles of Confederation, and various state constitutions with respect to the legality of the founding of the nation).

18. For the constitutional background, see generally ANDREW HARDING, *THE CONSTITUTION OF MALAYSIA: A CONTEXTUAL ANALYSIS* 30–45 (2012).

19. Jürgen Habermas has developed this idea in the course of his treatment of the idea of “constitutional patriotism” as a means of bringing the peoples of Europe together in a constitutionalized European Union. For a discussion, see Justine Lacroix, *For a European Constitutional Patriotism*, 50 POL. STUD. 944 (2002).

implicated in the conflict all contend that they were part of all of the relevant *demos*. An example might be the creation and subsequent separation of India and Pakistan.²⁰ Or, consider that conflicts produce diasporas—people who once were unquestionably part of the *demos*, and so would have been included in the constituent power, but who left the territory in part because of the conflict. Should those members of the diaspora who want to participate in the constitution-making process be allowed to do so?²¹

Further, the constitution-making body cannot actually be the people as a whole. For purely practical reasons, that body can be at most representative of the people. Its members may claim to speak in the aggregate for the people, but shortfalls are inevitable. This is especially so where the constitution-making body is composed in substantial part of representatives of political groupings or “parties”²²—the scare quotes because the groupings need not have all or indeed any of the organizational trappings usually associated with political parties. Some groupings may be left out of the constitution-making process for seemingly practical reasons. They might be too small to warrant a seat at a table already crowded with representatives of larger ones or might lack the organizational capacity to participate meaningfully in the body’s work.²³ Yet, these small groupings might be socially or normatively significant, as with indigenous peoples in many

20. See Am. Political Sci. Ass’n, *Notes from the Editors*, 106 AM. POL. SCI. REV., no. 4, Nov. 2012, at iii, v (describing the “boundary problem” that one cannot democratically decide how to demarcate the relevant *demos* and citing the partition of India as an example of a violent contest over such a border determination). Although the case is not exactly analogous, the expulsion of Singapore from the Federation of Malaysia, and Singaporean leader Lee Kuan Yew’s reported comment that the expulsion “anguish[ing],” suggests the stakes of the boundary-drawing question. See EDWIN LEE, SINGAPORE: THE UNEXPECTED NATION 598 (2008).

21. Improvements in international communications make it easier today than earlier to include the diaspora in these processes.

22. See MARTIN VAN VLIET ET AL., CONSTITUTIONAL REFORM PROCESSES AND POLITICAL PARTIES 14–21 (2012) (discussing the role and challenges of political parties in constitution-making processes); Angela M. Banks, *Expanding Participation in Constitution Making: Challenges and Opportunities*, 49 WM. & MARY L. REV. 1043, 1056–58 (2008) (explaining that power-sharing agreements between parties may ensure that those outside the parties’ networks have “little to no chance of having any significant political power” and “participatory constitution making may only provide challengers with limited opportunities for political inclusion”).

23. See Yash Ghai & Guido Galli, *Constitution-Building Processes and Democratization: Lessons Learned*, in DEMOCRACY, CONFLICT AND HUMAN SECURITY 232, 242–43 (Int’l IDEA ed., 2006) (explaining that some groups in the constitution-building process are at a disadvantage to other groups that have more funding or are better organized). Historically, of course, even large groups have been omitted from constitution-making—most notably women. Jon Elster, *Ways of Constitution-Making*, in DEMOCRACY’S VICTORY AND CRISIS 123, 129 (Axel Hadenius ed., 1997). This Essay concerns modern constitution-making processes, though, and today such omissions are rare, though underrepresentation is not. See VIVIEN HART, U.S. INST. OF PEACE, SPECIAL REPORT: DEMOCRATIC CONSTITUTION MAKING 11 (2003), available at <http://dspace.cigilibrary.org/jspui/bitstream/123456789/4581/1/Democratic%20Constitution%20Making.pdf?1> (“Participatory processes have worked to overcome . . . racial and ethnic exclusions and have been notable . . . for the very visible inclusion of women.”); Ghai & Galli, *supra* (cataloging some successful modern constitutions that were created without meaningful public participation).

nations.²⁴ Even those who might claim to speak for the smaller groupings, such as representatives from NGOs, sometimes have a problematic relation to those groups.²⁵

For these reasons it is perhaps misleading to think that the constituent power is an actual aggregate entity in the real world. Rather, it should be understood as a concept that helps explain the normative basis for a constitution's claim to authority. But, the difficulties and shortfalls I have sketched raise questions about the nature of that claim to authority. The claim, I believe, should be understood not as implicating something akin to sociological legitimacy, or the facts about whether or to what degree people actually believe themselves to be obliged to submit to authority, but rather in purely conceptual terms. The practical payoff, then, might be small, though I believe that using the idea of the constituent power does sometimes support clearer thinking about some practical problems.

A nation with a constituent power in the relevant sense must get the constitution-making process started somehow. Today some constitution-making processes are assisted by elements of the international community, either international organizations such as the United Nations or individual nations.²⁶ That assistance is provided when there is some need.²⁷ Ordinarily that need arises from within the nation.²⁸ So, processes with international assistance—or even prodding—ordinarily get started from within.

They do so, in general, in two settings. The constitution in place may provide mechanisms for its own replacement, and the constitution makers may use those mechanisms.²⁹ But, to the extent that the constitution makers

24. See, e.g., Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Report on the Situation of Indigenous Peoples in Nepal*, ¶¶ 16, 52–58, U.N. Doc. A/HRC/12/34/Add.3 (July 20, 2009) (by James Anaya) (discussing the significance and challenges of indigenous peoples in Nepal and calling on Nepal to improve the representation and participation of indigenous peoples in its constitution-making process).

25. See, e.g., Davidson C. Williams, *Constitutionalism Before Constitutions: Burma's Struggle to Build a New Order*, 87 TEXAS L. REV. 1657, 1674–75 (2009) (describing how civil society groups, including women's, youth, environmental, and religious groups, participating in Burma's democratic constitution movement banded together with political groups to form "umbrella groups," whose ability "to speak for their members is complicated and often obscure").

26. See Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473, 1479–80 (2008) ("In many situations, external forces—nations such as the United States, which are important sources of external capital, and organizations such as the United Nations—think it important that a new domestic constitution have input from external advice givers."). For a skeptical discussion of the role of the international community in constitution-making, see *id.* at 1487 ("Yet, to the extent that politics is what matters, present and future, I am quite skeptical about the proposition that outsiders will be able to improve on the calculations internal participants already make.").

27. *Id.* at 1480.

28. *Id.*

29. See, e.g., U.S. CONST. art. V (providing procedures for the calling of a second constitutional convention); see also SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 21 (2006) (offering

are (or see themselves as) representatives of the constituent power, they may believe that they are not *legally* constrained by existing mechanisms. The theory is that those mechanisms are themselves the product of the constituent power, which always has unconstrained power. This is sometimes put in this way: After the constituent power creates a constitution, every action taken within that constitutional framework is an exercise of constituted power.³⁰ This is clearly so, in this theory, of ordinary legislation, of ordinary constitutional amendments, and even of constitutional replacements made according to the provisions of the constitution. But, the constituent power always retains the power to reconstitute the constitution on its own terms; that is, on terms set at any time by the constituent power as it is.³¹ So, for example, it is commonplace to observe that the U.S. Articles of Confederation provided that they could be amended only with the unanimous consent of the states making up the Confederation,³² but the U.S. Constitution—a replacement of the Articles—provided that it would take effect when nine of the thirteen states ratified it.³³ According to the theory of the constituent power, the example illustrates the constituent power being exercised in 1787–1789 in a manner inconsistent with the constituted power in the Articles, a constituted power that itself was an exercise of the constituent power in 1777–1781. Put another way, the constituent power always has the ability to call itself into being, disregarding restraints created *by itself* in an earlier appearance.

In a second version, constitution-making processes get started without there being a preexisting framework for constitutional revision, which can be described as constitution-making in a vacuum. Twentieth-century experiences of decolonization are good examples: Colonizing powers simply withdrew, sometimes facilitating the constitution-making process but not acting as participants in that process.³⁴ Some revolutionary transformations are similar in structure. The *ancien regime* has collapsed and its supporters have fled, leaving the field open for a complete constitutional revision. As

that while Article V makes it “next to impossible” to amend politically controversial provisions, such replacement is still an “abstract possibility”).

30. See Lars Vinx, *The Incoherence of Strong Popular Sovereignty*, 11 INT’L J. CONST. L. 101, 102, 108 (2013) (describing that a written constitution legitimates ordinary laws enacted in accordance with its authority where the constitution has been created by an act of the people’s constituent power).

31. *Id.* at 108. I put to one side the possibility that international law might impose some constraints on the constitution-making process. For a discussion of examples of internally imposed restraints on the constituent power, see Jennifer Widner & Xenophon Contiades, *Constitution-Writing Processes*, in ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW, *supra* note 12, at 57, 67–68. Such international constraints, if they exist, are imposed externally on the constitution makers.

32. ARTICLES OF CONFEDERATION OF 1781, art. XIII, para. 1.

33. U.S. CONST. art. VII.

34. See DIETMAR ROTHERMUND, *THE ROUTLEDGE COMPANION TO DECOLONIZATION* 245–50 (2006) (discussing constitution-making during the twentieth-century decolonization of European colonies in Africa and Asia).

my use of the term *ancien regime* suggests, revolutionary France can be taken as an example of this process,³⁵ and the flight of loyalists from the to-be United States gave the drafting of the U.S. Constitution something of the same flavor.³⁶

France and the United States are imperfect examples of constitution-making in a vacuum, and indeed there may be no perfect ones. The reason is that constitution-making does not occur on a desert island to which the constitution makers have just arrived. It occurs in real, historical time under real, historical circumstances. This leads to another tension in constitution-making exercises. The tension is between the power relationships as they exist when a new constitution is created and the power relationships that the new constitution both ratifies to some extent and creates to some extent.

Sometimes the collapse of the *ancien regime* means that its supporters have lost *all* political power. This may be true, for example, in some cases of imposed constitutions, where a conquering power creates a constitution for its now-defeated enemy. Nazis had no role in creating (West) Germany's Basic Law, for example.³⁷ Still, the complete collapse of preexisting political power is rare. Conservative supporters of the Japanese emperor played some part in the adoption of the postwar Japanese constitution even though it is usually described as a constitution imposed by the occupying forces.³⁸ Royalists were active participants in the French constituent assembly of 1789–1791,³⁹ and even in Germany conservative representatives participated in the Basic Law's creation.⁴⁰

35. JAMES R. ARNOLD, *THE AFTERMATH OF THE FRENCH REVOLUTION* 28 (2009).

36. See JAMES A. HENRETTA ET AL., *AMERICA'S HISTORY* 187, 189 (7th ed. 2011) (recognizing that after the American Revolution the loyalists fled and that “[a]s Patriots embraced independence in 1776, they envisioned a central government with limited powers”).

37. See Ernst Benda, *The Protection of Human Dignity (Article 1 of the Basic Law)*, 53 *SMU L. REV.* 443, 445–46 (2000) (relating that four years after the fall of the Third Reich, German leaders undertook to draft a constitution with “human dignity” as a central tenet, in response to the country’s Nazi past). Technically, the Basic Law was designed as the “constitution” of a temporarily divided Germany, to be replaced by a national constitution upon reunification. As things happened, reunification was accomplished without fundamental revisions of the Basic Law. See DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 31–32 (1994).

38. See KOSEKI SHŌICHI, *THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION* 111–37 (Ray A. Moore ed., trans., 1997) (describing the process by which the conservative Japanese government “Japanize[d]” the draft constitution written by the American staff of the Supreme Commander for the Allied Powers).

39. See, e.g., Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 *U. PA. J. CONST. L.* 345, 370 (2000) (noting that one delegate, Mounier, argued for a royal veto of whatever constitution the assembly produced). Mounier was part of *Les Monarchiens*, a group at the assembly whose members were “loyal supporters of the monarchy.” ERIC THOMPSON, *POPULAR SOVEREIGNTY AND THE FRENCH CONSTITUENT ASSEMBLY 1789–1791*, at 10–11 (1952).

40. See Inga Markovits, *Constitution Making After National Catastrophes: Germany in 1949 and 1990*, 49 *WM. & MARY L. REV.* 1307, 1309 (2008) (recounting that the Christian Democratic Union, a political party with some conservative elements, had a large number of seats in the drafting body).

More commonly, elements of the former regime participate directly in constitution-making. This is obviously true when the push for a new constitution comes when the existing constitution is understood to be functioning clumsily and so requires extensive but not revolutionary updating.⁴¹ More dramatic changes can occur only with the agreement, or at least acquiescence, of those empowered by the about-to-be-replaced constitution. Roundtable negotiations have become one important form of constitution drafting.⁴² These negotiations bring together representatives of the regime in place with representatives of the forces that all acknowledge will soon take power.⁴³ Communist parties sat at the negotiating table in central and eastern Europe as their political domination was disappearing,⁴⁴ as did the white National Party in South Africa's roundtable negotiations.⁴⁵

The reasons for such participation are clear. Those dominating the existing regime are universally understood to be on their way out, but roundtable negotiations are aimed at smoothing the path to their exit.⁴⁶ This means that the constitution being drafted has to gain their agreement.⁴⁷ Otherwise they will resist being displaced and violence will break out (or break out again, in some cases).⁴⁸ Even more, in many cases participants in the constitution-making process understand that those who formerly held complete political power will retain significant power after the transition. South African whites, represented by the National Party, would have

41. See MICHELE BRANDT ET AL., INTERPEACE, CONSTITUTION-MAKING AND REFORM: OPTIONS FOR THE PROCESS 261 (2011) (stating that roundtable discussions with the old regime usually occur in times of crisis, when the old constitution "does not provide a legitimate basis or adequate guidance for a workable constitutional reform process").

42. See *id.* at 261, 263–64 (discussing the importance and role of roundtable negotiations in constitution-making).

43. See Laurel E. Miller, *Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 601, 620–21 (Laurel E. Miller & Louis Aucoin eds., 2010) (discussing the use of roundtables "as a means of bringing together elements of the outgoing regime and new democratic formations").

44. See Thomas M. Franck & Arun K. Thiruvengadam, *Norms of International Law Relating to the Constitution-Making Process*, in FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 43, at 3, 11 (noting the presence of the Communist Party at roundtable talks in Bulgaria, Hungary, East Germany, and other countries as part of the transition to democratic government).

45. See Hassen Ebrahim & Laurel E. Miller, *Creating the Birth Certificate of a New South Africa: Constitution Making After Apartheid*, in FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 43, at 111, 119–21 (discussing the participation of the National Party in various negotiations prior to and during the South African constitution-making process).

46. See BRANDT ET AL., *supra* note 41 (describing the roundtable negotiation process as being useful in transitions between regimes because it enables legal continuity); Miller, *supra* note 43, at 622 (noting that roundtables are useful in transitional settings where "the outgoing regime retains enough support or power to remain a relevant player" because of the value of legal continuity and consensus building).

47. See Miller, *supra* note 43, at 622 (noting that roundtable cooperation with an outgoing regime that retains some support builds "stability, consensus, and legitimacy").

48. See BRANDT ET AL., *supra* note 41, at 263 (stating that in crisis situations roundtable failure could lead to violence).

substantial economic power in an African-dominated government,⁴⁹ and Communist parties in central and eastern Europe continued to have members who held on to strong collectivist visions of governance.⁵⁰ So, agreement from representatives of the former regime is needed not only to ensure a peaceful transition, but also to ensure that the new constitutional system is stable because everyone, including those representatives, finds it acceptable.

Constitution makers hope that the institutions they are creating will be stable over time.⁵¹ Political stability requires at least acquiescence from nearly all groups that have significant power, whether political, cultural, or economic.⁵² That requirement implies that even transformational constitutions project existing power relationships into the future, though they also seek to alter those relationships. Yet, doing so poses risks. The projecting of power relationships may limit the achievement of transformative goals. Excluding representatives of the *ancien regime* from constitution-making processes—as occurred, for example, as a result of the military occupation of the defeated Southern states after the U.S. Civil War⁵³—may generate resistance to the new arrangements, resistance that can itself limit the transformative possibilities.

We can bring out the tension that this exposes by overstating it as a paradox: Constitution-making processes will either be unnecessary or ineffective. Those holding power must agree to the new arrangements. But, they will do so only when they are confident that they will not be seriously disadvantaged by those arrangements. They can have that confidence when the new constitution does not change things much.

Clearly this is an overstatement. The postcommunist constitutions and the South African constitution did change things substantially, with the

49. See Patricia Agupusi, *Trajectories of Power Relations in Post-Apartheid South Africa*, 4 OPEN AREA STUD. J. 32, 39 (2011) (stating that whites still hold significant economic power in South Africa and therefore “have a huge influence on policies that affect their interests”); Robert Pear, *South Africa’s National Party: Vehicle for Afrikaner Power*, N.Y. TIMES, Sept. 7, 1989, at A14, available at <http://www.nytimes.com/1989/09/07/world/south-africa-s-national-party-vehicle-for-afrikaner-power.html?pagewanted=all&src=pm> (noting the National Party’s success at securing economic empowerment for white Afrikaners).

50. See, e.g., RETT R. LUDWIKOWSKI, CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE 151–52 (1996) (noting that in Poland negotiation with the communist government officials led to an agreement guaranteeing the communists seats in parliament and stating that the new presidency “remained in the hands of the communists”).

51. This is true even of constitutions expressly understood as transitional because the drafters of such constitutions typically envision, in rough outline, the contours of the regime that a new, permanent constitution will have. This is exemplified by the inclusion in the transitional South African constitution of a set of principles that would have to be incorporated in, or provide the structure for, the permanent constitution. S. AFR. (INTERIM) CONST., 1993, § 71; *id.* sched. 4.

52. I have inserted the qualification “nearly all” because on rare occasions it may be possible to create a constitution over the objection of a protesting minority, whose continuing protests will be met with forcible suppression by the new regime.

53. See, e.g., CARL H. MONEYHON, THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON ARKANSAS 165 (1994) (noting that following the Civil War, Congress refused to seat Arkansas’s representatives).

agreement of representatives of the former regimes who knew that their political positions would be significantly different once the new constitutions were in place.⁵⁴ Some participants in constitution-making may understand, if only vaguely, that the new arrangements they are creating will start a process of incremental change in power that will build on itself to produce substantial alterations in the distribution of power over time.⁵⁵ The intervening period may be long enough, or may be hoped to be long enough, for those benefiting from the existing distribution of power to adjust, leave, or learn how to regain power under the new arrangements.⁵⁶ Still, it may be worth considering the possibility that new constitutions themselves do not change anything but only ratify a change in the distribution of power that has already occurred.

Jon Elster provides some support for the tension between effectiveness and irrelevance in his observation that constitution-making often occurs under circumstances unfavorable to careful design.⁵⁷ When constitution-making occurs during crisis or, sometimes, after the exhaustion of conflict, constitution makers may find themselves pressed to reach some conclusion within a compressed time period.⁵⁸ The felt urgency conduces to quick compromises without substantial attention being paid to how the constitution will operate once adopted.⁵⁹ Such constitutions may be ineffective. Where constitution-making occurs in the absence of a crisis, constitution makers

54. See LUDWIKOWSKI, *supra* note 50 (describing this process in Poland); Ebrahim & Miller, *supra* note 45, at 121–22, 147 (noting such an occurrence in South Africa).

55. See, e.g., Daniel J. Elazar, *Constitution-Making: The Pre-Eminently Political Act*, in CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES 3, 6 (Daniel J. Elazar ed., 1990) (noting how the Yugoslav Constitution was revised to reflect changes in power distribution).

56. See, e.g., Andrew Arato & Zoltán Miklósi, *Constitution Making and Transitional Politics in Hungary*, in FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 43, at 350, 356 (observing that the sponsors of Hungary's two original draft presidential constitutions sought to "institutionalize an elaborate, electorally centered transition, in which political power would not be risked for a considerable period—an arrangement that a reformist, partially democratic system of the rule of law was to legitimize"); Ebrahim & Miller, *supra* note 45, at 120 (noting that the division of the South African constitution-making process into two phases "concretized a fundamental compromise between those who sought a swift transition to majority rule and those who sought to preserve some governmental influence and group privileges for the constituencies of the ancien regime").

57. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 394, 396 (1995).

58. See BRANDT ET AL., *supra* note 41, at 47 (explaining that factors suggesting urgency include the risk of returning conflict, the risk of a coup, an impending election, or foreign pressure); Elster, *supra* note 57, at 394–95 (discussing the role of time pressure and crisis in effective constitution-making). Sometimes the period may be extended over time, but then primarily because the parties to the negotiation treat the constitution-making process as a continuation of the crisis or conflict.

59. See Elster, *supra* note 57, at 394 (suggesting that passion rather than reason is most present when drafting a constitution in a crisis).

may deliberate carefully but, feeling no real pressure, may largely reinscribe in the new constitution the power arrangements of the existing one.⁶⁰

III. The Processes of Constitution-Making: Questions About Inclusiveness

The U.S. Constitution was drafted by an unrepresentative, small group meeting behind closed doors.⁶¹ Such a process would, generally speaking, be unacceptable today. International organizations and NGOs would assert with some plausibility that it would be inconsistent with some soft norms of international law, and it is almost certainly inconsistent with what specialists in constitution-making regard as best practices.⁶² Probably more important, except under unusual circumstances, domestic audiences would regard it as an inadequate basis for generating a constitution that will become binding domestic law.⁶³

Contemporary constitution-making processes must be inclusive in some general sense. Satisfying that requirement at both the drafting and the adoption stages raises some interesting general questions.

A. *Inclusiveness in Drafting*

Until recently it would have been obvious that constitution drafting could not directly include wide segments of a nation's people. The only possibility was achieving inclusiveness by ensuring that the drafting body was sufficiently representative of all the relevant constituencies.⁶⁴ Iceland's recent constitution-drafting exercise suggests that this might no longer be true in its strongest form. The drafting there was "crowdsourced," with every Icelander having the right—and power—to submit suggestions for constitutional provisions through social media websites utilized by the constitution-revision body.⁶⁵ In that sense the drafting process included every Icelander who was interested in participating. One can imagine similar crowdsourced drafting processes even for nations larger than Iceland.⁶⁶

60. *See id.* at 394–95 (“If people find themselves with all the time they need to find a good solution, no solution at all may emerge.”).

61. *See* George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH L. REV. 967, 971–72 (1991) (stating that small committees drafted the Constitution in private to ensure frank discussion).

62. *See* Landau, *supra* note 3, at 619–20 (asserting that some organizations maintain that governments should come to power through democratic means).

63. *See* David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 312 (2010) (recognizing an open-government movement in the United States and asserting that there is less support for secrecy in recent decades).

64. *See* Elster, *supra* note 57, at 373–74 (detailing how the United States, France, and Germany created assemblies to draft new constitutions).

65. *See* *Icelanders Back First ‘Crowdsourced Constitution,’* EURACTIV.COM, Oct. 22, 2012, <http://www.euractiv.com/enlargement/icelanders-opens-way-crowdsource-news-515543> (describing how Icelanders submitted feedback through Facebook and Twitter).

66. Ireland provides another recent example. *See* Eoin Carolan, *Ireland’s Constitutional Convention Considers Same-Sex Marriage*, INT’L J. CONST. L. BLOG (Apr. 9, 2013), <http://www>

Existing political groupings and parties will almost certainly affect how crowdsourcing and similar mechanisms of direct public participation in drafting actually operate. For example, parties may prompt their members to submit identical proposals, thereby multiplying the apparent public support for the proposals.⁶⁷

Of course the proposed Icelandic constitution was not “drafted” through crowdsourcing, which simply generated ideas and tapped public sentiment. Someone had to do something with the citizenry’s suggestions. Wining the outlandish from the strange but plausible, for example, would seem essential to making the process work. And, even were the drafters to start out regarding themselves as no more than charged with selecting the most popular suggestions and placing them in the constitution, they could not maintain that posture permanently. Some suggestions might be completely inconsistent with others. The drafters might submit them in the alternative to the public at the adoption stage.⁶⁸ More important, constitutional provisions often interact. Suppose there is overwhelming support for Provision A, quite a bit of support for Provision B, and slightly less support (but still a substantial amount) for Provision C. A constitution that contained A and B might be unworkable in predictable ways,⁶⁹ so the constitution’s writers might choose to place A and C in the constitution.

The crowdsourcing example illustrates a more general point about constitution writing. An inclusive process can generate a wide range of perfectly decent proposals for the constitution, but integrating them into a single document that will serve as the blueprint for an effectively functioning

.iconnectblog.com/2013/04/irelands-constitutional-convention-considers-same-sex-marriage-2 (describing public submissions to a constitutional convention that is a “hybrid of ‘ordinary’ citizens and experienced political representatives”).

67. I owe the idea of party prompting to Lauren Coyle. The phenomenon known as “astroturfing” in the United States is similar; the term is used to describe communications from the “grass roots” that are actually coordinated by elite organizations. See, e.g., Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 200–01 (2012) (“A 1935 congressional investigation uncovered what we would now term an ‘astroturf’ campaign, whereby utility companies paid for the sending of over 250,000 telegrams to Washington, written by utility company employees, and often forging the signature of senders.”).

68. The referendum on adopting the Icelandic constitution asked voters to express their opinion on six specific options for inclusion in the constitution as well as on the constitution as a whole. *Referendum: Eighty Percent Want Natural Resources Declared National Property*, ICE. REV. ONLINE (Oct. 21, 2012, 2:20 PM), http://www.icelandreview.com/icelandreview/daily_news/Referendum_Eighty_Percent_Want_Natural_Resources_Declared_National_Property_0_394572.news.aspx. Tom Ginsburg, *Iceland: End of the Constitutional Saga?*, INT’L J. CONST. L. BLOG, (Apr. 6, 2013), <http://www.iconnectblog.com/2013/04/iceland-end-of-the-constitutional-saga/>, describes the Icelandic Parliament’s rejection of most of the referendum’s results.

69. The best recent example of this kind of unworkability is Israel’s short-lived experiment with electing a Prime Minister separately from electing Parliament. Predictably, the Prime Minister lacked support from Parliament because voters chose a “leader” as Prime Minister and voted for narrower parties pursuing sectarian interests when they cast their votes for Parliament. See Yüksel Sezgin, *The Implications of the Direct Elections in Israel*, 30 TURKISH Y.B. INT’L REL. 67, 86 (2000).

government requires a fair degree of technical skill.⁷⁰ The technicians, almost certainly lawyers and legal academics, sometimes with the assistance of international organizations and NGOs,⁷¹ may regard themselves as faithful servants of the inclusive process. Almost inevitably, though, lawyers' technical concerns will have some effects—predictable and unpredictable—on the meaning of the constitution they write.⁷² To the extent that constitutions as written are to be *legal* documents, inclusiveness will be tempered to some degree by the necessary concern for technicality.

Inclusiveness will almost always be tempered by more than that, though. Assume that the drafting body—a constituent assembly—is adequately representative of the nation's constituents. Under modern conditions it will have to function with some substantial degree of openness. The secrecy of the U.S. constitutional convention would no longer be broadly acceptable.⁷³ As Jon Elster has emphasized, conducting constitution writing in secret has advantages.⁷⁴ It allows participants to make unprincipled bargains, tradeoffs that cannot be justified on the basis of any deep view of what the new government should look like or do but are justified only on the shallow but important ground that the tradeoffs are required to get agreement on the constitution overall.⁷⁵ Afterwards, the constitution's advocates can invent principled accounts to justify the results (not the tradeoffs), or hope that they will be ignored as part of a larger discussion. And, Elster argues, drafting in public leads participants to posture for public consumption and to stick with their positions longer than is desirable,⁷⁶ out of concern for seeming to waffle on important issues.

As a practical matter, drafting can rarely be done in public anyway. Public discussions by drafters might produce agreement on a few items, but many others are likely to be intractable without hard bargaining of the sort that is difficult to do in public.⁷⁷ Instead, the drafters will retreat to the back rooms, or to dinner tables, where the important work will be done.⁷⁸

70. Cf. Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201, 208 (2009) (positing that the drafting phase of constitution-making under a model involving direct consultation with the public or representative groups is “likely to be the least participatory [phase], given the challenges of writing-by-committee, much less writing-by-nation” and remarking that “in some well-known cases, the public is excluded from the drafting process and not consulted at all”).

71. See Bryan Schwartz, *Lawyers and the Emerging World Constitution*, 1 ASPER REV. INT'L BUS. & TRADE L. 1, 7 (2001) (asserting, in the context of international agreements, that certain governments draw heavily on lawyers at the drafting stage).

72. See *id.* at 10 (“When lawyers draft they sometimes achieve results that are hard to understand because they have tried too hard to anticipate and provide for every possibility.”).

73. See Pozen, *supra* note 63.

74. Elster, *supra* note 57, at 388.

75. See *id.* at 388–89.

76. *Id.* at 388.

77. See *id.* (“[P]ublic debate drives out any appearance of bargaining . . .”).

78. See *id.* at 395 (arguing that the constitution-drafting process should include some elements of secrecy to avoid grandstanding and rhetorical overbidding).

Whether a combination of seeming openness with openness with respect to some matters and secrecy with respect to others will be acceptable to modern audiences is probably highly dependent on circumstances. Some political cultures may accept the combination, and others may resist it.⁷⁹ In the latter case, and sometimes in the former, secrecy may be impossible for another reason: leaks. Again, unlike the conditions in 1789 Philadelphia, today keeping sensitive information under complete control may be close to impossible. A person angry about what has just happened behind closed doors may tweet some information; some participant in the dinner table conversation may strategically disclose it “in confidence” to a journalist; many other variants are possible.⁸⁰

The effects of all this can be put as a chain of contradictions. Contemporary constitution writing must occur in substantial part before an observing public, but effective constitution writing must occur in substantial part behind closed doors. But keeping information behind closed doors is in practice impossible. Probably the best one can hope for is that sometimes things will work out so that there is “enough” openness and “enough” secrecy.⁸¹

B. *Inclusiveness in Adoption*

A newly drafted constitution must be adopted. And, again, today adoption generally requires a substantial amount of popular participation.⁸² Popular participation can take place at two stages after a new constitution is proposed—through processes that allow the people to propose, and the constitution drafters to adopt, revisions in the initial proposal⁸³ and through ratification processes.⁸⁴

79. Compare Pozen, *supra* note 63, at 299 (“[I]t is not incompatible with [the United States’] national ethos for the government to conceal many things.”), with *Icelanders Back First ‘Crowdsourced Constitution,’ supra* note 65 (explaining how Icelanders used social media to provide input on a new constitution).

80. For an example of and commentary pertaining to a constitution that was leaked, see Nathan J. Brown, *Constitution of Iraq Draft Bill of Rights: Commentary and Translation*, CARNEGIE ENDOWMENT FOR INT’L PEACE (July 21, 2005), <http://www.carnegieendowment.org/files/BillofRights.pdf> (last updated July 27, 2005). Adrian Vermeule pointed out to me the complexity of the process of strategic leaking: The recipient knows that the leaker is breaching the stated norms for political purposes, which gives the recipient reason to discount the accuracy of the information contained in the leak.

81. For example, leaked information might produce only a minor setback in the progress of the backroom negotiations, perhaps because it deals with something the leaker is more concerned about than are other participants.

82. I omit discussion here of constitution-making processes that either by their own terms require vetting by some other body, typically a constitutional court, or by constitutional-court interpretation requiring such vetting. The use of a vetting body raises interesting questions about whether the constituent power can be controlled by law, which I address briefly below. See *infra* text accompanying notes 130–31.

83. E.g., *Icelanders Back First ‘Crowdsourced Constitution,’ supra* note 65 (describing Iceland’s constitutional-drafting process, which incorporated the social-media-generated feedback of citizens); see also Zachary Elkins et al., *The Citizen As Founder: Public Participation in*

Both stages require the dissemination of the proposal, and dissemination cannot be merely mechanical—simply distributing the proposal widely.⁸⁵ Rather, the nation's people must have the opportunity to understand the proposal.⁸⁶ Technical and political issues can arise in connection with the educational processes necessary for effective dissemination. Particularly in nations with low literacy rates, the mechanisms for dissemination must use channels other than descriptive writing. In the recent past, visual depictions in graphic form (“comic books,” disparagingly), and radio and television transmissions were used;⁸⁷ today social media are available. Using any of these alternatives raises questions beyond the technical because translating the proposed written constitution into some other form inevitably alters its meaning. Some alterations will be substantively consequential, which means that those charged with the task of translation have the power to redefine some constitutional provisions, sometimes in politically controversial ways. Those who find themselves disadvantaged by the translation may organize to oppose going forward with the constitutional process; they may argue that they do not oppose the constitution as written but rather the constitution as it is being described by the means of dissemination.

Even before the availability of crowdsourcing techniques, sometimes the people were asked to comment on the proposed constitution before they were asked to ratify it. Sometimes quite a substantial number of comments were submitted.⁸⁸ One can be skeptical about the value of the comment process. As with other forms of crowdsourcing, popular suggestions may impair the technical integrity of the constitutional draft. More important perhaps, such suggestions run the risk of undoing compromises reached during the drafting process.⁸⁹ Further, political groupings or parties that only

Constitutional Approval, 81 TEMP. L. REV. 361, 365–66 (2008) (identifying “direct consultation” as a method of popular participation in constitutional design).

84. See Elkins et al., *supra* note 83, at 364 (referring to ratification as “[t]he modal form of participation in constitutional design”).

85. See HART, *supra* note 23, at 7 (discussing examples of nations that have “experiment[ed] with new structures and forms of participation . . . to develop an open process”).

86. See Richard A. Rosen, *Constitutional Process, Constitutionalism, and the Eritrean Experience*, 24 N.C. J. INT'L L. & COM. REG. 263, 277 (1999) (“In a society which has limited experience with successful constitutional governance . . . the drafters must also popularize and educate the people about these concepts, for a people cannot be wedded to something which they do not understand.”).

87. See *id.* at 294 (recounting the use of comic books and radio broadcasts to educate Eritreans about their constitution-making process); HART, *supra* note 23, at 8 (discussing South Africa's use of numerous forms of media—including radio, television, and cartoons—to educate and involve the public in the constitution-making process).

88. See, e.g., HART, *supra* note 23, at 7 (stating that South Africans made two million submissions to their country's Constitutional Assembly); Elkins et al., *supra* note 83, at 366 (mentioning a report that 61,000 citizen submissions were made to Brazil's Congress as part of its constitution-making process).

89. See Elkins et al., *supra* note 83, at 371–72 (noting that an open process can “make bargaining and the granting of concessions more difficult” and “hinder tough choices and compromise”).

grudgingly accepted the constitutional draft may use the comment process as a wedge for reopening matters that others regarded as settled. Popular participation may in this way undermine the very legitimacy that it is supposed to generate.

One response to these difficulties is to defang the comment process by treating it as merely cosmetic. That is, innocuous suggestions may be incorporated in a revised proposal to demonstrate that the comment process was meaningful, but truly significant suggestions, even those with substantial support, may be disregarded. More study of comment processes is needed, but my present view is that these comment processes are more often cosmetic than substantial.

Either in its initial or a possibly revised form, a proposed constitution must then be ratified to become binding law. At this point the distinction between constitution-making via established amendment processes and constitution-making via some other mechanism returns to prominence. Depending on the existing constitution's amendment rules, new constitutions developed as constitutional amendments might not require popular ratification. So, for example, if the amendment rule requires only parliamentary approval by a qualified majority (such as a supermajority, or majorities in successive sessions), a new constitution adopted through the amendment process might not be submitted to the people for ratification. There might be an emerging soft norm of international law that requires popular ratification no matter what domestic mechanism for proposing a new constitution is adopted, though as a soft-law norm the requirement lacks effective enforcement.⁹⁰ Popular ratification is almost certainly regarded as "best practice" in constitution-making today.⁹¹

Ratification is desirable, even if not required, in part to ensure that the new constitution has domestic legitimacy. Typically ratification occurs through a national referendum.⁹² Some issues already mentioned recur at the ratification stage, but sometimes in a more focused way.⁹³ Political parties

90. As an example, the Venice Commission, an advisory component of the Council of Europe, expressed concern about the scope of recent revisions to the Hungarian Constitution, made without popular ratification, but has no power to do more than that. European Comm'n for Democracy Through Law (Venice Comm'n), *Opinion on the New Constitution of Hungary*, ¶¶ 6, 144, Council of Eur., Op. no. 621/2011 (June 20, 2011), available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2011\)016-E.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2011)016-E.aspx).

91. See Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 668 (2006) (arguing, based on a study of constitution-making processes in postconflict environments, that "the more representative and more inclusive constitution building processes resulted in constitutions favoring free and fair elections, greater political equality, more social justice provisions, human rights protections, and stronger accountability mechanisms"); Tushnet, *supra* note 26, at 1491 ("Modern constitution making appears to require some form of popular ratification of a proposed constitution.").

92. Elkins et al., *supra* note 83, at 364.

93. For a case study of the Kenyan process in which this occurred, see Alicia L. Bannon, Note, *Designing a Constitution-Drafting Process: Lessons from Kenya*, 116 YALE L.J. 1824 (2007).

may organize in support of or against ratification, and their campaigns can have all the characteristics of ordinary political campaigns, including severe simplification of complex issues, sometimes to the point of distortion or deception.⁹⁴

The ratification referendum may result in the adoption or defeat of the proposed constitution. Often ratification defeats are described as failures,⁹⁵ though the term may be inapt. A defeat may signal that the proposed constitution was not in fact well-suited to the nation as it then was, even though it might be well-designed for a nation that might have been transformed were the constitution to have been adopted. In parallel, a referendum vote in favor of adopting the constitution should not in itself be treated as a success full stop. Whether it is a success will depend on how well the constitution functions once it is in place and operating for a while.

C. *Concluding Thoughts About Inclusiveness*

The practical concerns about drafting and adoption discussed in the preceding sections show that the concept of constituent power discussed in Part I intersects with practical issues of constitution-making. When Abbé Sieyès introduced the idea of constituent power, it served primarily a conceptual end, that of explaining why a constitution created as the French constitution was had a claim to authority: It had authority because it was an act of the constituent power convened in a self-described constituent assembly.⁹⁶ Whether the participants in the constituent assembly actually represented real constituencies rather than notional ones was largely irrelevant.⁹⁷ Today real representativeness in its creation is the foundation of a constitution's authority. Inclusiveness is the contemporary mechanism for ensuring that a constitution actually is an exercise of the constituent power.

94. See, e.g., *id.* at 1840–41 (describing the referendum campaign in Kenya, which included misrepresentations of the proposed constitution's provisions by opponents and promises of "patronage and resources" by proponents in return for support).

95. See, e.g., *Kenya: Divided by the Colours of a New Constitution*, IRIN, July 30, 2010, <http://www.irinnews.org/Report/90011/KENYA-Divided-by-the-colours-of-a-new-constitution> ("An attempt to pass a new constitution in 2005 failed when 57 percent of Kenyans voted against the draft, with 43 percent supporting it.").

96. See EMMANUEL JOSEPH SIEYÈS, *WHAT IS THE THIRD ESTATE?* 124–26 (S. E. Finer ed., M. Blondel trans., Praeger 1964) (1789) (using the term "nation" to refer to the constituent power and declaring "[t]he government . . . can only be a product of *positive* law. Every attribute of the *nation* springs from the simple fact that it exists. No act of will on its part can give it greater or lesser rights than those it already enjoys" (second emphasis added)).

97. Cf. Elster, *supra* note 57, at 375 ("In France, the constituent assembly decided to ignore the instructions of their constituencies with regard to both the voting procedures and the King's veto.").

IV. The Substance of Constitution-Making: Scope and Comprehensiveness

This Essay focuses on constitution-making processes in general, not on the particular substantive choices by constitution makers. It is not concerned with the choice between having a parliamentary system or a presidential one, for example, or with the precise form given processes for constitutional review of legislation. We can examine some general issues of substance by moving to a higher level of generality, though.

A. *Expressing Foundational Principles in a Constitution*

Often the hard work in constitution-making involves working out details of government structures because different structures have different and to some degree predictable political consequences. Modern constitutions typically have preambles and other provisions stating general principles.⁹⁸ Constitution writers can and sometimes do omit preambles without sacrificing much.⁹⁹ Most preambles combine pabulum—in references to general ideas about human rights, for example—with some effort to capture a sense of national identity.¹⁰⁰ Most often, this combination serves some broad expressive or educational purposes, but occasionally more emerges from the preambles and general statements of principle.

Often these provisions are largely precatory, with relatively little legal effect. Legislators can rely on them, arguing that their proposals, if adopted, will advance the general principles or the aims articulated in a preamble.¹⁰¹ Often they are expressions of the constitution-writers' understanding of national identity.¹⁰² Sometimes, though, preambles and general principles

98. Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT'L J. CONST. L. 714, 716 (2010).

99. See Sanford Levinson, *Do Constitutions Have a Point? Reflections on "Parchment Barriers" and Preambles*, in WHAT SHOULD CONSTITUTIONS DO? 150, 156–57, 177–78 (Ellen Frankel Paul et al. eds., 2011) (exploring the purpose of preambles and concluding that they contribute little towards some functions of constitutions); Orgad, *supra* note 98, at 716 n.6 (noting that states without preambles in their constitutions include Austria, Belgium, Cyprus, Finland, Latvia, Luxembourg, the Netherlands, and Singapore).

100. See, e.g., IR. CONST., 1937, pmb. (incorporating general ideals with references to national history in its goal “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, the unity of our country restored, and concord established with other nations”); see also Vicki C. Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 PENN ST. INT'L L. REV. 319, 325 (2010) (listing expressions of national identity in the preambles of the constitutions of Iraq, China, France, Germany, and Ireland).

101. See, e.g., Press Release, Senator Patrick Leahy, Statement on the Constitutionality of the Patient Protection and Affordable Care Act (Mar. 24, 2010), <http://www.leahy.senate.gov/press/statement-on-the-constitutionality-of-the-patient-protection-and-affordable-care-act> (“Among the six purposes set forth by the Founders was that the Constitution was established to ‘promote the general Welfare.’ It is hard to imagine an issue more fundamental to the general welfare of all Americans than their health.”).

102. See Jackson, *supra* note 100.

can have practical and legal force.¹⁰³ Occasionally the expressive, practical, or legal effects of statements of general principles and preambles may create unanticipated difficulties for an operating constitution.¹⁰⁴

Preambles come in many variants. Some, like the U.S. Constitution's, are terse and consist almost entirely of statements of general principle.¹⁰⁵ Preambles consisting primarily of general principles are almost entirely forward-looking. More typically, preambles are both backward and forward-looking.¹⁰⁶ They describe the nation's historical origins and the reasons for adopting this constitution. Postconflict constitutions may refer to the struggle's resolution by the process resulting in the constitution being offered for adoption. Examples include the preambles to the 1937 Irish Constitution and the 1996 South African Constitution. The former refers to "centuries of trial," and the "heroic and unremitting struggle to regain the rightful independence of our Nation."¹⁰⁷ The latter says that "the people of South Africa[] [r]ecognise the injustices of our past [and] [h]onour those who suffered for justice and freedom in our land."¹⁰⁸ Some preambles are long and quite detailed.¹⁰⁹ The longer the preamble, the more likely it is to reflect the kinds of negotiated compromises that pervade constitutional details. The Iraqi preamble, for example, carefully includes as many of the peoples of Iraq as possible, so as to avoid the implication that one group has constitutional priority.¹¹⁰

Preambles can conceal as well as reveal important issues. Referring to a nation's "people" may, in specific contexts, signal to insiders and sometimes to others an ethnonationalist understanding, for example. More generally, backward looking statements may come to have exclusionary implications as a nation's population changes.¹¹¹ In the twenty-first century, many nations

103. See *infra* notes 116–17 and accompanying text.

104. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905) ("Although [the] Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments.").

105. See U.S. CONST. pmb. (promoting "Justice," "the general Welfare," and "Liberty" among other principled values).

106. Constitutions written to replace ones that have become outdated may simply pick up the preamble from the existing constitution.

107. IR. CONST., 1937, pmb.

108. S. AFR. CONST., 1996, pmb.

109. See, e.g., A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY], pmb., available at <http://www.kormany.hu/download/e/2a/d0000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf#!DocumentBrowse>.

110. See pmb., *Doustour Joumhouriat al-Iraq* [The Constitution of the Republic of Iraq] of 2005 (calling upon "the pains of sectarian oppression inflicted by the autocratic clique and inspired by the tragedies of Iraq's martyrs, Shiite and Sunni, Arabs and Kurds and Turkmen and from all other components of the people").

111. For a discussion focusing on the Irish Constitution of 1937, see Mark Tushnet, *National Identity as a Constitutional Issue: The Case of the Preamble to the Irish Constitution of 1937*, in *THE CONSTITUTION OF IRELAND: PERSPECTIVES AND PROSPECTS* 49 (Eoin Carolan ed., 2012).

are “nations of immigration,” with increasingly large portions of their populations drawn from other lands (sometimes recently, sometimes over extended periods of time, as with the Turkish-origin population of Germany).¹¹² Backward looking statements may impede the development of a national self-understanding that comports with the nation’s actual composition and may even serve as the focal point for the creation, or at least intensification, of ethnonationalist politics.

Even forward-looking statements of principle may have similar effects. Consider the terse “whereas” clause that precedes Canada’s Charter of Rights and Freedoms: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.”¹¹³ The reference to God may come to seem inapt over time. Similarly with the Irish Constitution’s preamble, which expressly speaks “[i]n 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” and invokes principles of “Prudence, Justice and Charity,” terms that resonate strongly with the natural law tradition.¹¹⁴ The weaker the ties of the people of Ireland (including immigrants) to the Roman Catholic Church, the more distance there will be between the preamble and the nation for which it purports to speak. Focusing less on the terms as used in their historical context than on the general principles they articulate can alleviate these difficulties. Notably, the Canadian clause does not say that Canada is founded upon the supremacy of God, but rather on “principles that recognize” that supremacy.¹¹⁵ An atheist might agree with the founding principles without agreeing that only God’s supremacy justifies them.

Preambles and general principles will have legal force when they are embedded in constitutions with provisions for constitutional review in the courts. Sometimes courts will rely on preambles and general principles as the grounds for specific exercises of the power of constitutional review. In France, the Constitutional Council’s foundational decision on associations in 1971 referred to the preamble of the 1958 Constitution as stating some of the “fundamental principles recognized by the laws of the Republic” that provided the foundation for the Council’s finding a statute

112. See, e.g., PHILIP L. MARTIN, *THE UNFINISHED STORY: TURKISH LABOUR MIGRATION TO WESTERN EUROPE* 3 (1991) (“Organised Turkish labour emigration began with an agreement of October 1961 between Turkey and the Federal Republic of Germany.”); Catherine Dauvergne, *Amorality and Humanitarianism in Immigration Law*, 37 *OSGOODE HALL L.J.* 597, 616–17 (1999) (naming the United States, Canada, and Australia as examples of “nations of immigrants”).

113. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (announcing the principles in a preambulatory fashion, but not labeled as a preamble).

114. IR. CONST., 1937, pmbl.

115. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

unconstitutional.¹¹⁶ The High Court of Australia invoked the general principle of representative democracy that underlies that nation's structures of governance to infer a principle of freedom of political expression even though the authors of the Australian Constitution deliberately refrained from including in it a comprehensive bill of rights, including a protection for free speech.¹¹⁷ The U.S. constitutional scholar Charles Black advocated that we use a method of constitutional interpretation calling on judges to make similar structural inferences from general terms and principles.¹¹⁸

Constitution writers might sometimes welcome structural constitutional interpretation, for reasons discussed below.¹¹⁹ Even if constitution writers hope to prevent it, they may find it difficult to express that hope in words that effectively constrain the technique. The authors of India's 1947 Constitution adopted a formulation used in Ireland's Constitution to give constitutional status to social and economic rights. The Irish Constitution protected those rights through "directive principles of social policy," which were to be "the care of the [Parliament] exclusively, and shall not be cognisable by any court."¹²⁰ The Indian Constitution changed the descriptive wording slightly, to "directive principles of state policy," and omitted the ban on judicial enforcement.¹²¹ That ban was generally understood as implicit in the constitutional structure through an understanding confirmed by other constitutional provisions; the constitution distinguished between "fundamental rights," contained in Part III, which were enforceable in court, and the directive principles in Part IV, and one could readily infer that they would not be enforceable in that way.¹²² Nonetheless, the Supreme Court of India has read into the judicially enforceable right to life many important social and economic rights laid out in the directive principles.¹²³

B. *Unamendability*

Some constitutions single out specific substantive provisions and purport to make them unamendable. The classic expression is the so-called

116. See JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 272–73 (1992) (discussing the decision on associations).

117. *Australian Capital Television Pty. Ltd. v Commonwealth* (1992) 177 CLR 106, 136–39.

118. See generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969) (lecturing on the neglected method of structural interpretation, specific applications of structural inference, and judicial review).

119. See *infra* subpart IV(C).

120. IR. CONST., 1937, art. 45 (capitalization omitted).

121. INDIA CONST. pt. IV (capitalization omitted).

122. See GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* 14 (2000) (discussing the Directive Principles and Fundamental Rights sections of the Indian Constitution and noting how the government's legislative and constitutional amendment powers became subject to judicial review).

123. The foundational case is *Olga Tellis v. Bombay Mun. Corp.*, (1985) 2 S.C.R. 51, 55 (concluding that the right to life includes a right to livelihood because "no person can live without the means of living").

“eternity” clause of the German Basic Law. That clause, in Article 79, says that amendments “affecting the division of the Federation into [States] . . . or the principles laid down in Articles 1 and 20 shall be inadmissible.”¹²⁴ Article 1 states, “Human dignity shall be inviolable,”¹²⁵ and Article 20 describes Germany as “a democratic and social federal state.”¹²⁶ Article 20 also backs up these provisions: “All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.”¹²⁷ Some constitutional courts have followed the Supreme Court of India in articulating a doctrine according to which some constitutional amendments are substantively unconstitutional if they conflict with what that court calls the constitution’s “basic structure.”¹²⁸ Depending on domestic constitutional conditions and traditions, the basic structure can include both broad principles such as federalism and secularism and seemingly narrow provisions such as term limits for the nation’s president.¹²⁹

Reconciling the proposition that constitutional provisions can be unconstitutional with the idea that constitutions are exercises of the constituent power is difficult. Suppose that the purportedly unconstitutional amendment is adopted by the amendment rules specified in the existing constitution.¹³⁰ The amendment is an exercise of (a form of) the constituent power at the time the amendment occurs. It is unclear as a matter of basic theory why an exercise of the constituent power at an earlier time should prevail over an exercise of the constituent power—of a people constituted differently—at a later time.

The notion of “inadmissibility” might be thought to offer a solution. An amendment seeking to change an unamendable provision could be inadmissible in the sense that its proponents could not lawfully use the existing amendment procedure to get it adopted: Relevant officials might rule

124. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBll. I, art. 79, cl. 3.

125. *Id.* art. 1, cl. 1.

126. *Id.* art. 20, cl. 1.

127. *Id.* cl. 4.

128. See SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE 40–42 (2009) (discussing the constitutional basis for India’s “basic structure doctrine,” which requires that new amendments to the constitution must comport with its basic structure).

129. The Colombian Constitutional Court held that an amendment allowing a president to run for a second term was constitutional but one allowing a further reelection for a third term was unconstitutional. Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 2010, Sentencia C-141/10, Gaceta de la Corte Constitucional [G.C.C.]. The Court relied largely on what it described as procedural irregularities in the conduct of the referendum in which a third term was approved, but there were overtones of substantive unconstitutionality in its opinion. *Id.* Note, of course, that the substantive unconstitutionality does preclude the nation’s people from choosing as president (in the third election) the person whom they truly believe best represents them (as do all term limit rules, as explained in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837–38 (1995)).

130. The theory of the constituent power raises questions about whether such procedures *must* be followed. Those questions parallel the ones I address in the text.

the amendment out of order or refuse to place it on the ballot, and, were courts called upon and agreed with the officials' judgments about substantive unconstitutionality, the courts would uphold such refusal. Sometimes the idea of an amendment's substantive unconstitutionality is coupled with the acknowledgement that the "amendment" could be adopted as part of a process of replacing the existing constitution with another—at least where the existing constitution itself lays out processes for constitutional replacement.¹³¹

At this point the theory of constituent power comes in with real bite. Consider here the constitutional theory expressed in the U.S. Declaration of Independence:

[W]henver any Form of Government becomes destructive . . . , it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. . . . [I]t is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.¹³²

Behind every constitutional structure lies the possibility of revolutionary overthrow—peasants with pitchforks, so to speak. The constituent power can exercise itself through the forms of law, but those forms cannot ultimately constrain the constituent power.¹³³

Inadmissible or unconstitutional constitutional amendments press constitutional theory to its limits in revolution. As the authors of the Declaration of Independence agreed, the right to revolution should not be exercised lightly.¹³⁴ This consideration points in two directions for the theory of unconstitutional amendments. The doctrine erects legal barriers to the adoption of fundamental changes in a constitution, to its basic structures, and so might be thought to ensure that the constituent power exercise itself in that way only in the most pressing circumstances. Similarly, mechanisms for constitutional replacement, where they exist, typically are more cumbersome

131. Cf. Richard Stacey, *Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-Making Process*, 9 INT'L J. CONST. L. 587, 590, 601–03 (2011) (summarizing Carl Schmitt's conceptualization of the distinction between "constituent power" and "constituted powers" and observing that, in light of Schmitt's theory, "it becomes important to determine both whether a representative body holds constituent power and whether the changes it seeks to make amount to amendments, fundamental amendments, or constitutional replacements").

132. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

133. For a general discussion, see CARL SCHMITT, *CONSTITUTIONAL THEORY* 271–79 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928).

134. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating that "[p]rudence . . . will dictate that Governments long established should not be changed for light and transient causes" but that regime change is appropriate after a "long train of abuses and usurpations").

than those for constitutional amendment.¹³⁵ The increased burden of replacing the existing constitution with another one might, again, limit replacements to truly important occasions.

Yet, the doctrine of substantive unconstitutionality might frustrate proponents of fundamental change who in response might resort to the right of revolution, with violence often attending it. Or, the proponents might treat the obstacles to accomplishing their goal as pointless impediments, permissibly ignored. This might be particularly so where the thwarted amendment seems relatively discrete. In the term-limits case, for example, proponents might think that everything else about the constitution was quite acceptable and be puzzled at being required to go through an elaborate process of constitutional replacement at the end of which is a “new” constitution identical, save for the term-limits provision, to the old one. Perhaps constitutional theory should treat an unconstitutional amendment as a pro tanto exercise of the right to revolution through the form of law, a form that allows fundamental change to occur without violence.

C. *Deferring Issues for Future Resolution*

Recent work by Rosalind Dixon and Tom Ginsburg, and by Tsvi Kahana, has highlighted some structural features of substantive constitutional provisions.¹³⁶ Constitution writers resolve some core substantive issues but defer others, sometimes equally important ones, to the future.¹³⁷ These deferrals come in various forms.

Perhaps the most familiar is the deferral of issues to constitutional courts. The authors of the Constitution of South Africa were personally committed to the abolition of capital punishment but were not in a position politically to include abolition in the constitution.¹³⁸ They created a constitutional court and understood that that court would address capital punishment’s constitutionality,¹³⁹ as it did in the first case it decided.¹⁴⁰ Equality clauses often enumerate specific protected classes accompanied by a catchall provision.¹⁴¹ The latter licenses later decision makers, primarily

135. See Thomas Ginsburg et al., *The Lifespan of Written Constitutions*, U. CHI. L. SCH. REC., Spring 2009, at 10, 14 (“Even more costly than amendment is total replacement, because there are more issues to bargain over . . .”).

136. See Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT’L J. CONST. L. 636, 640–41 (2011) (discussing how the structure of certain “by law” clauses defers important decisions into the future). Some of Dixon’s work, and Kahana’s, is in progress and not available for formal citation. I discuss it with their permission.

137. *Id.* at 637.

138. Peter Norbert Bouckaert, *Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa*, 32 STAN. J. INT’L L. 287, 298–99 (1996).

139. *Id.* at 298.

140. *State v. Makwanyane* 1995 (3) SA 391 (CC) at 402 para. 5.

141. See, e.g., Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11, § 15(1) (U.K.) (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without

courts, to decide whether some nonenumerated class should receive protection equivalent to that given the enumerated ones.¹⁴² Historically, the most important uses of catchall provisions have involved gender.¹⁴³ There the catchall has been used because the constitution is old and difficult to amend, as in the United States.¹⁴⁴ Sometimes, though, it occurs because the constitution makers preferred deferring the issue to later resolution by another institution than to resolving it themselves.¹⁴⁵ This appears to be the case with some modern constitutions in connection with sexual orientation.¹⁴⁶

Sometimes deferrals to the future occur for largely technical reasons. Consider the laws regulating election processes. Constitution makers might be able to specify some basic choices, for example the choice between first-past-the-post plurality rules in individual districts or proportional representation of various sorts. Implementing those choices requires greater detail than is often achievable in the constitution-making process.¹⁴⁷ Yet, the precise contours of electoral laws—and other statutes of similar importance—are typically almost as consequential as the choices embedded in the constitution. In part constitution makers can address these questions by specifying that some topics, such as the electoral rules, will be set by “organic laws” to be adopted by the legislature.¹⁴⁸ Typically the category of organic laws is defined by rules requiring their adoption—and, importantly, amendment or repeal—by a qualified majority of the legislature, sometimes a

discrimination and, *in particular*, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” (emphasis added)).

142. See Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CALIF. L. REV. 735, 747–48 (2002) (explaining that a general catchall equality clause “leaves much more discretion for future interpreters and decisionmakers” than a specific gender equality clause).

143. See, e.g., *id.* at 739 (“In the absence of gender-specific constitutional text, the story of constitutionalizing American women’s equality is a story of creative interpretation of the Equal Protection Clause and of advocates’ bravado.”).

144. See Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem* 1, 13 (Chi. Pub. Law and Legal Theory, Working Paper No. 346, 2011) (finding that “as constitutions age, they may . . . become more difficult to amend” and that this, coupled with the fact that the “protection of minorities [is] . . . an[] important factor for constitutional designers to consider when adopting various amendment mechanisms,” necessitates particular diligence when considering how constitutional rights will be effectuated).

145. See Dixon & Ginsburg, *supra* note 136, at 637 (noting that it is “often the case that constitution-makers self-consciously choose *not* to bind their successors”).

146. See KEES WAALDIJK & MATTEO BONINI-BARALDI, SEXUAL ORIENTATION DISCRIMINATION IN THE EUROPEAN UNION 67–69 (2006) (“[S]exual orientation is only spelled out in the constitution of one Member State In most other Member States constitutional protection can be derived from more general words in their national constitution.”).

147. See Dixon & Ginsburg, *supra* note 136, at 641–43 (discussing decision-cost constraints that lead to deferrals).

148. See Elster, *supra* note 57, at 367 (discussing the existence in some countries of “a body of ‘organic laws’” that apply to certain fundamental aspects of political life, such as elections to the legislature).

supermajority such as two-thirds, sometimes a majority of the body as a whole rather than a majority of a quorum.¹⁴⁹

Organic laws fall between ordinary legislation and constitutional provisions on a scale of difficulty of adoption, amendment, and repeal. In addition to their utility in dealing with important subjects whose implementation is rife with technical detail, creating the category can be a useful mechanism for getting over some obstacles in the constitution-writing process, and the phenomenon of organic laws is common enough that constitution writers may reasonably believe that they are not avoiding their responsibilities. Still, there are some hidden traps. Less important is the possibility that the constitution writers will place too many laws in that category, perhaps out of a desire to get their work completed. Once adopted, the organic laws may be more resistant to alteration than appropriate for the subject matter.¹⁵⁰ More important, deferring issues to the legislature may simply put off political confrontations that might have been addressed at the constitution-writing stage but that might be destabilizing in the legislature.

Dixon and Ginsburg's study focuses on another form of deferral—provisions that specify that some issues will be resolved “by law” rather than, implicitly, by the constitution itself.¹⁵¹ Here it is useful to distinguish between federal systems and nonfederal (unitary) ones. Constitutions for federal systems must allocate power between the nation and subnational units. Exercises of the power allocated to the national government will necessarily occur by law in some sense. Put another way, a by-law clause accompanies every allocation of power to the national government. The U.S. Constitution gives Congress the power “[t]o establish . . . uniform Laws on the subject of Bankruptcies.”¹⁵² The reference to “[l]aws” might seem to make this a by-law clause, but in reality the Bankruptcy Clause is indistinguishable in this regard from the Commerce Clause, which immediately precedes it and makes no reference to “laws” regulating commerce among the several states.

By-law clauses can have a function, other than deferral of decision to the future, not addressed in detail by Dixon and Ginsburg. Consider a unitary system, in which the national government has all the powers inherent in sovereignty. Saying that the national government shall act “by law” with respect to some subject adds nothing to the power of the government to be created by the constitution and so does not defer any decision at all. A by-

149. *See id.* (“Some countries have a body of ‘organic laws’ that, although not part of the document referred to as ‘the constitution,’ require a supermajority for their amendment. In France, the requirement is that of an absolute majority; in Hungary, it is two-thirds.”).

150. As a hypothetical, consider a constitutional provision that an organic law will define the nation's bankruptcy laws.

151. *See generally* Dixon & Ginsburg, *supra* note 136 (describing how constitution makers defer decision making by adopting “by law” clauses). Of course, this form is independently interesting only when the reference to “law” is not to organic laws.

152. U.S. CONST. art. I, § 8, cl. 4.

law clause might serve to allocate power between the legislature, which enacts laws, and the executive, which acts by decree, by secondary legislation (the term used in the United Kingdom),¹⁵³ or by administrative “rule” (the term used in the United States).¹⁵⁴ I note one difficulty with the use of by-law clauses to allocate power between legislature and executive. Except with respect to prerogative powers, those inherent in the executive function itself, all executive action is ultimately authorized by law. The British terminology is especially useful here because it shows that legislatures enact primary legislation that executives then implement through secondary legislation.¹⁵⁵ A by-law clause might not effectively distinguish between executive action taken pursuant to permissibly delegated authority and action that must be taken pursuant to quite specific laws. Indeed, again putting prerogative power to one side, no statute can be sufficiently detailed to resolve all questions by law, implying that a by-law clause will be subject to some pressure at the edges and perhaps even close to the core.¹⁵⁶ The allocational function of by-law clauses deserves more scholarly study.

In work in progress, Dixon is examining another facet of the alternatives of drafting specificity and generality. Sometimes constitutional specificity arises from one important function of new constitutions, that of repudiating abuses of the past.¹⁵⁷ The South African constitution’s detailed provisions laying out the procedures for pretrial detention are an example.¹⁵⁸ Specificity tightly confines future interpreters, while generality licenses them to engage in more wide-ranging interpretation. Relying on evidence from cognitive

153. See Winston Roddick, QC, *Devolution—the United Kingdom and the New Wales*, 23 SUFFOLK TRANSNAT’L L. REV. 477, 480 (2000) (“It is the secondary legislation that makes detailed provisions for the implementation of the primary Acts of Parliament.”).

154. RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 7 (2d ed. 2012) (characterizing agencies as having the power to issue “legally-binding rules”).

155. The U.S. account of executive power, other than that inherent in the executive, as consisting of delegations from the legislature is to the same effect.

156. For an example, see Sujit Choudhry & Kent Roach, *Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability*, 41 OSGOODE HALL L.J. 1, 8–18 (2003) (discussing the Canadian Supreme Court’s interpretation of a clause requiring that certain rules be “prescribed by law” (internal quotation marks omitted)).

157. Cass Sunstein has made this use of specificity a normative feature of what he regards as good constitutional design. See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 35–36 (2004) (“[R]ights are a product of concrete historical experiences with wrongs.”).

158. S. AFR. CONST., 1996, § 35. Specifically, § 35 provides, in pertinent part:

(1) Everyone who is arrested for allegedly committing an offence has the right—

.....

(d) to be brought before a court as soon as reasonably possible, but not later than—

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day

Id. § 35(1).

science, Dixon argues that future interpreters—specifically, judges—might treat generality as a signal that the constitution writers trusted them to interpret the new constitution correctly and as a result will be inclined to do so in a reciprocal manner, that is, by interpreting it to reflect what the judges understand to be purposes the constitution writers did not, or could not, effectively express in the document itself. The other side of the argument is that specific provisions may be taken to signal mistrust of the future interpreters. A provision that stated that pretrial detention must be limited to a “reasonable” time before a court appearance might be interpreted to require an appearance within 48 hours of arrest, but a court attuned to interests in domestic security might adopt a more flexible standard. Fearing a return to the past they are seeking to repudiate, the constitution writers will attempt to tie interpreters’ hands through linguistic specificity. Dixon suggests that this strategy may backfire: Just as interpreters who take generality as a signal of trust and reciprocate, interpreters who interpret specificity as a signal of mistrust may also reciprocate, this time by being quite grudging in their constitutional interpretations.

Dixon’s argument is intriguing but rests on what might turn out to be shaky foundations in its application of the findings of cognitive science, particularly in light of the extended time frame in which the supposed reciprocity effects are to occur. Consider first the years shortly after a constitution’s adoption. There is likely to be a substantial overlap between the constitution writers and its early interpreters. Memory might do much of the work that Dixon attributes to reciprocity. Reciprocity and its obverse might have some effects because the interpreters engage in ongoing interactions with the constitution writers. Suppose for example that the constitution writers are suspicious about the capacity of judges chosen by the prior regime to interpret the constitution fairly. They might well insert as many specific provisions into the constitution as they can. Knowing of the constitution writers’ suspicions, the interpreters may confirm them through grudging interpretation. Yet, here it may be unclear whether we are observing the psychological effects Dixon describes or instead observing the confirmation of the predictive judgment the constitution writers made. Now consider constitutional interpretation over the longer run. The interpreters may invoke what we can call the “What’s he to Hecuba?” principle.¹⁵⁹ That is, the constitution writers have passed from the scene. It is unclear why interpreters should now be concerned with reciprocating the trust or mistrust exhibited by the constitution writers.

Dixon suggests that principles of reciprocity can help us understand what she calls optimal constitutional design, that is, design that combines specificity and generality to produce optimal levels of flexibility and rigidity

159. See WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act 2, sc. 2 (E.K. Chambers ed., D.C. Heath & Co. 1917) (1603) (“What’s Hecuba to him, or he to Hecuba, That he should weep for her?”).

when the constitution's provisions are implemented.¹⁶⁰ That certainly is a desirable feature for constitutions to have, but whether cognitive science provides better guidance than Hamilton's "reflection and choice"¹⁶¹ seems to me open to question.

Tsvi Kahana has begun work on a project related to Dixon's. Discussing the process by which the Basic Law: Freedom of Occupation was amended in 1994,¹⁶² and evoking John Marshall's opinion in *McCulloch v. Maryland*,¹⁶³ Kahana distinguishes between a "majestic" constitution and a more mundane one. A majestic constitution contains truly fundamental provisions of a sort that can inspire loyalty among the nation's citizens; a mundane one is filled with technical detail and has, as Richard Hofstadter said of Abraham Lincoln's Emancipation Proclamation, "all the moral grandeur of a bill of lading."¹⁶⁴ As the reference to *McCulloch* suggests, the distinction between the majestic and the mundane does not map directly onto a distinction between rights-granting and power-conferring constitutional provisions. And, as my earlier mention of the South African provision on pre-arraignment detention suggests, neither does it map directly onto a distinction between the general and the specific, for the South African provision, understood against its historical background, is a majestic one. More work needs to be done here as well, but Kahana's insight about the majestic and the mundane is likely to prove generative.¹⁶⁵

V. Conclusion

This Essay is replete with generalizations and qualifications. The qualifications are as important as the generalizations. The issues I have identified do not create difficulties in every constitution-making process, and some processes—probably unusually—may go quite smoothly. The issues' structural dynamics are built in, but the dynamics may not always affect constitution-making because specific circumstances keep them suppressed. The idea of the constituent power plays an important part in thinking about

160. As with many issues of constitutional design, this one is bound up with questions about the amendment formula: Specificity that turns out to be undesirable may be altered pursuant to amendment, but the ease with which that can occur depends on the amendment rule (and similarly with generality).

161. THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 1.

162. Basic Law: Freedom of Occupation, 5752–1992, SH No. 1387 p. 114 (Isr.), *repealed and replaced by* Basic Law: Freedom of Occupation, 5754–1994, SH No. 1454 p. 90 (1994) (Isr.).

163. 17 U.S. (4 Wheat.) 316, 407 (1819) (suggesting that a constitution should not have "the prolixity of a legal code").

164. RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 131 (25th Anniversary ed. 1973).

165. The distinction might have some bearing, for example, on how we should think about the choice between placing constitutional amendments at the end of the document and integrating them into the document in their appropriate place. For a discussion of James Madison's choice on this question, see Edward Hartnett, A "Uniform and Entire" Constitution; Or, What If Madison Had Won?, 15 CONST. COMMENT. 251 (1998).

some but not all of the issues, but that idea sometimes serves a purely conceptual end, clarifying some important questions, yet sometimes seeming to be tied to ideas about the actual participation and consent of a nation's people in constitution-making.

I think it useful to sketch some issues that often arise, though, and not merely because of scholarly interest. Constitution makers face a range of pressures from the specific historical conditions under which they act. Perhaps they can improve their performance merely by being aware of typical issues: What might seem to them unique problems might actually be common ones, and thinking about how other constitution makers have dealt with those problems may help them in their own endeavors. As Oliver Wendell Holmes observed, "When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength."¹⁶⁶ Perhaps this Essay has identified some of the dragons that inhabit the cave of constitution-making.

166. O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).