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William W. Van Alstyne
William & Mary Law School

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QUINTESSENTIAL ELEMENTS OF MEANINGFUL CONSTITUTIONS IN POST-CONFLICT STATES

WILLIAM W. VAN ALSTYNE*

quintessence, n. In ancient and medieval philosophy, the fifth and highest essence after the four elements of earth, air, fire, and water, thought to be the substance of heavenly bodies and latent in all things.[1]

INTRODUCTION

The overall topic of this symposium is "Constitutional Drafting in Post-Conflict States." Given the extent to which there has been such a seismic shake up of various states within the past two decades, the subject for our consideration would seem to be exquisitely timely. Given the uncertainty of what may yet emerge from the internecine violence still raging in places such as Iraq in the brutalizing aftermath of the dismantled Saddam Hussein regime, or from the ongoing strife even now still savaging Somalia, the broken state of Congo, or Robert Mugabe's cruel regime in Zimbabwe and the apparently kleptocratic government in Nigeria, however, one may well insist that our symposium may also be somewhat premature. Although one would surely want to be of "constitutional drafting" help, quite obviously none of these states are, as yet, genuinely post-conflict states. Accordingly, it is surely hard to speak with any confidence on the kind of constitutions one might most sensibly consider with conditions such as they are in these chaotic states.

Leaving these places to one side (on the understanding that none of these places possesses sufficient stability to fit the definition of a *post*-conflict state to qualify for anything beyond the most

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* Lee Professor of Law, Marshall-Wythe School of Law.
1. AMERICAN HERITAGE DICTIONARY 1937 (4th ed. 2000).

minimum suggestions[2]), on the other hand, even if one widens one's view to take in the dissolution of the former Soviet Union, from which nearly all of its fifteen formerly integrated "republics" exited since 1989, or widens it again to include the five states newly formed from former Yugoslavia, or the two from the cleaving of Czechoslovakia into Czech and Slovak national states in 1993[3]—to name just some few new "post-conflict" states—it is still not obvious what one's own best intuitions can usefully yield regarding the sorts of things suitable to be inscribed in the constitutions of such recently sundered places as these. Most of these newly born (or reborn) states have already settled such questions for themselves, whether for the better or otherwise. Whether that is wholly true, it is in any event far from obvious how rank outsiders, remote from the local circumstances of each of these places, can be of responsible service in providing advice. Moreover, it is a task from which I might well be personally excused in any event, mindful both of the chastening observations Mark Tushnet provides in his separate article in this symposium cautioning one against undue pontificating on matters such as these outside one's normal range,[4] as well as mindful of the superior credentials possessed by scholars such as Donald Horowitz (whose own contribution also appears in this symposium[5]), which qualify them to speak with an authority I cannot claim.

Even so, allowing for all of this, granted that one should be aware of one's limitations, and granted also that one ought to be very wary of overgeneralizing,[6] perhaps it is nonetheless possible that some

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2. Though even now, some able scholars *have* managed to give sobering thought in respect to some of these still chaotic states; for example, see the insightful suggestions offered by Donald Horowitz on reconstituting Iraq in Jacob Dagger, *Reinventing Iraq*, DUKE MAG., July-Aug. 2007, at 30-31 (interviewing Donald Horowitz); *Unifying Iraq*, WALL ST. J., June 19, 2007, at A16.

3. *See* Peter Murrell, *How Far Has the Transition Progressed?* 10 J. ECON. PERSP. 25, 25-26 (1996).

4. *See* Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473 (2008).

5. Donald L. Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 WM. & MARY L. REV. 1213 (2008); *see also* DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT (2000); Donald L. Horowitz, *Ethnic Conflict Management for Policy Makers*, *in* CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES 115 (Joseph V. Montville ed., 1990).

6. One might "overgeneralize" by presuming to suggest, for example, whether a federal

brief canvassing of constitutions in other "post-conflict states," including our own, may nevertheless yield *some* useful observations to share. In just this last regard, lest the oldest of all of these (namely, our own Constitution) be prematurely put to one side as highly unlikely to be useful in these discussions in thinking about today's world, still, it is useful to note, if just in passing, that it happens to fit squarely within the qualifying description of a "post-conflict" constitution, i.e., a constitution drawn up in the aftermath of revolution and war. In other words, like a large number of other "post-conflict" documents of much more recent times—such as the Constitution of the Soviet Union with its own first "post-conflict"

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constitutional order is more likely to function "better" than one describing a unitary national state. Note, merely as a first step in considering the question, that the question may itself make little sense if one is thinking about small, relatively homogeneous compact states of hardly more than postage-stamp size—for example, Liechtenstein, Monaco, San Marino, Dubai, or Singapore—albeit one might think it to be a more challenging question in the circumstances, say, of Iraq, of China, or, for that matter, of either Canada or the United States itself. But note that even then—i.e., even assuming it may be important to consider whether, in the circumstances one is addressing, that a "federal" republic (rather than a "national" republic) *may* make better constitutional sense—it is not always easy to measure *which kinds* of legislative powers may be "best" vested in the national government and which other kinds may be better left to pluralistic determinations of the constituent states (however they may be formed). One may think the answers to be obvious, but consider, for example, that while laws respecting "marriage" and "divorce" are determined state by state within the United States, in closely neighboring Canada—itself emphatically a very strong "federalism" model of constitutional government in many significant respects—it is exclusively the *national* government—*not* the provincial governments—that is empowered by its constitution to provide the laws declaring who may marry and who may not. *See* The British North America Act, 1867, 30 & 31 Vict. ch. 3 (U.K.), *as reprinted in* R.S.C., No. 5, pt. VI, § 91 (Appendix 1985). Thus, as it happens, the Canadian *"federalism"* rule on this particular matter is the very *opposite* of the *"federalism"* rule that prevails in the United States.

So, to come more quickly to the point of this extended footnote, what does one make of this in a more general way? Which approach—the Canadian or the American—seems more consistent overall with "federalism?" Perhaps, in that respect, the American approach can claim the higher ground. On the other hand, putting that question aside (i.e., greater consistency with "federalism" as such), which rule—the American or the Canadian —commends itself as the "better" rule as such? In the United States, for example, given things as they are, would one welcome an amendment to the Constitution empowering Congress to establish "the law" on this subject such that nothing other than what the national government itself declared to be a "suitable" marriage—or a "suitable" divorce—could have any legal standing in any state? If so, just why would one consider *that* to be desirable? (But then, on the other hand, if not, then why not?) Whatever one's own views on these particular questions, the point here is that it is questions of just this endlessly contestable kind that caution one to think carefully about the implications of what one proposes to put into a constitution—to do so even in "federal" states, and most especially so in offering advice for drafting constitutions for people and places one hardly knows.

version in 1918, carried through three subsequent editions until the national collapse in 1989,[7] or that of the People's Republic of China (1982),[8] or that of postwar Germany (1949),[9] or that of postwar Japan (1946)[10]—our own more aged Constitution is itself very much a "post-conflict" document, such as it is. To be sure, it was negotiated with far fewer preexisting models from which to draw in working out its design than now exist.[11] Even so, even allowing for all of that, are there any lessons to be learned here? I think there are, at least a few.

I.

Its first enacted version, the original constitution (The Articles of Confederation (1781)), insisted in its very Preamble that what the thirteen "post-conflict" states sought in its promulgation was not some merely loose relationship. Much less was it claimed to be a relationship of a merely provisional or temporary sort. To the contrary, the Preamble pointedly declared that these Articles meant to provide for a "*Perpetual Union*," thereafter to be known (even as it still is) as "The United States of America."[12] That document—our own original, written, post-conflict constitution—was never even

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7. *See* ROBERT SHARLET, SOVIET CONSTITUTIONAL CRISIS: FROM DE-STALINIZATION TO DISINTEGRATION 9-10 (1992).

8. *See* ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 44-45 (1998).

9. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 10 (1994).

10. *See* GLENN D. HOOK & GAVAN MCCORMACK, JAPAN'S CONTESTED CONSTITUTION 4 (2001).

11. So, for example, the English had no formal written constitution at all at the time. *See generally* David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 VAND. J. TRANSNAT'L L. 863 (2003). Indeed, the Constitution of the United States *is* the oldest, extant written constitution in the world, the next oldest being that of Norway, from 1814. *See* Lawrence Watters, *Indigenous Peoples and the Environment: Convergence from a Nordic Perspective*, 20 UCLA J. ENVTL. L. & POL'Y 237, 288 (2001-02). The second half of the twentieth century wrought a revolution in written constitutions, which have become a commonplace feature of nearly every national state. New Zealand and Israel, as well as the United Kingdom itself, provide the rare exceptions among modern states in having no written constitution even today, a point to which I shall return at the close of this Article.

12. *See* ROBERT W. HOFFERT, A POLITICS OF TENSIONS: THE ARTICLES OF CONFEDERATION AND AMERICAN POLITICAL IDEAS 199 (1992).

once amended.[13] But, as we know, on the other hand, neither did it last. Rather, despite its vaunted claim of providing an enduring charter of *perpetual* union, the Articles began nearly at once to fall apart and indeed were abandoned quite unceremoniously in a practical manner of speaking, to be succeeded by the provisions of the Constitution drafted de novo in a single sweltering Philadelphia summer session in 1787, in a successor document declaring *itself* to be the new supreme law (in lieu of the original Articles of perpetual union), once conventions in even a mere nine states might meet and ratify its various provisions, as, indeed, occurred within the very next year.[14]

But even with this *second* beginning as it was—a second beginning further fortified nearly at once by certain, critically added amendments that were proposed by the First Congress to assemble under its auspices in 1789 (followed promptly by ample state ratifications sufficient to install nearly all of them—ten of twelve —into the Constitution), the newer and far grander edifice nonetheless also came within a hair's breadth of crashing to pieces within

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13. Nor, as a practical matter, was there any great likelihood that it could it have been. Its amendment provision (Article XIII) required unanimity of state approval for any change, no matter how slight. *See id.* at 206. There was essentially no real chance that the unanimity requirement could be met at the time; for example, Rhode Island declined even to send delegates to the Philadelphia Convention, even to consider amendments to the Articles of Confederation, and—having spurned the Philadelphia Convention—Rhode Island likewise declined to ratify the new Constitution until it was literally left by itself. *See* ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 115, 159-60 (1948).

14. To be sure, however, as a practical matter, had Virginia and New York conventions not promptly also added *their* resolutions of ratification (thus making these two large, economically important, critically located states the tenth and eleventh states to approve the Constitution), it is most unlikely that the new, more carefully drafted Constitution of 1787—despite its vaunted claim of providing a "*more* perfect Union"(i.e., "more perfect" than the merely "*perpetual* union" provided by the Articles of Confederation)—would have succeeded, rather than nearly at once falling apart. *See* WILLIAM H. RIKER, THE STRATEGY OF RHETORIC: CAMPAIGNING FOR THE AMERICAN CONSTITUTION 220, 229 (1996).

There is one additional, albeit minor, note in this regard: Although conventions in *eleven states* (all of the original thirteen formerly joined under the Articles of Confederation except North Carolina and Rhode Island) had fully ratified the Constitution as of mid-1788, even then the Constitution did *not* take effect even within *these* states until the *following* year when, in March of 1789, the first Congress formally assembled under its auspices, even as the old government was dissolved. See, for elaboration, the opinion by Chief Justice John Marshall, for a unanimous Supreme Court, in *Owings v. Speed*, 18 U.S. (5 Wheat.) 420 (1820).

mere decades of its own original entrenchment. The irony of the event—and the lessons to be learned from it—are perhaps all the more instructive, moreover, insofar as the defects contributing to the crash this time around were quite the opposite of the kind of defects accounting for the problems that had beset the first installment of the Constitution (the Articles of Confederation). That is, they were not the consequence of what had been left out by way of adequate provision to establish the nation but instead, the consequence of what had expressly been put in.

Those expressly included provisions are far too well known to require review in extended comment here, but, briefly, they were those that effectively tipped the scales of national power, committing disproportionate control of national political power and of national policy into the hands of states with slavery on their minds,[15] as well as other provisions that substantially aided and abetted the institution itself,[16] albeit in shrouded locutions (not using words such as "slavery" or "slaves")—clauses effectively

15. These states included, for example, those with large slave populations (states such as Virginia itself, where slaves were first landed at Jamestown in 1619, the number gradually growing and the state laws gradually adjusted in increasingly harsh fashion such that, by 1789, roughly as many persons were held in conditions of regulated chattel slavery in Virginia as equaled the whole of its free population). *See generally* THAD W. TATE, THE NEGRO IN EIGHTEENTH-CENTURY WILLIAMSBURG (1965). Tate provides additional references in a useful bibliography. *Id.* at 237-46. All of these states were constitutionally "accommodated" by guaranteeing each state proportionately *greater* representation in the House of Representatives—and likewise a *greater* share of presidential electors as well—than these states (essentially six of the original thirteen) would otherwise have had, but for the compromises etched into provisions made in Article I, Section 2 (the "three fifths of all other Persons" counting provision, which carries its effect into Article II, allocating presidential electors guaranteed to each state corresponding to the number of representatives it is guaranteed under the allocation formula in Article I, Section 2). *See* U.S. CONST. art. I, § 2, cl. 3; *id.* art. II, § 1, cl. 2.

16. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 1 (indicating that "[t]he Migration or Importation of such Persons [meaning the importation of slaves] as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to [1808]," thus providing states a twenty-year "safe harbor" to continue importing slaves); *id.* art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."); *id.* art. V (providing for amendments, including a special provision forbidding any amendment to the Constitution prior to 1808 that would affect the twenty-year "safe harbor" guarantee in Article I, Section 9, Clause 1); *see also* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

abandoned only with forcible enactment of a trilogy of amendments: the 13th in 1865, the 14th in 1868, and the 15th in 1870, following an horrendous Civil War (1860-1865). All of this being so and looking back on all of this in a mere flash, it is certainly accurate to describe "*The*" Constitution of the United States as a telling example of "constitution drafting in a 'post-conflict state'"[17] and perhaps, therefore, also itself a study that may provide some insight into the pitfalls one is likely to encounter in drafting constitutions in each of two critical respects: what may be important to put into them[18] and equally, on the other hand, what may be just as important *not* to include.[19]

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17. It is surely such an example. Indeed, it is probably more accurate to identify it as a "*two* 'post-conflict'" constitution. It is a constitution forged from two violent conflicts—the first that was provisionally settled in 1781, in Yorktown (with Cornwallis's surrender, after which the English sought a negotiated peace), and the second in 1865 (with Lee's surrender of the Army of Northern Virginia at Appomattox Court House, effectively concluding four years of America's bloodiest war—a war consummated with more than one million casualties and more than 600,000 deaths—succeeded by that particular trilogy of amendments that fundamentally remade the Constitution still again). For an excellent recent review of these transforming events, see GARRETT EPPS, DEMOCRACY REBORN (2006).

18. For example, it may be important to put in a sufficient amplitude of described national substantive power to sustain a commanding national government, both domestically and in respect to foreign affairs (assuredly the missing ingredient from and crippling weakness of the original Articles of Confederation); perhaps, too, some prescribed separations in kinds of power (horizontally as well as vertically) as may be found in many well-ordered states, including our own; and perhaps, also, not least importantly, some reasonably clear iteration of "rights" or "freedoms" that the government may not merely expediently trade away or presume simply to ignore.

19. For example, it may be important *not* to include such concessions (whether to favored groups, or regions, or states) as may seem merely necessary to secure adequate consensus if there is to be any realistic prospect to put any proposed "post-conflict" constitution into legal effect in the first place, but concessions one has reason to know may also merely temporize—and thus merely postpone—another "reckoning" which, altogether foreseeably, may come with a dreadful likelihood, as it most assuredly did in the "United" States.

Here, again, another reference to Canada may be useful in passing, this time by way of furnishing examples of "special" accommodations of a partisan sort, though none as gross and disfigured as our own Constitution of 1789. In one of several provisions intended to persuade Quebec not to withhold its endorsement (which Quebec has even yet not provided despite various failed efforts to appease it), the provision providing for its national Supreme Court expressly requires that three of nine justices come from Quebec. Supreme Court Act, R.S.C., ch. S-26, S. 6 (2007), *available at* http://laws.justice.gc.ca/en (search "Title" for "Supreme Court Act"). No similar accommodation is made for any other province (i.e., no other province or combination of provinces is similarly guaranteed some designated "portion" or "representation" on the nation's highest court).

Additionally, here is a different kind of example, also from Canada, one potentially far more consequential in kind: To allay concerns that various provisions in its Charter of Rights

II.

"Constitution drafting" is also merely the art of the possible, however, and perhaps never more so than when undertaken in the immediate aftermath of great crises characteristic of post-conflict states. And it will sometimes be obvious that, despite one's well-founded misgivings respecting the kinds of things we have just now reviewed, in order to construct (or reconstruct) a constitution with provisions minimally satisfactory to all parties without whose willingness to subscribe to it in the fractious circumstances of its proposal the enterprise itself may be doomed, there *will* be "accommodations" believed to be essential to make, and they probably *will* include a number of merely concessionary clauses—clauses that ought not have been necessary but nonetheless seemed to be required and so become an encysted part of the resulting document, such as it was.

Even so, contingent on one other consideration, namely, what the document provides respecting how, by whom, when, and in what degree those provisions—or any other provisions—may be subsequently altered in due course, this consideration may appropriately weigh less heavily in judging the document as a whole. The "trick" here, quite obviously, is how to find the proper balance, such that *subsequent* constitutional alteration (whether minor or major) is made neither so easy on the one hand, that, like the Constitution of California,[20] its provisions may be just readily put at risk by simple

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and Freedoms (equivalent to the entrenched Bill of Rights in the United States) might, in the hands of the judiciary, prove to be too risky, the Charter itself expressly allows the national Parliament and each provincial legislature simply to "opt out" of being bound by any of a designated number of the listed guarantees. Part I, Sec. 33 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.). That is, they may simply declare that, in respect to a particular law, it may *not* be called into question under particular Charter sections, and if they do so declare, then that is that!

20. *See* CAL. CONST. art. XVIII, § 4 (providing for amendment by simple majority vote in statewide referendum). Is it suitable to refer to California in this context, given that it is merely a state within the United States, and not in any sense a "nation?" But surely it may be. The population of California today (roughly 36 million) is by itself virtually ten times greater than that of all thirteen states combined when the Constitution was drafted and put into effect (and much larger, too, for that matter, than that of many modern nation states). *Compare* U.S. Census Bureau, California, http://quickfacts.census.gov/qfd/states/06000.html (last visited Feb. 21, 2008), *with* U.S. CENSUS BUREAU, POPULATION, HOUSING UNITS, AREA

majoritarian referendum or, say, whenever the national assembly may happen to convene,[21] nor so arduous that, as in the example of our own original constitution (i.e., the Articles of Confederation[22]), little if anything (other than mere trivial changes[23]) could be proposed by way of amendment with any realistic expectation of meeting the enactment requirements set forth in the Constitution itself.[24]

In this respect, it is probably the case that the U.S. model is unduly stringent. In standardly[25] requiring agreement by two-

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MEASUREMENTS, AND DENSITY: 1790 TO 1990 (1990), http://www.census.gov/population/censusdata/table-2.pdf. By itself, moreover, were it a nation, California's economy would rank it well within the ten largest national economies of the world economies. *See* California Legislative Analyst's Office, Cal Facts 2006 State Economy, http://www.lao.ca.gov/2006/cal_facts/2006_calfacts_econ.htm#economy (last visited Feb. 21, 2008). Within California, moreover, provisions in the state constitution have been applied in its courts with significant effect; for example, in California, state constitutional law is itself a considerable force. *See, e.g.*, Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 202-04 (1998) (cataloguing California's robust independent constitutional interpretation).

21. This is too close to the actual situation in The People's Republic of China, as well as in India, in which alterations in the constitution need only be approved by two-thirds of the national legislature in order to take effect. *See* XIAN FA art. 64 (1982) (P.R.C.); INDIA CONST. art. 368, cl. 2: amended by the Constitution (Twenty-fourth Amendment) Act, 1971. Particularly where a single political party readily holds two-thirds or more of the elected national representatives, as in China, it becomes virtually as easy to alter the constitution itself as to enact any merely ordinary law. For additional critical reflections on the rule of law in China, see William W. Van Alstyne, *Civil Rights and Civil Liberties: Whose "Rule of Law"?*, 11 WM. & MARY BILL RTS. J. 623 (2003).

22. *See supra* note 13 and accompanying text.

23. See, for example, U.S. CONST. amend. XXVII, which is so utterly trivial that even few lawyers will be able to identify it without looking it up—and of which scarcely anyone was even aware when Congress declared it to be "valid ... as part of the Constitution," in May 1992. H.R. Con. Res. 319, 102d Cong. (1992). For a brief critical review, see William Van Alstyne, *What Do You Think About the Twenty-seventh Amendment?*, 10 CONST. COMMENT. 9 (1993).

24. For a collection of differing perspectives on this challenging problem, see, for example, RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995).

25. One says "standardly," advisably. More accurately, Article V also provides that amendments may be proposed in a convention to be called by Congress on petition of two-thirds of the states. U.S. CONST. art. V. This procedure, however, has *never* successfully been invoked. *See* Ronald D. Rotunda & Stephen J. Safranell, *An Essay on Term Limits and a Call for Constitutional Convention*, 80 MARQ. L. REV. 227, 228 (1996). Article V also permits Congress to send proposed amendments to state ratification conventions (rather than to the fifty state legislatures), if it wishes. U.S. CONST. art. V. This option, however, was actually used only once (to bypass state legislatures in respect to the Twenty-first Amendment, to

thirds majorities in both houses of Congress to propose an amendment, plus resolutions of ratification by *three-fourths* of the fifty state legislatures (all but one of which is bicameral),[26] the provisions thus set in place in Article V are exceedingly hard to fulfill. Even taking proposals to amend—and thus actually to alter a constitution's embedded provisions—as seriously as one ought, the requirements of the amending article are worthy of some measured skepticism. Indeed, they are substantially more stringent than will be found in most other constitutions and probably unduly stringent even for the United States itself.[27]

III.

With characteristic assertiveness, Richard Epstein recently offered the following dissent from a famous observation by a person far more famous than even himself. "Churchill," he wrote, "was wrong when he said democracy was the worst of all forms of government, except the rest. *Constitutional democracy will work*

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secure repeal of the Eighteenth Amendment).

26. In all states except Nebraska—the one unicameral legislature—the amendment must win approval by a majority in *each* house, i.e, each considered separately from the other must vote "aye;" otherwise, the proposed amendment fails. This commonplace feature obviously magnifies the possibility of blocking proposed amendments, merely by effective lobbying in either chamber, such as it is, regardless of statewide sentiment overall and the more than adequate support reflected in the ample votes in the other house.

27. In my own view, the difficulty of securing amendments has had two related deleterious effects. The first deleterious effect is that, precisely because the project of securing any significant amendment is made so problematic, far more than originally, incidentally, when there were but thirteen states and a need therefore to secure approval in ten rather than as today in all of thirty-eight, the burden has seemingly fallen upon the Supreme Court to compensate by engaging in "virtual amendment" by judicial fiat, i.e., by exceedingly loose "interpretations" of existing articles and clauses. But precisely because the Court *does* engage in this practice, many who might otherwise be willing to risk a vote to approve a desirable and meaningful amendment to the Constitution may be hesitant to do so. Having witnessed how loosely the Supreme Court has presumed in the past to construe (or misconstrue) existing provisions already embedded in the Constitution, there is an added wariness to vote for anything that may merely give the Court an additional lever to pull whenever a mere majority of its members may be so inclined to pull it to produce results they deem suitable to please themselves. The net effect is one of "negative synergy." For a more elaborate discussion and review (as applied specifically to the failed Equal Rights Amendment, which would have been the twenty-seventh amendment), see William Van Alstyne, *Notes on a Bicentennial Constitution: Part I, Processes of Change*, 1984 U. ILL. L. REV. 933, 951-58.

better."[28] What Epstein meant by that, of course, was that unchecked, democracy provides no security against whatever tides of passion and prejudice the people (the "demos") decide.[29] Constitutional democracy "works better," intelligently dividing authority, integrating various checks and balances, setting boundaries on what may (and may not) be done, when, by whom, and under what circumstances—even while also providing a means for each of these matters to be subject to reconsideration by generations downstream. And doubtless, in some strong measure, virtually all who spend their time in drafting or worrying over what kind of constitution one ought to adopt, what ought to be included within its provisions (and, oppositely, what ought not) must surely agree with Epstein. Otherwise, it is hard to account for the intensity of feeling, as well as of anxiety, that go into these enterprises, or even to account for this modest symposium on drafting constitutions in post-conflict states.

To be sure, under *one* view, it does not really matter what goes into (or is left out of) a constitution. For example, if one agrees that its main purpose is more by way of promotional advertising than something more, then one will be less vexed than otherwise respecting its particular provisions. Rather, understanding that the constitution is not necessarily to be taken seriously as "hard" law[30]—*enforceable* law—its provisions may be authored principally with a concern for appearances, not for substance. And, in point of fact, it is doubtless true that a number of constitutions are substantially of just this sort.

How, then, does one tell the difference? We have already touched on one sure telltale sign, namely, the relative (i.e., excessive) ease of making alterations so that, insofar as certain clauses of the constitution may prove to be a hindrance to what "the people" (whether as allegedly represented in a national congress or by literal plebescite) would apparently now prefer, it is scarcely more difficult to make an alteration in the constitution than it is to enact

28. Richard Epstein, *Zoning: Deliberative Democracy at Zero Prices*, DAEDALUS, Summer 2007, at 67, 70 (emphasis added).

29. *See id.* at 68-70.

30. For an elaboration of this expression, see William W. Van Alstyne, *The Idea of the Constitution as Hard Law*, 37 J. LEGAL EDUC. 174 (1987).

any other law.[31] But are there any other telltale signs? Most assuredly there are. Among the most obvious are these:

(1) May—or may not—the constitution itself be appealed to when it matters most, i.e., when the full force of (what otherwise passes for) "the law" is brought down upon one (whether it is "brought down upon" one *in* court[32] *or out*[33])?

(2) Assuming the constitution may be appealed to,[34] are the courts in which is lodged the authority and affirmative obligation to hear one's constitutional objection (or constitutional claim) *not* to take direction from some *other* authority

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31. This is, of course, one easy way of coping with what Alexander Bickel wrote of so perplexingly, in his famous book, THE LEAST DANGEROUS BRANCH (2d ed. 1962), wherein he coined the term "countermajoritarian difficulty" to describe his view that judicial review stands in tension with democratic theory. *See id.* at 16. I admit even now, however, while admiring Bickel enormously, of not grasping the problem as he presented it. For I had taken it for granted (and still do) that, indeed, it is an essential function of a constitution (as law) to *be* "countermajoritarian" in a meaningful sense of that term (i.e, to constrain it "against itself" so to speak). If one finds the idea too distasteful, well and good, in which event it is merely logical either to render its provisions "nonjusticiable" or, indeed, so susceptible of ready amendment as on *that* account—the sheer ease of enacting changes—will readily enable today's majority so to amend it and at once get on with its agenda, whatever that might be.

32. This force may be brought down upon one "in court" when one is criminally prosecuted or civilly sued, and whether the proceeding itself has been initiated by an arm of the government or by some party other than the state itself.

33. It may be brought down upon one "out" of court when, indeed, one is *not* proceeded against in any "court," rather, one is "proceeded against" *in other ways and other places* (for example, as when one is merely arrested and, as it were, "simply detained," or as when one is simply set upon and dispossessed, or as when one is merely turned away and left without effective recourse to seek relief). The critical issue here is not the issue of the obligation of courts as such; rather, the issue here is antecedent to that one, i.e., of meaningful *access to the courts*. (It is just this issue that was most recently tested in the U.S. Supreme Court, for example, in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), and, even as this Article goes to press, is once again critically before the Supreme Court, in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007).)

34. This is itself a very large assumption, incidentally (indeed, a false assumption in many countries with nominally strong constitutions, i.e., virtually "model" constitutions, many of which read far more impressively than the understated Constitution of the United States). Note, once again, that there are also two separate questions here: the first of which is that of *meaningful access to courts*, and the second is that of the *jurisdiction* of courts in terms of their authority and duty to determine constitutional questions *additional* to any "nonconstitutional" questions on which the case might turn. In this latter respect, one means to distinguish regimes that permit lots of cases "to be heard in court," but which simultaneously reserve "*constitutional*" questions for *other* authorities to resolve (for example, to be "resolved" by the highest *political* organ(s) of the state) and which neither litigants nor courts may presume to draw into question.

but, rather, to act on the question independently of what *other* authorities say?[35]

(3) Do the constitution and laws enacted pursuant to the constitution provide adequately to secure the integrity of the courts? So, on the one hand, do they provide for a sufficiency of tenure and of material support to enable the courts to do their work?[36] Do they also, however, provide adequate means to check the integrity of the judiciary itself?[37]

No doubt, putting to one side these familiar questions, in our efforts to identify essential elements of "*meaningful*" constitutions, there are a host of others one might believe to be worthy of at least as much consideration as we have but very briefly given to these—not merely other questions relating to the judiciary in

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35. Herein arises a still separate question (i.e., *not* as to whether there is access to courts and *not* whether it is inclusive of the right to raise constitutional questions and have them ruled upon by the court). Rather, it is the still *separate* question of "*independent*" judicial review. The question was resolved early on in the United States by Chief Justice Marshall, writing for a unanimous Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (concluding that the judicial oath clause of Article VI obliges judges to make an independent assessment of whether an act of Congress is authorized by the Constitution—i.e., independent of Congress and equally independent of whatever may have been asserted by the President in signing it into law). Stated differently, the proposition is this: the courts *are not* to "defer" to the views of the coequal departments of government in deciding constitutional questions, and they *are* to decline to apply or enforce any law for which *they* can find no warrant in the Constitution as it now stands.

36. So, for example, in the United States, the salient provisions in Article III entrench all federal judges with lifetime tenure, (i.e., no limited term of years can be set by Congress—whether in respect to those appointed to the Supreme Court or to the lower federal courts), and no legislation reducing their compensation during that tenure may be enacted to take effect during their service. *See* U.S. CONST. art III, § 1. (This is not to say, however, that there may not be other ways to affect them greatly, such as "starving" the judiciary budget itself, or by adding new justices to serve (thus to dilute the effect of votes of current members of the Court), or altering the appellate jurisdiction of the Supreme Court, or contracting the jurisdiction of the lower courts, quite apart from the power in the House to impeach for "treason, bribery, or other high crimes and misdemeanors," and to try, convict, and remove in the Senate, a power never successfully employed, however, in respect to justices on the Supreme Court itself. *See* U.S. CONST. art. I, § 2, cl. 5; *id.* art. II, § 4; *id.* art. I, § 3, cl. 6.) In respect to the "tenure-for-life" feature of Article III (rather than merely a generous *limited* term provision, say, of eighteen years), incidentally, the United States is evidently alone, as knowledgeable critics have been quick to observe. *See* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 44-46 (Roger C. Cramton & Paul D. Carrington eds., 2006).

37. *See supra* note 36.

particular (i.e., "other questions" addressed to such important matters as *the process* by which the judges are selected, or *by whom* selected or appointed, and *on whose advice or consent*[38]), but questions relating to *other* departments and *other* government personnel.[39] Even so, even as in the instance of a child asked to spell "banana" (or maybe "Mississippi"?), one must be prepared to show some discipline in knowing when to stop rather than to continue simply to run on. I think we are roughly at that point, indeed, if not already past it, so I mean now quickly to conclude.

IV.

Written constitutions are now virtually a dime a dozen, and most certainly much more common than in previous epochs, in the long history of national states. Indeed, as noted in a very early footnote,[40] it is rare that any nation today lacks some inscribed template of a constitutional sort. Thus our foray, our quest, has been that of attempting merely to sort through different varieties of written constitutions such as they are, looking to try to identify elements that would seem to make some of them more meaningful than others—including some among the latter which, though they

38. Note, for example, that nothing in the U.S. Constitution determines how *state* court judges are to be selected (or elected), though doubtless it is in the state courts (rather than the federal courts) that by far the greater number of constitutional issues are adjudicated, with but a tiny fraction thereafter becoming subject to reexamination in the Supreme Court (or, indeed, for that matter, in many instances, in any federal court). In states submitting judges to ordinary election processes, judicial tenure can be highly unstable, more or less submitting the determination of the acceptability of the judges' decisions to populist review. (For a recent Supreme Court decision sharply illuminating this issue, see *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).)

39. To illustrate this latter point with but a single example, does either the Constitution itself—or suitable legislation enacted pursuant to its provisions—provide any effective measure of "whistle-blower" protection? Or, to the contrary, does the regime of law provide *no* modicum of security for those who decline to accept an ongoing clandestine unconstitutional practice, *regardless* of how egregious, *regardless* of how persistent, and *regardless* of by whom or at what level of government it is being pursued? The presence (and so, too, the *absence*), of constitutional and/or of statutory measures suitably addressed to the dark abyss of internal state practices may itself tell us as much as anything else about the *real* "meaningfulness" (or meaninglessness) of a constitution, whether it is our own or that of some far more recent "post-conflict" state.

40. *See supra* note 11 (identifying Israel, New Zealand, and the United Kingdom, as exceptions to the general rule).

read quite impressively, turn out to be inscribed on mere wet cardboard (indeed, turn out to be a promise made to the ear and broken in the heart).

Is that quest worthwhile? I think it is, but one needs also to be cautious in one's confidence, diffident in one's thinking, and sobered by observations such as these by Learned Hand, deservedly among the most justly admired American judges, serving on the federal court from the time of the First World War itself through the Second and beyond:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[41]

Doubtless, in some larger sense, Judge Hand was, and is, right. To the extent that he is, perhaps the answer to the question raised in the very title to this brief Article, i.e., how does one distinguish the "*quint*essential" elements of meaningful constitutions (from those we merely regard as "essential"), is not to be found anywhere within even the most perfectly drafted constitution, including our own (for which I certainly make no claim of "perfect-as-is"). *Those* elements, i.e., the *quintessential* ones, if to be found at all, even as Learned Hand suggested, lie outside the document, outside the courts, elsewhere—somehow within a general spirit of moderation, altruism, tolerance, and resolve. Lacking those elements, a society will not sustain itself nor may the best possible constitution have any sufficient effect.

Yet, though that be true, I would close not with Judge Hand as the last word, but instead with these remarks offered by Thomas Jefferson, commenting in a letter to James Madison, on how he believed the enactment of the Bill of Rights into our Constitution was a useful thing to do. "A brace the more will often keep up the building which would have fallen, with that brace the less,"

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41. LEARNED HAND, THE SPIRIT OF LIBERTY 144 (Irving Dilliard ed., 1959).

Jefferson observed.[42] So, here as well. The endeavor of struggling nations to instantiate meaningful constitutions, is not to be slighted. Rather, it is to be encouraged and aided, as best we can aspire to do.

42. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON (Adrienne Koch & William Peden eds., Modern Library Paperback ed. 1998) (1944).