Texas Law Review
See Also
Volume 95

Response

On Searching for Archetypes in Constitutional Preambles

Sanford Levinson*

Whatever may be precise criteria for describing a work of scholarship as a *tour de force*, this essay by David Law surely meets any that might be imagined. He has used the most sophisticated available contemporary methodological tools to analyze the preambles of the 171 constitutions "in force as of 2012."[1] The purpose is to discover whether there are any patterns that can be discerned among them. The answer, he argues, is a resounding yes. The various preambles can be usefully sorted among three "archetypes," which he describes as "liberal," "statist," and "universalist." This fact, he suggests, will be especially useful for students of comparative constitutional law inasmuch as it will allow them to cast their net far more broadly than is now the general case even among those relatively few academics who have liberated themselves from fixation on a single jurisdiction's constitution.

Law explicitly agrees with Ran Hirschl, truly one of the world's leading students of comparative constitutionalism—his 2014 book *Comparative Matters* deservedly shared a prize for the year's best book awarded by the Law and Courts Section of the American Political Science Association[2]—who has caustically noted that most comparative constitutional analysis has

* W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin.

1. David Law, *Constitutional Archetypes*, 95 TEXAS L. REV. 153, 194 (2016).

2. Past Award Recipients, LAW & CTS.: AN ORGANIZED SEC. AM. POL. SCI. ASS'N, http://lawcourts.org/Archives/past_awa_rec.html [https://perma.cc/A2WM-P7VD].

been based on what political scientists call "small-N" observations.[3] That is, a small number of constitutions have served as the grist for the comparative mill. Hirschl refers to "overanalyzed, 'usual suspect'" subjects.[4] Too many current approaches to comparative constitutionalism depend on analysis of "[t]wo dozen court rulings from South Africa, Germany, Canada, and the European Court of Human Rights—alongside a more traditional set of landmark rulings from the United States and Britain."[5] Law quotes another scholar who notes that English-language writing about comparative constitutionalism "typically uses American, Canadian, South African, and British constitutional law as its case studies, with excursions, sometimes, to . . . Australia, India, Israel, and Germany."[6] These observations are surely true, and they point to the unfortunate degree of parochialism that exists even among scholars who otherwise deserve great credit for looking beyond their own national borders for insights into the complex questions surrounding the notion (and reality) of what we call "constitutionalism."

There can be no doubt, therefore, of the intrinsic ambition of Law's project and its potential importance for both research programs and pedagogy dealing with comparative constitutionalism. I am dazzled by the ambition and by the remarkable synthesis he provides of the 171 preambles. But let me confess at the outset that I have nothing useful to say about the formidable methodological apparatus that underlies his arguments. Political scientist though I may be, at least in terms of having long-ago received a Ph.D. in that discipline, I simply do not have the competence to assess the methodology. I will leave that up to younger, more recently trained, political scientists.

What I can do, though, is to offer some observations about the substantive claims that Law puts forth. I have little trouble accepting his general postulation that constitutional "archetypes" exist and that the kind of "large-N," highly empirical (and computer-based) research program that this article exemplifies can be enormously useful in allowing us to identify them. My qualms arise, however, about the problems connected with one of his suggested archetypes, "statism." I believe that the term elides some important issues. I would prefer, for example, to distinguish "nationalist" preambles as a potential archetype. Moreover, I think it may be a serious error to basically ignore explicitly theocentric preambles, which are an important presence in the world, if for no other reason than the practical importance of some of the countries that have adopted such preambles. I will suggest that it may be ultimately more helpful to present four archetypal models than to remain

3. *See* Law, *supra* note 1, at 192 n.136 (citing RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 244 (2014)).

4. RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL 4 (2014).

5. *Id.* at 163.

6. Law, *supra* note 1, at 193 n.139 (quoting Monica Claes, *Constitutional law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 223, 224 (Jan M. Smits ed., 2d ed. 2012)).

within the three asserted by Law. To anticipate the argument to be made below, I think that it might be more helpful to divide the universe of preambles into "liberal," (secular) nationalist, universalist, and religious, in some cases out-and-out theocratic, archetypes.

Law's "large-N" approach is remarkably egalitarian in its thrust. The constitutions of Fiji, St. Lucia, and Albania, to name only three, are given equal weight in his analysis with those, say, of the United States, China, or India.[7] As already indicated, there is something to be said for this latitudinarianism inasmuch as it opens us up to more than the "usual suspects," but there is also something ultimately odd about this kind of full-bore egalitarianism. After all, if one objects to the narrowness of Hirsch's "usual suspects," that is far more likely to be explained by the general omission in much comparative work of such countries as, say, Indonesia, Brazil, Nigeria, and Pakistan than by the fact that we rarely cast our gaze on the three countries mentioned at the beginning of this paragraph. To be sure, Tom Ginsburg wrote a seminal and truly fascinating book about constitutional transformations in Mongolia, South Korea, and Taiwan.[8] Moreover, Fiji has, in fact, proved of interest to analysts interested in the practical problems posed by pluralism and multiculturalism.[9] There may be genuine insights to be gained from the smallest of "small-N" studies. It is difficult, though, to escape the notion that size matters when we pick the subjects of our most intense scrutiny. In any event, I want to turn to my substantive qualms and to suggest some potential modifications to the extraordinarily ambitious research design and synthesis that Law presents his readers.

As he notes, preambles are relatively understudied, not least because, with some exceptions—France is probably the most important—judges have taken pains to deny that they are truly to be taken seriously as part of what might be called the operative constitution. American law students spend extraordinarily little time genuinely reflecting on the Preamble to the United States Constitution—and how, for example, it differs from almost all preambles to the fifty American state constitutions, let alone those of other countries.[10] But even if, as in the United States, practicing lawyers are well advised to refrain from basing their substantive legal arguments on the language of the Preamble, there is much to be learned from reading what drafters of

7. *See* Law, *supra* note 1, at 238 app.

8. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

9. *See, e.g.*, THE ROLE OF CONSTITUTION-BUILDING PROCESSES IN DEMOCRATIZATION: CASE STUDY FIJI, http://www.idea.int/cbp/upload/CBP-Fiji.pdf [https://perma.cc/XNH6-3EAR].

10. What is most striking in comparing the U.S. Constitution with those of the states is the near-ubiquity—Oregon is the exception—of religious language. The national Constitution is relentlessly secular, which cannot be said to be true of the overwhelming bulk of American state constitutions, let alone, say, the three national constitutions to be discussed immediately above in the text. *See* Jeff Rense, *The Preambles Of All 50 States Of The United States*, RENSE.COM, http://www.rense.com/general72/preamb.htm [https://perma.cc/SWB7-6X7C].

constitutions have chosen to place at the outset of their handiwork.

At the very least, preambles can be read to specify the actual point of the overall constitutionalist enterprise. Liberal constitutions, for example, might suggest that their basic purpose is to safeguard what the U.S. Constitution calls the "blessings of liberty," which are usually defined in terms of individual rights protected against state limitation. Or, as in the "statist" preambles that Law analyzes, the purpose might instead be to create a state—and accompanying governmental institutions—strong enough to assure the achievement of what might be termed a specific national project, which, as in China, Vietnam, or Cuba, might include the realization of a socialist or communist socioeconomic order. Finally, there are the modern constitutions, written in the aftermath of not only World War II, but also the great transformations of the later 20th century. These constitutions speak in more universalist terms, including integration into the norms enunciated by contemporary international law especially regarding human rights. It is tempting to run liberal and internationalist constitutions together, but Law notes that the former tend not to speak in overtly internationalist language. One might wonder, for example, what room universalist constitutions leave for traditional notions of state "sovereignty," which might be viewed as central to liberal (or statist) constitutions proclaimed in the name of a particular people. I shall have more to say about this presently.

But, as already suggested, I believe that Law scants discussion of what might be viewed as a fourth archetypal form of constitutional preamble, which has a specifically theocratic bent in a way that is not true of the very few specific preambles that he chooses to quote. What, for example, if the point of the constitutionalist enterprise is envisioned as instantiating the teachings of a God who is sovereign over at least the country in question and, perhaps, the entire world?

Consider in this context the preambles of the Greek, Irish, and Pakistani constitutions. The Greek constitution is presented "In the name of the Holy and Consubstantial and Indivisible Trinity."[11] Ireland also begins "In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred," and it immediately goes on, speaking in behalf of "the people of Ireland," to

> humbly acknowledge[] all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social

11. 1975 SYNTAGMA [SYN.] [CONSTITUTION] pmbl. (Greece), *translated at Greece 1975 (rev. 2008)*, CONSTITUTE, https://www.constituteproject.org/constitution/Greece_2008?lang=en [https://perma.cc/89RE-385T].

> order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution.[12]

Pakistan's constitution is in the same vein: "[S]overeignty over the entire Universe belongs to Almighty Allah alone," and it is basically the "sacred trust" of the Pakistani people and those who rule in their behalf to exercise their "authority . . . within the limits prescribed by Him." Ultimately, the point of the Pakistani constitutional order appears to enable the overwhelmingly Muslim population "to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah . . . ."[13]

Hirschl has written a notable book on *Constitutional Theocracy*,[14] a phenomenon that, for better or, more likely, distinctly for worse, is an important part of the contemporary world. This is obviously most noticeably true of contemporary Islamic countries,[15] but the Irish constitution reminds us that Christianity has scarcely been a shrinking violet with regard to proclaiming its centrality in various constitutionalist enterprises.[16] And Israel, which is attempting to square the circle of being both a "Jewish" and "democratic" state, includes important subpopulations for whom the former means fidelity to *Halakha*[17]—i.e., traditional Jewish law and not merely, for example, organizing the calendar around Jewish holidays instead of, as in the United States, Christian ones.

And, of course, there are those within the United States, including the drafters of the 2016 Republican Party platform, which might well prefer to amend the Preamble in a more theocratic direction. Thus the Party declared that "the fundamental precepts of American government" include

> That God bestows certain inalienable rights on every individual, thus producing human equality; that government exists first and foremost to protect those inalienable rights; that man-made law must be consistent with God-given, natural rights; and that if God-given, natural, inalienable rights come in conflict with government, court, or human-granted rights, God-given, natural, inalienable rights always prevail . . . .[18]

I noted above that forty-nine of the fifty American state constitutions make some allusion to God or divine "providence." Were the language of the Republican Platform added to the Preamble of the U.S. Constitution, how

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12. CONSTITUTION OF IRELAND 1937 pmbl., https://www.constituteproject.org/constitution/Ireland_2015?lang=en [https://perma.cc/X36E-8U5L].

13. PAKISTAN CONST. pmbl., https://www.constituteproject.org/constitution/Pakistan_2015?lang=en [https://perma.cc/9UU5-FLMZ].

14. RAN HIRSCHL, CONSTITUTIONAL THEOCRACY (2010) (extensively discussing not only Pakistan, but also Iran and Israel).

15. *Id.* at 4.

16. *Id.* at 29.

17. *Id.* at 8.

18. THE REPUBLICAN PARTY, REPUBLICAN PLATFORM 2016, at 9 (2016), https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf [https://perma.cc/G7SX-59DT].

would it affect (if at all) the classification of the current Preamble as an almost equally divided mixture of "liberal" and "universalist" tropes (with a very small aspect of "statism")?[19]

Indeed, let me confess that my deepest qualms arise from the use of the term "statist" itself. I think it is exceedingly rare that anyone enunciates the purpose of a constitution as the per se creation of a strong state. Why, after all, people will ask, should we want such a state? The answer is always in terms of the presumed purposes of the overall constitutional project, and it is certainly true, as Law demonstrates, that the purposes can differ. The important point, though, is that states are, from a theoretical perspective, mere instruments for some higher value. Our central attention should be directed to the statements of purposes and, then, perhaps, the kinds of states thought necessary to achieve these purposes. And it should be obvious that *all* ostensible purposes can, under certain conditions, result in the creation of strong states.

It is an irresistible temptation, in spite of my cautionary comments above, to draw on the U.S. Constitution as evidence. After all, that Preamble is described as almost entirely liberal and universal, with only slight traces of statism.[20] And, as every law student knows, a steady mantra of American constitutionalism is based on the notion that the national Constitution creates a limited national government of only assigned powers. Furthermore, it is a commonplace that the U.S. Constitution, unlike almost all post-1945 constitutions (and, for that matter, all U.S. state constitutions[21]), rejects positive rights in favor only of negative rights that assure a citizen's right to be let alone free of governmental domination.[22] Yet it is almost laughably easy to read the Preamble's injunction to provide for the "general welfare" and "common defense," let alone to "establish Justice," as encouraging the creation of a state strong enough actually to achieve these estimable ends. Even more to the point, perhaps, is that one cannot possibly understand the rejection of the Articles of Confederation and replacement by the Constitution without realizing that the proponents of the new Constitution desired a national government that would be strong enough to meet any and all challenges that might arise.

Publius, throughout the *Federalist*, is altogether explicit in presenting such a view of the Constitution as what the new country needs.[23] Consider only the following two statements, taken from *Federalist* numbers 23 and 41,

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19. *See* Law, *supra* note 1, at 221 (analyzing the prevalence within each of the 171 preambles of "liberal," "statist," and "universalistic" tropes).

20. *See generally* U.S. CONST. pmbl.

21. *See generally* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013).

22. *Id.* (identifying positive state rights of U.S. state constitutions).

23. *See generally* SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL: READING *THE FEDERALIST* IN THE TWENTY-FIRST CENTURY (2015).

respectively, and written, for all that it matters, by Hamilton and Madison: "The circumstances that endanger the safety of nations are infinite, . . . no constitutional shackles can wisely be imposed on the power to which the care of [that safety] is committed."[24] And, if this isn't enough to shake the confidence of devotees of "limited government," then consider Madison's statement that "[i]t is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions."[25] There is a reason, after all, that Publius repeatedly dismissed as "parchment barriers" those clauses that were ostensibly to limit governmental power even when the people as a whole might well wish strong governmental action. If one defines "liberalism" as motivated by providing security for the citizenry, then it may be foolhardy to distinguish "liberal" regimes from more "statist" ones.

Still, one might see the essence of "liberalism" as the concern for individual rights (including security) and the concomitant purpose of liberal regimes as the protection of those rights. In contrast are far more communitarian, indeed "nationalist," constitutions that define their project not in terms of the individuals comprising the political order, but, rather, the flourishing of the nation as a whole. Law recognizes as much when he writes that "[s]tatism contrasts with universalism and liberalism in depicting the state as a coherent and distinctive community."[26] I think it would be more helpful (and accurate) to suggest that the relevant preambles might themselves draw attention to the ostensible "coherent and distinctive community" that wishes to create a state strong enough to allow the community to flourish. "As the embodiment of a genuine community," Law writes, "the state is uniquely capable of identifying and expressing the will of the community, and it has both the right and the obligation to act on behalf of the community."[27] Surely this is correct, but what is gained by calling this "statist" instead of "communitarian" or, indeed, *volkisch?* Perhaps the most eloquent 20th century articulation of this view of constitutionalism, where the pre-existing *volk* is given priority over the contingent governmental forms they may choose at any given time, is found in the magnum opus of the egregious Carl Schmitt,[28] an apologist for the Nazi takeover of Germany in behalf of *ein Volk.* One can readily understand the aversion to seeing him as a genuine contributor to our understanding. It is ultimately foolish, though, to reject his insight, for it captures an undoubtedly important strain of constitutional thinking that continues to be all too important in the modern world.

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24. THE FEDERALIST NO. 23, at 106 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

25. THE FEDERALIST NO. 41, at 191 (James Madison) (Clinton Rossiter ed., 1961).

26. Law, *supra* note 1, at 169.

27. *Id.*

28. *See generally* CARL SCHMITT, CONSTITUTIONAL THEORY (Jeffrey Seitzer ed., Jeffrey Seitzer trans. 2008).

For better or worse, communitarianism and its closely-linked partner, nationalism, are alive and well among the contemporary countries of the world (and their constitutions). The Wilsonian project of "popular self-determination," based at last in part on the assertion of the U.S Declaration of Independence that *all* peoples of the world have a right to enter the international political community as autonomous agents,[29] continues to dominate much contemporary ideology, often with extraordinarily mischievous consequences. Liberal constitutions, as Law notes,[30] are those that have, more or less, made their peace with pluralism and, therefore, the lack of a singular community congruent with political boundaries. From this perspective, the notion of a liberal "nation-state" is almost a contradiction in terms, for any given state will contain a plethora of "nations" (or peoples), all of whom must be accommodated in order to achieve the most important end, which is civil peace. This, as much as any abstract theoretical commitments, helps to explain why liberal states reject a strong notion of established religion, for there are simply too many religions, and the establishment of one is bound to generate conflict instead of peace.

Universalist constitutions agree in effect that there is no singular community that deserves special solicitude and, unlike liberal constitutions, happily submits to notions of universalistic norms. As Law writes, in what are perhaps the two most important sentences of his entire article, "[u]niversalism is fundamentally cosmopolitan in the sense that it predicates the legitimacy and authority of the state upon compliance with norms and principles that apply broadly to all states. *National sovereignty is conditional upon acceptance of and respect for international norms*."[31] To take universalism truly seriously ultimately requires the junking of any deep respect one might have for notions of state "sovereignty" or "autonomy," at least whenever that might entail acceptance of behaviors or policies—think only of torture or, for many, capital punishment—that violate general norms. But that also entails rejection of any deep regard to any and all communities or nations and their traditional beliefs that might run counter to enlightened cosmopolitanism.

When Law presents his fascinating word clusters designed to establish his three archetypes, I am struck that the words "nation" and "people" seem decidedly more prominent in the ostensibly "statist" archetype than the other two. The lesson I draw from this is the centrality of nationhood and identity as a distinct people to specific constitutional projects. *All* of the archetypes, at least in the contemporary world within which we live, end up justifying what are in fact strong states. They do, however, provide strikingly different rhetorics by which defenders of state power will make their case. No national

29. *See generally* Jack M. Balkin & Sanford Levinson, *To Alter or Abolish*, 89 S. CAL. L. REV. 399 (2016).

30. Law, *supra* note 1, at 169–70.

31. *Id.* at 175 (emphasis added).

politician in the United States can (yet) overtly justify the use of national power as a means of protecting continued hegemony by a "white Americans,"[32] but the equivalent can all too easily be done in other countries throughout the world that have more communitarian or nationalist self-understandings. The focus on "statism" per se is, I think, more distracting than helpful. I view this as a friendly criticism, inasmuch as I certainly accept the premise that we can learn valuable lessons by engaging in the kind of "large-N" perusal of preambles that Law counsels.

I simply think that the archetypes would be better formulated, perhaps as four—(secular) liberal; (secular) communitarian/nationalist; universalistic; and religious/theocratic. I am struck that none of his clusters in fact includes strongly religious language. The word "religion" and "faith" appear, respectively, in the clusters identifying "liberal" and "universalistic" constitutions, but they could easily be "universal designators" establishing, say, the equal respect to be accorded *all* religious faiths. Interestingly, the word "Islam" does appear in the cluster of "statist" archetypes.

Conclusion

Scientific work, whether in the natural or social sciences, proceeds through complex processes of sifting and winnowing hypotheses and the evidence that ostensibly supports them. Great honor should go to those who initiate important new conversations, whether or not the particular answers offered early on ultimately withstand close scrutiny. It should be clear that David Law deserves such honor for his remarkable overview of many dozens of constitutions and constitutional analogues such as international treaties and for taking the existing conversations about preambles in exciting new directions. I do believe that some tweaking of his archetypal forms would in fact enhance the conversation. In particular, I think the term "statist" is ultimately less helpful than "communitarian" or "nationalist." Moreover, I do think that it is worth paying more attention to the difference between basically secular and religious self-presentations by those in whose name a constitution is ostensibly "ordained" (to adopt the language of the U.S. Constitution once more).

32. The sentence in the text was written before the disastrous election, thanks to one of the many indefensible features of the 1787 U.S. Constitution, the Electoral College, of someone who is at best an authoritarian narcissist and, at worst, a fascist more than happy to serve as the conduit for the takeover of the American polity by the euphemistically titled "alt-right" that in fact articulates a thoroughly racist understanding of the American project.