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WHAT'S IN A NAME? REFLECTIONS ON TIMING, NAMING, AND CONSTITUTION-MAKING

VICKI C. JACKSON*

I. INTRODUCTION: THE PARADOXES OF CONSTITUTION-MAKING

There is a paradox, well described by Jon Elster,¹ that the crisis conditions that often lead to constitution-making are incompatible with the kind of deliberation thought necessary for the creation of a constitution consistent enough with the needs of its polity to be successful. "Post-conflict" situations are likely to involve crises that motivate constitution-making, but are also likely to create conditions in which the probability of creating a lasting constitution at one blow is low.

This essay explores the consequences of this observation, suggesting that those committed to constitutionalism need an expanded repertoire of approaches in post-conflict societies (including contingent, incrementalist, revisable or interim approaches). Moving directly to traditional, comprehensive forms of constitution-making² in some circumstances may be antithetical to promoting

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

2. By "traditional" I refer to the preparation in a continuous, short-term process of a purportedly comprehensive written constitution as a single (or consolidated) instrument, as in the drafting and adoption of the U.S. Constitution. As will be developed below, the understanding of this as a form of constitution-making distinct from more transitional approaches is subject to challenge.

the conditions necessary for constitutionalism—including trust in legal institutions.³ The increasing range and diversity of constitution-making approaches is humbling, or should be, especially for those seeking to influence other countries' decisions of when and how to engage in constitution-making. Constitutions are a foundation for the rule of law, insofar as they specify the rules by which law is made, interpreted, applied, enforced, and changed; successful polities need a constitution (written or not) to allocate these responsibilities. Yet making a written constitution may at times be antithetical to the constitutionalism it seeks to promote. And calling the process "constitutional" may at times be antithetical to producing the kind of agreement that may lead to a more permanent, or legitimate, state of constitutionalism.

A second and related paradox of relevance to constitution-making in post-conflict societies arises from the distinctive features of constitutions. In most settings, constitutions are understood to be legal instruments that are foundational in terms of defining and allocating legitimate governmental authority, hierarchically supreme over other sources of law,⁴ and entrenched—meaning that they are more difficult to change than other forms of law and intended to be more enduring. In the kinds of crises generated by conflicts and their aftermaths, the entrenched, foundational, and supreme character of the constitution as a matter of legal hierarchy can help to mobilize attitudes of public-spiritedness and elicit extraordinary efforts to produce the best possible document. Bruce Ackerman famously refers to "constitutional moments" of high popular mobilization and enhanced deliberation, beyond the type

3. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 19 (1990) (observing that law is not useful if it is ignored or does not influence behavior, and arguing that trust in legal institutions is related to their perceived procedural fairness and that perceptions of procedural fairness contribute to the legitimacy of government); see also Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847 (1998). For a suggestion that constitutions may reflect a healthy distrust of unchecked government power, helping to produce a willingness to coordinate or cooperate by offering forms of protection against untrustworthy behavior by government agents, see Russell Hardin, *Distrust*, 81 B.U. L. REV. 495, 516-21 (2001). Although Hardin argues that "law commonly fills in where trust [in "the strong, encapsulated interest sense"] would not be possible," *id.* at 519, Tyler's work suggests that without some degree of generalized trust in the institutions of law, law cannot "fill in."

4. Cf. DENNIS C. MUELLER, *CONSTITUTIONAL DEMOCRACY* 63 (1996) (emphasizing that "[c]onstitutions define the rules under which all future political games are to be played").

characteristic of "ordinary" politics.⁵ Moments of dramatic regime change, as occurred in Iraq and Afghanistan, may enhance the conditions for this version of constitution-making, as the very rupture creates a "veil of ignorance" regarding future politics and enhances the capacity for longer term deliberation.⁶ The raised stakes of constitution-making may not only move contending parties to focus on the constitutional project, but also encourage elites—who, having invested in the project of constitution-drafting, may have incentives to persuade those whose assent is required to ratify the document and then, as actors in the political system, to try to make the constitution work.⁷

5. BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 48-51 (1992) [hereinafter ACKERMAN, *LIBERAL REVOLUTION*]. Popular mobilization may be tested and expressed through special methods of bringing a constitution into existence as law, but even without high popular mobilization, the moments in which major conflicts subside and new regimes are to be constructed have the capacity to motivate elites to put energy into crafting an agreement that sufficient numbers can accept as the foundational, supreme, and entrenched law. Ackerman recognizes that "a constitution can also win legitimation through evolutionary processes, in which elites build consent without the support of revolutionary mass mobilizations," and refers to Spain as an example. *Id.* at 47 n.1; see also *infra* pp. 1257-59 (discussing constitutionalism without a single written constitutional instrument, as in the United Kingdom and Israel).

6. JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1971) (explaining "veil of ignorance" as a construct in which those deciding on future rules to govern a society do not know their own position under the system to be designed, thereby creating incentives for impartial judgment). For a discussion of how constitution-making processes may simulate aspects of a "veil of ignorance," see ACKERMAN, *LIBERAL REVOLUTION*, *supra* note 5, at 64 (arguing that constitution-making right after the moment of founding or revolutionary change avoids the problem of politicians becoming "more accomplished in serving specific constituencies ... [and] less interested in uniting with one another in making an overarching constitutional statement of principle"); Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 *CARDOZO L. REV.* 191, 228-29 (1995) (linking conditions approaching a "veil of ignorance" to optimal timing for constitution-making and suggesting, following Przeworski, that some form of a "veil of ignorance" may be approached when "the [constitutional] actors do not know the balance of forces in their society"). See also JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 78-80 (1965); cf. Bruce Ackerman, *The New Separation of Powers*, 113 *HARV. L. REV.* 634, 667 (2000) (arguing that having to submit proposed constitutional amendments to multiple referenda will induce more long-term thinking by drafters).

7. See ACKERMAN, *LIBERAL REVOLUTION*, *supra* note 5, at 51-53. These benefits will arise only where it is possible to reach a constitutional agreement in which elites in the major communities concerned have a sufficient stake and see a sufficient benefit for themselves and their constituencies; absent that possibility, it may be that trying to create an entrenched constitution will do more harm than good. See *infra* pp. 1274-78 (discussing Iraq).

However, a constitution's entrenched character, together with its foundational and hierarchically supreme status, may also create disincentives to cooperative or public-spirited drafting behavior. Existing powerful parties fearing the loss of power through an entrenched constitution may, rationally, be obstructive; they may refuse to participate, block thoughtful compromises, or otherwise seek to derail the project.⁸ In societies with existing cleavages based on ascriptive identity with a clear majority in one group, minority groups may be reluctant, even in moments of regime change, to bargain over a document that is likely to entrench majority power; where the rule of law is weak or legal institutions unsettled, minorities may not be willing to rely on a legal instrument's statement of rights. Minority groups may be especially reluctant in fluid situations in which they believe that waiting until later will allow them greater influence—for example, due to immigration patterns, birth rates or other demographic trends, or to the possible (hoped for) intervention of other external powers. The stakes of constitution-making are high, then, and can work to enhance constitution-making efforts, to destroy them, or to invite stalemate.

To these paradoxes, avowedly “transitional” constitutions may seem to offer important solutions. Transitional constitutional documents (as the Northern Ireland agreements have been described and as the Interim South African Constitution was proclaimed), or more incremental constitutional processes (as in Poland or Hungary), may decide only some, not all, of the matters that full-

8. On the possibility of rational resistance to negotiation, see Robert H. Mnookin, *When Not To Negotiate: A Negotiation Imperialist Reflects on Appropriate Limits*, 74 U. COLO. L. REV. 1077, 1078-79 (2003). Although different processes may be successful in generating trust among suspicious parties to a complex constitutional negotiation, see, e.g., Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1 (2003) (arguing that the decision rule of “sufficient consensus” facilitated difficult negotiations in both Northern Ireland and South Africa); cf. Dana Lansky, *Proceeding to a Constitution: A Multi-Party Negotiation Analysis of the Constitutional Convention of 1787*, 5 HARV. NEGOT. L. REV. 279, 281 (2000) (emphasizing the role of a trusted intermediary, Benjamin Franklin, in the U.S. Constitutional Convention), there may be both rational resistance by minority parties to constitutional deals, where minority parties believe they can make a better deal in the future, or with other (including foreign) parties, and understandable resistance promoted by suspicion and the absence of trusted intermediaries. In short, for some participants, no deal may appear better than any foreseeably available deal.

fledged traditional constitutions typically address.⁹ Transitional constitutions may be at once entrenched and impermanent; their adoption may be via a process that lacks democratic legitimacy but proclaims authority to make binding decisions, either briefly, or for all future constitution-making. The stakes may be at once high, to the extent that interim constitutions claim the authority to prescribe the processes by which future agreements are made (or, in the case of South Africa, to also specify principles to which future constitution-making must adhere) and (relatively) low, insofar as they contemplate their own supersession in the near future.

Some caveats and assumptions are in order. First, I posit that both constitutions and constitution-making have multiple purposes, and that these are not necessarily the same. Constitutions as legal documents serve many functions, some of which may be in tension with each other; likewise, constitution-making serves many functions, not necessarily congruent with those of the constitution itself, and potentially in tension with it. Constitutions may be “constitutive” of their polity; they may express and symbolize national identity; and they may serve as a symbol of national sovereignty and membership in a community of nations.¹⁰ But they also either describe existing allocations of government or empower and create organs of government to which different powers are allocated. Importantly, at least in the western tradition, they also limit government power and protect individual (and sometimes, group) rights. Constitutions may also embody important compromises among important parts of society—compromises that represent agreements that are the foundation of peaceful coexistence within one polity. Finally, constitution-making, though intended to produce written constitutions, may serve other (and

9. See *infra* Parts II.B-C on Poland, Hungary, and South Africa; *infra* notes 152-57 and accompanying text on Northern Ireland.

10. Constitutions are not necessarily constitutive of national identity, though in the United States, the Constitution probably is. Nor are written constitutions necessarily associated with national sovereignty; the United Kingdom is surely recognized as a sovereign without having a written constitution. Constitutions may also serve (though, again, they need not) as expressions of national commitments to international legal standards. Increasingly, however, the connotation of having a “constitution” is intimately tied to the identity of the contending groups within a polity.

more immediate) purposes unrelated to—and even at war with—constitutions functioning as fundamental law.¹¹

Second, I assume the normative value of constitutionalism. Constitutionalism entails a sufficiently shared willingness to use law rather than force to resolve disagreements; to limit government power and to protect human rights through law and defined processes; to provide a reasonable degree of predictability and stability of law that people may rely on as they structure their lives; and to maintain a government that is legitimate and effective enough to maintain order, promote the public good, and control private violence and exploitation.¹² The goal of constitution-making should be understood, not as producing a written constitution, but as promoting constitutionalism.¹³

11. See, e.g., Elster, *supra* note 1, at 373-75 (discussing upstream and downstream constraints resulting from the different interests of those who authorize a constitution-making process and those who must approve the final product, the likelihood that they may be in tension with each other, and the likely dominance of downstream constraints on constitutional ratification). Constitution-drafting, especially under modern conditions of publicity, often includes advancing the immediate political interests of constitution drafters through symbolic politics associated with other political events. For this reason, Elster and others recommend having some constitutional deliberations proceed in secret, where serious bargaining and workable compromises are more likely to be found. See *id.* at 384, 387-88, 395.

12. I do not attempt a comprehensive definition nor engage with debates over the roles of entrenchment, institutional structure, democracy, substantive moral norms, the rule of law or political culture in defining constitutionalism. For a sampling of the literature, see SARTORI GIOVANNI, *THE THEORY OF DEMOCRACY REVISITED* 308-09 (1987) (discussing liberal constitutionalism as a blend of the “rule-of-law” and a constrained “rule of legislators”); Daniel P. Franklin & Michael J. Baun, *Introduction to POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH* 6-7 (Daniel P. Franklin & Michael J. Baun eds., 1994) (emphasizing the importance of political culture); John Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 465 (1991) (describing constitutionalism as a state of mind); Louis Henkin, *John Marshall Globalized*, 148 PROC. AM. PHIL. 53, 55 (March 2004) (referring to consent of the governed, representative government, separation of powers, and protection of individual rights as elements of constitutionalism); Walter Murphy, *Constitutions, Constitutionalism and Democracy, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 3 (Douglas Greenberg et al. eds., 1993) (emphasizing substantive as well as process criteria); Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633 (1991) (emphasizing pre-commitment).

13. The criteria for evaluating whether constitution-making in post-conflict societies has advanced constitutionalism vary. A minimalist approach might require that the constitution-making process produce a more peaceful commitment to governance by law and politics (rather than violence) than existed before. More rigorous criteria would look to see if there were some number of successful elections and changes in government power under the

In this essay, I focus on the processes of constitution-making, more than on substantive design choices or provisions.¹⁴ But even with so narrow a focus, transitional constitution-making processes offer the opportunity to reflect on conventional understandings of the relationships between constitutions and constitutionalism in several respects. First, constitutional desiderata generally include the goal of endurance across long periods of time; transitional constitutions need not embrace this aspiration. They thus cast into new relief the relationship between traditional, entrenched constitutions and constitutionalism; yet their efforts to bind future constitutional decisions reflect a constitutional normativity, perhaps transnational in character, not necessarily grounded in positive decisions of particular polities.

Second, to the extent that transitional constitutions are being used as instruments of peacemaking and as efforts to reconstitute or transform their societies, such usages may challenge the idea of constitutions as embodying a fixed or particular identity. They offer the possibility of a new genre of constitution-like instruments whose goal is not to entrench but to disentrench and to provide ongoing opportunities for “unsettlement” of power relations.¹⁵

constitution. A still more stringent set of criteria would consider the duration of the constitution and its success not only in promoting effective governance and maintenance of an acceptable level of order, but also in accomplishing human rights protection. (Still more ambitious definitions could be envisioned.) Constitution-making in times of conflict or following regime change has an uneven record of success on any of these criteria. Finally, one must recognize the possibility that constitutions (and their making) may obstruct constitutionalism. See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 267-68 (2d ed. 2006) (discussing possible examples from Latin America, Ethiopia, and the United States); see also *infra* note 92.

14. Thus, I do not consider in this essay the relationship of choices between parliamentary and presidential forms, among various voting schemes, or between consociational and federal approaches, to a constitution's success. (For an introduction to a large and interesting literature on these and other aspects of constitutional design, see the essays in *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT AND DEMOCRACY* (Andrew Reynolds ed., 2002)). Nor do I say much about the relationships between the processes used in constitution-making and the institutional forms adopted. See, e.g., Elster, *supra* note 1, at 380-82 (exploring how the “institutional interest” of existing legislatures, for example, influences structural design (e.g., the tendency for bicameral drafting bodies to reproduce bicameralism in the constitution)). Severing process from substance is both artificial and impossible, as they are highly interwoven and process choices reflect substantive commitments. Nonetheless, limitations of space narrow the scope of this essay.

15. See LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF*

Indeed, transitional constitutions problematize the very name of the instrument. Constitutions have historically been multi-purpose instruments, in part concerned with the need to provide for the basic rules of governance (including the selection of members of the government and its decision-making processes) on an ongoing basis, in part a link between past and future, in part an assertion of particular identities, and in part a proclamation of a state's status in the world. Resistance to naming an instrument as a "constitution" reflects the complex interaction of these elements in the minds of the participants to constitution-like processes.

Third, dominant U.S. conceptions of a constitution see it as the product of a discrete founding moment, created through a process distinct from ordinary lawmaking but steeped in popular decision making;¹⁶ transitional constitutions suggest there is more variation in the timing and processes that give rise to permanent constitutions. Fourth, constitutions are often viewed as the product of a particular polity, having purposes internal to that polity. Transitional constitutions, in contrast, may include transnational elements in governance, are often clearly shaped by external participants, and may require further external participants as guarantors to effectuate the transition. In this respect, transitional constitutions offer challenges to the dominant conception of a constitution as a purely internal legal instrument.

I discuss these points below, by reference to successful constitution-making in Germany and Japan in the 1940s, in Eastern Europe and South Africa after 1989, and the very challenging conditions of constitution-making in Iraq in recent years. In Part II, I lay out three models of post-conflict constitution-making that have arguably been successful in the post-World War II period.

CONSTITUTIONALISM AND JUDICIAL REVIEW 56-58 (2001). Professor Ruti Teitel discusses the idea of constitutions as disentanglement devices, but in the context of transition from authoritarian rule. See RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 198 (2000).

16. Given the general exclusion of slaves and women from the relatively small group that framed and voted on the ratification of the original U.S. Constitution and the major Civil War Amendments, this narrative, associating the Constitution with popular will manifest in discrete "constitutional moments" of "higher lawmaking," see BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); see also Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1990-2006 (2004), has significant elements of mythology, and may obscure other equally important sources of the Constitution's endurance and legitimacy.

In Part III, I examine the constitution-making process in Iraq through late 2006 in light of these models and then analyze several features of so-called transitional constitution-making, exploring how it is and is not distinct and what it suggests about the changing nature of constitution-making and constitutions themselves.

II. MODES OF CONSTITUTION-MAKING AFTER SERIOUS REGIME CHANGE

Given the double-edged nature of calling on contending parties to engage in an overtly “constitutional” lawmaking process, traditional constitution-making should perhaps not always be understood as an integral part of regime change or transition. Although law, and the development of rule of law attitudes, seem like integral parts of post-conflict transition to any kind of good, complex society, written capital “C” constitutions are perhaps a different matter. Experience tells us that constitutions are helpful, but perhaps not essential to well-functioning legal systems or to the status of sovereigns in the world. The United Kingdom has managed to get along with a reasonably well-functioning internal rule of law system, while also obtaining recognition on the world stage as an empowered sovereign, without a single written instrument that is the constitution. Israel is another example of a country that has achieved, domestically, a considerable degree of rule of law with respect to the population within the older boundaries of the state and has received recognition as a sovereign in the community of nations, again, without the adoption of a single written constitutional instrument.

On Gary Jacobsohn’s account, the Israeli experience might be understood to stand for the proposition that when a polity is deeply divided about its own essential character, formal constitution-making is best deferred.¹⁷ Although Israel’s Declaration of Independence announced its intent to have a constituent assembly make a constitution (pursuant to the United Nations 1947 partition resolution), the constituent assembly that was elected decided instead to function as a legislature (Knesset), providing for

17. See GARY JEFFREY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* 102-03 (1993).

transition laws; rather than adopting a complete constitution, the Knesset would enact "Basic Laws," through ordinary lawmaking, over time. Referred to as the Harari Resolution, this solution was viewed as a compromise among those who wanted a constitution, those who were opposed to limits on parliamentary sovereignty, those who thought Israel did not need a written constitution but could govern itself through Jewish law, and those who argued that the timing was not right to make a constitution because "[o]ne does not create a constitution at the beginning of a revolution but when it is completed."¹⁸ Jacobsohn argues that "the radically different understandings of the essence of the regime held by ... alliance partners" made them particularly opposed to the argument, made by proponents of a constitution, that having a constitution would help educate a "diverse population in the political principles of the regime."¹⁹ Jacobsohn suggests that the absence of agreement on whether the essence of Israel was as a Jewish state or a secular democratic state helps account for the deferred or incremental character of constitution-making in Israel. The Harari Resolution compromise might be understood to suggest the possibility of deferring hard decisions about identity while still establishing basic rules for the process of governance.

At the same time, some scholars argue that it is one of the first tasks after regime change, especially from authoritarian to more liberal, democratic regimes, to codify and entrench the basic commitments of the new regime in a written constitution. Bruce Ackerman has argued that it is at the moment of regime change that there is likely to be the greatest solidarity among different members of the prevailing movements, based on what they are opposed to, that can be drawn on to codify fundamental commitments in written form.²⁰ It is a time, perhaps, of greater altruism, which should be capitalized on—a moment above the self-interested wheels of daily political life (in part because a new daily political

18. *Id.* at 101 (quoting a member of the governing party in the first Knesset and citing to ISRAEL IN THE MIDDLE EAST: DOCUMENTS AND READINGS ON SOCIETY, POLITICS AND FOREIGN RELATIONS, 1948-PRESENT 42 (Itamar Rabinovich & Jehuda Reinharz eds., 1984) (internal quotation marks omitted)).

19. *Id.* at 102.

20. See ACKERMAN, LIBERAL REVOLUTION, *supra* note 5, at 48-49.

life has not yet been established and the revolutionaries are not yet comfortable incumbents in permanent office) that offers the hope for agreement on fundamentals of self-governance that would enable a country to maximize its chances of sustaining the momentum toward a more liberal and democratic polity.²¹

What one thinks about optimal timing and methods of constitution-making may depend on what cases are seen as paradigmatic. The examples discussed above described the incremental development of British constitutionalism, over centuries of struggle; the founding of the state of Israel in the wake of the Holocaust, which created a unity of purpose among the Israeli "founders" that overrode deeper conflicts of vision and allowed for deferral and incrementalizing of an internal constitutional framework; or, for Ackerman, constitution-making after something like the American Revolution, led from within by revolutionaries who had worked and fought together in opposition to a colonial force, now defeated and withdrawn, for many years. None of these situations are necessarily analogous to the "post-conflict societies" in which today's constitution-making problems arise.

Other models of successful constitutional regime transition exist: Germany and Japan, which adopted new post-World War II constitutions under the strong influence of an occupying power whose leadership played a significant role in the creation of a new constitution; Eastern Europe after the fall of the Soviet Union, using Poland and Hungary as different versions of an emerging paradigm of incremental constitutional change; or South Africa. Yet even after considering these examples below, no a priori answers emerge to the questions of whether and when to adopt a new constitution following resolution of a major conflict and the resulting regime change.²²

21. See *id.* at 49-52, 55-56, 64-65. While the "winners" may be at the height of altruism, the passions and interests of the losers may nonetheless obstruct success. See JACKSON & TUSHNET, *supra* note 13, at 355 (suggesting that "clean break" constitution-making may meet sharp resistance from those formerly in power).

22. The interactions of historic, political, legal, religious, and cultural factors confound broad generalizations. Cf. Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 879-80 (1988) (reviewing literature showing great variation in consequences of "imposed law" on different societies).

Constitutions are written under a wide range of circumstances. Three broad schematics or models of constitution-making in post-conflict settings in the period since World War II are sketched below, in brief, simplified terms.²³ First, there are constitutional processes designed to produce a “quick clean break” from a prior, discredited regime in which comprehensive constitutions are adopted wholesale in a relatively brief period of time. Some of these are Ackermanian “constitutional moments,” in which victorious internal revolutionary forces consolidate their principles into a constitutional document. In Germany and Japan, however, constitutions were adopted by an occupied population following a complete military victory upon the occupying power’s insistence on implementing a new constitutional regime.

Second, there are constitutions that, while representing a break from the past, emerge from a more incremental process of constitutional change, occurring not over a relatively short one- or two-year period, but over a period that may be closer to a decade.²⁴ In these more incremental constitutional processes, as in Hungary or Poland, a combination of mechanisms, including parliamentary and civil society deliberation, parliamentary lawmaking, popular referenda, and constitutional court decisions may be at work.

Third, and a relatively recent innovation: there are constitutions that proclaim themselves to be transitional or interim in character, intended to introduce some subsequent constitution-making process. In these processes, as in South Africa, there are designedly two (or more) stages of legitimate constitution-making, the first of which may depend more on negotiation between elite key players, and the latter on a more popular, participatory, and inclusive form of deliberation and decision-making.

23. For a more comprehensive typology of the circumstances of constitution-making, including those that do not follow major conflict (as, for example, in Canada’s adopting the 1982 Charter), see RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 7-8 (2004).

24. If Israel were considered a “post-conflict society,” it might be argued that it is still in transition almost sixty years after its founding, as Basic Laws covering different subjects continue to be enacted by the Knesset in its constituent-assembly capacity.

I comment briefly below on each of these models in their more successful forms, acknowledging, however, that each model may also have examples of failures.²⁵

A. Quick Clean Breaks and New Permanent Constitutions Under Occupying Forces

“Clean breaks” followed by successful constitution-making may be more readily achieved in settings in which distant colonial powers are divested of control, and/or in which those who formerly held power, or were allied with those who did, can essentially leave the country (as many Loyalists did in the United States after the Revolutionary War). The United States Constitution, adopted after a revolution, is sometimes viewed as a paradigm for constitution-making as a clean break within a constitutional moment. Yet, as others have pointed out, the 1787 Constitution was not the first, but the second constitution under which the former colonies operated, and the convention that produced it was informed by considerable constitutional learning that took place under the operation of the prior constitutional document.²⁶ Although some of its important

25. See *supra* note 13 (discussing criteria for evaluating success). Failures of initial post-colonial constitutions in Africa are sometimes attributed to the dominance of the former colonial powers or those who had benefited from their presence in determining their constitutions' content. See H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65, 67, 70-72 (Douglas Greenberg et al. eds., 1993). Czechoslovakia may be an example of a failure of incremental constitution-making; not coming relatively quickly to a new consolidated constitution arguably allowed time for political elites in Slovakia to conclude that their interests would be better served in a separate country. The division of this state was elite driven, and not particularly well supported by the public in either half. See ERIC STEIN, CZECHO/SLOVAKIA: ETHNIC CONFLICT, CONSTITUTIONAL FISSURE, NEGOTIATED BREAKUP 248 (1997) (noting that in late 1992, when the separation agreement had been negotiated, only 37 percent of Slovaks considered it necessary); John McGarry, “Orphans of Secession”: *National Pluralism in Secessionist Regions and Post-Secession States*, in NATIONAL SELF-DETERMINATION AND SECESSION 220 (Margaret Moore ed., 1998) (attributing Slovak secession to “elites” and noting that in 1990 only 8 percent of Slovaks favored secession). But cf. HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE 198 (2000) (treating the separation as resulting from sharp political differences rather than national leaders' desire for independence as such).

26. See TEITEL, *supra* note 15, at 206-09 (analyzing U.S. constitution-making through a transitional perspective); see also Andrew Arato, *Constitutional Learning*, 52 THEORIA 1, 24 (2005). “Clean breaks” are not necessarily followed by successful “constitutional moments.”

revolutionary leadership participated in the Convention of 1787, bringing their charisma and principled self-restraint to the table, they did so in an atmosphere not flush with revolutionary fervor but chastened by the challenges of governance under a more confederal system. In any event, regime change in settings in which the controlling powers in a prior regime are more fully integrated with broad social groups may pose greater challenges for making a “clean break” without continued or renewed violence, at least absent acceptance by a large majority of the population, including members of the former group in power.²⁷

It was clear in Iraq that the occupying forces would insist on a “clean break” from the prior regime, one that, in all likelihood, a great majority of the people sought as well. How to achieve this “clean break” in the face of likely resistance from those privileged or empowered under the prior regime, however, presented a real challenge; here, there was a regime change effected by foreign military intervention in a country with existing ascriptive cleavages and little recent history of free, representative government at the national level.

Japan and Germany are two widely cited examples of post-conflict constitution-making,²⁸ imposed and/or heavily supervised by victorious occupying powers. In both of these instances, a clean break was successfully imposed, marking a decisive abandonment

See also William W. Van Alstyne, *Quintessential Elements of Meaningful Constitutions in Post-conflict States*, 49 WM. & MARY L. REV. 1497, 1800-01 (2008).

27. See JACKSON & TUSHNET, *supra* note 13, at 355 (“[T]he greater the degree of ‘break’ from the past ..., the greater the likely resistance of those [formerly] empowered by a regime. Clean breaks and sharp constitutional moments may thus be more possible in settings in which relatively segregated and small minorities are overthrown from power, or in which colonial powers are divested of control. In both of these cases, the ability of those formerly holding power to obstruct is limited—in one case by their isolated, minority status, in the other by their distance.”). The external connections of the internal groups are also relevant: the oppressed group in South Africa was a substantial majority of the country whose claims for democracy had wide international support, while the former power was a relatively small minority, which had lost international support and whose incentives to bargain were informed by the knowledge that they could be outvoted in any democratic polity.

28. See, e.g., David E. Sanger, *Redefining the War: The Administration’s New Tone Signals a Longer, Broader Iraq Conflict*, N.Y. TIMES, Oct. 17, 2005, at A1 (“In the prelude to the war and in the early days of the occupation, Mr. Bush and top members of his national security team compared the effort to remake Iraq to the American occupations of Japan and Germany. As the insurgency grew—a feature missing from those two successful occupations—they dropped that comparison.”).

of prior regimes that were presumably supported by significant numbers of the population. Yet both of these cases occurred under historically specific conditions not replicated in Iraq.

In Japan, constitution-making happened relatively quickly after the end of World War II, in large part because of pressure brought by General MacArthur, who advised the Japanese that in order to prevent the prosecution of the Emperor for war crimes, adoption of a liberal, democratic constitution that renounced rights of belligerency and abolished the sacred character of the Emperor's position was essential, and quickly, to dissuade the Allies in the Far Eastern Commission (FEC) from seeking the Emperor's trial for war crimes.²⁹ The occupation forces in Japan were able to rely in considerable measure on Japanese constitutional and legal experts to translate and modify a draft prepared by the occupation authorities and then negotiated, in small ways, with the existing government of Japan.³⁰ After elections held under full suffrage rules took place, the legislature approved the new constitution as an amendment to the prior Meiji Constitution.³¹ During this post-surrender period, the occupation forces faced little or no armed resistance.³²

In Germany, constitution-making happened after a somewhat longer period of occupying force governance. Representative government was built from the bottom up in the *länder* (subnational) subdivisions in the three sectors controlled by the United States,

29. See RAY A. MOORE & DONALD L. ROBINSON, *PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR* 109 (2002); KOSEKI SHŌICHI, *THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION* 100-01 (Ray A. Moore ed. and trans., 1997); see also LAWRENCE W. BEER & JOHN M. MAKI, *FROM IMPERIAL MYTH TO DEMOCRACY: JAPAN'S TWO CONSTITUTIONS, 1889-2002*, at 77-94 (2002); THEODORE MCNELLY, *THE ORIGINS OF JAPAN'S DEMOCRATIC CONSTITUTION* 5-11, 28-29 (2000). The FEC's position concerning the treatment of post-war Japan, its constitution, and constitution-making procedures differed from MacArthur's in several respects. See generally MOORE & ROBINSON, *supra*, at 142-54.

30. See KOSEKI, *supra* note 29, at 99-130; MCNELLY, *supra* note 29, at 7-10; MOORE & ROBINSON, *supra* note 29, at 137-38 (describing negotiations over local government provisions).

31. See generally MOORE & ROBINSON, *supra* note 29, at 282, 183-314; KOSEKI, *supra* note 29, at 91-94.

32. This was at least in part due to the Emperor's ability to command respect from the population for his decision to surrender, see MOORE & ROBINSON, *supra* note 29, at 48-49, following the devastation wrecked by the use of nuclear bombs at Hiroshima and Nagasaki.

the United Kingdom, and France.³³ These *länder* governments then sent representatives to a body that, from the occupying powers' viewpoint, was a constitution-drafting body; from the German participants' viewpoint, however, they were drafting a "basic law," with ratification to be obtained not by popular referendum as the Allies had proposed, but by votes taken in each of the *länder* legislatures.³⁴ Although concern existed about the so-called "were-wolves" (adherents to the former regime trained as guerillas), there was in fact very little violent resistance to the Allied occupation of Germany.³⁵

In each case, the timing of constitution-drafting was motivated in important part by factors external to the polity itself, involving relationships among occupying allied powers. In each case, wholesale constitutional revision was entailed. (Despite formalities of constitutional continuity in Japan through its enactment as an amendment, the Japanese Constitution and the German Basic Laws were complete and wholesale constitutional revisions.) In each case, an occupying power that had won a complete surrender and faced little, if any, continued resistance to the occupation, played a dominant role in the timing and strongly influenced the content of constitution-making.³⁶ The completeness of the occupying

33. See JOHN FORD GOLAY, *THE FOUNDING OF THE FEDERAL REPUBLIC OF GERMANY* 1-17 (1958); PETER H. MERKL, *THE ORIGIN OF THE WEST GERMAN REPUBLIC* 3-15, 18-19 (1963).

34. See MERKL, *supra* note 33, at 53-54 (describing the desire of heads of the *länder* governments to "emphasize even more the provisional character of the new arrangement" by avoiding the term "constituent assembly" to describe the drafting body and the term "constitution" to describe the document, and by not having popular ratification "so as not to give it the full weight of a constitution"); see also GOLAY, *supra* note 33, at 40; Inga Markovits, *Constitution-making After National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1307, 1308-09 (2008). Although the Allies initially insisted on ratification by referendum, they were later persuaded otherwise. See *infra* notes 140-45 and accompanying text.

35. See Michael J. Frank, *U.S. Military Courts and the War in Iraq*, 39 VAND. J. TRANSNAT'L L. 645, 691 & n.171, 751 n.451 (2006); see also HAROLD ZINK, *AMERICAN MILITARY GOVERNMENT IN GERMANY* 105 (1947) (noting that anticipation of "serious difficulty" due to "underground movements, youthful gangsters and general hatred" was not realized in early months of the occupation); *id.* at 122 (noting crimes by displaced persons as a problem in the winter of 1945).

36. Another factor is the homogeneity of the people. See MOORE & ROBINSON, *supra* note 29, at 16 (describing Japan as ethnically homogenous). Although there were political and ideological disagreements among those involved in constitution-drafting in Japan and Germany, ascriptive differences (e.g., of religion, language, or ethnicity), which can all too

forces' victory over a regime that had had significant popular support laid a foundation in each country for a commitment to wholesale constitutional change, recognized by virtue of the country's defeat as a necessity that could not be avoided, and created incentives for cooperation that were important in the process. So within the broad model of "clean break" constitution-making, there are important variations, involving, *inter alia*, the roles of internal political groups and external forces, consisting of former, or present, occupying or colonial powers.

B. Incremental, Multi-channel Constitutional Regime Change

In Eastern Europe, constitution-making occurred in a different kind of "post-conflict" setting, one in which political conflict had been previously suppressed by Communist Party hegemony. With the withdrawal of Soviet support for Communist governments in Eastern Europe and the fall of several of those governments in open elections, a more incremental method of constitutional regime change occurred, albeit with marked differences from one country to another.³⁷ Formal changes in the constitution began immediately—and marked a very clear break from the prior regime—but constitutional change continued to emerge over a longer time period as well, in a process in which domestic courts and informal negotiations played important roles.

In Poland, the seeds of constitutional change began before 1989, with the establishment of a Constitutional Tribunal in the mid-1980s.³⁸ For eight years, beginning in 1989, an incremental process of constitutional revision occurred that included amendments adopted in 1989 and the adoption of the so-called "Small Constitu-

readily become quite polarizing, may have had less political salience. (My knowledge, however, is limited, and societies that may appear homogenous to outsiders with limited knowledge may be less so below the surface.)

37. This brief account necessarily glosses over the very different histories of Poland, Hungary, and other former "eastern bloc" countries that would be needed to fill in this story.

38. See SCHWARTZ, *supra* note 25, at 49 (describing how Poland's Constitutional Court was authorized in 1982, established in 1985, and functioned from 1986 until 1997, when it was replaced by a larger Constitutional Tribunal under the 1997 constitution). Beginning in 1989, when new members joined the court, it became more active in reviewing legislation. See *id.* at 56.

tion" of 1992, both of which preceded negotiation, drafting, and adoption of the final constitution in 1997.³⁹ In Hungary, which had also seen a process of constitutional liberalization begin in the 1980s, if not earlier, constitutional change occurred in 1989 primarily through extensive "round table" discussions within and among the Communists and Socialists, their opposition, and civil society groups.⁴⁰ The round table discussions produced agreements for piecemeal amendments to the existing constitution, enacted by the sitting parliament, which also created early on an empowered Constitutional Court.⁴¹

Both Poland and Hungary proceeded in their constitution-making without external occupation—in a sense, liberated from the realistic possibility of external occupation by the former Soviet Union. Their incrementalist processes relied on a mix of informal negotiations, legislative action, judicial interpretation,⁴² and, in the case of Poland, a popular referendum.⁴³

What made these more incremental approaches occur, and what made it possible to pursue them without significant bloodshed or governmental breakdown, is of clear importance to generalizing from this model.⁴⁴ One might have thought that traditional

39. See generally MARK BRZEZINSKI, *THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND* (1998). The "Small Constitution," Brzezinski explains, was in important part a reaction to an immediate crisis over the distribution of legislative and executive power; it did not address constitutional rights and was understood to be provisional. See *id.* at 97-99, 106.

40. See Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757, 1774-75 & n.43 (2006) (indicating that the one hundred amendments to the old constitution changed almost 90 percent of its text).

41. See Istvan Pogany, *Constitutional Reform in Central and Eastern Europe: Hungary's Transition to Democracy*, 42 INT'L & COMP. L.Q. 332, 338 (1993).

42. On the important and constructive role of the Hungarian Constitutional Court and its president, Laszlo Solyom, in the transition, see Scheppele, *supra* note 40, at 1775-91; see also SCHWARTZ, *supra* note 25, at 75-82, 106-08 (describing the court in the period up through 1998 as "one of the most valuable institutions in Hungary's progress toward constitutional democracy").

43. See Ryszard Cholewinski, *The Protection of Human Rights in the New Polish Constitution*, 22 FORDHAM INT'L L.J. 236, 236 & n.2 (1998); see also BRZEZINSKI, *supra* note 39, at 112-13, 127.

44. For a critical view of incremental processes, see Arato, *supra* note 26, at 6-8 (arguing that processes without definite stages and end dates for constitution-drafting risk "degenerat[ion] into the kind of permanent constitutional revolution that is unable to found any system of authority" and, relatedly, "privilege learning over normativity" too much).

constitution-making would have a high priority and that agreement would be reached on a single document relatively easily, given the early stages of transition and ideological preparation that had occurred before the dramatic events of 1989 (costing the Communist Party external support for its continued hegemony) and the powerful incentive to cooperate offered by the prospect of joining the European Union. Instead, constitutional change proceeded in a more piecemeal fashion, guided by round table discussions whose conclusions were acted upon by legislative bodies in formal compliance with the amendment process of prior constitutions. In both, large portions of the population had in some sense cooperated with the Communist Party when it was in power and members of the former regime for the most part remained in their respective countries. There was no crushing military victory, no occupying or dominant and well-organized power to insist on speedy action on a single, integrated new constitution. The longer period (especially in Poland) and the more incremental approach not only allowed, but may have resulted from, the need for extended negotiations and practice in democratic bargaining among the adherents to the prior regime and other groups now able to exercise political freedoms.⁴⁵

C. Interim Constitutions in Planned Stages

A third model, which may overlap with each of the other two, is exemplified by South Africa, where a significant regime change occurred without external armed intervention (but following years of international pressure). South Africa's constitution-making process was internally driven (though with considerable "outside" input); it involved a wholesale constitutional change that was more deliberately staged than in the Eastern European models and that occurred over a longer period of time than the "quick clean break" constitution-making in Germany or Japan. It saw multiple phases, which began no later than in 1990 with the release of Nelson

45. Cf. JON ELSTER, CLAUDE OFFE & ULRICH K. PREUSS, *INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA* 64 (1998) (suggesting that at times "non-constitution making may be the wiser choice," as in Poland, where postponing enactment of a whole new constitution permitted deferral of difficult church-state issues, including abortion).

Mandela from prison and culminated in 1996 after the South African Constitutional Court approved a revised, final constitution.⁴⁶

The successful constitutional process itself involved early and sustained negotiation of basic principles that marked a clear break from the prior regime; an Interim Constitution embodying those principles that created a powerful Constitutional Court to approve the final constitution; constitution-drafting by a democratically elected national legislature with substantial public input and outreach, including transitional provisions that provided security to members of the prior regime for a few years thereafter; a further legislation-drafting process in response to revisions that the Constitutional Court said were necessary; and the unexercised possibility of public referendum.⁴⁷

The first phase of formal negotiations, whose ground rules took considerable time to establish, was the Multi-party Negotiating Process, which lasted roughly two years—from 1992 to 1994.⁴⁸ This process led to an agreement on an interim constitution in late 1993, which was enacted into law in January 1994 and came into full force in April 1994 when democratic elections with full adult suffrage for a new legislature occurred pursuant to the interim constitution.⁴⁹ The Interim Constitution was a substantial governance instrument and included over 250 articles dealing with executive, legislative, and judicial power, as well as local, provin-

46. See HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALIZATION AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* 73-92, 95-105, 110-17 (2000) [hereinafter KLUG, *CONSTITUTING DEMOCRACY*]; see also Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373, 376 (2006) (noting the importance of the 1989 Harare Declaration for developing a framework for negotiations between Mandela and de Klerk).

47. See KLUG, *CONSTITUTING DEMOCRACY*, *supra* note 46, at 104-05 (describing transitional power-sharing agreement with members of old regime); JACKSON & TUSHNET, *supra* note 13, at 280-85 (describing the Interim Constitution and subsequent processes culminating in adoption of the final constitution).

48. This multi-party negotiating group came out of the Convention for a Democratic South Africa (CODESA), which met at the end of 1991. For a description of its work, see LOURENS DU PLESSIS & HUGH CORDER, *UNDERSTANDING SOUTH AFRICA'S TRANSITIONAL BILL OF RIGHTS* 4-6 (1994); see also PATTI WALDMEIR, *ANATOMY OF A MIRACLE* 194-95 (1997) (describing Nelson Mandela's proposal for the two-stage process made about a year before the CODESA first met).

49. See *In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) ¶¶ 10-17 (S. Afr.).

cial, and national authority. It provided, *inter alia*, for the establishment of a Constitutional Court and set forth basic rights to be enforced by that court. It not only specified the procedures to be followed for adopting a constitution, but it also specified thirty-four basic principles with which the new constitution would need to comply—a provision to be enforced by Constitutional Court review.⁵⁰

Following the 1994 election of a democratic legislature, which also worked as a constituent assembly, the constitution was drafted over the next two years in a process that included a stunning amount of outreach. This outreach included the extensive circulation of drafts and explanatory materials that led to more than 70 percent of the public having knowledge of the constitutional process.⁵¹ The constitution, as passed by the legislature, was submitted to the Constitutional Court, which provided opportunities for and received much public comment. The Court found that in certain respects the constitution did not comply with the thirty-four principles. The legislature acquiesced to the binding force of these principles (or the Court's interpretation thereof) by redrafting in response to the Court's objections and producing in a relatively quick period of time (about a month) a revised version, soon thereafter approved by the Court.⁵²

The enormous potential for violence in the South African transition was for the most part, though not entirely, averted.⁵³ The combination of international condemnation of the apartheid regime, the African National Congress's (ANC's) preparatory work that

50. See S. AFR. (Interim) CONST. 1993 sched. 4 (basic principles).

51. See JACKSON & TUSHNET, *supra* note 13, at 283 n.f.

52. See *id.* at 284-85.

53. In the early years of transition there were violent encounters; mass strikes also played a role in forcing reluctant leaders of apartheid regime-established "homelands" to participate in the process. See DU PLESSIS & CORDER, *supra* note 48, at 2-3, 7, 11-12; Heinz Klug, *Constitution-making, Democracy and the "Civilizing" of Unreconcilable Conflict: What Might We Learn from the South African Miracle?* 3-8 (Univ. of Wis. Legal Stud. Research Paper No. 1046, 2007) [hereinafter Klug, *South African Miracle*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987302. The potential for organized—or disorganized—violence was present throughout much of the early negotiating process, and was no doubt a factor in the decision making that sought to avert it. See KLUG, *CONSTITUTING DEMOCRACY*, *supra* note 46, at 103 (discussing how the "gunning down of ANC protesters" in 1992 "emphasized the ANC's inability either to seize power through insurrection or to insist upon an unfettered constituent assembly").

helped influence the international community's views, the creative use of interim institutions (including establishment of the Constitutional Court), and the ability to agree on a small number of basic principles that would endure were important contributing factors to this success. Additionally, one must not ignore the importance of the personal characteristics and self-restraint of much of the leadership in the South African negotiations, which also helped to create space for a constitutional transition that was surprisingly deliberative and broadly inclusive.⁵⁴ The constitution-making process may be as much a symptom of the commitments, capacities, and incentives of the leadership, both elected and unelected, and the people, as it was a factor that contributed to the relatively peaceful regime transition.

III. THE ROLE OF TRANSITIONAL CONSTITUTIONS IN POST-CONFLICT REGIME CHANGE TOWARDS THE RULE OF LAW AND DEMOCRATIC CONSTITUTIONALISM: THE CHALLENGES OF CONTEXTUALIZED ANALYSIS

The few examples discussed above might be understood to suggest that, at least in the absence of a relatively complete military victory and occupying force on the ground, a fair amount of time—for deliberation, compromise, education, participation, and renewed discussion prior to efforts to solidify agreements in a comprehensive and final constitution—is conducive to successful constitution-making in situations of serious post-conflict regime change. The South African process, in particular, has encouraged interest in the possibility that forms of structured constitutional “reflexivity” or “learning” can occur through adoption and implementation of a “temporally extended method of constitution making [in] several carefully delineated steps.”⁵⁵ But comparison and

54. See Klug, *South African Miracle*, *supra* note 53, at 25. Desmond Tutu's appeal for forgiveness, and the work of the Truth and Reconciliation Commission, though not uncontroversial, may also deserve consideration as factors that may have helped to create and sustain space for this constitutional transition.

55. ANDREW ARATO, CIVIL SOCIETY, CONSTITUTION, AND LEGITIMACY 254-55 (2000); *cf.* ULRICH K. PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 115, 124-25 (1995) (suggesting that Round Table processes contributed to or were examples of “reflexive constitutionalism,” pointing toward a constitution “of cognitive

generalization here are remarkably difficult, and turn out to be something of a quagmire.

There are many confounding factors that may affect analysis and predictions in particular cases. These include the nature of current leadership elites; the nature of the prior regime; the nature of any indigenous preparatory work on a new constitution; and the presence or absence of deep cleavages in society not resolved by the prior conflict. Social welfare inequalities, group identification and inter-group relationships, existing legal institutions and political culture, existing layers of law and functioning (vel non) government infrastructures, and other broader issues of history and context are also important, as are questions of appropriate "lustration" (and containment of various forms of revenge), and the role of neighboring or powerful states or transnational actors. All of these factors may interact with different processes of constitution-making, including how drafters are elected or appointed and, if elected, whether for a special convention or as members of a standing legislature, as well as provisions for popular participation. Each case study, when more fully elaborated, may involve instances of potential failure averted, of potential opportunities lost, and many distinguishing characteristics.

Yet one can perhaps say at least this: *the apparent success of some forms of "transitional" or incremental constitutional change should plainly caution against assumptions that final constitution-making is necessarily the best first step towards establishing constitutionalism in post-conflict societies.*⁵⁶ Instead it appears that democratic legitimacy can emerge through a range of processes,

and moral learning, in which society makes itself an experiment" that is open to change, and calling for a "constitution of knowledge" to be strengthened over a "constitution of power"). In some sense, formal provisions for constitutional amendment provide a capacity for change in light of experience; Preuss suggests the distinctiveness of "morally reflexive constitutionalism" in transitional settings like the Round Tables consists of an institutional capacity for "social self-enlightenment" in which the very "conditions of this discourse itself are constitutionally reformulated," *id.* at 123, 125, implying that both the process and substance of constitutional transition were the subjects of learning and renegotiation. Arato is more skeptical. *See supra* note 44.

56. *But cf.* U.S. Inst. for Peace, Rule of Law: Project on Constitution Making, Peacebuilding, and National Reconciliation, <http://www.usip.org/ruleoflaw/projects/constitution.htm> (last visited Feb. 23, 2008) (describing the "drafting of a new constitution" as "a key element of democratization and state-building").

including those formally controlled by less than fully legitimate governments or by occupying military authorities from liberal democracies.

A. Iraq: Timing and Other Choices, Internal and External Forces

In a sense, the model initially used in Iraq was a cross between a “transitional constitution” model and a “clean break/comprehensive drafting” model, premised upon democratic ratification through referendum rather than on parliamentary approval.⁵⁷ Some of the preconditions that existed in South Africa for its multi-stage model were not present: there was no indigenous equivalent to the ANC within Iraq that could provide a well-organized and ideologically well-prepared source of leadership.⁵⁸ Nor, after the military intervention in Iraq, was there a well-functioning governmental infrastructure,⁵⁹ nor a corps of delegates with substantial

57. The use of “interim” constitutions had a sorry history in Iraq, where Hussein held power for the most part under such an “interim” instrument. See Nathan J. Brown, *Constitutionalism, Authoritarianism, and Imperialism in Iraq*, 53 DRAKE L. REV. 923, 928-29 (2005).

58. Although there were internal resistance movements (beginning with the Shiite al-Da'wa organization in 1957), they were more splintered (in part because the level of repression seriously curtailed organization, in part because of differences in religious ideology) and mostly oriented to the establishment of some form of Islamic state; efforts by Iraqis in exile to form an umbrella resistance organization that included religious and secular opposition and the Kurdish minority were, according to Juan Cole, largely unsuccessful. See Juan Cole, *The Iraqi Shiites: On the History of America's Would-be Allies*, BOSTON REV., Oct./Nov. 2003, available at <http://bostonreview.net/BR28.5/cole.html> (describing al-Da'wa's withdrawal from Chalabi's Iraqi National Congress in 1995 over disputes with the Kurds). On the continuing impact of the history and form of the early opposition, see, for example, Sudarson Raghavan, *Maliki's Impact Blunted by Own Party's Fears*, WASH. POST, Aug. 3, 2007, at A1 (noting that the Da'wa Party was a potent force, that it had a cell-based structure that promoted secrecy, and that it was suspicious of the United States, in part because of its failure to back an uprising in 1991). For another account of the role of the Iraqi opposition to Saddam Hussein that developed after the Gulf War, see Noah Feldman & Roman Martinez, *Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 FORDHAM L. REV. 883, 885-90, 918-19 (2006) (arguing that the Iraqi opposition was influential in formulating and advancing an approach to the new constitution committed to “Islam, democracy, pluralism, federalism, and human rights”). On the importance of preparatory work or prior frameworks, see *infra* note 132 (noting the ANC's 1988 framework); see also Colm Campbell & Fionnuala Ní Aoláin, *Local Meets Global: Transitional Justice in Northern Ireland*, 26 FORDHAM INT'L L.J. 871, 871 n.2 (2003).

59. See JONATHAN MORROW, *WEAK VIABILITY: THE IRAQI FEDERAL STATE AND THE CONSTITUTIONAL AMENDMENT PROCESS 4* (U.S. Inst. of Peace, Special Rep. No. 168, July

experience in legislation or successful constitution-making.⁶⁰ The Transitional Administrative Law (TAL) functioned as something of an interim constitution, but the constitution-drafting process that followed arguably failed to allow enough time for the major groups to work by real consensus or for sustained public outreach and participation prior to a vote. In contrast to the two years of the Multi-party Negotiation Process in South Africa followed by two years of constitution-drafting, the 2005 constituent assembly in Iraq had only a few months and did not take advantage of an extension period contemplated by the TAL under pressure from the occupying authorities.⁶¹ In fact, just days before the referendum on the final constitution, a provision was added—but not printed in the drafts previously circulated for review—to provide for a further

2006) [hereinafter MORROW, WEAK VIABILITY], available at <http://www.usip.org/pubs/specialreports/sr168.pdf> ("Regime change did not consist of replacing Saddam Hussein's cabinet ministers with U.S. appointees; the dismantling of government ministries was near total. Saddam Hussein's government apparatus was utterly destroyed in 2003, and the central governmental power that existed before then reverted more or less immediately to regional and local sectarian interests.").

60. Cf. Lansky, *supra* note 8, at 281-83 (noting the importance of the experience that most of the members of the U.S. Constitutional Convention had had in working in representative bodies at the state or national levels).

61. See JONATHAN MORROW, IRAQ'S CONSTITUTIONAL PROCESS II: AN OPPORTUNITY LOST 2 (U.S. Inst. of Peace, Special Rep. No. 155, Dec. 2005) [hereinafter MORROW, IRAQ'S CONSTITUTIONAL PROCESS II], available at <http://www.usip.org/pubs/specialreports/sr155.pdf>. As Morrow recounts, the TAL "envisaged a six-and-a-half month, transparent, participatory" process and "also provided the option, in Article 61(F), of a further six-month extension." *Id.* The six-month period was, under the circumstances, quite short. Although elections to the committee were held in late January, the drafting process did not even begin until late June or early July 2005, and in early August Kurdish and Shi'a leaders began to exclude Sunnis (who came late into the process because of their prior boycott of elections for members of the drafting group) from participation in drafting discussions. Notwithstanding Article 61(F) and the "preference of the Chairman of the Constitution Drafting Committee" that it be used, the U.S. government "pressed for the drafting to be completed by August 15," *id.* at 2, leading to what has been described as a greatly foreshortened, nonconsensual process with wholly inadequate time to subsequently distribute information, receive public responses, and analyze and respond to those responses prior to the referendum held on October 15. See *id.* at 8-20; cf. Daniel H. Cole, *From Renaissance Poland to Poland's Renaissance*, 97 MICH. L. REV. 2062, 2093 (1999) (reviewing BRZEZINKSI, *THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND*, *supra* note 39, and noting that "[t]he remarkable thing is not that it took Poland eight years to adopt a new constitution but that it took Poland only eight years to adopt a new constitution"); ELSTER, OFFE & PREUSS, *supra* note 45, at 68-69 (suggesting that Czechoslovakia's failure to survive may be attributed to adoption of a two-year period for constitution-making, rather than either a shorter (three-month) or longer (ten-year) period).

revision soon after its ratification (reflecting both time pressure and potential provisionality).⁶²

The drafting process in Iraq arguably exacerbated, not mitigated, group suspicion. Although it is still early for evaluation, the interim constitutional process in Iraq lacked features of timing and inclusiveness that some other successful uses of interim processes had. Part of the premise underlying theoretical accounts of transitional constitution-making is the benefit which the processes of negotiating an instrument and working with it will have upon groups whose suspicion of one another prevents them from drafting a more permanent constitution. In Klug's terms, initially seeking agreement only on broad principles enables contending groups to imagine different applications; over the course of discussions within a transitional framework, the contending groups become accustomed to a legalized, principled form of argument, which has a "civilizing" effect on what might otherwise produce violent confrontations.⁶³ But this was not the case in Iraq, where the Sunni

62. Article 142, inserted on October 12 before the October 14 referendum, provided that the elected legislative body should "at the beginning of its work" form a committee to make recommendations "within a period not to exceed four months" concerning "necessary amendments"; it also provided for voting rules both within parliament (absolute majority) and by required popular referendum (majority vote, but defeated if rejected by two-thirds of voters in three or more governorates). See MORROW, *WEAK VIABILITY*, *supra* note 59, at 2, 5-6. As of mid-2006, the committee had apparently not yet been appointed. See *id.* at 2-10 (explaining how much change is needed for Iraq to be a viable state and describing how difficult it would be to pass any constitutional amendments). In at least one other respect the Iraqi Constitution had a "transitional" element, providing for a three-member Presidency Council for the first four years, to be replaced by a single President. See Feldman & Martinez, *supra* note 58, at 913-14.

63. See Klug, *South African Miracle*, *supra* note 53, at 25 (arguing that the South African process illustrates "how the adoption of constitutional principles and a constitutionalist discourse made available 'legitimate' rules and practices for the 'civilizing' of local difference"); cf. Sujit Choudhry & Robert Howse, *Constitutional Theory and the Quebec Secession Reference*, 13 CAN. J. L. & JURISPRUDENCE 143, 167 (2000) (suggesting that at times, in both constitution-making and constitutional interpretation, "agreement is easier with respect to abstract principles and harder with respect to particulars"). Yet negotiation theory suggests that, perhaps particularly in post-conflict settings in which groups are deeply riven, it may be easier to build trust by seeking agreement on small, incremental matters. Robert S. Adler & Elliott M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiation*, 5 HARV. NEGOT. L. REV. 1, 83 (2000) (suggesting that trust develops through small, incremental steps of trust confirmed by reciprocal extensions of trust and citing DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* 1, 124-27 (1981) to similar effect); cf. ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 162 (2d ed. 1991) (noting the role of negotiation over "small issues" in

population boycotted elections for members of the drafting body,⁶⁴ indicating that not all groups were ready even to discuss a final constitution. The United States insisted upon and was able to arrange for Sunni representatives late in the process, but after only a few weeks of discussions, representatives from the other two groups excluded the Sunnis from further discussions.⁶⁵ The entire process took less than six months, despite the advice of a number of experts that more time was needed.⁶⁶ Although the constitution was approved at the referendum, the Sunni population voted overwhelmingly against it.⁶⁷ Sunni lack of participation, and exclusion, were basic failures, though perhaps not the only ones in the constitutional process.⁶⁸

Although the history of this Iraqi constitution is still unfolding, its prospects for success are currently in doubt.⁶⁹ The difficulties

a relatively successful end to a plane hijacking crisis).

64. See MORROW, IRAQ'S CONSTITUTIONAL PROCESS II, *supra* note 61, at 6.

65. See *id.* at 8-9.

66. See *infra* note 70.

67. See MORROW, WEAK VIABILITY, *supra* note 59, at 3.

68. The ratification formula, providing a veto if three or more provinces rejected the constitution by more than two-thirds, also raises questions (as any voting scheme may do, see *infra* note 116). Although some critics saw this provision as too great a concession to the Kurdish community, one might also wonder how a constitution that was rejected by decided majorities in three Sunni provinces—but not by the requisite supermajority in one of these, see MORROW, IRAQ'S CONSTITUTIONAL PROCESS II, *supra* note 61, at 3—would thereafter obtain legitimacy in those areas. In an increasingly ethnically polarized state, where the very nature and scope of the state is at issue, adopting a binding instrument so plainly opposed by the vote of substantial numbers of a major minority group is a risky proposition, though perhaps not without precedent in the world of constitution-making. (The Canadian Charter of Rights and Freedoms of 1982 was adopted without the consent of Quebec, see JACKSON & TUSHNET, *supra* note 13, at 1041; yet Canada, despite interest in secession among some in Quebec, continues to be a reasonably well-functioning liberal democracy.)

For other critiques of the constitution that emerged in Iraq, including its unusually decentralized federalism with an extremely weak central government (highlighted by the fact that regional laws have priority over most national laws), see, for example, YASH GHAI & JILL COTTRELL, A REVIEW OF THE CONSTITUTION OF IRAQ (2005), <http://law.wisc.edu/ils/glsl/arotcoi.pdf>; MORROW, WEAK VIABILITY, *supra* note 59, at 5-6, 29-30 (criticizing federalism provisions). For a more positive view, see John McGarry & Brendan O'Leary, *Iraq's Constitution of 2005: Liberal Consociation as Political Prescription*, 5 INT'L J. CONST. L. 670 (2007).

69. For pessimistic assessments, see, for example, JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? 96 (2006) (arguing that U.S. pressure for a rigid and fast timetable in Iraq led to a constitution that did not represent consensus and "may do more to exacerbate intergroup conflict than to ameliorate it"); Andrew Arato, *Post-Sovereign Constitution Making and Its Pathology in Iraq*, 51 N.Y.L. SCH. L. REV. 535, 552

surrounding the constitution may have been exacerbated by the absence of full Sunni participation, the United States's insistence on the speedy production of a final constitution, an absence of the internal infrastructure for successful "quick clean break" constitution-drafting that existed in Japan and Germany, and the failure to allow more time for adapting South Africa's innovative model of interim constitution-making (including inadequate public outreach or consideration of public comments).⁷⁰ Little, if any,

(2006-07); *see also* NATHAN J. BROWN, IRAQ'S CONSTITUTIONAL PROCESS PLUNGES AHEAD 1 (Carnegie Endowment for Int'l Peace, Policy Outlook, July 2005) [hereinafter BROWN, PROCESS PLUNGES AHEAD], *available at* <http://www.carnegieendowment.org/files/PO19Brown.pdf> (explaining "why the constitution is unlikely to address Iraq's political crisis"); UNMAKING IRAQ: A CONSTITUTIONAL PROCESS GONE AWRY 1 (Int'l Crisis Group, Middle East Briefing No. 19, Sept. 26, 2005) [hereinafter UNMAKING IRAQ], *available at* <http://www.crisisgroup.org/home/index.cfm?id=3703> (arguing that "[r]ushing the constitution" made consensus impossible and resulted in a poor constitutional text). Writing in July 2006, however, Morrow concluded that although the constitution lacked legitimacy, its existence as a legal text might provide a framework for a revised federalized polity. *See* MORROW, WEAK VIABILITY, *supra* note 59, at 1, 3; *see also* McGarry & O'Leary, *supra* note 68, at 676 (arguing that Iraq's future depends on defense of the 2005 Constitution and its further development "in a liberal consociational direction").

70. For contemporaneous criticism of the proposed constitutional process in Iraq, including the extremely limited time effectively available for constitution-drafting (on paper a six-month period after elections to the constituent assembly; in fact only about two months, with a referendum scheduled two months thereafter), *see* NATHAN J. BROWN, IRAQ'S CONSTITUTIONAL CONUNDRUM 1 (Carnegie Endowment for Int'l Peace, Aug. 31, 2005), *available at* http://www.carnegieendowment.org/files/brown8_314.pdf ("The Iraqi constitutional process was asked to do too much too quickly."); BROWN, PROCESS PLUNGES AHEAD, *supra* note 69, at 3 (expressing concern in July 2005 about the "rushed process" and suggesting that the United States was insisting on meeting the August 15 deadline rather than permitting the extension contemplated by the TAL because meeting deadlines "is the strongest evidence available of political progress" that might respond to strong domestic criticism of the Bush Administration); IRAQ: DON'T RUSH THE CONSTITUTION (Int'l Crisis Group, Middle East Rep. No. 42, June 8, 2005), *available at* <http://www.crisisgroup.org/home/index.cfm?l=1&id=3506>; IRAQ'S CONSTITUTIONAL PROCESS (U.S. Inst. of Peace, Special Rep. No. 132, Feb. 2005), *available at* <http://www.usip.org/pubs/specialreports/sr132.pdf> (raising concerns that the TAL did not specify sufficient processes for promoting the legitimacy of the constitution-making it contemplated, and noting concerns over timing because an effective public education process takes at least a year, and the period for drafting was itself so short that "[c]oming up with a realistic timetable for this process will be an immediate challenge"); UNMAKING IRAQ, *supra* note 69. Although deadlines may play a useful role in bringing complex constitutional negotiations to a close, choosing the time for a deadline is not always easy. *See, e.g.*, GEORGE J. MITCHELL, MAKING PEACE 126-27, 142, 144-47 (1999) (describing years of discussions leading up to his decision on the timing of a deadline that worked because the parties were ready for it); *see also* I. WILLIAM ZARTMAN, RIPE FOR RESOLUTION: CONFLICT AND INTERVENTION IN AFRICA 266-73 (updated ed. 1989) (arguing that some conflicts may not be "ripe" for resolution until the parties reach a

attention was given either to more fully trying to implement a serious, multi-staged constitutional process as occurred in South Africa, or to adapting the approach taken in Germany after World War II of developing representative bodies in subnational levels before seeking to engage in a national constitution-drafting process.⁷¹ Given the radical discontinuities in governance capacity produced by the invasion, the overthrow of the Hussein government, and the de-Baathification that followed, building from the existing national legal infrastructures (as in Eastern Europe) was not an option.

The constitution may end up being seen as a useful step towards establishing constitutionalism in Iraq,⁷² but thus far an argument can be made that the process of its adoption gave force to insurgencies against the U.S.-backed government.⁷³ One hopes otherwise, but Iraq's may be a situation in which premature efforts to engage in full-scale constitution-making were antithetical to long-term prospects for the rule of law and constitutionalism, in part because

"mutual, hurting stalemate," which can be difficult to identify amidst "the rubble of events"); Melanie Greenberg, *Mediating Massacres: When "Neutral, Low-Power" Models of Mediation Cannot and Should Not Work*, 19 OHIO ST. J. ON DISP. RESOL. 185, 192 (2003) (referring to Zartman's work).

71. As of mid-2007, reorganization of some basic government services at local levels was reportedly occurring in Iraq. See Michael E. O'Hanlon & Kenneth M. Pollack, Op-Ed., *A War We Just Might Win*, N.Y. TIMES, July 30, 2007, at A19 (reporting that the Iraqi National Police, controlled by the Interior Ministry, "remains mostly a disaster," but that "[i]n response, many towns and neighborhoods are standing up local police forces, which generally prove more effective, less corrupt and less sectarian"). Evidently, in November 2005 some "Provincial Reconstruction Teams (PRTs)" were established to assist provincial and local governments in their governance functions; in January 2007, new PRTs were established. See ROBERT M. PERITO, *PROVINCIAL RECONSTRUCTION TEAMS IN IRAQ 1-2* (U.S. Inst. of Peace, Special Rep. No. 185, Mar. 2007), available at <http://www.usip.org/pubs/specialreports/sr185.pdf>.

72. For a positive assessment of the substance of the 2005 constitution's "liberal consociational approach" and "flexible asymmetry," see McGarry & O'Leary, *supra* note 68, at 687-88.

73. MORROW, *WEAK VIABILITY*, *supra* note 59, at 3 (concluding that the constitution-making of 2005 was a "high-water mark of the degree to which Iraq's Sunni Arabs have been excluded, and have excluded themselves, from Iraqi public life. The result of this failure has been violence ... [and] it remains quite possible that the way the Iraqi constitution was drafted in 2005 contributed to the post-August shift of the Sunni Arab insurgency to attack Shia and Kurdish civilian targets, and the corresponding arrest, summary detention and in some cases torture and execution of Sunni Arab suspects by Shiite members of the Iraqi public security forces.").

they failed to allow the time for bargaining, negotiating, and deliberation (first over ground rules, then over substance) that might have created sufficient incentives for each of the contending groups to have a stronger stake in the success of the constitution and the Iraqi state. The connections between processes of constitution-making and their ultimate substance and acceptance are complex and contingent; whether a constitution “works,” or ends up being viewed as transitional or permanent, can sometimes be determined only after the passage of much time. But at a minimum, experience suggests the need for more analysis of the role of time, and timing, in constitution-making and regime change.⁷⁴

B. Transitional Constitutions: Entrenchment, Endurance, and Identity

The timing of a constitution-making process is only one factor among many other aspects of process, form, and substance. This Section explores designedly transitional, incrementalist approaches, in relation to the “clean break,” comprehensive constitution-making model. The two more transitional constitutional models noted above—one involving incremental constitutional change following political regime change, the other involving a multi-staged “interim” constitutional process—are no panacea. Yet they present intriguing alternatives to the U.S. founding paradigm, particularly in intensely divided polities.

74. More time is not necessarily always better; the calculus of time for legitimate and effective lawmaking is quite complex. Cf. Jacob E. Gerson & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543 (2007) (arguing that timing rules for enactment of legislation may have both positive and negative effects; for example, “delay” rules may allow time for polarized debates to moderate, but may also allow time for more interest group influence). For recent scholarly work linking time and law in other settings, see TODD D. RAKOFF, *A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE* (2002) (emphasizing the importance of coordinated time for cultural and civic life and development of social cohesion), reviewed by Orly Lobel, *Book Review: The Law of Social Time*, 76 TEMP. L. REV. 357 (2003); JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001) (emphasizing a constitution’s role in linking people with their particular past over time).

A classical conception of a constitution, in John Marshall's words, is that it is not only a foundational law, but also one that is "intended to endure for ages to come."⁷⁵

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; *nor can it, nor ought it to be frequently repeated*. The principles, therefore, so established, are *deemed fundamental*. And as the authority, from which they proceed, is supreme, and can seldom act, they are *designed to be permanent*.⁷⁶

Thus, making a constitution is a "very great exertion"—an exercise that happens at a discrete time; the principles it establishes are "deemed fundamental" and form a "supreme" law, clearly "designed to be permanent."⁷⁷

Ruti Teitel argues that transitional constitutions do not fit this classical model, but have a number of distinctive characteristics.⁷⁸ First, they are "not created all at once but in fits and starts."⁷⁹ Second, they are often explicitly provisional, anticipating that they will be replaced by subsequent, more permanent constitutions. Third, she suggests, transitional constitutions look both backwards to the past and forwards to the future, while classical constitutions are forward-looking instruments. Finally, Teitel argues that transitional constitutions can be understood as a stage in the develop-

75. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819). For a different view, see Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 396 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958), quoted in David Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1721 (2003) (arguing that constitutions ought to expire or be readopted every nineteen years). See also *infra* note 88.

76. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (emphasis added).

77. *Id.*

78. TEITEL, *supra* note 15, at 191, 195-97. In Teitel's discussion, transitional constitutions embrace both nominally transitional constitutions and processes of incremental constitutional change in the wake of regime shift from military or authoritarian to democratic modes. See *id.*

79. *Id.* at 196.

ment of a Rawlsian consensus, which emerges gradually over time through multiple iterations of constitutional negotiation change.⁸⁰

Constitutions as forward and backward looking: Yet these characteristics of transitional constitutions may not be so distinctive on closer examination. In a sense, all constitutions look both backward and forward.⁸¹ “Post-conflict,” as expressed in the title to this Symposium, is itself a complicated idea. All human societies have conflicts, and ongoing conflict within society often motivates constitutional change. It is in part the nature of the conflict the society has previously experienced, and the nature of the conflicts that remain, that help frame the challenges faced by constitution makers. Whether constitutions emerge in the wake of fundamental regime change (e.g., from authoritarian or military control towards democracy) or from within an ongoing democratic polity, whether they are regarded as “clean breaks” or as incrementalist change, constitutions provide links to a particular past—perhaps imagined and mythic, and certainly partial. Without a linkage to some imagined past, constitutions could not do the work of helping to constitute a particular community.⁸² All national communities in this age of constitutions have some imagined past identity,⁸³ contested, to be sure, and only some strands of which will be reflected in the legal regime. Yet the ability of constitutions to create narratives that link generations over time is an important

80. See *id.* (emphasizing how ongoing change in the constitutional order produces change in the participants' perspectives, which in turn affects the “potential for constitutional consensus”).

81. I discuss this further in a forthcoming book, VICKI C. JACKSON, *CONSTITUTIONAL COSMOLOGY: CONVERGENCE, RESISTANCE AND ENGAGEMENT IN TRANSNATIONAL CONSTITUTIONALISM* (forthcoming 2008).

82. See Kim Lane Scheppele, *A Constitution Between Past and Future*, 49 WM. & MARY L. REV. 1377 (2008); cf. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 6-7 (rev. ed. 1991) (defining a “nation” as an “imagined political community,” one that is “inherently limited and sovereign”; imagined because its members do not all know each other and limited because “[n]o nation imagines itself as coterminous with mankind”).

83. Cf. TEITEL, *supra* note 15, at 196 (“While the picture of a polis at constitutional point zero might have been appropriate for describing constitutionalism in the eighteenth century, in the late twentieth century, constitutions associated with political change generally succeed preexisting constitutional regimes and are thus not simply created anew.”). Implicit in this observation is the possibility that all new constitutions are in some sense transitional, backward-looking as well as forward-looking.

aspect of the durability of those that do endure,⁸⁴ whether the linkage is one of embrace or rejection of a particular past.

Moreover, the incremental quality of constitution-making, moving, in Teitel's words, in "fits and starts," can be found in many constitutional settings, including the accretion of the British constitution over centuries, or the incremental expansion of the voting citizenry that amendments to the U.S. Constitution created between 1865 and 1971.⁸⁵ The adoption of the Israeli Basic Laws, a process that has now stretched over half a century and may continue, is another example of incremental constitutional development that is not necessarily indicative of fundamental regime change.⁸⁶

Distinguishing a category of "transitional" constitutions becomes even more difficult when one considers that avowedly transitional constitutions may become permanent, as was the case with the German Basic Law; consensus may develop over time in a wide variety of ways. And even "permanent" constitutions are, in a sense, also in transition: any constitution that "lasts" must have a capacity to be "transitional" in allowing for contest over changing understandings and new circumstances, whether through amendment or interpretation. Thus, constitution-making can be incremental without necessarily being *distinctively* transitional.

Entrenchment and Endurance Disaggregated? Still, there are differences between transitional and permanent constitutions, and among different forms of transitional constitutional processes. The avowedly unsettled or incomplete nature of the agreement in a nominally transitional constitution is distinctive. While in place, these transitional or interim agreements assert their status as foundational and supreme, and they often provide amendment rules designed to "entrench" their superiority until they are changed in

84. Cf. RUBENFELD, *supra* note 74, at 12 (describing constitutional law as allowing a people to "memorialize and hold itself" to commitments over time).

85. See U.S. CONST. amends. XIII (1865) (abolishing slavery), XIV, §2 (1868) (providing incentives for states to allow black men to vote), XV (1870) (securing right to vote regardless of race or prior condition of servitude), XIX (1920) (securing women's right to vote), XXIII (1961) (extending right to vote for President to residents of the District of Columbia), XXIV (1964) (prohibiting poll taxes for voting), XVI (1971) (extending right to vote to those eighteen or older).

86. See *supra* notes 17-19 and accompanying text and *supra* note 24.

accordance with the rules specified.⁸⁷ Transitional constitutions thus may disaggregate the features of legal entrenchment and supremacy, on the one hand, and legal endurance, on the other. In so doing, and depending on their performance and that of subsequently enacted constitutions, they may shed new light on the advantages and disadvantages of constitutional “sunset” clauses—that is, requirements of reconsideration in plenary form after a set period of years, far enough into the future to allow time for the development of some authoritative institutions of politics and governance.⁸⁸

Some transitional constitutions seek not only to entrench themselves as law for a short period of time, but also to advance entrenched principles or rules from which future constitution makers cannot depart. This was a distinctive feature of the South African process. The non-elected members of the South African Multi-party Negotiating Process decided on the thirty-four basic principles to which the later constitution must conform and determined that the Constitutional Court would enforce this requirement.⁸⁹ This conduct might be viewed as a form of partial,

87. See, e.g., Feisal Amin al-Istrabadi, *Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law*, 50 N.Y.L. SCH. L. REV. 269, 274 (2005-06) (“Article 3 [of Iraq’s Transitional Administrative Law (TAL)] makes clear that, regardless of nomenclature, the TAL is in fact an interim constitution in all but name. Article (3)(A) makes the TAL the supreme law of Iraq, superseding any legislation.”); *id.* (stating that the TAL’s provisional nature is indicated by Article 3(C), which states that the TAL “shall cease to have effect upon the formation of an elected government pursuant to a permanent constitution”). Al-Istrabadi is identified as “Ambassador and Alternate Permanent Representative of Iraq to the United Nations,” who was “one of the principal legal drafters of the Iraq Transitional Administrative Law and was the principle author of its bill of rights.” *Id.* at 269 n.*.

88. See *supra* note 75 (noting Thomas Jefferson’s view); see also Jacob E. Gerson, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 254-55 (2007) (describing more of Jefferson’s correspondence with Madison on this point); cf. N.Y. CONST. art. XIX, § 2 (providing that at a general election, at least every twenty years, the people must vote on whether to hold a convention to revise or amend the state constitution).

89. See JACKSON & TUSHNET, *supra* note 13, at 280-85. The Northern Ireland Agreement also provides for a set of rights that are to be respected whatever the outcome of later referenda on sovereignty and national identity, and provides for the establishment of specific institutions, including a Human Rights Commission, to protect those rights. See Paul Mageean & Martin O’Brien, *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement*, 22 FORDHAM INT’L L.J. 1499, 1519-25, 1527-28 (1999); Christopher McCrudden, *Mainstreaming Equality in the Governance of Northern Ireland*, 22 FORDHAM INT’L L.J. 1696, 1734-38 (1999); Brendan O’Leary, *The Nature of the Agreement*, 22 FORDHAM INT’L L.J. 1628, 1649-50 (1999).

long-term entrenchment. Whether the normative force of such pre-binding efforts is derived from the subsequent decision of the polity to treat them as binding (i.e., by consent), or from their substantive normative force (in some instances, as “supra-positive” norms of international constitutionalism),⁹⁰ can be debated but perhaps not disentangled: the substantive force of the principles may contribute to the willingness of both judicial and political actors to treat them as binding.

Will the separation of entrenchment and permanence in these transitional instruments help to move societies closer to constitutionalism, democracy, and justice? Does incremental, or transitional, constitution-making better promote the chances for constitutionalism and democracy in riven societies? Do severely rifted societies with little practice in democracy need a modest and restrained, rather than comprehensive and perfectionist, governance instrument?⁹¹ As will be discussed below, the answers to these questions will lie in part with the particular interests and aspirations of those with power in the constitution-making process.

Interests and Constraints, Internal and External: The interests of those drafting constitutions in “transitional” settings must at this point be considered.⁹² To the extent that drafters of constitutions

90. See generally Gerald Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003).

91. Cf. Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 ISR. L. REV. 216 (1999) (arguing for a restrained role of courts in societies with deep conflict about political decisions). I raise here a question of the scope and ambition of the constitutional (or proto-constitutional) instrument, rather than the related question about how highly it is entrenched, as discussed in Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 275 (Sanford Levinson ed., 1995).

92. As noted earlier, constitutional provisions (or processes) may actually obstruct constitutionalism. See JACKSON & TUSHNET, *supra* note 13, at 267-68. Such provisions may reflect the institutional or personal interests of influential participants. Cf. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND WHAT WE THE PEOPLE CAN DO ABOUT IT) 62, 90 (2006) (arguing for a new constitutional convention to remedy anti-democratic and unjust features of the U.S. Constitution, including provisions for “equal suffrage” in the Senate, reflecting interests of small states, and the rules of the Electoral College, which used to provide advantages to voters in slaveholding states); Elster, *supra* note 1, at 377 (noting Charles Beard’s argument (no longer widely accepted) that the U.S. Constitution was designed to entrench the economic interests of its drafters). Query whether provisions like the rule of two Senators per state, or those protecting former dictators from loss of power or from punishment (as in Chile’s designation of Pinochet as Senator-for-life) might be seen as at times promoting and, at other times,

are members of the polity, they are necessarily self-interested in ways that can be both important to and problematic for success. Internal drafters who were the victors in a long struggle against an oppressive past may be motivated, as Bruce Ackerman contemplates, by an altruism born of having “sacrificed much of their lives for certain fundamental principles.”⁹³ But internal drafters for a regime brought down by outside forces may or may not have had the time or civic space to develop a competing vision that would carry forward a constitution-drafting process and thus may end up focused on the more particular interests of their segments of society.⁹⁴ Depending on these and other circumstances, internal drafters may be better situated to produce a more, or less, transitional constitution with more, or less, of an effort to embed entrenched principles.

Where those who are drafting constitutions (or imposing constraints on what is drafted) are not members of the polity—for example, the Americans who drafted the Japanese constitution⁹⁵—they may be able to take a more dispassionate view of the interests of the whole. However, outside drafters, particularly when dominated by a single powerful country, may well also have particular national interests which they seek to advance through constitutional constraints imposed on the other.⁹⁶ In either case, their activity will be less “authentic” and, in many cases, they will be less knowledgeable about the conditions and cultural histories that must inform successful constitution-making. Acceptance of

obstructing constitutionalism?

93. ACKERMAN, *LIBERAL REVOLUTION*, *supra* note 5, at 48-53, 55, 64; *cf. id.* at 62 (arguing further that immediate constitution-making will help secure revolutionary leaders’ commitments; once political elites sign on to the text, they “will find it hard to play fast and loose with it to serve their short-run interests”).

94. *See supra* note 58 (discussing Iraq). A comparative study of the pre-transitional organizing and development of constitutional ideas in successful and less successful transitions would be illuminating.

95. *See supra* notes 29-32 and accompanying text.

96. *See, e.g.*, U.S. Dep’t of State, *The United States, Cuba, and the Platt Amendment*, 1901, <http://www.state.gov/r/pa/ho/time/ip/86557.htm> (last visited Feb. 23, 2008) (describing how the United States insisted that Cuba include in its own constitution (1901) the provisions of the Platt Amendment enacted by the U.S. Congress, forbidding Cuba from entering into certain foreign agreements and providing for U.S. intervention to defend Cuba as conditions for an end to U.S. military occupation); *see also* Paul D. Carrington, *Could and Should America Have Made an Ottoman Republic in 1919?*, 49 WM. & MARY L. REV. 1071, 1086-87 (2008).

such a constitution will depend on the degree to which internal drafters and ratifiers and people can be persuaded to adopt it as their own.⁹⁷

Effective drafting by insiders to the system is thus fraught with the difficulty of effectively compromising the combinations of self-interest and public interest at the table; constitutional drafting by, or under, the strong influence of outsiders (even assuming their altruistic intentions) risks delegitimation of the constitutional project by proxy. And in either situation, the presence or absence of the forms of entrenchment associated with “traditional” constitutions can influence the drafting process. As noted earlier, promulgating an entrenched and enduring law raises the stakes for the endeavor, because whatever is done will be harder to undo. Sometimes raising the stakes can be a good thing for a lawmaking process by focusing attention, demanding and thus justifying the devotion of considerable time. If some significant leaders take it seriously, others may need to as well, and permanent guarantees may be needed to assure the different parties to a negotiation that their interests will remain protected. On the other hand, sometimes raising the stakes by requiring that all elements of an agreement be permanent can be a bad thing for successful conflict resolution—intensifying polarization and leading to more rigid positions than might occur in negotiations over more temporary solutions.⁹⁸ And without some minimal levels of trust in legal institutions or their guarantors, constitutional design of checking institutions may not be enough to overcome suspicion and fear.⁹⁹

97. That is, outside intervention or constraint on internal drafting may result in the inclusion of provisions—whether they concern human rights or the protection of other nations’ sovereign or commercial interests—that are not internalized by the governments or people involved (though this may occur with indigenously drafted provisions as well).

98. On the challenges that polarization presents for conflict resolution and the benefits of consensus-building in resolving multi-party disputes, see Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 81 (2002) [hereinafter Menkel-Meadow, *Lawyer as Consensus Builder*]; Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes: Inaugural Lecture of the A.B. Chettle, Jr. Chair in Dispute Resolution and Civil Procedure*, 94 GEO. L.J. 553, 568, 571-72 (2006) [hereinafter Menkel-Meadow, *Peace and Justice*]. See also *supra* note 63 (referring to conflict resolution literature and the importance of small first steps to building trust).

99. To the extent that entrenchment raises the stakes too high, some suggest it can be addressed by a relaxed amendment formula. Cf. Holmes & Sunstein, *supra* note 91, at 275 (arguing that constitutions in the newly democratic states of Eastern Europe should be easily

Yet some agreements not called “constitutions” may end up functioning very much like them, where the politics of the moment lend urgency and force to the need to have the kind of hard deliberation characteristic of good constitution-making. Perhaps the Northern Ireland Multi-party Agreements will end up being so viewed eventually, as a decision of the British law lords suggests.¹⁰⁰ If so, perhaps it will be seen as an example in which more was accomplished towards constitutionalism, in part by claiming somewhat less.¹⁰¹

Transitional constitution-making often involves non-national participants—international organizations, human rights activists, occupying or former colonial powers. Some transitional instruments contemplate the formal involvement of an extra-national element in governance, as in the Northern Ireland agreements. Avowedly transitional constitutions offer the possibility of a staged approach, combining insider and outsider participation. In theory, transitional constitution-making permits segmenting the time periods when international elements have an explicit role—that is, at the transitional, but not the more final, stages.¹⁰² It thereby may offer

amendable in some provisions (including social rights) in order to allow space for democratic parliamentary majorities to have scope for lawmaking).

100. See *Robinson v. Sec’y of State for N. Ir.*, [2002] UKHL 32, ¶ 25 (Eng.) (Lord Hoffman), available at <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020725/robin-2.htm> (“[T]he Belfast Agreement concluded on Good Friday 1998 ... was the product of multi-party negotiations to devise constitutional arrangements for a fresh start in Northern Ireland.... The 1998 Act is a constitution for Northern Ireland, framed to create a continuing form of government against the background of the history of the territory and the principles agreed in Belfast.”). Commentators emphasize the importance of the submission of that Agreement to popular referendum for its quasi-constitutional status. See, e.g., Kieran McEvoy & John Morison, *Beyond the “Constitutional Moment”: Law, Transition, and Peacemaking in Northern Ireland*, 26 *FORDHAM INT’L L.J.* 961, 968 (2003).

101. Calling for people to produce a “constitution” (so-named) may increase the stakes because of the expressive and constitutive aspects of constitution-making. See *supra* note 10 and accompanying text; *infra* notes 139-66 and accompanying text; cf. Elster, *supra* note 1, at 378-84 (comparing the institutional and group interests, or stakes, at work in U.S. and French constitution-making in the late eighteenth century). Entering into “multi-party negotiations,” as occurred in Northern Ireland, did not require parties to take a position on their permanent national identity; making a “constitution” might do so. See *infra* notes 152-57 and accompanying text. Query whether a document called the “Constitution” could have been approved by popular referendum at the time of the Good Friday Agreements, given the questions of national identity implicated by the term, even if (counterfactually) the interested state parties would have permitted it to go forward on that basis?

102. Northern Ireland may end up illustrating this possibility. See *supra* note 100.

some possibility of mediating among the interests of insiders and outsiders to the end of legitimate constitutions and working constitutionalism.

Interests, Identities, and Multi-phase Transitions: Teitel's concept of the transitional constitution as part of a constructivist, deliberative project by which areas of consensus are developed over time is a normatively attractive one, which assumes that the product of more talking will be more consensus.¹⁰³ The South African example is a powerful one, a remarkable transformation of an unjust, minority-dominated system built on the abuse, subordination, and political exclusion of a racial majority by a racial minority into one that accepted full adult suffrage and the seismic shift in political power that entailed. Although South Africa's constitutional transition has by no means been easy or successful across the board—particularly in the achievement of its constitutional aspirations for more economic justice and meeting minimal human requirements for housing and medical care¹⁰⁴—it nonetheless must be counted as a substantial success in the direction in which it has moved the country on measures of justice and constitutionalism.

A number of scholars have also argued that South Africa's constitutional transformation—and in particular, its development of the formal two-stage process—is an important innovation in constitution-making, one that provides a means for combining constitutional “learning” (from experience with democratic politics and governance) and constitutional legitimacy (by more full-fledged democratic participation in later stages).¹⁰⁵ On such accounts, the goal of this transitional process may be understood as establishing

103. *But cf.* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 75 (2000) (suggesting that if people are talking in groups of the like-minded, more talking can lead to more polarization). On structuring the conditions of deliberation to enhance prospects for consensus-building and avoid polarization, see, for example, Menkel-Meadow, *Lawyer as Consensus Builder*, *supra* note 98, at 81-82, 104 (discussing, *inter alia*, Lawrence Susskind's work, such as THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (Lawrence Susskind et al. eds., 1999)).

104. See, e.g., *Gov't of Republic of South Africa v Grootboom*, 2001 (1) SA 46 (CC) ¶ 2 (S. Afr.) (decided Oct. 4, 2000) (referring to “the intolerable conditions under which many of our people are still living,” notwithstanding constitutional provisions for progressively realizing the goal of providing “a right of access to adequate housing”).

105. See, e.g., Arato, *supra* note 26, at 26-28.

the conditions for informed democratic decision-making about the constitution: decisions which may or may not represent a Rawlsian consensus,¹⁰⁶ but rather an agreement that can be lived with—a *modus vivendi*, if not a true consensus. Professor Klug's argument focuses less on cognition and learning, and more on habits of argument—of the participants becoming enmeshed in a discourse around legal principles.¹⁰⁷ Even on these more modest accounts, the innovation is an important one in moving towards conditions of constitutionalism. But the preconditions for its use may not always be present.

A more modest conception of interim agreements is that their goal is only to maintain the use of law talk, rather than violence, through a series of interim agreements. On this view, the idea of post-conflict constitutionalism may be committed to a vision of constitutions as a form of continuous conversation, of impermanency, and of disentanglement, but not necessarily, as Teitel envisions, a form of disentanglement of the old while moving towards entrenchment of a more normatively attractive rule of law and construction of a more positive national identity.¹⁰⁸ Consecutive interim agreements with much more limited (or nonexistent) aspirations to bind the future beyond the term of the agreement may represent a substitute for consecutive cycles of violence and, while not necessarily conducive to long-term institution building, may be all that is achievable for some periods of time.¹⁰⁹ Although such open-ended "constitutional" processes have some severe disadvantages, including their difficulty in developing stable institutions through which social conflicts are managed, in a context in which constitutions are being used as tools of peacemaking in an

106. See TEITEL, *supra* note 15, at 196.

107. See Klug, *South African Miracle*, *supra* note 53, at 23-35; cf. KLUG, *CONSTITUTING DEMOCRACY*, *supra* note 46, at 137 (describing negotiations as producing an "unconscious process of hybridization" of international and local norms).

108. See TEITEL, *supra* note 15, at 196, 198.

109. Cf. MORROW, *WEAK VIABILITY*, *supra* note 59, at 1-2 (arguing that the Iraqi constitution "lacks the essential criterion of any constitution: the consent of *all* major national communities," but that it may nonetheless be sufficient as a "legal text" to provide a framework for a "radically regionalized ... polity," and suggesting that the amendment process might be used to make recommendations for legislation and intergovernmental or international agreements to encourage Sunni Arab engagement with the constitution and promote preservation of the Iraqi state).

ongoing conflict it may be necessary to develop not a two-staged, but a multi-staged use of transitional agreements as preferable to the coercion of arms.

Depending on the political circumstances, transitional agreements have the capacity to move in more normatively attractive directions. If competing ascriptive or ideological groups in society have relatively equal power, or if a current majority group foresees its power waning in the future, or if all major groups face similar degrees of uncertainty, continuous bargaining may well lead to a more or less acceptable entrenched agreement embodied in a liberal constitution because leaders of each group see advantages in making such an agreement.¹¹⁰ Alternatively, if the group at the negotiating table with the strongest power has what Arato calls an "orientation to democratic consensus,"¹¹¹ these transitional processes may well lead towards the possibility of a workable constitution. On the other hand, more permanent or forward-looking agreements may be particularly difficult to arrive at in circumstances in which one or more powerful groups believes it will be in a better position to strike a deal at some future time; more conversation in a short time in those circumstances might yield less, rather than more, consensus. As noted earlier, if groups believe that as their numbers rise in the future they will have more power, they might seek to maintain the possibility of easy amendment or further interim agreements. What may forestall the latter possibility is the political exhaustion principle—that people are not willing to devote unlimited time and attention to fundamental lawmaking.¹¹²

Yet where issues of identity are at stake, as increasingly they are,¹¹³ it is not difficult to envision cycles of animosity that may require the work of several "interim" agreements before a stable constitutional settlement is reached. To the extent that a "constitution"—in contrast to an interim agreement—must express a

110. On the incentives of a present majority group that sees its number and power waning in the future to agree to constitution-like protections that may currently benefit a rising minority, see Donald L. Horowitz, *Explaining the Northern Ireland Agreement: The Sources of an Unlikely Constitutional Consensus*, 32 BRIT. J. POL. SCI. 193, 204 (2002).

111. Arato, *supra* note 26, at 17.

112. See ACKERMAN, *LIBERAL REVOLUTION*, *supra* note 5, at 55.

113. See generally Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359 (1996).

national identity (as well as provide mechanisms for allocating and sharing government power), moving from transitional to final may be particularly problematic in deeply riven societies, as many post-conflict societies will be. Interim agreements, to gain consent, may have the effect of reinforcing group cohesion. Depending on the nature of group leadership, and the incentives vel non which voting schemes may provide for the rise of extremist positions within differentiated groups,¹¹⁴ one could imagine arrangements that exacerbate rather than improve prospects for agreement on a workable, permanent constitution.

Given the importance of political preconditions for the likely success of constitution-making in any of these forms, the expertise of constitutional lawyers in other ongoing systems will be of only limited relevance in post-regime change settings. Expertise in local history and politics, in comparative governance, in political transitions and decisional processes, as well as comparative knowledge of successful and unsuccessful constitutions and approaches to constitution-making, should be brought to bear.¹¹⁵ How much there is to know or think about in deciding on the form of constitution-making that should occur is further illustrated below.

114. See Donald L. Horowitz, *Constitutional Design: Proposals Versus Processes*, in *THE ARCHITECTURE OF DEMOCRACY*, *supra* note 14, at 15, 20-25, 29-30 (noting problems that consociational accounts have with identifying incentives for agreement by majorities to share power with minorities, noting significance of fact that each group may have more extreme and more moderate elements, and arguing for vote pooling arrangements to provide incentives for moderation and agreement); *cf.* Sunstein, *supra* note 103, at 75 (on problems of group polarization). At an extreme, polarization and intensification of ethnic or religious conflicts may lead to "ethnic cleansing," or secession. See DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* xi (2d ed. 2000) [hereinafter HOROWITZ, *ETHNIC GROUPS*]; see also Thomas M. Franck, *Why Federations Fail*, in *WHY FEDERATIONS FAIL* 167 (Thomas M. Franck ed., 1968).

115. For a thoughtful argument for including "process experts" with experience in facilitating consensus-building in legal settings, see Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347 (2005). *But see* Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473, 1474 (2008) (suggesting that normative advice on constitution-making processes or substantive provisions is "largely pointless"). Although I share Tushnet's view that the role of local conditions and the variety and distinctiveness of constitution-making processes preclude development of anything approaching a "blueprint" for advice-giving, I am not so pessimistic about the benefits of sharing knowledge. Awareness of a broad range of successful and unsuccessful constitution-making efforts, and some understanding of how each different example proceeded in its own context, may be helpful to the exercise of sound judgment in future situations notwithstanding the absence of fully replicable conditions.

C. Timing and Process

The existence of alternative modes of constitution-making means that it is a question whether traditional, comprehensive constitution-making should always be a priority in post-conflict societies or whether less ambitious pre-constitutional agreements should instead have priority, at least in some circumstances. South Africa, Hungary, and even Northern Ireland illustrate different strategies of interim or incremental constitution-making. They suggest that constitution drafters' tool kits must be expanded beyond the all-encompassing models of constitution-making represented by the United States and post-World War II German and Japanese episodes.

1. Timing

Timing—that is, choosing a constitutional “moment” or a series of “moments” along a temporal continuum moving towards constitutionalism—is a first question. Constitutional processes are normatively desirable, generally, to lay a foundation for legal provisions for stable and just democratic politics; democratic politics are not possible absent a basic set of rules and units for voting, provisions usually found (at least in general terms) in constitutions.¹¹⁶ But the moment for constitution-drafting is not always, or even usually, an entirely autochthonous choice in post-conflict settings. Occupying powers may insist on drafting a constitution for their own purposes and powerful external bodies may offer incentives to do so. Even where external pressures are less intense, the association of a written constitution with national identity and national sovereignty and the desire, whether for altruistic or other reasons, to establish an enduring basic framework for governance, may quickly lead domestic actors to the constitution-drafting table. Relatedly, constitutions may be important symbols of aspiration to indicate a clean break from the

116. Although it may be that “all election mechanisms are vulnerable to manipulation by a variety of means,” Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 595 (2002) (noting insights of Condorcet and Arrow), it is nonetheless an essential aspect of any framework for rule of law governance that the means of choosing the government (as well as the rules by which it regulates conduct) be decided upon and known.

past; in Iraq, for example, the interim nature of constitutions under prior regimes may itself have given momentum to a desire quickly to have a permanent constitution to differentiate the past.¹¹⁷ The more general point is that there may not be as much choice as might be imagined about whether and when to have a constitution-drafting process—any choice is often highly constrained.

In light of the normative and practical benefits of having a constitution,¹¹⁸ there is much to be said for relatively speedy moves toward constitution-making. Yet post-World War II Japan and Germany should not be understood to stand in general for the capacity of an occupying power to insist on constitution-making on a (relatively) quick schedule, especially in significantly riven societies, that will turn out to be successful. Experience elsewhere—in Eastern Europe, South Africa, and Northern Ireland, for example—may suggest that the kinds of bargaining that constitutional compromises typically entail are better achieved through more limited forms of agreement made over a longer period of time. Yet, depending in part on the nature of different groups' leadership and incentives and the amount of agreement among those groups over what the conflict did or did not resolve, more time could be used for purposes destructive of the capacities for peaceful and humane self-governance.

2. *Process*

In addition to questions of whether to engage in interim or final constitution-making, some political scientists and lawyers argue for particular kinds of processes—for example, separate “conventions” (rather than standing general legislative bodies) to draft constitutions—both to avoid the institutional and personal self-interest of existing members of legislative bodies and to better embody the interests of the people in a specifically constitutional process.¹¹⁹ Yet

117. See Brown, *supra* note 57, at 928-29, 932-35 (describing Iraq's use of interim constitutions that did not constrain executive power, from 1958 until the U.S. invasion in 2003).

118. That is, of having a good constitution. On the possibility that constitutions may, by design or otherwise, obstruct development of constitutionalism and a just constitutional order, see *supra* notes 13, 92.

119. See, e.g., ACKERMAN, *LIBERAL REVOLUTION*, *supra* note 5, at 58-60; Elster, *supra* note 1, at 395.

enough examples exist of successful parliamentary adoptions to make one skeptical of insisting on this one form.¹²⁰ In societies without existing representative institutions and in which constitutions are being used as tools of peacemaking and social transformation, the constitutional process might contribute to representative government by linking the drafting of the constitution to new institutions of democratic governance, as in South Africa. Each process thus has distinctive advantages and disadvantages.

Moreover, although there is arguably an emerging international consensus that "legitimate" constitution-making requires public participation or ratification,¹²¹ history suggests that a fairly wide range of processes may, over time, create bonds of legitimacy between a constitutional instrument and a majority of the polity to which it applies. In deeply riven societies, some democratic processes have the capacity to deepen rather than bridge differences.¹²² Although the Iraqi constitution-making process appears to have allowed inadequate time for discussion and compromise, and as structured resulted in a decidedly negative vote in the Sunni areas notwithstanding which the constitution went into effect, one cannot say in any categorical way that contemporaneous consent of all minority groups is necessary for successful constitutional change.¹²³ Depending on existing social and political norms,

120. Neither the Polish nor the Hungarian constitutions were drafted by specially elected constitutional conventions; rather, standing legislatures enacted changes that had been negotiated through informal processes and, in the Polish case, the new constitution was then also approved by popular referendum. See *supra* notes 38-43 and accompanying text; see also ELSTER, OFFE & PREUSS, *supra* note 45, at 70 (discussing Hungarian, Bulgarian, and Czech legislatures' drafting or amending constitutions as part of regime change).

121. See, e.g., VIVIEN HART, DEMOCRATIC CONSTITUTIONMAKING 1, 12 (U.S. Inst. of Peace, Special Rep. No. 107, July 2003), available at <http://www.usip.org/pubs/specialreports/sr107.pdf>; cf. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) (suggesting that international law is coming to recognize a right to democratic governance).

122. See HOROWITZ, ETHNIC GROUPS, *supra* note 114, at 628-33. Voting rules, coupled with information about the vote, may have other destabilizing effects. Some observers believe that the overwhelmingly negative vote of Sunni provinces on the Iraq Constitution left the Shiite and Kurd groups feeling less of a sense of moral obligation to the Sunnis to make revisions as contemplated by the last-minute addition of Article 142. See MORROW, WEAK VIABILITY, *supra* note 59, at 5-6; cf. AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY (2003) (arguing that democracy itself, combined with free markets in many developing nations, may lead to a release of ethnic hatred directed at "market-dominant minorities").

123. See *supra* note 68 (noting that Quebec did not consent to Canada's 1982 Charter).

constitutions negotiated by elite representatives of groups—whether in a special assembly or convention or in a representative parliamentary body—may prove sufficiently durable to move towards constitutionalism without having the added qualities of legitimately entrenched law that popular ratification may be thought to provide. Perhaps all one can say is that establishing a purportedly representative or democratic process for constitution-making and then prematurely cutting off deliberation among intensely polarized groups is a high-risk approach, carrying within it the elements of its own delegitimation.

If there are more general conclusions to be drawn about timing, process, and scope of constitution-making projects in post-conflict societies, this is not the province for constitutional lawyers alone. As noted earlier, such judgments call for the insights of historians, political scientists, cultural anthropologists, and conflict resolution specialists. To the extent that lawyers are involved, the “tool kit” they bring to developing agreements that work towards the rule of law and a more just society must be an expanded one,¹²⁴ including not only capital “C” constitutions but also working agreements, power-sharing agreements, basic laws, and interim constitutions. Drafting temporary agreements for elected legislatures and governing bodies (through voting systems that do not more deeply entrench existing cleavages), while temporarily deferring decision-making on contested issues, may allow time for habits of compromise and living together under law to be established where need be. For instance, the Northern Ireland agreement called for continued transnational involvement in the difficult issue of prisoner releases over a two-year time frame and provided for the future establishment of a commission to evaluate and make recommendations on policing.¹²⁵ Similarly, when the two Germanys came together, resolution of the abortion regime was deferred, again to within a two-year time frame.¹²⁶

124. See Menkel-Meadow, *Peace and Justice*, *supra* note 98, at 568, 571-72; Carrie Menkel-Meadow, *Practicing Law “In the Interests of Justice” in the Twenty-First Century: Pursuing Peace as Justice*, 70 *FORDHAM L. REV.* 1761, 1770-74 (2002).

125. See Agreement Reached in the Multi-Party Negotiations arts. 9-10, Apr. 10, 1998, 37 *I.L.M.* 751.

126. See PETER E. QUINT, *THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION* 156-57 (1997) (describing how the Unification Treaty permitted the former German Democratic Republic (GDR) to maintain for the transition period its own

D. Independent Guarantors: Courts

Despite the increasingly democratic orientation of normative constitutional legitimacy under which public deliberation and ratification are believed necessary, the use of non-democratic, “independent” elements to secure the guarantees of an interim or permanent constitution may also have an important role to play in deeply polarized settings. The role of the Constitutional Court in South Africa is a notable example: created by the (non-democratically chosen) multi-party negotiators and enacted into law by the (non-democratic) prior regime’s legislature, the Constitutional Court in South Africa was charged with reviewing the final constitution to assure its compliance with the thirty-four negotiated basic principles.¹²⁷ Although it is difficult to justify this court’s creation through a theory of democratic consent, its independence from the prior regime and its high stature enabled it to perform the vital role of offering assurance to all parties that the rights and structures they negotiated for would be carried forward.¹²⁸ Arguably, incorporation of international or foreign law or actors in constitutional regimes, discussed in the next Section, can play a similar role in offering some form of non-democratic, but independent, check on the range of outcomes permissible under fragile new constitutional processes.

E. International Guarantors and Involvement: Constitutions as Janus-faced

Classical understandings of a “constitution” are inward-looking. In the U.S. paradigm, the Constitution is conceived exclusively as the product of, and governing instrument for, “We the people of the United States”—a specific and territorially bounded polity. Yet many of the written constitutions of the world have been the

abortion law, which permitted abortions relatively freely in contrast to the law of West Germany, and also added an article to the Basic Law “to suspend certain provisions of the Basic Law, for an interim period, through an amendment of the Basic Law itself”; cf. U.S. CONST. art. I, § 9, cl. 1 (prohibiting federal regulation of the slave trade for twenty years).

127. See *supra* notes 47, 50 and accompanying text.

128. For an argument that the South African court’s 2005 decision invalidating the death penalty helped establish the court’s authority as protector of human rights and interpreter of the constitution, see KLUG, CONSTITUTING DEMOCRACY, *supra* note 46, at 142-48.

product of a combination of external and internal forces. Occupying powers, including the United States (and well before the reconstitution of Japan and Germany after World War II), have sought to impose on or persuade other peoples as to what should be in their constitutions.¹²⁹ Despite the inward focus of much discussion about constitutions, national constitutions also matter to a transnational community: they help define state sovereignty for purposes of recognition, they structure the state's capacities to deal with other states, and they may affect the capacity of the states to comply with international norms of interest to all member nations, including those against offensive war and those protecting human rights. Even constitutions that are in important respects highly indigenous products must face outwards as well as inwards in order to accomplish their goals, which include asserting and securing the sovereign capacities of the state on the international stage.¹³⁰

In a number of recently adopted constitutional instruments, international law and/or members of the international community are present.¹³¹ In South Africa, the indigenous constitution-making process was framed and informed by international opposition to the apartheid regime and support for the move to a new democratic constitutional regime. International law itself played an important role in the South African process: according to Professor Klug, all of the principal negotiators by the early 1990s had accepted that a new constitution for South Africa would need to meet criteria set forth in international instruments condemning the apartheid

129. See *supra* note 96.

130. Although a written constitution is plainly not necessary for a state to be recognized as a sovereign in the international community, constitutions typically do address the criteria and parameters of recognition, including capacity to deal with foreign nations, and particularly in post-colonial settings are widely and explicitly used to assert sovereignty. Compare Montevideo Convention art. 1, Dec. 26, 1933, 49 U.S.T. 3097 (describing the elements of a state under international law), with 1958 CONST. pmb. (Fr.) ("The French people solemnly proclaim ... the principles of national sovereignty."); 1994 CONST. OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA pmb. ("We the Nations, Nationalities and Peoples of..."); and 1995 CONST. OF UGANDA art. IV (discussing the constitution's guarantee of national sovereignty, independence, and territorial integrity). I explore this further in JACKSON, *supra* note 81.

131. The increasing trend of international interventions in constitution-making has drawn notice from other scholars. See, e.g., Ulrich K. Preuss, *Perspectives on Post-conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization*, 51 N.Y.L. SCH. L. REV. 467, 491-93 (2006) (describing "constitutional intervention" as analogous to "humanitarian intervention").

system.¹³² And the interim and final constitutions made use of international law as a reference point for interpretation, requiring that international law be considered in interpreting the bill of rights and that all statutes be interpreted, whenever possible, in accordance with international law.¹³³ One can see this as a mild way in which a domestic constitution reaches out to use international law as a check on its own constitutional development, while at the same time inviting international scrutiny of whether the domestic constitution meets the international standards to which it aspires.

Other transitional constitutional instruments have created specific governmental roles for international or foreign powers. For example, the Constitution of Bosnia and Herzegovina, adopted under international auspices as part of the Dayton Accords,¹³⁴ recognizes international monitoring bodies operating within the state and provides for a Constitutional Court, three of whose nine members are selected by the President of the European Court of Human Rights.¹³⁵ As noted, the Northern Ireland agreements provide for fairly extensive sharing of powers among governmental organs in Northern Ireland, the Republic of Ireland, and the United Kingdom.¹³⁶ And, as suggested by growing arguments for "shared sovereignty" arrangements,¹³⁷ constitutions are no longer viewed as

132. See Klug, *South African Miracle*, *supra* note 53, at 22-24 (explaining how the ANC's "Constitutional Principles," published in 1988, and their "internationalization ... through the Harare Declaration [of a subcommittee of the Organization of African Unity (OAU)] and in the UN General Assembly's Declaration Against Apartheid in 1989" established parameters for the process of constitution-making).

133. S.AFR. CONST. 1996 arts. 39, 233; S.AFR. (Interim) CONST. 1993 art. 35. Although the international community's opposition to the apartheid regime may make South Africa's a special case, many constitutions in the last thirty years have been strongly influenced by international human rights regimes. For example, Canada adopted a Charter of Rights in 1982, inspired in part by the ICCPR; Argentina and Colombia, which adopted new constitutions in the 1990s, incorporated commitments to international human rights law in their constitutional texts. See CONST. ARG. (1994) art. 75(22); POLITICAL CONST. COLOM. (1991) art 93.

134. See General Framework Agreement for Peace in Bosnia and Herzegovina art. V & annex 4, Dec. 14, 1995, 35 I.L.M. 89.

135. See CONST. OF BOSNIA-HERZEGOVINA arts. II, VI; *see also id.* at art. VII (providing for appointment by International Monetary Fund of a member of the initial board of the Central Bank of Bosnia and Herzegovina).

136. See O'Leary, *supra* note 89, at 1641-50.

137. See Stephen D. Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, INT'L SECURITY, Fall 2004, at 85, 85.

solely a matter of domestic concern nor as requiring, for their practical efficacy, an entirely autochthonous process of adoption or implementation.

Provisions for international involvement may be understood as different forms of "guarantee" or "check" on the outcomes of domestic processes—important especially to the protection of different minority groups—that have some analogies to the role of the Constitutional Court in South Africa. Whether such shared arrangements can continue indefinitely—whether as both a practical and theoretical matter such foreign participation in domestic governance can be reconciled with political and normative constitutional legitimacy—or must instead be justified as leading towards a more fully domesticated constitution, is an important question beyond the scope of this essay. Here I note only that domestic approval of international involvement, or of the role of a constitutional court, goes at least part of the way to solving some of the legitimacy problems.¹³⁸ A larger point is that the provisions for international involvement found in some transitional constitutions make palpable, in an unusually expressive way, the "outward" facing functions of all domestic constitutions.

F. A Rose by Any Other Name? Naming the Governance Instrument

As already noted, it is not unheard of for the use of the word "constitution" to be a barrier to agreement.¹³⁹ Naming an instrument a constitution is an implicit claim about identity. Thus, even without a commitment to long-term entrenchment, the sovereignty-asserting and identity-establishing connotations of the idea of a "constitution" may create barriers to agreement on operational issues, just as it may inspire thoughtful deliberation for the

138. See Mark Tushnet, *Transnational / Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 261-64 (2003).

139. Cf. Bell, *supra* note 46, at 376-77 (attributing importance to the titles given to prenegotiation agreements in peacemaking so as to avoid the appearance of "law"). On the distinct questions of the role of "naming" injuries and "claiming" redress in the development of law, see William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC'Y REV. 631 (1980).

common good. And in a number of constitution-making processes, disputes over the very name of the document have come into play.

Consider once again Germany in the aftermath of World War II. The German state was divided into four sectors, each under the military control of one of the Allies: the United States, the United Kingdom, France, and the Soviet Union. Disagreements over Russian claims of reparations, how generously to rebuild the German economy, the status of certain German territories contested by France, and whether to create a strong centralized government for Germany (as the Soviet Union favored), a more decentralized federal government (as the United States and United Kingdom favored), or a looser confederation (as France favored) divided their views.¹⁴⁰ Over time, the United States, United Kingdom, and France determined that a national constitution should be prepared for their sectors; the Soviet Union refused to participate in this process for its sector. The three western Allies initially proposed that a constituent assembly, or a constitutional convention, be called by the *länder* governments, to draft a constitution then to be ratified by popular referendum. However, according to Professor Golay, “[t]he leaders of both the major Western German political parties, the Christian Democrats and the Social Democrats, were reported to be unwilling to identify themselves with any step which would set the seal on a partitioning of Germany.”¹⁴¹ The heads of the *länder* governments in the western three sectors responded by saying that until it was possible for all of Germany, including the Soviet sector, to govern itself, there should be no constituent assembly or drafting of a “constitution.”¹⁴² Instead, they proposed the election of a “parliamentary council” by the *länder* legislatures to draft a so-called “basic law” for the unified governance of the three western occupation zones.¹⁴³ They also rejected the idea of seeking popular ratification of a proposed basic

140. See GOLAY, *supra* note 33, at 1-10.

141. *Id.* at 14.

142. See *id.* at 15; see also Markovits, *supra* note 34, at 1308-09 (describing “fervent disagreements” between Allied Forces and German representatives over the “semantics” of using the word “constitution”).

143. See *id.*

law "as conferring an importance on it which should be reserved only for the constitution ultimately to be adopted."¹⁴⁴

Notice how important the sovereignty-establishing and identity-constituting functions of a constitution are in this story: the political leaders of the *länder* governments were willing to draft a "basic" document providing a framework of governance and protection of human rights, but not one that would proclaim the territorial sovereignty of any territory less than all of historic Germany. As negotiations with the occupying powers proceeded, German political leaders conceded that the instrument would be a "constitutional basic law," but they insisted on the name of "Basic Law," and included a clause, Article 146, implying that the Basic Law was provisional by stating that "this Basic Law will lose its validity on the effective date of a constitution that has been chosen by the German people in a free decision."¹⁴⁵ The symbolic quality of this Article—its lack of specificity an acknowledgment of the practical political realities of the day—may be contrasted with the very detailed provisions in more recent interim constitutions, not only for provisionality but also for the processes by which the instrument would be superseded.¹⁴⁶ And the German Basic Law also included another clause, the former Article 23, stating that the other parts of Germany would be covered by the Basic Law upon their accession.¹⁴⁷ Thus, the Basic Law was ambivalent on its own provisionality.¹⁴⁸

144. *Id.* As further described in Golay's book, the Allies responded quite negatively to the Germans' efforts to avoid creating a constitution as such; there were further interchanges, in which the German political leaders indicated that although the name would be "basic law," it would function as "a basic constitutional law." *Id.* at 16. The heads of the *länder* raised a "further objection that a popular referendum under the conditions then prevailing in Western Germany would offer the Communists the opportunity they had been seeking," and also raised the risk of rejection of a proposed basic law. *Id.* at 17. The cabined faith in the democratic process that led the United States to propose an unelected constitution-drafting body in Iraq was thus present in earlier moments of occupation-directed constitution-making.

145. QUINT, *supra* note 126, at 49 (translating Article 146 as it existed before unification).

146. *See, e.g.*, S. AFR. (Interim) CONST. 1993 ch. 5.

147. *See* QUINT, *supra* note 126, at 47-55 (describing three possible approaches to unification: loose confederation, reliance on Article 146, or reliance on Article 23, and explaining why the Article 23 approach was relied on); Mathias Reimann, *Takeover: German Reunification Under a Magnifying Glass*, 96 MICH. L. REV. 1988, 1995-96 (1998) (reviewing QUINT).

148. Notwithstanding Article 146, after unification the Basic Law continued in force in all of Germany. *See* QUINT, *supra* note 126, at 52-55; Reimann, *supra* note 147, 1995-98.

Germany was by no means the only post-conflict constitution of the modern era in which the very name of the document assumed contentious proportions. According to one recent study, disputes over constitution-making in Kosovo—closely tied to disputes over the nature of its identity as part of a broader Serbia and over the status of the Albanian Kosovars—were reflected in disputes over the name.¹⁴⁹ Thus, the authors report: “Kosovar Albanians wanted to call it a constitution; the SRSG [Special Representative of the Secretary-General of the United Nations] and other internationals saw that as implying a judgment on Kosovo’s final status.”¹⁵⁰ The compromise worked out was to call the document the “Constitutional Framework for Provisional Self-Government in Kosovo.”¹⁵¹

Northern Ireland, as well, illustrates the importance of naming the purportedly constitutional document. Brendan O’Leary suggests that “[n]ames matter in ethno-national conflicts,”¹⁵² but as we have seen in the case of post-war Germany, names of foundational legal instruments may matter even in the absence of such ongoing conflicts. O’Leary describes the many names used to refer to the agreements concerning Northern Ireland. It was published as “The Agreement: Agreement Reached in the Multi-Party Negotiations” and distributed to voters in Northern Ireland in 1998 prior to a referendum on it.¹⁵³ The U.K. government referred to it as “the Belfast Agreement” in its legislation giving it effect in the Northern Ireland Act 1998.¹⁵⁴ However, “republican dissident critics call it the ‘Stormont Agreement,’ advertizing their continuing rejection of the partition of Ireland executed by the Westminster Parliament in the Government of Ireland Act 1920, and their dislike of the final negotiating venue that once housed the hated Northern

149. See STROMSETH ET AL., *supra* note 69, at 115.

150. *Id.*

151. *Id.*

152. Brendan O’Leary, *The Belfast Agreement and the British-Irish Agreement: Consociation, Confederal Institutions, a Federacy, and a Peace Process*, in *THE ARCHITECTURE OF DEMOCRACY*, *supra* note 14, at 293, 294.

153. *Id.* at 294.

154. *Id.*; compare Northern Ireland Act 1998, ch. 47 pmbl. (Eng.) (referring to “the agreement reached at multi-party talks on Northern Ireland”), with *id.* § 3 (referring to “the Belfast Agreement”).

Ireland Parliament.”¹⁵⁵ Others refer to it as the “April 10 1998 Agreement,” and it is most popularly referred to as the “Good Friday Agreement,”¹⁵⁶ a term apparently acceptable to both Catholics and Protestants. Yet, O’Leary suggests, notwithstanding disagreement “over whether they were making a transitional, durable, or permanent settlement,” “the Belfast Agreement’s makers knew they were effectively engaged in constitutional crafting.”¹⁵⁷

Names are contentious not only in immediate post-conflict settings. Recent debate over the proposed constitution for Europe illustrates the importance of the normative connotations of this word. Its implicit normativity, associated with the identity-defining claims it makes about the purported singularity of the entity, posed a substantial political problem for efforts to obtain ratification. New efforts at modifying the treaty instruments may retain much of the substance of the agreements worked out but abandon the attempt to obtain agreement that the instrument is a “constitution.”¹⁵⁸

The final example I will note here is from Iraq. The Coalition Provisional Authority (CPA), established by the U.S.-led occupying forces in the spring of 2003, “initially envisioned that a representative assembly of Iraqis from around the country would write a new constitution, which would subsequently be ratified in a national referendum” prior to the transfer of powers to an elected Iraqi government.¹⁵⁹ However, just before the CPA formed an Iraqi Governing Council (IGC), an influential religious leader, Grand Ayatollah Ali al-Sistani, issued a “fatwa,” or religious edict, to the effect that “any constitution not drafted by a democratically elected body would be ‘unacceptable.’”¹⁶⁰ He objected to the Coalition forces’ plan to appoint members of a body to draft a constitution, as there was no assurance that such an assembly would “serve[] the best

155. O’Leary, *supra* note 152, at 294.

156. *Id.*; see also MITCHELL, *supra* note 70, at Preface (referring to “Good Friday Agreement”); Campbell & Aoláin, *supra* note 58, at 871 n.1.

157. O’Leary, *supra* note 152, at 293.

158. See, e.g., Dan Bilefsky & Stephen Castle, *Germans and Poles at Odds over EU Constitution*, INT’L HERALD TRIB., June 14, 2007, <http://www.ihl.com/articles/2007/06/14/asia/union.php/php> (“Britain is the other main opponent, and it won limited concessions, including a discussion on dropping the name ‘constitution’....”).

159. Feldman & Martinez, *supra* note 58, at 891.

160. *Id.* at 891-92 (quoting al-Sistani).

interests of the Iraqi people or express their national identity whose backbone is sound Islamic religion and noble social values.”¹⁶¹ The concern over outside imposition and the desire for an Iraqi constitution to reflect the values, including religious values, of a majority of Iraqi citizens is palpable. Although the CPA initially tried to work around this fatwa to create a constitution-making process without direct elections, eventually the CPA decided it needed to proceed in accordance with al-Sistani’s edict.¹⁶² The new proposal called for the IGC to draft an interim governance document that, in order “to avoid breaching Sistani’s fatwa,” was to be called the “Transitional Administrative Law (TAL),” which included the procedures to be followed for the drafting of a final constitution by a popularly elected assembly.¹⁶³ Thus, the interim instrument (the TAL) avoided any use of the “c” word in order to achieve apparent compliance with the fatwa.

Other reasons have been suggested for why the name “constitution” was avoided in the TAL and for why some Iraqis may have wanted to move towards a permanent constitution quickly. Some scholars suggest that because Saddam Hussein relied on interim constitutions, dissidents who played a prominent role in the occupation period desired to quickly move towards a final “constitution.”¹⁶⁴ As one of its drafters explained, the negative history of constitutionalism in Iraq, associated with these interim or provisional constitutions which for much of Iraq’s history allowed governance by the “caprice of a single man,” also helps explain

the decision of the Iraqi Governing Council (IGC) not to call the Law of Administration for the State of Iraq for the Transitional

161. *Id.* at 891 n.28 (quoting al-Sistani).

162. *See id.* at 893-94.

163. *Id.* at 895.

164. *See* al-Istrabadi, *supra* note 87, at 270; *see also* Brown, *supra* note 57, at 928-29 (discussing the Interim Constitution of 1970 and the Interim Constitution of 1958, and describing most constitutional instruments during the period of Hussein’s rule as “interim constitutions”). Brown explains that after 1958 there was a new constitution, followed by a military coup which suspended the constitution and established authority in the Revolutionary Command Council. *See id.* at 928. Thereafter, “[a]n interim constitution was hastily issued that confirmed the Council’s monopoly over authority.... The constitutional order of Iraq grew more complex, but it did not change in essence between that time and the abolition of the RCC by Paul Bremer in 2003.” *Id.* Hussein’s “interim constitution” may be an example of a constitution functioning to obstruct constitutionalism. *See supra* note 13.

Period (TAL) an interim or provisional constitution. Too many provisional constitutions had been promulgated in recent memory and "provisional" constitutions had a tendency to become permanent in Iraq.¹⁶⁵

Moreover, the drafter further explained, since under the CPA no instrument became final unless signed by the U.S. Administrator, "[n]o Iraqi wanted the American Civil Administrator to sign a document called an Iraqi constitution."¹⁶⁶

Thus, the term "constitution" clearly goes beyond implying a mere legal instrument, even a basic and foundational one. It is a legal instrument associated with sovereignty, so where the nature or territory of a state is contested its usage will have unwanted connotations for some participants. It is also a legal instrument associated with group identity, and thus naming it may embody whole histories of conflict or claims of injustice.

CONCLUSION

Transitional (and transnational) agreements of many different names and intended durations are emerging as important proto-constitutional instruments. Constitutional lawyers, aware of the freight carried by constitution-making, must not simply assume that the goal is to have a constitution, when the goal is actually to promote the capacities of people to live together under a government that can operate peacefully, effectively, and justly. Constitutional lawyers must carry a broader array of tools, even while acknowledging that there is no clear and simple metric for choosing among them.¹⁶⁷ Figuring out the better choices is a highly context-specific activity, and context includes whether there are appropriate levels of basic order, security, and meeting of humanitarian needs.¹⁶⁸

165. al-Istrabadi, *supra* note 87, at 270 (citation omitted).

166. *Id.*

167. *Cf.* Arato, *supra* note 26, at 22-23 (arguing that a constitution-making process with enhanced democratic legitimacy "cannot be achieved by the imposition of concrete models," and urging a focus "on a plurality of principles that can be publicly used to legitimate a given process of constitution-making," including legal continuity, a "plurality of democratic channels, consensus, (partial) empirical translations of a veil of ignorance ... and reflexivity").

168. *See* STROMSETH ET AL., *supra* note 69, at 11-13.

The constitutionalist's tool kit's broader repertoire now includes transitional and interim agreements, perhaps involving other countries or international organs, or other guarantors, and varied forms of constitution-making procedure. Constitution-making can no longer be conceived of as necessarily an exclusively national project, nor as necessarily a project involving entrenchment of a "final" constitution, but rather, as a process by which the habits of power sharing, political compromise and respect for individual rights are encouraged, often with the active participation of non-national members of a concerned regional or international community.¹⁶⁹ Indeed, where constitutions are deployed for peacekeeping or transformative purposes, it may be the process of constitution-making itself, rather than the constitutional settlement, that is the alternative to war—at least in some places, for some times.

169. See also Jiunn-Rong Yeh & Wen-Chen Chang, *From Origin to Delta: Changing Landscape of Modern Constitutionalism* (bepress Legal Series, Working Paper 1815, Oct. 6, 2006), available at <http://law.bepress.com/expresso/eps/1815> (discussing transitional and transnational constitutionalism); cf. Bell, *supra* note 46 (treating the use of constitutions with hybrid elements of international participation in post-conflict settings as part of a new "lex pacificatoria").