

William & Mary Law Review

Volume 49 (2007-2008)
Issue 4 *Constitution Drafting in Post-conflict
States Symposium*

Article 12

3-1-2008

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Karol Edward Soltan, *Constitution Making at the Edges of Constitutional Order*, 49 Wm. & Mary L. Rev. 1409 (2008), <https://scholarship.law.wm.edu/wmlr/vol49/iss4/12>

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CONSTITUTION MAKING AT THE EDGES OF CONSTITUTIONAL ORDER

KAROL EDWARD SOŁTAN*

INTRODUCTION

This Essay is a report from the battlefield. The battle is between the forces of the constitution, a moderate form of politics, and the politics based on the barrel of the gun. But the Essay is not about what goes on at the front. It is more about how we should change our thinking at headquarters to make the battle easier to fight.

It is an effort to reformulate our way of thinking about constitutions and about what we do with constitutions, notably making them, to serve the goals of constitutionalism not only in safe and happy places (the “headquarters”), but also at the battlefield, where the risk of war or other forms of conflict is substantial. This includes both post-war, or post-conflict, situations and pre-war, or pre-

* Associate Professor, Department of Government and Politics, University of Maryland at College Park. I presented an earlier version of this paper at the Symposium on Constitution Drafting in Post-Conflict States organized by the Institute of Bill of Rights Law at the William & Mary Law School. I would like to thank the organizers and participants of the conference, for many helpful comments. This paper is part of a series, with some overlaps, on the themes of moderation, constitutionalism, and universal civilization. “Large Format Moderation” will appear as a chapter in *UNIVERSAL JUSTICE IN A DIVIDED WORLD* (Steven Simon & Stephen Elkin eds., Penn State Univ. Press forthcoming 2008). Karol Sołtan, *Large Format Moderation* (Mar. 4, 2007) (preliminary draft on file with author), available at <http://www.puaf.umd.edu/prospective/specialization/cp4/soltan%20moderation.rtf>. “Constitutional Patriotism and Militant Moderation” was published in the *International Journal of Constitutional Law*. Karol Sołtan, *Constitutional Patriotism and Militant Moderation*, 6 *INT’L J. CONST. L.* 96 (2008). “Mature Democracy and Global Solidarity” will appear as a chapter in *GLOBAL DEMOCRACY AND ITS DIFFICULTIES* (Anthony Langlois & Karol Sołtan eds., Routledge forthcoming 2008). I draw also on *Rebuilding Constitutional Order*, a working paper written in 2005 as part of the Program to Develop Strategies for Failing, Failed and Recovering States (PPC IDEAS Project financed by the Bureau of Policy and Program Coordination of USAID), and on “Constitution Making in Fragile States,” a lecture delivered at the University of Alberta in March 2006 (transcript available at http://digitalcommons.law.umaryland.edu/schmooze_papers/64/).

conflict situations.¹ It is what I refer to as the edges of the constitutional order. It is where some form of state of emergency is either at hand or is a looming possibility.

The state of emergency of the kind we constitutionalists, and moderates, should care about is not the one that so preoccupied Carl Schmitt; it is not a situation where the very survival of a state is at risk.² As Czechoslovakia was breaking up, the survival of that state was certainly at risk because it did not survive, but we were nowhere close to the edges of constitutional order. There was no risk of war, nor of a regime that would rely much more on coercion and threat. Whatever the wisdom of the split, there was no constitutionalist problem. A state of emergency arises, rather, when the very survival of constitutional order is at risk. When that happens we might need to sacrifice a state or two without shedding a constitutionalist tear.

We inherit from the eighteenth century two forms of constitutionalist catechism,³ one French and the other American. They are moderately different in content, and very different in style. The French version, embodied in *The Declaration of the Rights of Man and Citizen*,⁴ is in the form of briefly stated principles officially adopted at the start of constitution making. The American version, which we now know as *The Federalist*,⁵ is a set of essays making the argument in favor of the constitution after it has been proposed.⁶

1. The making of the Iraq constitution serves as an example of a pre-conflict situation. See ALI A. ALLAWI, *THE OCCUPATION OF IRAQ: WINNING THE WAR, LOSING THE PEACE* 219-32 (2007).

2. See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* xi-xxi (George Schwab trans., 1985).

3. On *The Declaration* as a catechism of principles for constitutional design, see Marcel Gauchet, *Droits de L'Homme*, in *DICTIONNAIRE CRITIQUE DE LA REVOLUTION FRANÇAISE: IDÉES* (François Furet & Mona Ozouf eds., Flammarion 1992).

4. *THE DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN* (Irene Collins trans., Univ. of Liverpool 1985); The Avalon Project at Yale Law School, *Declaration of the Rights of Man—1789*, <http://www.yale.edu/lawweb/avalon/rightsof.htm> (last visited Feb. 21, 2008).

5. See *THE FEDERALIST NOS. 1, 6-9, 11-13, 15-17, 21-36, 59-61, 65-85* (Alexander Hamilton), *NOS. 10, 14, 18-20, 37-58, 62-63* (James Madison), *NOS. 2-5, 64* (John Jay), available at <http://www.yale.edu/lawweb/avalon/federal/fed.htm>.

6. The closest equivalent in Poland's constitution-making process at the time, Ignacy Potocki's *Zasady do Poprawy Formy Rządu* [*Principles for the Improvement of the Form of Government*], had no comparable impact because even supporters of the constitutional reform complained the principles were too abstract and "metaphysical." JERZY ŁOJEK, *KU NAPRAWIE RZECZYPOSPOLITEJ: KONSTITUCJA 3 MAJA 80* (1988).

Our current stage of modernity, which is different from what earlier counted as modern, but not postmodern either, is in need both of such catechisms, and of larger theories that back them up. The catechisms of the eighteenth century emerged from the battle lines of the constitutional order of that period. What emerges from the battle lines today should be a substantial modification, as well as strengthening and generalization, of the constitutional catechisms inherited from the eighteenth century. Repetition is not the best form of building on the past. So this Essay, and the book project of which it is a part, is my effort to build on the work of Madison and Hamilton, Sieyes and Condorcet, and Kollataj and Potocki without necessarily retaining a great deal of what they actually said.

Over the last decade the international community has given much attention to the problems of constitution making in fragile states, in quasi-states, for territories in which the state has collapsed, or for territories that have never been properly governed by a state. To get a feel for the diversity of this problem, consider three examples: East Timor, from the withdrawal of Indonesian authorities in 1999 until its full independence;⁷ Iraq today;⁸ and the European Union since the Treaty of Maastricht or perhaps the Treaty of Nice.⁹

I was directly involved in East Timor and Iraq, and I think I have learned something from this experience. I have become convinced that among the chief problems facing us in such situations are not just the obvious: the interests of the powerful have to be accommodated, or else nothing happens. And when they are accommodated, the result may not be as attractive or as effective as we might wish—long term prospects of democracy, peace, and human rights might suffer. Interests are often a problem, but so are some broadly shared ideas relevant to constitution making in fragile states, which often do not seem to serve anyone's interests. To fight those ideas we need to shift from the immediate concerns with the crises often

7. See generally MICHAEL SMITH & MOREEN DEE, *PEACEKEEPING IN EAST TIMOR: THE PATH TO INDEPENDENCE* (2003).

8. See ALLAWI, *supra* note 1, at 403-17.

9. See generally EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (J.H.H. Weiler & Marlene Wind eds., 2003); MICHAEL LONGO, *CONSTITUTIONALISING EUROPE: PROCESSES AND PRACTICES* (2006); J.H.H. WEILER, *THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION* (1999).

associated with fragile states to a discussion at a higher level of abstraction. And we need to look beyond law narrowly construed.

I. THE PHILADELPHIA MODEL AND ITS FALLACIES

Our conception of constitution making is dominated by images of the hot summer in Philadelphia at the Constitutional Convention of 1787, combined in some cases with those from another summer during the French Revolution only two years later in Paris. Even Giscard d'Estaing, of all people, daydreamed of Philadelphia and Paris while sitting at the podium when he presided over the Convention on the Future of Europe.¹⁰ In 2002 he wrote:

Souvent, de l'estrade où je préside ... je me dis que le spectacle qui se déroule devant mes yeux n'est pas tellement différent de celui que David a dépeint dans la salle du Jeu de paume, lors du serment fameux, ou de celui qui a pris place, de mai à septembre 1787, dans le hall de l'Indépendance de Philadelphie.¹¹

Let us call this the Philadelphia model, even if it does not correspond perfectly to what actually happened in Philadelphia. According to this model a constitution is the supreme law of a state, and we make a constitution when we write it and adopt it in accordance with proper and legitimate procedures. And in a fragile state one task of the constitution is to make the state less fragile, as in Philadelphia where the Framers of the American Constitution replaced a loose and unworkable confederation with a federal state. The Philadelphia model suggests that this is how constitution making in fragile states should proceed. This model, however, is wrong in just about every way. It is wrong about what a constitution is, wrong about how to make constitutions, and wrong again about the desirable result of constitution making.

10. The Convention on the Future of Europe drafted the proposal for a European constitution, later rejected in the French and the Dutch referenda. DEVELOPING A CONSTITUTION FOR EUROPE 10-11 (Erik Oddvar Erikson et al. eds., 2004).

11. Valéry Giscard d'Estaing, *La Dernière chance de l'Europe Unie*, LE MONDE (Paris), July 23, 2002 ("Often from the stage where I preside ... I tell myself that the spectacle before my eyes is not that different from that painted by David of the famous Tennis Court Oath or that which took place from May to September 1787 in the Independence Hall of Philadelphia." (author's translation)).

The first claim of the Philadelphia model is that a constitution is the supreme law of a state. That may well describe the U.S. Constitution, and perhaps Stalin's constitution for the USSR, but it does not accurately describe the British constitution. The description is problematic because Stalin's constitution was not a constitution, whereas the British constitution is. Certainly that is what one must believe in order to distinguish reality from fiction and propaganda. The risk we take by defining a constitution as the supreme law of a state is that we will take institutional Potemkin villages as real. Because there is a document formally recognized as the highest law, it is tempting to conclude that it must be a constitution even if it is universally ignored. Conversely, we may take as unreal constitutions that are not so easy to identify even if they are real, in the manner of the British constitution.

Taking Potemkin villages seriously may seem harmless enough, but it is not. The goal of constitutions is to achieve peace, democracy, and protection of human rights. A document that only says it guarantees all these things is not really a good substitute.

The world is full of institutional Potemkin villages. States that are recognized by other states in the international system, but are lacking both firepower and legitimacy, are really states in name only. Other examples of Potemkin villages are property systems that exist on paper only, while real economic life consists of efforts to bypass them, and constitutions that serve as manifestos or false advertising, but have otherwise no relationship to reality.

Part of the problem in these cases is that our concepts and theories reflect a division of labor, intellectual and professional, which has evolved in wealthy democratic countries, relatively well protected from violence, and with strong commitments to democracy and the rule of law. Lawyers study law and legal institutions, whereas economists study markets. The easiest thing to do when we try to help poor countries with fragile states, often on the brink of or in the midst of civil war, is simply this: we transfer to the poor country with a fragile state what works in the rich country with an effective state, supported by concepts and theories developed in that context. But this does not work, at least not often and not well. It produces institutions that are Potemkin villages—all appearance and no substance. Not just constitutions, but entire legal systems, are largely fictitious because they are a combination of laws that are

too rigid, largely ignored, and in a world that operates independent of law. So this is a larger problem not limited to constitutions. But my objective is to demonstrate how to think about constitutions in a way that will keep us from contributing to the construction of these Potemkin villages.

So let me suggest an alternative way of thinking about constitutions: they are commitments, and they are constitutions only to the degree they are serious commitments. Hence the popularity in discussions of constitutions and constitutionalism of the imagery of Ulysses binding himself to the mast in order to hear the Sirens and survive the experience,¹² or the frequent repetition of the slogan that in constitutions the people sober restrain the people drunk.¹³ We make a commitment to something when we make changing our minds more difficult than it would otherwise be. Without that element, there is no constitution; it is all fiction and mirage. To make a constitution is to make a certain kind of commitment. The key questions are: to what are constitutions commitments, and what form do these commitments take?

Let me suggest an answer which is I believe both faithful to the constitutionalist tradition and practical in difficult situations, such as fragile states. In a one sentence summary: they are commitments to a certain form of moderate politics, which requires us to diminish the use of the means of destruction in politics and to strengthen impartial principle. Both commitments are largely legal in form, which means they can be enforced by courts, or by court-like institutions, such as the Constitutional Council in France. Their legal form is not sufficient, however. And the two commitments combined are the centerpiece of moderate politics.

Serious commitments develop incrementally and in stages. The making of constitutions is no different. In the transition from communism in Poland, for instance, we first had the commitments

12. See JON ELSTER, *Imperfect Rationality: Ulysses and the Sirens*, in *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 36, 90 (ev. ed. 1985); JON ELSTER, *Ulysses Unbound: Constitutions as Constraints*, in *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT AND CONSTRAINTS* 88, 90 (2000).

13. Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 196 (Jon Elster & Rune Slagstad eds., 1988) ("A constitution is Peter sober while the electorate is Peter drunk. Citizens need a constitution, just as Ulysses needed to be bound to his mast.... By binding themselves to rigid rules, they can avoid tripping over their own feet.").

of the Round Table agreements of early 1989, followed by a series of agreements as an immediate response to the unexpected results of the June 1989 elections.¹⁴ Then a series of new laws and amendments to the Communist constitution were enacted at the end of that year.¹⁵ And that still was not the end of the slow development of a new constitution.¹⁶ There was after all, much later and really much less important, an actual new constitution adopted in 1997.¹⁷

The development of the South African constitution is also well known. An interim constitution was adopted in 1994 that significantly constrained the provisions of the permanent constitution, putting the South African Constitutional Court in the unusual position of ruling in 1996 that a new constitution is unconstitutional.¹⁸

Iraq, too, provides us with an example of constitution making in stages. It began with the adoption of the Transitional Administrative Law (TAL), an interim constitution of doubtful legitimacy, but quite workable as a transitional document.¹⁹ “Our pal the TAL” was what a Kurdish member of the Iraqi government called it in a conversation at a time during the summer of 2005, when the constitutional negotiations were getting a bit frustrating, and TAL looked good by comparison.²⁰ The current constitution is the next stage, but it is incomplete in some obvious ways; crucial details about the workings of the second chamber of the federal legislature and of the supreme court still need to be decided.²¹ So the Iraqi

14. MARK BRZEZINSKI, *THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND* 83 (Palgrave Macmillan 2000).

15. *Id.* at 87-89.

16. *Id.*

17. *Id.* at 127.

18. HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* 175-76 (2000).

19. Jonathan Morrow, *Iraq's Constitutional Process II: An Opportunity Lost* 3 (U.S. Inst. of Peace, Special Report No. 155, 2005), available at <http://www.usip.org/pubs/specialreports/sr155.pdf>.

20. *See id.* at 21-22 (predicting in 2005 with regard to constitutional negotiations that “[e]fforts to bridge the Sunni-Shia divide by tinkering with the constitutional text [were] unlikely to be fruitful It is not clear that a constitutional consensus could be attained that is different from the terms of the [TAL].”).

21. Nathan J. Brown, *The Final Draft of the Iraqi Constitution: Analysis and Commentary*, WEB COMMENT (Carnegie Endowment for Int'l Peace, Washington, D.C.), Sept. 16, 2005, at 9, 11, available at <http://www.carnegieendowment.org/files/FinalDraftSEPT16.pdf>.

constitution has been developing in stages as well. Its development has looked nothing like the images conjured by the Constitutional Convention during that one hot summer in Philadelphia.

This brings me to one final deficiency of the Philadelphia model. Constitution making should not be seen as necessarily a part of state building. The product of a constitution need not be a state. A commitment to principle and peace is often well served by effective legitimate states, but it might be better served over any given territory by alternative institutional arrangements, of which states may be only component parts. The European Union could be a prototype for such arrangements. Somalia may be an example of such a territory. Iraq might be too.

So my four theses about constitution making in fragile states are as follows:

- First, constitutions are not supreme law. Or, to use a British phrase, the law of the constitution is not to be identified with the constitution.
- Second, constitutions are commitments to moderation, above all to diminish the use of the means of destruction, and to enhance impartial principles.
- Third, these commitments are likely to develop in stages, not in one constitution-making convention
- Fourth, the result may not be a strengthened state, but rather a union of states akin to the contemporary European Union, or it may be a number of separate states. Constitution making is not necessarily state building.

II. CONSTITUTION AND LAW

Both law and drafting (that is, writing) contribute to constitutions. But the constitution exists beyond the law and beyond writing. And not all writing that contributes to the constitution is the writing of law. The 1789 *Declaration of the Rights of Man and*

*Citizen*²² and *The Federalist*²³ are written documents on the borderline between law and non-law, although for more than thirty years now the *Declaration* has certainly been a part of French law, having earlier survived only in the limbo of preambles.²⁴ These works exemplify a form of writing that is clearly constitutional; they are part of a constitutional commitment, even though they are not law.

Some writing can come to be constitutional in stages, although it was not such initially. One example is “propaganda constitutions,” like the Soviet one.²⁵ The right to secede was guaranteed to all republics of the USSR by the text of the Soviet “constitution.”²⁶ But this was a propaganda document with no relationship to the real commitments, which were quite unconstitutional, of the Soviet political system. This particular text, having been rightly dismissed as irrelevant for decades, became quite real when the Soviet Union collapsed.

More generally, political and social theory of a certain kind can contribute to, and detract from, the constitution. Two kinds of textual traditions may contribute to constitutions. One kind is an ideological type, like liberal theory, except that some form of moderate theory would be more appropriate. The other kind is a certain type of intellectual discipline, like the political science of the Madisonian type—a discipline that now exists only on the margins of American political science.

So, in addition to “the law of the constitution,” there is also the text, or rather the texts of the constitution, with some overlap between the two. Of course, there is also the legal text of the constitution, but the idea of a constitution as a legal text and nothing more is really too simple. It neglects the political difficulty of the task of constitution making.

Seen from Dili, Erbil, and Baghdad, the British constitution seems to me surprisingly relevant, though it is neglected by all. But one is inclined to say that even the British do not really understand

22. THE DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN, *supra* note 4.

23. See *supra* note 5 and accompanying text.

24. JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 57 (1992).

25. See Eberhard Schneider, *The Discussion of the New All-union Constitution in the USSR*, 31 *SOVIET STUD.* 523, 525-26 (1979).

26. *USSR: SIXTY YEARS OF THE UNION 1922-1982*, at 314 (1982).

it. What is unique about the British constitution that makes it relevant as we look from the edges of constitutional order? It has a substantial unwritten component, but that surely does not matter.²⁷ It is uncodified, so its content, even its written content, is subject to the judgment of judges and scholars.²⁸ But that does not help constitutionalism because it only makes it more difficult to teach and to learn.

Everyone, including the British, seems to agree that the British constitution is not entrenched. If that were true, then, by my definition it would mean de Tocqueville was right—Britain does not have a constitution.²⁹ I think rather that, contrary to the almost universal judgment of mankind, the British constitution *is* entrenched, though it is not legally entrenched, so the courts can have no role in enforcing its more entrenched features. The entrenchment depends on scholarly formulations and on the electorate. The constitution is *politically* entrenched, and that is why it should be always remembered when making constitutions in difficult settings. In the end it is political entrenchment that matters, no matter how much we reinforce it with legal entrenchment.

III. THE DEVELOPMENT OF CONSTITUTIONS IN STAGES

Constitutions for the difficult situations along the edges of constitutional order are going to be complex objects, and complex objects require design and development in stages. If we take seriously as a basic principle of rationality that all complex design must be done in stages, then we must see any local constitution making as a process drawing on two pasts: the local and the global. That is to say, the local commitments are not only built on past local commitments and loyalties, but also on global ones. They are built on and modify the laws and the texts of the past, both local and global. So every local constitution making is best seen as an

27. See COMPARATIVE CONSTITUTIONALISM 31-39 (Norman Dorsen et al. eds., 2003).

28. See *id.*

29. Alexis de Tocqueville famously remarked: "In England the Parliament is acknowledged to have the right to modify the Constitution. In England, therefore, the Constitution can change constantly; or, rather, it does not exist. Parliament, besides being a legislative body, is also a constituent one." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 113 (Arthur Goldhammer trans., Library of America 2004).

extension and elaboration of a global constitution—a global commitment, albeit incomplete, to moderation.

If constitution making proceeds in stages, we must abandon Jeffersonian ideas of periodic conventions in which each generation gives itself a constitution. And we must abandon Sieyés's idea of the people as the constituent power.³⁰ We build on what exists, and on what we inherit from the past.

The explicit entry of global institutions, such as the U.N. in East Timor and other such places, into constitution making is simply a more explicit form of the global nature of all local constitution making. It could not be done if there were no principles of global constitutionalism. If the local population insisted on a theocracy there would be no way to engage the U.N.

Global institutions can enhance commitment both by providing enforcement in the form of guns, and by modifying economic incentives. There are also global constitutionalist principles, and each extension of constitutionalism to a new territory is best seen as an incremental part of a global transition to a constitutional order. It is best seen that way because the local constitution making builds on global precedents. The use of foreign materials in *The Federalist* has now developed into a very extensive practice of constitutional borrowing, constitutional learning, and constitutional precedent following. But, of course, this point is not limited to the moment of "constitution making" because there is no such moment. It extends to the deepest interstices of constitutional jurisprudence. So global constitutionalism needs to be formulated at various levels: the jurisprudential level, the drafting level, and the political theory level. The particular needs to be integrated with the general, and the local with the global.

Constitutions are also crucially local. They build incrementally on already existing local commitments and loyalties and, thus, are bound to modify global constitutionalism. The revolutionary tradition of earlier modernity is at a distinct disadvantage here, aiming as it does to replace the inherited institutions with something entirely new.³¹ If you engage in complex design in stages, then

30. For a discussion on Sieyés's idea of the people as the constituent power, see Bronislaw Baczko, *The Social Contract of the French: Sieyés and Rousseau*, 60 J. MODERN HIST. S98, S98-S125 (Supp. 1988).

31. For a discussion of Thomas Jefferson's view that each generation has a natural right

you do not want to replace what came before with something entirely different imposed by a "constitutional convention." You build on and modify existing commitments and loyalties. You build a constitution "from below."

Constitution making "from above" will insist that it also result in nation building. It is part of the statist program of often forced assimilation that attempts to create nations of all people whom the latest war settlement put within the boundaries of a given state. Constitutionalism "from below" is by comparison a program based on a serious commitment to self determination, and not just a legal commitment such as we find, for example, in the text of the constitution of Ethiopia.³² Such a serious commitment would allow the boundaries of states to reflect underlying potential for constitutionalism, resulting in a program of the constitutionalization of boundaries. Within Switzerland this is already possible, and perhaps it is also possible within the EU.³³ It is much more difficult elsewhere. So we need a global constitutional order at least sufficient for the constitutionalization of boundaries. Perhaps the best example of such a process in action is the secession of the Canton of Jura from the Canton of Bern in Switzerland through a series of referenda, mostly in the mid-1970s, but extending into the 1990s.³⁴

A. Moderation

It is sometimes said that modern constitutionalism is applied liberalism.³⁵ But, first, that does not get the relationship right.

to start the world anew and that no generation of men has a right to bind another, see Richard K. Matthews, *The Radical Political Philosophy of Thomas Jefferson: An Essay in Retrieval*, 28 *MIDWEST STUD. PHIL.* 37, 48-51 (2004).

32. For a discussion of Ethiopia's legal commitment to self-determination embodied in its constitution, see Kidane Mengisteab, *New Approaches to State Building in Africa: The Case of Ethiopia's Ethnic-based Federalism*, 40 *AFR. STUD. REV.* 111, 122-29 (1997).

33. See JONATHAN STEINBERG, *WHY SWITZERLAND?* 254 (2d ed. 1996) ("Switzerland is not simply another rich, small state in the heart of Europe. It is the living expression of a set of ideas, which may be summed up: although the will of the majority makes law and constitutes the only true sovereign authority, the minorities, however small, have inalienable rights. The dilemma of majority will and minority rights can be overcome by the ingenuity of men.").

34. *Id.* at 96-97.

35. On the relationship between liberalism and modern constitutionalism, see STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 5-10 (1995);

Various forms of codification of design principles must be integrated with design. We should have unity of theory and practice, but the influence in such unity goes both ways. So liberal theory also attempts to codify constitutionalist practice. And, second, constitutionalist practice, especially at the edges of constitutional order, could be better served by a different form of political theory, a theory of moderation rather than liberalism.³⁶

A workable and defensible definition of moderation would include three elements. First, moderation requires some form of moral pluralism. There are multiple good ends, and we should aspire to the most attractive balance between them.³⁷ Hence, moderates are attracted to a variety of metaphors of balance and center, like avoiding extremes and choosing the golden mean. The aim is always to find the most attractive and appropriate balance, and hence to support the center against the unbalanced extremes. At the heart of constitutionalist practice, whether in constitution making, amending, or deciding cases under the constitution, is balancing, and the search for attractive forms of balance.³⁸ And despite what is often said, it is not the balancing of interests but rather the balancing of rights and *legitimate* interests.

Liberal theory, by contrast, allows singling out some principles as supreme, and often encourages the search for the single principle that can govern the political system,³⁹ whether it is a unitary principle along the lines of John Stuart Mill's utilitarianism⁴⁰ or a more complex ordering of principles along the lines of John Rawls's

DONALD S. LUTZ, *PRINCIPLES OF CONSTITUTIONAL DESIGN* 15-22 (2006).

36. Moderation, as I conceive it, can be seen as a modification of a broadly conceived republican tradition. On this broad republicanism, see PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997) and MAURIZIO VIRIOLI, *REPUBLICANISM* (Antony Shugaar trans., Hill and Wang 2002).

37. See William A. Galston, *Value Pluralism and Liberal Political Theory*, 93 *AM. POL. SCI. REV.* 769, 770-72 (1999) (briefly describing the basic principles of pluralism).

38. See David Beatty, *THE ULTIMATE RULE OF LAW* 159-88 (2004) (discussing proportionality as a theory of constitutional interpretation).

39. See JOHN GRAY, *ISAIAH BERLIN* 141-68 (1996) (arguing that value pluralism and liberalism are incompatible theories). *But see* Galston, *supra* note 37, at 769 ("Many people (ordinary citizens as well as academics) are both value pluralists and political liberals and see these positions as mutually supportive.").

40. See generally J.S. MILL, *UTILITARIANISM* (Roger Crisp ed., Oxford Philosophical Texts 1998).

theory of justice.⁴¹ Liberal theory distorts constitutionalist practice in a way that is distinctly unhelpful at the edges of constitutional order. The fundamental value is moderation.

Isaiah Berlin has recently been the most influential moral pluralist.⁴² Other prominent moral pluralists before the current popularity of the idea, all with deep twentieth century roots in the area between the Soviet Union and Nazi Germany, include the émigré Russian Sergei Hessen and the Polish philosopher Leszek Kołakowski,⁴³ whose pluralist liberal conservative socialism neatly summarized the political impulses of the glory days of Solidarity's struggle against communism.⁴⁴ Utilitarianism, net benefit maximization, and Rawls's theory of justice are good examples of non-pluralist thought.⁴⁵

Moderation requires, second, both recognizing the pervasive power of destruction and violence, and making the defeat of destruction a central goal. Destruction and violence in moderation is not a moderate idea. So the second defining aspect of moderation is recognizing violence and destruction as the enemy. A moderate aims to destroy destruction, and failing that, to enslave it by subjecting it to the governance of a complex order of principles. Confucians, constitutionalists, and pacifists take the problem of destruction and the threat of destruction seriously.⁴⁶ Deweyan problem solvers and deliberative democrats typically do not.⁴⁷

41. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed., Harvard Univ. Press 1999) (1971).

42. See GRAY, *supra* note 39 ("Isaiah Berlin is often compared to David Hume."). See generally ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* (Henry Hardy ed., 1991).

43. See Andrzej Walicki, *My Łódź Meister and the Pluralism of Values*, 16 *DIALOGUE AND UNIVERSALISM* 101-08 (Guy Russell trans., 2006) (recognizing the contributions of Sergei Hessen, Isaiah Berlin, and Leszek Kołakowski to the theory of value pluralism).

44. See Leszek Kołakowski, *How To Be a Conservative-Liberal Socialist*, in *ENCOUNTER*, 46-47 (1978); Marek Leszkowski, *Główne Nurty Solidarności* [Main Currents of Solidarity], 1(8) *KONTAKT* 7-10 (1982).

45. See generally ANTHONY BOARDMAN ET AL., *COST-BENEFIT ANALYSIS: CONCEPTS AND PRACTICE* (3d ed. 2005); WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* (2d ed. 2002); MILL, *supra* note 40; RAWLS, *supra* note 41.

46. See JOSEPH GRANGE, JOHN DEWEY, CONFUCIUS, AND GLOBAL PHILOSOPHY 88 (2004).

47. On Dewey's problem with evil and human destructiveness, see PHILIP SELZNICK, *MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 172-74 (1992) ("Dewey gave short shift to the deficiencies of human nature and the recalcitrance of institutions."). On deliberative democracy, see *DELIBERATIVE DEMOCRACY* (James Bohman &

A third element of moderation is a commitment to reason, rationality, or at least reasonableness, which, among other things, gives moderates a fondness for deliberation, though only a moderate fondness.

B. The Consociational and Centripetal Models

Discussion of the design of government institutions, including constitutions and electoral laws, in deeply divided societies has itself been deeply divided. The divide is mainly between advocates of consociational democracy, most notably Arend Lijphart, and advocates of what some have called the centripetal approach, most prominently advocated by Donald Horowitz.⁴⁸ Both approaches favor moderation.⁴⁹ One does so by relying more on institutions to supply “the defect of better motives.”⁵⁰ The other relies more on the promotion of politicians with the right kind of motives.⁵¹ Both can be better evaluated when we articulate more fully our ideal of moderation, which certainly must include more than the willingness to compromise with one’s opponents.

William Rehg eds., 1997); DELIBERATIVE DEMOCRACY (Jon Elster ed., 1998); DEMOCRACY (David Estlund ed., 2002). In all these discussions, human destructiveness is not a looming concern.

48. See DONALD HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 566-76 (1985) (arguing that Lijphart and other consociational theorists have not recognized the potential consequences of their policy recommendations); Donald Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 WM. & MARY L. REV. 1213, 1215-20 (2008). But see Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96, 96-109 (2004) (responding to consociationalism’s critics, especially Horowitz); John McGarry & Brendan O’Leary, *Consociational Theory, Northern Ireland’s Conflict, and its Agreement. Part 1: What Consociationalists Can Learn from Northern Ireland*, 41 GOV’T & OPPOSITION 43, 43-63 (2006) [hereinafter McGarry & O’Leary, *Part 1*] (affirming that consociationalism is a valuable political theory, despite the fact that it suffers from some important weaknesses); John McGarry & Brendan O’Leary, *Consociational Theory, Northern Ireland’s Conflict, and its Agreement 2: What Critics of Consociation Can Learn from Northern Ireland*, 41 GOV’T & OPPOSITION 249, 249-77 (2006) [hereinafter McGarry & O’Leary, *Part 2*] (highlighting the serious weaknesses in anticonsociational arguments).

49. See, e.g., Adriano Pappalardo, *The Conditions for Consociational Democracy: A Logical and Empirical Critique*, 9 EUR. J. POL. SCI. 365, 375-76 (1981) (noting how the consociational method favors moderation).

50. THE FEDERALIST NO. 51, at 252 (James Madison) (Terence Ball ed., Cambridge Univ. Press 2003).

51. Donald L. Horowitz, *Electoral Systems: A Primer for Decision Makers*, 14 J. DEMOCRACY 115, 118 (2003).

A consociational democracy is a regime with two defining characteristics, as most advocates would see it, and a third important feature.⁵² The defining characteristics are those that protect each of the groups in the polity from the others. First, each group is given as much autonomy over its own affairs as is feasible.⁵³ Second, each group is given veto power (or partial veto power) in the decision making of the central government.⁵⁴ The combination of these two features acts to protect each group from possible harm by the others. The third principle of consociational democracy is the principle of proportionality: positions in the legislature, the civilian bureaucracy, the police and the military, and other centers of power are allocated proportionally to demographic strength.⁵⁵ But what really matters here, above all, is the ability of each group to prevent any of these powerful agencies from doing it damage. For example, it is important to a minority that it be proportionately, and thus, fairly, represented in the military.⁵⁶ But it is also important that the command authority of the group's members in the armed forces, and the location where these forces are stationed, is such that they can prevent the forces from being used against the group.

A consociational democracy is, above all, a regime that aims to protect the contending groups in a country. You can think of it as a peace treaty extended into the workings of a government. To do so effectively, the regime must accommodate all groups that might threaten peace, especially extremist groups.⁵⁷

The centripetal approach is not so inclusive.⁵⁸ It proposes various institutional designs, especially electoral laws, that promote moderate politicians who are willing to compromise with other groups at the expense of extremists.⁵⁹ This approach can live with

52. See McGarry & O'Leary, *Part 1*, *supra* note 48, at 43-44; see also Lijphart, *supra* note 48, at 97.

53. McGarry & O'Leary, *Part 1*, *supra* note 48, at 44.

54. *Id.*

55. *Id.*; see also Lijphart, *supra* note 48, at 97, 103, 105.

56. Lijphart, *supra* note 48, at 105.

57. See McGarry & O'Leary, *Part 2*, *supra* note 48, at 262 ("Excluded radicals can destabilize power-sharing institutions ... Excluded radicals may engage in violence, creating a polarized atmosphere that pressurizes moderates and makes compromise difficult.").

58. See *id.*

59. Lijphart, *supra* note 48, at 98.

majoritarian democracy, as long as the ruling majority is an inter-ethnic coalition of moderates.⁶⁰

Consociationalism is an instrument of moderation because making all sides secure, and convincing them that they are secure, blocks the most common path to war in deeply divided societies—one driven by the “logic of fear,”⁶¹ which I explain below.⁶² In situations in which the “logic of fear” is the dominant reality, there is no room for moderate politicians, and institutions that favor them will not succeed. But, to the extent that moderation has two aspects, the suppression of human destructiveness and the promotion of multiple legitimate ends, consociationalism by itself is clearly incomplete. When Lijphart himself wrote down his constitutional recommendations for deeply divided societies,⁶³ he outlined his consociational program and stopped there, neglecting, for example, to add a constitutional court.⁶⁴ A full-blown moderate program would be mainly consociational in situations dominated by the “logic of fear,” but not necessarily elsewhere. And it would recognize at all times that moderation is not simply a negative view—a fight against violence and destruction. It is also an effort to promote multiple legitimate ends. So it needs to strengthen and elaborate on what I call below “neutral” ground. And among notable denizens of this neutral ground, in addition to a broad variety of individuals and institutions, such as constitutional courts, we will find those heroes and heroines of Horowitz’s centripetalism, the moderate politicians.⁶⁵

C. Complex Demos

A good way to illustrate both the underlying shared commitment to moderation of the consociational and centripetal approaches, and the likely differences in the range of their applicability, is to consider a generalization of the usual simple majoritarian model of

60. *See id.*

61. For a discussion of how a group’s fear of domination can play out in a divided society, see HOROWITZ, *supra* note 48, at 187-90.

62. *See infra* notes 83-86 and accompanying text.

63. Lijphart, *supra* note 48, at 99-106.

64. *See id.*

65. *See* Horowitz, *supra* note 51.

democracy that so many people carry around in their heads, and which some explicitly advocate.⁶⁶

Much of democratic thought and practice, born in an age of simplicity, assumes a simple demos, making decisions by a simple majority.⁶⁷ So, democracy turns into majoritarian democracy. But, as Lijphart and others have shown, the actual practice of democracies, especially in deeply divided societies, is often more consensual, and relies on separation of powers in a way that a simple majority rule does not.⁶⁸ This can be seen as a practical adaptation to difficult situations. In part, it is unquestionably that. But many of these practices can also be seen as reflecting a recognition of the complexity of the demos, a complexity that requires that we reformulate more deeply the way we think about democracy. We understand little of the nature and the role of a complex demos in a democracy. So, for example, participants in the discussions about the present and future prospects of democracy in the European Union worry about the absence of a European demos,⁶⁹ a demos being seen as a prerequisite to democracy. But all these discussions assume that a simple demos is the only possible demos.

To evaluate the various claims in these discussions, we need a notion of a demos that is relevant to the task at hand and that allows for complexity. Let us say a group is a demos to the extent its members are willing to sacrifice when they are outvoted. They are willing to be a loyal minority. And they are willing to restrain themselves also when they are the democratic winners, refraining from imposing their will to the fullest extent possible. Obviously, democracy will work more easily in a group to the extent that the group is a demos. Nations tend to be good demoi. Europeans as a group are not; they are too deeply divided among themselves.⁷⁰ And

66. See TOCQUEVILLE, *supra* note 29, at 283 ("It is the very essence of democratic government that the majority has absolute sway, for in a democracy nothing resists the majority.").

67. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 34-62 (expanded ed. 2006) (discussing the implicit assumptions of "populistic" democracy).

68. See generally Arend Lijphart, *Consociational Democracy*, 21 *WORLD POL.* 207 (1969).

69. For a discussion of the European demos, see Matthew J. Gabel & Christopher J. Anderson, *Exploring the European Demos (Or Lack Thereof): The Structure of Citizen Attitudes and the European Political Space* (CEuS, Working Paper No. 2001/4, 2001), available at <http://www.monnet-centre.uni-bremen.de/pdf/wp/2001-4-Gabel-Anderson.pdf>.

70. See, e.g., Renaud Dehousse, *Beyond Representative Democracy: Constitutionalism in a Polycentric Polity*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE*, *supra* note 9, at

the populations of many deeply divided states such as Cyprus, Lebanon, Iraq, and so many others also do not seem to be good demoi.⁷¹ This all follows if the decision-making procedure the demos uses is simple majority vote.

In a simple demos there are only two kinds of politically relevant boundaries: the boundary separating members from nonmembers and boundaries separating each individual member from every other member. To think seriously about a democracy that can work in difficult circumstances like Iraq or Somalia, for example, we need to have a more general conception of what a demos can be. It can have various levels and types of complexity. And democratic procedures must operate at these various levels of complexity. The simple demos of the now dominant view of democracy, with its simple majority rule, must be seen for what it is: a very special case. Democratic theory must consider a demos with various kinds of internal boundaries.

We can define the structure of a demos by the location and depth of the boundaries within it—the structure of its internal divisions. These may be religious, ethnic, or class divisions; what matters for this account of the internal structure of the demos is simply where the boundaries are and how deep they are. If a boundary has no depth, then it does not exist at all. Maximum depth, on the other hand, indicates a boundary that justifies complete mutual independence of the groups that the boundary divides. The maximally deep boundary separates two distinct demoi. The many boundaries of intermediate depth give structure to a complex demos.

Another way to clarify the notion of depth of boundary is to consider the nature of the democratic procedures appropriate for a complex demos. Let us say that we have an encompassing demos divided into sub-demos and, for simplicity, let us assume that all internal boundaries are equally deep. If the internal boundaries are

135; Anthony Smith, *National Identity and the Idea of European Unity*, in *THE QUESTION OF EUROPE* 319 (Peter Gowan & Perry Anderson eds., 1997) (“A common European cultural identity, if such there be, does not yet have its counterpart on the political level; to date, each state of the European Community has placed its perceived national interests and self-images above a concerted European policy based on a single presumed European interest and self-image.”).

71. See Daniel Byman, *Constructing a Democratic Iraq: Challenges and Opportunities*, 28 *INT’L SEC.* 47, 55 n.32 (2003) (noting the consociationalism failures of Cyprus, Lebanon, and Nigeria).

maximally deep, then decisions in the encompassing demos should be made using a consociational democratic procedure. A decision is made if a majority in each sub-demos agrees. We also have then the support of the majority in the encompassing demos. When, in a system of sovereign territorial states, the states all become democratic, their treaties will be adopted roughly by this procedure. Consociational democracy works on the basis of this rule within a state. At the other extreme of boundary depth, we will still require a majority of the encompassing demos, but the requirement of support from within each sub-demos will go down to zero. We have then the maximally simple encompassing demos ruled by a simple majority. In such a society, the sub-demos effectively do not exist politically.

Complexity comes in between these two extremes. At maximum depth of boundaries, we require just over 50 percent of the votes from each of the sub-demos. As the depth declines, the requirement goes down. Let us take the 40 percent level as an example. Now the boundaries are substantially less deep than in the consociational case. The decision rule is that a proposal is adopted if it gains a majority in the encompassing demos and at least 40 percent in each sub-demos. In the consociational democratic procedure, each sub-demos has a majoritarian veto. A majority of any sub-demos has the capacity to block any proposal. When we move from depth measured at 50 percent to depth measured at 40 percent, simple majorities in sub-demos no longer have the capacity to block proposals: a group needs just over 60 percent to block. We can describe this shift in terms of the degree of solidarity assumed across the internal boundaries within the demos. The consociational procedure assumes no solidarity. The 40 percent procedure assumes some.

I hope it is clear how the story continues. As the internal boundaries lose depth, the blocking majority required for a sub-demos to veto a proposal becomes higher. At the extreme, no voting majority, not even unanimity, is sufficient, and the encompassing demos loses its internal structure entirely and becomes a simple demos, ruled by simple majority vote. So, at one extreme of a democracy with a complex demos, we have its consociational form, and at the other extreme, we have a single simple demos. In between, we have the rules most characteristic of a complex demos that we find, for example, in the method of electing presidents in

Nigeria,⁷² or the decision-making procedures negotiated in the Good Friday Agreements for Northern Ireland.⁷³

Discussing in this way a democratic decision-making rule for a complex demos, I have said nothing about federalism and the decision-making rules federal systems adopt. Yet, seemingly, federal systems are precisely those that accept having a complex demos. Unfortunately, this is not exactly right. Federal systems are complex polities, to be sure, but, in federalism, the complexity is at the level of states, not demoi. A federal system has at least two entrenched levels of authority, so its central government has both direct representation of citizens, and a representation of the member states or provinces. Federal law may apply like a treaty to the member states, and it also applies directly to citizens; it has a direct effect on citizens. And the typical democratic procedure in a federal state is not the procedure I outlined above for complex demoi. It is rather some version of the procedure proposed in the current draft of the EU Constitutional Treaty.⁷⁴ This is usually called a double majority procedure, which requires for adoption the support through their representatives of both the majority, or supermajority, of the population of the encompassing demos (the EU in this case) and the majority, or supermajority, of the sub-demos (the member states of the EU in this case). The U.S. Constitution adopts a similar procedure. To become law, a proposal needs to be supported by a majority of the representatives of the people, the members of the House of Representatives, and a majority of the representatives of the states, the members of the Senate.⁷⁵

In a double majority system, or even in any double supermajority system, an individual state and its people can be defeated no matter how intense and unanimous is their opposition to a proposal. Such systems are compromises between an encompassing unitary state and a collection of independent unitary states. Therefore, states enter into the calculations of the decision-making procedure because

72. For a discussion of the method of electing presidents in Nigeria, see HOROWITZ, *supra* note 48, at 635-38.

73. See McGarry & O'Leary, *Part 1, supra* note 48, at 46-47; see also Brendan O'Leary, *The Nature of the Agreement*, 22 *FORDHAM INT'L L.J.* 1628, 1628 (1999) (describing the Good Friday Agreement).

74. Treaty of Lisbon, Dec. 13, 2007 O.J. (C 306) 50 (amending the treaty on European Union and the Treaty Establishing the European Community).

75. U.S. CONST. art. I.

a proposal needs the support of the majority of the states to pass. But, a democratic procedure should more directly reflect the complexity of the underlying demos, and it should protect each of its components.

The dominant view of democracy takes the very special case of simple democracy as normative, and takes the complex case as a necessary modification for difficult situations. On reflection, this seems to be an odd view. Our general conception of democracy as popular sovereignty must allow for a people with various forms of internal structure, not just the simplest structure. It should allow for a complex demos. And when we construct such a conception, it becomes clear that the consociational form of democracy is most appropriate when the internal divisions are deepest. Centripetal forms are better when the internal divisions weaken. And simple majoritarian democracy is best when there are no internal divisions of any importance.

But, according to my view, moderation requires more than either one of these perspectives has to offer. It requires a systematic commitment to diminish the power of human destructiveness, and to enhance the power of the multiple legitimate ends.

IV. HUMAN DESTRUCTIVE CAPACITY

I will discuss first the commitment to diminish the reliance on the means of destruction in politics. What does it mean to use guns less? We begin an answer by noting that there are two rather different uses of guns in politics, and both are at issue here. I use a gun in one way when I kill you with it. That is a common use of guns. But even more common is a different use: I threaten you with death if you do not give me your wallet. You remain alive, but I become richer. This is what we know as coercion. Both violence and coercion are pervasive in politics.⁷⁶ Both uses of guns are common. Constitutions, and constitutionalism more broadly, involve a commitment to diminish both uses.

76. See Timo Airaksinen, *An Analysis of Coercion*, J. PEACE RES. 213, 213-15 (1998) (discussing coercion and its effect on society).

Traditionally, this has created some tension. Faced with a threat of a Hobbesian war of all against all,⁷⁷ or just with a bloody and protracted civil war, another use of guns, it is natural to turn to what we might call a Hobbesian solution, a hegemonic power capable of rule through overwhelming coercion.⁷⁸ So, to take an example from my own experience, faced with massive violence and destruction in East Timor as a result of the independence referendum in 1999,⁷⁹ the United Nations Security Council created what seemed like a perfectly Hobbesian solution to a Hobbesian situation. It established the United Nations Transitional Administration in East Timor (UNTAET) to govern the country, and gave its head, the Special Representative of the Secretary General, all executive, legislative, and judicial power.⁸⁰ Not even the most absolute of monarchs ever claimed such powers. On the surface, and at least transitionally, massive war was replaced with massive coercion.

But a constitution must be a commitment to limit both actual violence and coercion. Traditional constitutionalism is unbalanced here. It tells us a great deal about creating a limited state through a variety of mechanisms, such as the separation of powers or checks and balances. It also tells us about making the state predictable, and thus making it easier for individuals to avoid being punished or otherwise damaged and harmed by the state. But it does not provide us with many guidelines on how to diminish the propensity toward violence, other than by imposing the sort of overwhelmingly coercive sovereign that constitutions are supposed to guard us against.

This imbalance makes sense when the starting point is not a fragile state but an absolute monarchy or a dictatorship, a very specific form of too much use of the means of destruction. But in a fragile state the potential use of the means of destruction typically requires different measures.

It is useful to think of all constitutions as simultaneously being peace treaties settling a war or a potential war, whether between

77. See Gregory S. Kavka, *War of All Against All*, 93 *ETHICS* 291 (1983) (discussing Hobbes's *Leviathan*).

78. *Id.* at 304.

79. See Nicholas J. Wheeler & Tim Dunne, *East Timor and the New Humanitarian Interventionism*, 77 *INT'L AFF.* 805, 805 (2001).

80. See Dwight Y. King, *East Timor's Founding Elections and Emerging Party System*, 43 *ASIAN SURV.* 745, 745-46 (2003).

ethnic and nationality groups, regions, or classes. In the context of fragile states this way of thinking becomes crucial. In defending the Iraqi Constitution, I have said again and again: all constitutions are in part peace treaties.⁸¹ Hence, we should think of the Iraqi constitution as a peace treaty in the making.⁸² I do not want to take back anything I have said. But there is much that needs elaboration. Constitutions need to be not simply peace treaties but, more generally, effective mechanisms for diminishing the role of violence and threat of violence in the politics of a country. Peace treaties can be such mechanisms. But they are not the only ones. To understand how constitutions ought to work, especially in fragile states, we need to take a step back and consider more generally the forces that strengthen the propensity for violence, and the variety of ways these forces can be neutralized. This will tell us what commitments should be part of constitution making.

A. Violence-producing Mechanisms

We can identify three mechanisms that can lead to violence. Let us call them the logic of fear, the logic of optimistic ambitions, and the logic of moral outrage. And we can identify for each a family of interventions that can weaken or block the operation of each mechanism.

- *Logic of Fear*: The logic of fear begins operating when the perceived first strike advantage in an inter-group conflict is sufficiently strong.⁸³ This will occur only in settings where the underlying conflict between groups is sufficiently great that there is much to gain from a war and the strategic situation, that is, the distribution of resources, is such that there is an advantage to striking first.⁸⁴ A group then will attack first in order to

81. Karol Soltan, *Think of It as a Treaty*, NEWSDAY, Oct. 23, 2005, available at <http://www.krg.org/articles/detail.asp?smap=&lngnr=12&rnrr=77&anr=6955>.

82. *Id.*

83. Jack Snyder & Robert Jervis, *Civil War and the Security Dilemma*, in CIVIL WARS, INSECURITY, AND INTERVENTION 15, 21 (Barbara F. Walter & Jack Snyder eds., 1999); Barry R. Weingast, *Constructing Trust: The Political and Economic Roots of Ethnic and Regional Conflict*, in INSTITUTIONS AND SOCIAL ORDER 163, 164-65 (Karol Soltan et al. eds., 1998).

84. See, e.g., Weingast, *supra* note 83, at 21-22.

defend itself. Fear produces a preemptive, or preventive, war.⁸⁵ This logic was dramatically expressed by an old woman in Sarajevo in the midst of the post-Yugoslav wars: "The Serbs will kill us all, we need to slaughter them first."⁸⁶

- *Logic of Optimistic Ambitions:* We find this logic in political movements confident that they are on the verge of creating a Heaven on Earth. The prize is so worthy that for these movements even the most extreme sacrifices are worth imposing on others and on themselves. Whereas the typical example of the logic of fear will be found in ethnic wars, a typical example of this logic will be found in ideological wars, with revolutionary movements aiming at a deep transformation not just in the political system, but in economics and society at large. But ambitious ethnic groups, such as Serbs demanding a Greater Serbia, or self-aggrandizing thugs, such as Charles Taylor in Liberia, can also weigh their costs and expected benefits and conclude in favor of war.
- *Logic of Moral Outrage:* Moral outrage, a product of injury or humiliation, can be channeled and given satisfaction in a variety of ways. Criminal prosecution and truth and reconciliation commissions are two prominent examples. But it can also fuel powerful outbursts of violence.

Let me say something about what we can do to block each one of these mechanisms, and in this way to promote a constitutionalist commitment to moderation.

B. The Logic of Fear

We can distinguish two methods of keeping fear in check in deeply divided societies. One method is for a dominant group to

85. Snyder & Jervis, *supra* note 83, at 22.

86. Erik Melander, *Anarchy Within: The Security Dilemma Between Ethnic Groups in Emerging Anarchy* 215 (Uppsala Univ. Dep't of Peace and Conflict Research Report No. 52, 1999).

keep all others subordinate. Fear leads to violence when it prompts preventive or preemptive war. But fear of a hegemonic power does not produce this response, because a preventive strike against a hegemon has no chance of success. When the dominance of the hegemonic group, which may be the state, declines, however, fear begins to argue in favor of preemption and violence, unless some alternative institutional framework is found. This happens typically when the coercive capacity of the state falters, and the security apparatus of the state is no longer capable of effective deterrence. The declining effectiveness of the military and police constitutes a key element in the initial conditions for the violence-generating mechanism of the logic of fear to get started.

The most often used, and the most effective, alternative to coercive hegemony as an instrument to block the logic of fear is some form of consociational democracy, or “power sharing.” It is misleading, however, to think of power sharing as one alternative. We have rather a wide variety of arrangements, which perform at least two functions. They allow the groups involved in conflict to act *separately*, without interference from others. And they also allow the groups to act *jointly*, in a way that does not undermine the security of any of them. This involves some combination of power sharing, which includes checks and balances, veto powers, and organizational integration; power separation—mainly territorial and personal autonomy; and resource sharing. The key is to combine power sharing—the pure case being one in which each group retains veto power over all central decisions—and power separation, which involves shifting decisions out of the center, separating the groups in conflict, and giving them decision-making power.

A security dilemma arises—in the standard account—when each party builds up its military capacity to gain security, and in the process diminishes the security of others. The security dilemma is avoided if the military assets are purely defensive, such as walls or fortifications. Having surrounded oneself by a wall, one can feel more secure without threatening others. Boundaries that are hard to cross have this effect, but so do other resources that work like walls, fences, boundaries, or shields, as do resources that allow us to hide or resources that give us mobility, allowing us to run. These defensive weapons can also be institutional boundaries that are hard to cross, establishing the autonomy of various sub-units of a

polity. I will come to them in a moment. It should be remembered, however, that hard-to-cross boundaries are not the only instrument of separation. The capacity to run and to hide can be quite significant, both politically and economically. The capacity of capital to move across borders, often referred to as capital flight, can certainly be important: When the Chinese in Indonesia started getting massacred, Chinese capital moved out fairly quickly, giving extra incentive for the government to stop the riots.⁸⁷

When we introduce significant internal boundaries in a political system we can call the result “federal.” There are many forms of such federalism largely distinguished by the powers they allocate to the center and those they distribute among the “pillars” or the provinces. But we need to also make a more basic distinction between territorial and nonterritorial—personal or corporate—divisions.

In nonterritorial systems, boundaries are defined not territorially but in terms of personal membership. A member of an ethnic or religious group, for example, can be governed, on some issues, by his or her “pillar” no matter where they live. If we want homogeneous pillars, and the ethnic groups are not separated territorially, this is the method of division that we must use. The pillars can be given powers in areas where territoriality is not a significant constraint, as in the provision of education. The Ottoman millet system is a much-cited historical precedent.⁸⁸ Among contemporary examples are systems that give ethnic minorities the right to establish and control their own schools, supported by public funds, as in Belgium or India.⁸⁹ A voucher system could be seen as a more flexible alternative—in which there is no need to negotiate ahead of time which groups have this right and which do not—with each person having a choice of education system to join, and all those systems with sufficient membership to be viable gaining the support of the

87. See *Anti-Chinese Riots Continue in Indonesia*, CNN.COM, Aug. 29, 1998, <http://www.cnn.com/world/asiapcf/9808/29/indonesia.riot>.

88. See, e.g., D.K. Fieldhouse, *The Decline of the Ottoman Empire in the Middle East and the 'Arab Awakening,'* in *WESTERN IMPERIALISM IN THE MIDDLE EAST 1914-1958*, at 2-9 (2006); see also John Coakley, *Approaches to the Resolution of Ethnic Conflict: The Strategy of Non-territorial Autonomy*, 15 *INT'L POL. SCI. REV.* 297, 299 (1994).

89. See generally Keith Watson, *Educational Policies in Multi-cultural Societies*, 15 *COMP. EDUC.* 17 (1979) (discussing national treatment of minorities regarding education).

state.⁹⁰ A different set of examples of nonterritorial decentralization is provided in countries, like Lebanon and India, that recognize for their various religious groups autonomous legal systems that govern such matters as marriage and divorce, children, or inheritance.⁹¹

The more common federal systems have internal divisions that are territorial, and there are a variety of choices in boundary determination. In many federal systems, state and ethnic group boundaries mostly coincide, thus providing as large a degree of autonomy to these groups as the powers given to the states in which they live. Perhaps the purest examples are Belgium and Czechoslovakia in its dying days.⁹² There are many more examples, such as Switzerland,⁹³ India,⁹⁴ and Canada,⁹⁵ where boundary determination is more mixed, but often follows linguistic lines.

C. The Logic of Optimistic Ambitions

The propensity for violence of an individual or a group increases with the gains—the improvements of the world, as they see it—they are pursuing, and the more optimistic they are about achieving those gains. Violence is costly, but the greater expected gains justify the cost. To make an omelet, we need first to break some eggs, and the bigger the omelet, the more eggs will have to be sacrificed. So when deep political and social transformation enters the agenda of major players, or when players with such an agenda become major, the prospects of violence and of breakdown of constitutional order increase.

There are two situations in which such an increased propensity for violence is likely to occur. First, it is likely as a response to deterioration, as in failing states. Second, it is also possible as a response to emerging opportunities of improvement, as in revolutions of rising expectations.

90. See *Free To Choose, and Learn*, ECONOMIST, May 3, 2007, at 65.

91. Margaret Moore, *Sub-State Nationalism and International Law*, 25 MICH. J. INT'L L. 1319, 1330 (2004).

92. Ronald L. Watts, *Forward: States, Provinces, Länder, and Cantons: International Variety Among Subnational Constitutions*, 31 RUTGERS L.J. 941, 957 (2000) (discussing Belgium).

93. *Id.*

94. *Id.* at 946.

95. *Id.* at 957.

Two important examples of the latter pattern are familiar from European history. The Renaissance unleashed an enthusiasm for improvement and reform in many spheres of life, including religion. But efforts to reform eventually led to increasingly brutal wars of religion, in which the issues at stake were much bigger, and hence worth fighting for, than the issues that prompted the original efforts at reform.

A second prominent example can be found within the French Revolution.⁹⁶ The sequence of events that begins the revolution is clearly a response to deterioration. But again, this provides an opportunity for improvement on a scale much greater than the original decline suggested, including a program of rationalization of the state and the society, recognition of natural rights and new principles of constitutional design, replacement of a monarchy with a republic, and so on. And those large stakes then support the political logic of turning to violence.

One way to undercut this logic of large stakes and optimistic ambitions is to incrementalize programs for improvement and transformation. Many examples of deep transformation successfully achieved without violence involve various forms of such incrementalization, including transitions to democracy in Mexico,⁹⁷ Spain,⁹⁸ and Portugal,⁹⁹ the collapse of communism in some countries of Europe, for example Hungary,¹⁰⁰ and in some respects Poland;¹⁰¹ and the collapse of the apartheid regime in South Africa.¹⁰²

A second way to undercut the logic of large stakes is to decentralize improvement, and to establish programs of improvement separate from the state. There are two key examples: civil societies and the market. Both allow multiple individuals and groups to

96. See generally FRANCOIS-AUGUSTE MIGNET, *HISTORY OF THE FRENCH REVOLUTION FROM 1789-1814* (2006), available at Project Gutenberg, <http://www.gutenberg.org/etext/9602>.

97. José Woldenberg Karakowsky, *Lessons from Mexico*, 12 J. DEMOCRACY 151, 155 (2000).

98. Nancy Bermeo, *Redemocratization and Transition Elections: A Comparison of Spain and Portugal*, 19 COMP. POL. 213, 218-19 (1987); Omar G. Encarnación, *Civil Society and the Consolidation of Democracy in Spain*, 116 POL. SCI. Q. 53, 60 (2001).

99. Bermeo, *supra* note 98, at 214-18.

100. Duncan Light, *Grazing on Communism: Heritage Tourism and Post-Communist Identities in Germany, Hungary, and Romania*, 2 TOURISM GEOGRAPHIES 157, 166-67 (2000).

101. Andrzej Walicki, *Totalitarianism and Detotalitarianization: The Case of Poland*, 58 REV. POL. 505, 521-24 (1996).

102. Hermann Giliomee, *Democratization in South Africa*, 110 POL. SCI. Q. 83, 87-88 (1995).

invest time, money, energy, and other resources into making a better world by their ingenuity. Instead of a central authority controlling all investment decisions, making the stakes at the center immense, you have in a market multiple smaller actors making smaller decisions. And at the heart of civil society we find a similar decentralization of efforts to improve the world, though in this case not driven by the profit motive.

D. The Logic of Moral Outrage

We find the most dramatic efforts to respond constructively to moral outrage in situations where a great deal of this outrage has accumulated—for example, when a thoroughly outrageous regime has just collapsed, or a genocidal war has just ended. The response has been some combination of the following elements:

1. Criminal justice: Nuremburg, Yugoslavia, Rwanda¹⁰³
2. Amnesty and reconciliation
3. Establishing the truth about the past
4. Restitution, rehabilitation, compensation
5. Purifying the body politic: denazification, lustration, etc.

This list gives us a good idea of the range of choices available to deal with moral outrage. To understand what needs to be done, it helps to keep in mind that courts, and the criminal justice system in general, including police and prosecutors, are at the heart of the task of preventing the accumulation of moral outrage in a well-functioning state. A typical reason for the accumulation of moral outrage is that some group in the population is protected from the reach of criminal law, or some range of activities is illegitimately protected. Some people and some criminal activities are *de facto* above the law.

The solution is some combination of, first, repairing the routine means of response to moral outrage, and second, establishing *extraordinary* means of response that have sufficient neutrality and effectiveness. An example of the first strategy would be a reform of

103. See WILLIAM A. SCHABAS, *THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* (2006).

the court system, of criminal law and procedure, or of the police. An example of the second strategy would be a special investigatory commission set up in response to a scandal.

Moral outrage can have powerful distorting effects on people's perception of reality, and it is itself subject to powerful distortions. It can be therefore the basis of very distorted analyses of how the offending injury or humiliation occurred, and how responsibility for it ought to be allocated. This is why the determination of facts is such a central feature of the courts of law. And it is why this feature is preserved in the various "Truth and Reconciliation" commissions.¹⁰⁴ More generally, moral outrage cannot properly be handled without neutral and effective—in other words, thorough and reliable—investigative efforts, whether it is in courts, investigative commissions, or by journalists and historians.

V. NEUTRAL GROUND

The second task of constitutions is to enhance the role and influence of multiple legitimate ends, impersonal principles, and impartial institutions or persons. To do this is to diminish the bite of Madison's "problem of faction."¹⁰⁵ Madison wrote in *Federalist No. 10*:

No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment With equal, nay with greater reason, a body of men, are unfit to be both judges and parties, at the same time; yet, what are many of the most important acts of legislation, but so many judicial determinations ... concerning the rights of large bodies of citizens¹⁰⁶

This problem can be solved only to the extent that we can arrange governmental institutions, and their social context, in such a way that impartial principles, neutral decision makers, and impartial institutions have a chance to exist and to be *effective* in influencing

104. For an example, see Truth and Reconciliation Commission, <http://www.doj.gov.za/trc> (last visited Feb. 22, 2008).

105. THE FEDERALIST NO. 10, at 42 (James Madison) (Terence Ball ed., Cambridge Univ. Press 2003).

106. *Id.*

outcomes. We must build neutral ground, which can include institutions of various kinds, including, of course, the institutions of the state, as well as persons, groups, ideas, places, and even objects that are seen as neutral within the most important and divisive conflicts in a country. In a deeply divided country we may find no neutral ground at all: no impartial persons, institutions, or ideas. By contrast, in countries with highly developed neutral ground, the state will be both neutral—or at least neutral enough—and powerful, so that the institutions of the state, and its officials, will constitute a powerful neutral ground.

In modern constitutional democracies, the power of impartial principles takes the form of a commitment to free and fair elections, one person/one vote, equal human dignity, and basic human rights. In fragile states, we must build toward such commitments in stages, which include introduction of the appropriate legal forms and building social realities that can eventually give these forms the appropriate principled content. We might call this building neutral ground. It includes institutional neutral ground, for example, impartial media—especially radio stations; autonomous professional associations—especially lawyers; and autonomous universities. Building a cultural neutral ground would be even deeper, transforming human attitudes to allow for more impartial “loyalties to what the situation requires”¹⁰⁷ in addition to existing group loyalties. And building neutral ground includes strengthening the role of moderate politicians, those capable of fairness and impartiality, and those willing to compromise.

“Why do you hire only people from your tribe?” an African politician in office was once asked,¹⁰⁸ in an effort to understand the roots of the corrupt practices that make effective governing so difficult in many African countries. “Who else would hire them?” he answered, providing a vivid example of what happens when the idea of impartiality is so weak that hiring on the basis of merit is not even an alternative to be seriously considered. Before we can get a

107. I paraphrase Justice Brandeis. See ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 232-37 (1956) (In response to an accusation of unethical conflict of interest and an inquiry as to who he represented, Brandeis replied, “I should say that I was counsel for the situation.”).

108. This is according to a widely circulating story for which I have been unable to find a precise reference.

constitutional court to challenge political institutions on the grounds of high universal principle, we need to have a social setting in which something other than protecting one's own is imaginable; otherwise high principle will have no chance to be seen as such. It will be only the Tutsis favoring the Tutsis, or the rich favoring the rich.

Neutral ground is composed of those elements of the social life of the country that are nonpartisan in ways relevant to the social conditions of that country, and that contain a range of neutral legitimating factors such as legality, erudition, and technical or professional competence. Neutral ground may need to be built up wherever it happens to be found. This could be anywhere from the traditional monarch to the association of market women, from a university and a professional association to the soccer league.

In a country with a well-functioning legitimate state, the state will be perceived as relevantly neutral, or at least neutral enough, and will dominate neutral ground. But when we are starting from nothing, we may not be able, for example, to establish independent and neutral courts or bureaucracies because there are no judges or civil servants who are seen as neutral in relevant ways.

Neutrality requires at least two elements: (1) a relevant form of nonpartisanship in the large conflicts of the society, and (2) no or limited corruption, which is another form of nonpartisanship of a more personal kind. The effectiveness of neutral ground requires, in addition, that the key decision makers have the relevant skills and that the institutional arrangements give them incentives to exercise those skills, and make it possible to exercise them effectively.

A widely accepted conclusion in the literature is that when the state is not ethnically neutral, civil war is likely.¹⁰⁹ This conclusion needs to be both expanded and disaggregated. If we stick to large-scale abstractions, then we should say that not only an ethnically neutral state, but also an ethnically neutral market, are important for preventing civil war.¹¹⁰ But especially for practical purposes it is useful to look into the component parts of the state, and outside the state, for the necessary neutral ground.

109. See Robin M. Williams, Jr., *The Sociology of Ethnic Conflicts: Comparative International Perspectives*, 20 ANN. REV. SOC. 49, 50 (1994).

110. AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 260-64 (1st ed. 2003).

Potential elements of neutral ground include government institutions (such as courts), constitutional enforcement institutions (courts or otherwise), independent professional civil service, nonpartisan professional military and police, and independent central banks or electoral commissions. Other institutions independent of government, such as universities, an autonomous legal profession, or independent media, can also be part of this neutral ground. In the larger social context we may include in this category political moderates, in the most divisive conflicts, and people with a hybrid, intermediate, or uncertain identity. When the key social conflicts are between the haves and the have-nots we would also include "the middle class." Social scientists used to believe that a large middle class was crucial for a stable democracy.¹¹¹ This does not appear to be true, but a large and powerful neutral ground does seem to help.

CONCLUSION

Constitution making everywhere is the development and strengthening of commitments to moderate politics. This operates through entrenched legal texts, but only in part. It requires incentives favoring moderate politicians, whenever that has a chance of being effective. But, in general, it will not be enough. We need to rethink democracy to give a complex demos the central place it deserves. And we need both to undermine the power of the gun, and to promote neutral ground. These are the main lessons we should learn from the experience of constitution making at the edges of constitutional order.

111. See, e.g., Seymour M. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69, 83 (1959).