

Chapter One

INTRODUCTION TO A CONSTITUTION

The United States was the first nation to create a constitution. Now, almost all nations have one. This section asks both what makes a document a “constitution” and looks at why and how one is made.

I. CONSTITUTION-MAKING

What prompts constitution-making? What are the crucial considerations when one is made?

Jon Elster

Essay: Forces and Mechanisms in the Constitution-Making Process

45 Duke L.J. 364, 368–95 (1995)

Modern constitution-making began in the late eighteenth century. Between 1780 and 1791, constitutions were written for the various American states, the United States, Poland, and France.

The next wave occurred in the wake of the 1848 revolutions in Europe. Counting all the small German and Italian states, revolutions took place in more than fifty countries. Many of these also adopted new constitutions—often replaced within a short period by constitutions imposed by the victorious counterrevolutionary forces.

A third wave broke out after the First World War. The newly created or recreated states of Poland and Czechoslovakia wrote their constitutions. The defeated German state adopted the Weimar Constitution.

Next, the fourth wave occurred after the Second World War. The defeated nations—Japan, Germany and Italy—adopted new

constitutions under the more or less strict tutelage of the Allied Powers.

A fifth wave was connected with the breakup of the French and British colonial empires. It began in India and Pakistan in the 1940s, but the process did not really gain momentum until the 1960s. In many cases, the new constitutions were modeled closely on those of the former colonial powers. To name only a few examples, the constitution of the Ivory Coast was modeled on that of the Fifth French Republic, whereas those of Ghana and Nigeria followed the British “Westminster model.”

The next wave is linked to the fall of the dictatorships in Southern Europe in the mid-1970s. Between 1974 and 1978, Portugal, Greece, and Spain adopted new democratic constitutions.

Finally, a number of former Communist countries in Eastern and Central Europe adopted new constitutions after the fall of communism in 1989. Although I do not have an exact count, there must be a couple of dozen new constitutions in the region.

[A] large fact that may help us understand why constitutions occur in waves . . . is that new constitutions almost always are written in the wake of a crisis or exceptional circumstance of some sort. . . .

[The result is] two basic paradoxes of constitution-making. . . . The first paradox arises from the fact that the task of constitution-making generally emerges in conditions that are likely to work against good constitution-making. Being written for the indefinite future, constitutions ought to be adopted in maximally calm and undisturbed conditions. . . .

The second paradox stems from the fact that the public will to make major constitutional change is unlikely to be present unless a crisis is impending. . . . If people find themselves with all the time they need to find a good solution, no solution at all may emerge.

Herman Schwartz

Building Blocks for a Constitution

Issues of Democracy, 12, 12–17 (March 2004)

<http://usinfo.state.gov/journals/itdhr/0304/rjde/rjde0304.pdf>

Those who write constitutions for emerging democracies face daunting challenges. First, they must write a document that enables the society to decide difficult and divisive questions peacefully, often under grave circumstances. At the same time they must establish effective protections for human rights, including the right of the minority to disagree.

Secondly, divisions and conflicts usually begin quickly and resolving these can create long-term problems. When the transfor-

mation is negotiated, as in much of the former Soviet bloc, the losers will try to hold on to as much power as they can. If the change involves the complete ouster of a regime, as in Iraq, then the winners will vie for power. The compromises resolving these disputes are often incorporated into the constitution, which can be troublesome in the long run. For example, compromises over slavery in the U.S. Constitution made it possible to get that Constitution adopted but were ultimately not good for the nation.

Moreover, a constitution is written at a specific point in time, usually when the society faces very difficult economic, social and other problems. There is a temptation and often a necessity to deal with these problems quickly. But provisions designed to quickly deal with immediate problems may not be appropriate solutions for the long term.

Overhanging all documents written at a specific time and place is the fact that it is impossible to foretell the future—and the future will always be different from what is anticipated. Thus, drafters of constitutions must give future governments the flexibility to meet unpredictable and unforeseeable challenges.

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PRELIMINARY CONSIDERATIONS

First, should the constitution be written by an ordinary legislative body or by a special constituent assembly? If the decision is to go with the former, incumbent legislators can write a constitution that keeps themselves in office. A special constituent assembly representing as many elements in society as possible is preferable, even though it is more cumbersome and expensive.

Another preliminary decision is about changing or amending the constitution after it is adopted. It should not be easy to do this.

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THE BUILDING BLOCKS

An initial issue is whether to have a presidential or a parliamentary system.

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There is no obvious answer to which system is better. The choice will often depend on history, the needs of the moment, and other factors. All the countries of the former Soviet bloc outside the Soviet Union, as well as the Baltic nations, adopted parliamentary regimes, in large part because they wanted to become a part of Western Europe which is almost entirely parliamentary. All the former non-Baltic components of the Soviet Union however, have adopted presidential systems. . . .

It must also be decided whether to have a unicameral (single house) or a bicameral (upper and lower house) legislature. If the state is to be a federal state with relatively autonomous components, such as the United States or Germany, it may be desirable to have a second (usually upper house such as the U.S. Senate) legislative chamber that represents the interests of the components.

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Whether to have a second chamber raises an additional question: how centralized is the state to be? How much authority and autonomy should be allocated to lower levels of government like regions or national units?

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THE JUDICIARY

History has established the need for an independent judiciary that can keep the other branches from transgressing constitutional limits, and particularly where basic human rights are concerned. This can be either the regular judicial system, as in the United States, or a special tribunal, a constitutional court, limited to deciding constitutional questions and a few other matters, as in Germany.

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Whatever system is chosen, the constitution must explicitly establish the courts' authority to annul laws and other norms and acts inconsistent with the constitution.

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The constitution must also provide that the lower court judges apply the constitution in their decision-making. In many of the new democracies, all too often those judges ignore constitutional issues when making decisions.

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PROTECTION OF HUMAN RIGHTS

Every new constitution now contains a statement of basic human rights. This is not enough. The constitution must create institutions to make those rights enforceable. The constitution must specifically provide that persons who claim that their rights have been violated have ready access to a court, and that if a violation has occurred, the victim can obtain an adequate remedy for that violation.

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ADOPTING THE CONSTITUTION

The final question is how should the constitution be adopted? By the special constituent assembly discussed earlier? By the regular parliament, as in many European countries? By the general public? Should the public's involvement take place before or after the constitution is drafted? If the latter, how should the public's participation be obtained? These and other questions have been answered in different ways, and though many political scientists believe that the approval of a constitution should be by the people, that has not been the universal approach.

Writing a constitution is an experiment, the results of which will always be significantly different from what was intended and anticipated. Moreover, the success of a constitution is usually the result of external factors—the economy, the social forces at work within the society, the nation's foreign relations, natural disasters, and many other factors over which constitutional drafters have no control.

Notes

1-1. Two recently drafted constitutions are those of Afghanistan and Iraq, pursuant to processes that were heavily covered in the U.S. news. Although they do not fall into any of the waves described in the first excerpt, do they form another, identifiable "wave" of their own? Do those constitutional drafting processes exhibit the paradox described above? How did those countries resolve the many questions of the constitutional drafting process?

1-2. Does the history of the U.S. Constitution—its drafting and amendment—illustrate the paradox described above? How were the questions confronting the drafters of the U.S. Constitution similar or different from those confronting the constitutional drafters in Afghanistan or Iraq?

II. CONSTITUTIONALISM

What does it mean to have a "constitution"? Is more than simply having a document with that label required?

Stanford Encyclopedia of Philosophy
Constitutionalism

(Spring 2004)

<http://plato.stanford.edu/archives/spr2004/entries/constitutionalism/>

In some minimal sense of the term, a "constitution" consists of a set of rules or norms creating, structuring and defining the limits of, government power or authority. Understood in this way, all states have constitutions and all states are constitutional states.

Anything recognisable as a state must have some acknowledged means of constituting and specifying the limits (or lack thereof) placed upon the three basic forms of government power: legislative power (making new laws), executive power (implementing laws) and judicial power (adjudicating disputes under laws). Take the extreme case of an absolute monarch, Rex, who combines unlimited power in all three domains. If it is widely acknowledged that Rex has these powers, as well as the authority to exercise them at his pleasure, then the constitution of this state could be said to contain only one rule, which grants unlimited power to Rex. He is not *legally* answerable for the wisdom or morality of his decrees, nor is he bound by procedures, or any other kinds of limitations or requirements, in exercising his powers. Whatever he decrees is constitutionally valid.

When scholars talk of constitutionalism, however, they normally mean something that rules out Rex's case. They mean not only that there are rules creating legislative, executive and judicial powers, but that these rules impose limits on those powers. Often these limitations are in the form of individual or group rights against government, rights to things like free expression, association, equality and due process of law. But constitutional limits come in a variety of forms. They can concern such things as the *scope* of authority (e.g., in a federal system, provincial or state governments may have authority over health care and education while the federal government's jurisdiction extends to national defence and transportation); the *mechanisms* used in exercising the relevant power (e.g., procedural requirements governing the form and manner of legislation); and of course *civil rights* (e.g., in a Charter or Bill of Rights). Constitutionalism in this richer sense of the term is the idea that government can/should be limited in its powers and that its authority depends on its observing these limitations. In this richer sense of the term, Rex's society has not embraced constitutionalism because the rules defining his authority impose no constitutional limits.

A. ELEMENTS

Scholars have struggled to define the details of "constitutionalism." The attributes of rule of law, separation of powers, popular sovereignty and guarantee of rights are on most lists. Bhutan, a small nation located between China and India, has never had a constitution. In the following opinion piece, a critic of the Bhutan monarch's effort to create a constitution articulates many of the more specific elements that "constitutionalism" is thought to require.¹

1. The king unveiled the draft constitution in March, 2005, which has yet to be approved by national referendum.

Rakesh Chhetri
Bhutan's Sham Constitutionalism

Kathmandu Post, Jan. 30, 2002, available at
[http://www.nepalnews.com.np/contents/
englishdaily/ktmpost/2002/jan/
jan30/features.htm](http://www.nepalnews.com.np/contents/englishdaily/ktmpost/2002/jan/jan30/features.htm)

Authoritarian Bhutan does not have a Constitution. Under pressure from Bhutanese activists in exile and international community, the King has commissioned a Constitution drafting committee on November 30, 2001. It is yet another gimmick and 'window dressing' to show democratic credentials of the king to the international community. An authoritarian absolute monarch is hardly expected to write an effective representative democratic Constitution. It is important to discuss the principles of constitutionalism vis-a-vis the authoritarian rule. The basic principle of constitutionalism is to limit powers as against absolutism in Bhutan. A constitution is established to restrict the possibility of abuse of power by the ruler.

Constitution is the basic law and legal authority of a state. All laws are derived from it. It establishes a framework under which law is made and administered. It establishes the three organs of the government—legislature, to make laws; executive or the government to administer and execute the laws-and an independent judiciary to adjudicate on legal disputes between the citizens and the state, and among the citizens. In Bhutan's context, the king is the executive head of all the three organs of the government and exercises absolute power. He, and not the constitution, is the basis of legal authority.

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Constitutionalism: Constitutionalism means limited government. Most of the countries, even those having totalitarian and despotic governments, have constitutions. In a totalitarian and despotic system, constitution confers wider powers and discretion on the government to suppress and oppress their people. They cannot be accepted as a constitutional government. There is a fundamental difference between constitutions which exist at the pleasure of those in power, and constitutions which limit power—absolute power of an individual or a group. How could Bhutan ruled by an absolute monarch and governed by the 'rule of man' suddenly and voluntarily offer constitutionalism or rule of law? This only lends credence to the belief that Bhutan is trying to acquire a sham constitutionalism. True constitutionalism is not at all possible in Bhutan unless the king gives up his powers.

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Rule of law: The rule of law is essential for safeguarding civil liberties and for maintaining social order. The rule of law envisages that if our relationships with each other and with the state are governed by a set of rules, rather than by an individual or a group of individuals' we are less likely to fall victim to the authoritarian rule. The rule of law calls for both individuals and the government to submit to the law's supremacy. It is not possible to establish such rule of law in the present despotic Bhutan. Those close to the king will continue to exercise the law at their whims and fancies.

Democracy: Effective Constitutionalism is not at all possible without a system of representative democracy and a system of checks and balances on those exercising power... An elected government should be restricted by the constitution and the law. The government is also periodically accountable to the people and the people have the right to criticize. A representative democracy is incomplete without the existence of political parties, civil society, free and fair elections, freedom of expression and real decentralization of power. Thus, Bhutan must establish a representative democracy before drafting the Constitution. How could the constitution become functional without a representative democracy? We often hear the government hawks saying that 'people are not ready for democracy'. Democracy is a system, which offers preferences to people and they do not have to be 'ready' to accept a good system.

Checks and balances: A system of checks and balances checks both corruption as well as improper conduct of the political leaders. The law and the constitution exert various pressures on the representative government. The opposition party, parliament, media, civil society, pressure groups, trade unions, civil society, consumer forums etc., exercise substantial influence on the government, which direct and indirectly restrain government power. These are non-existent in Bhutan. Practice of holding regular elections imposes restrictions on the actions of the politicians and the government. Freedom of speech and expression is one of the most important restrictions. But there is no such freedom in Bhutan. Any criticism of the king and his government is considered treasonable offence. Bhutan must allow freedom of expression before embarking on sham constitutionalism and democracy...

Personal liberty: In a country like Bhutan, individuals live under perennial fear. A knock on the door can mean arrest and imprisonment without trial and even torture and death. People brought to trial are denied a fair hearing and charges often concern acts which are regarded as legitimate conduct in a democratic world. Bhutanese jails are occupied by prisoners of conscience and political dissidents, who are guilty of no criminal offence by democratic standards.

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No Nepali-speaking citizens, who comprise about 45 percent of Bhutan's population, has been included in the drafting Committee. The constitution will not represent the aspiration of all the sections of the Bhutanese society. . . . Unless, the king gives up his absolute powers, allow the political parties to function and pave the way for the establishment of a true liberal representative democracy, the so-called Constitution will have no meaning. It will be a sham constitution.

Notes

1–3. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803), Justice John Marshall states, “The government of the United States has been emphatically termed a government of laws, and not of men.” Does the above excerpt help you to see what a “government . . . of men” might mean? As to a more precise definition of the “rule of law,” see Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S.Cal. L. Rev. 1307, 1308–13 (2001) (“[T]here is no consensus on what ‘the rule of law’ stands for. . . . At a minimum . . . the rule of law requires fairly generalized rule through law: a substantial amount of legal predictability (through generally applicable, published and largely prospective laws); a significant separation between the legislative and the adjudicative function; and widespread adherence to the principle that no one is above the law.”); Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 8–9 (1997) (“[L]eading modern accounts generally emphasize five elements that constitute the Rule of Law. (1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it. (2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the most part. . . . (3) The third element is stability. . . . (4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens. (5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.”).

1–4. Why is separation of powers so important to make a constitution “real”? Could a king other than the one described as ruling Bhutan exist in a constitutional democracy?

1–5. What does popular sovereignty as a requirement of constitutionalism mean? Does it apply to the creation of the constitution itself, as the above writer implies? Consider that far fewer than half of the U.S. residents at the time were eligible to vote to ratify the Constitution. Or does popular sovereignty apply to the way current laws are enacted and applied? Does the U.S. constitutional structure meet the demands of popular sovereignty?

1–6. Protection of individual rights is widely viewed as an element necessary to make a constitution “real.” But constitutions vary widely in the rights protected. Are there some core individual rights that a constitution must protect to meet the demands of constitutionalism? Was the U.S. Constitution a “sham” before the effective date of the Bill of Rights?

1–7. In 2004, representatives of the nations of the European Union (EU) signed the Treaty establishing a Constitution for Europe. It was in the process of required ratification by member states when, in 2005, both French and Dutch voters rejected it in referendums. These rejections have stalled the ratification process by other nations. Whether a supranational organization such as the EU should or can have a “constitution” has been the subject of extensive debate. The European Union itself describes the document as follows:

A Constitution is a text which contains the fundamental rules of a State or a group of States. These rules answer several questions. How do the institutions work? How is the division of powers arranged? What means can be used to implement policies? What values are upheld? What are the citizens’ fundamental rights?

In actual fact, the European Constitution is both a treaty subject to the rules of international law and a Constitution in that it contains elements of a constitutional nature.

The European Constitution replaces the main existing Treaties [which establish the rules of the EU] with a single text.

The European Constitution does not replace the national Constitutions of the countries of Europe. It coexists with these Constitutions and has its own justification and its own autonomy. The European Constitution defines the contexts within which the European Union is competent to act. Europe also has a distinct institutional system (European Parliament, Council of Ministers, European Commission, Court of Justice of the European Union, etc.) . . .

The European Constitution is divided into 4 parts. Part I defines the values, objectives, powers, decision-making procedures and institutions of the European Union. It also describes the symbols, citizenship, democratic life and finances of the Union. Part II contains the “Charter of Fundamental Rights.” Part III describes the policies, the internal and external action, and the functioning of the European Union. Part IV contains general and final provisions, including the procedures for adopting and revising the constitution.

European Union, *A Constitution for Europe* 3–4 (2004), http://europa.eu.int/constitution/download/brochure_160904_en.pdf. Would the EU Constitution, if ratified, serve the purposes of a national constitution? How would it be different and how the same?

B. STRUCTURE

What should a constitution look like?

1. *Written vs. Unwritten*

Justice Marshall, again in *Marbury v. Madison*, 5 U.S. at 176–179, lauds the value of a “written” constitution. For a constitution to be “real,” is a writing required?

James T. McHugh
Comparative Constitutional Traditions

33 (2002)

The United States Constitution generally is cited as a “written” constitution. However, a more accurate and meaningful designation would be to refer to it as an “entrenched” constitution.

The concept of “entrenchment” refers not to the presence of a written document but to the manner in which it is created and maintained. Constitutions, by their nature, should not be subject to the degree of change possible through the normal legislative process. An entrenched document is created in a manner that imposes certain obstacles, even upon a general expression of the sovereign will, and its amendment or replacement is made equally difficult. Generally, an indication of some form of broad consensus is required to create or alter an entrenched constitutional document, thus raising its status above all other law within a society.

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Many observers commonly refer to the British constitutional tradition as a prime example of an “unwritten constitution.” However, that term is inaccurate. . . . [T]he British constitutional tradition can be identified in terms of numerous written documents, statutes, and other, positive sources that can be read and analyzed. . . .

The British constitutional tradition is more accurately identified as an “unentrenched” constitution. Its interpretation and application depend upon an ability to recognize its presence without the need for a formal document that defines it, succinctly. Furthermore, it is grounded upon expectations that are, while informal in appearance, just as powerful and binding as any formally entrenched constitutional legacy. . . .

One colloquial expression that may be found among some members of modern British society may be a reference to something that is, in practical terms, prohibited, simply because it is considered to be “not the done thing.” . . . An unentrenched

constitutional tradition absolutely depends upon that sort of attitude in order for it to function with any semblance of feasibility.

An unentrenched constitution does not have a formal structure. Its norms and principles are located in a diversity of sources that are well known to constitutional scholars, legal practitioners, and political elites.

Notes

1–8. Like England, New Zealand and Israel have so-called “unwritten” constitutions, although the Israeli Knesset is in the process of enacting a series of Basic Laws, which have constitutional stature. See New Zealand Parliament, *How Parliament Works; Our System of Government*, <http://www.parliament.govt.nz/en-NZ/HowPWorks/OurSystem/1/8/e/18e21b6e2651428bb64fab273c1c4d86.htm> (last visited Nov. 27, 2006) (“New Zealand has no single written constitution or any form of law that is higher than laws passed in Parliament. The rules about how our system of government works are contained in a number of Acts of Parliament, documents issued under the authority of the Queen, relevant English and United Kingdom Acts of Parliament, decisions of the court, and unwritten constitutional conventions.”); Daniel J. Elazar, *The Constitution of the State of Israel*, Jerusalem Center for Public Affairs, <http://www.jcpa.org/dje/articles/const-intro-93.htm> (last visited Nov. 27, 2006) (“Israel is, in fact, formally committed to the adoption of a written constitution. The first Knesset was elected as a constituent assembly and spent considerable time debating whether or not to write a constitution. The body was deadlocked as the religious parties opposed the idea of a constitution other than the Torah, while the left-wing socialists were equally opposed because they knew that any constitution that would emerge would not embrace their Marxian vision of what the new state should be. In a classic speech, David Ben-Gurion, Israel’s first prime minister, moved that preparation of a comprehensive constitution be set aside in favor of piecemeal development through enacting Basic Laws as consensus was achieved about each subject, that together would ultimately form a constitution. . . . The proposal for piecemeal writing of the constitution was accepted so every Knesset is also a constituent assembly that can enact Basic Laws, usually by a modest special majority of 61, namely, half plus one of its total membership. The Knesset deals with Basic Laws and other constitutional matters through a standing Constitutional, Legislative and Judicial Committee.”). Is there a difference between application of an “unwritten” constitution and the U.S. Constitution? Is there a significant unwritten background to the U.S. Constitution as well?

1–9. In constitutional democracies without one formal document, convention acts much like fundamental law, as the following excerpt explains.

Conventions that do not have the force of law

There is a strong element in British constitutional affairs of things happening just because this is the way they have always been done, or at least have been for a very long time. Tradition dictates that the State Opening of Parliament must begin with Black Rod, the monarch's messenger, having the door to the Commons chamber slammed in his face when he comes to summon members to the House of Lords. This symbolises the constitutional supremacy of the elected house, which is able to defy the wishes of peers.

The conventions also cover the code of conduct for ministers of the Crown, who are expected to conform to certain standards of behaviour. A secretary of state who has lost the confidence of the House, particularly of those on his or her own side, is expected to do the decent thing and resign. Similarly, a minister who is found to have told a deliberate untruth has to go. The conventions are not legally enforceable, but have been almost invariably observed throughout history.

ICONS, *A Portrait of England*, <http://www.icons.org.uk/theicons/collection/magna-carta/features/the-british-constitution-finished> (last visited Nov. 27, 2006). Are there conventions that apply to U.S. constitutional law? See Elazar, *supra* page 12 (“[I]n the American constitutional system, the conventions surrounding the Electoral College that morally bind presidential electors to follow the decision of the majority of the voters in their respective states are considered by Americans to be a matter of fundamental law, even though they are merely custom.”).

1–10. To the extent that democracies operate without a formal constitution, Parliament is supreme. See ICONS, *supra* page 13 (“[I]n England all executive power resides ultimately with Parliament. No other body is capable in practice of overruling the decisions of Parliament. Laws flow from Parliament, and the House of Lords, as well as being a legislative chamber, is also the highest court in the land. If your case has failed in a normal court of law, and then in the Appeal Court, you have the right finally to have it heard in the upper chamber of Parliament. Parliament has the right to summon anybody to appear before its committees, and acting in contempt of Parliament is a serious offence.”). Note that Justice Marshall in *Marbury v. Madison*, 5 U.S. at 178, suggested that such legislative supremacy “would subvert the very foundation of all written constitutions.” Does the situation in England prove him right or wrong?

1–11. Why haven't more countries followed the British model? The following excerpt offers some possibilities.

It is noteworthy that in none of the constitutional transformations of the last two decades has the transforming country adopted the British model of parliamentary supremacy coupled with the absence of a single written constitutional document. This model,

also represented in New Zealand and Israel but nowhere else among developed countries, has plainly fallen into some disrepute, but the reasons for this are unclear. One possibility is that the American model has won the day in the court of world constitutional opinion. Another is that a functioning government in the absence of a written constitution requires a degree of antecedent political stability that few, if any, transforming societies are likely to have. And still another is that transforming societies believe, perhaps correctly, that the very process of constitution-making serves important political functions independent of the product of that process.

Frederick Schauer, *The Causes and Consequences of Constitutional Form, Discussion Draft 9* n.8 (1998), <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ConstilReformSchauer.pdf>.

Why do you think countries opt for a formal, written constitution?

2. *Short or Long*

Herman Schwartz

Building Blocks for a Constitution

Issues of Democracy, 12, 13–14, March 2004,
<http://usinfo.state.gov/journals/itdhr/0304/rjde/rjde0304.pdf>

[Another] preliminary question [in drafting a constitution] is whether the constitution should be short or long. Many in the United States believe that because our short Constitution has lasted for more than 200 years, short constitutions are the best, even for nascent democracies. I do not share that view. U.S. constitutional law cannot be found within the texts of the thirty-four original and amending articles. It can only be found in the almost 540 volumes of decisions that a powerful and solidly established U.S. Supreme Court has issued over some 215 years. These decisions have established our most fundamental constitutional principles and rights, few of which can be discerned from the bare text of the U.S. Constitution. Democracies that are new, however, do not have the luxury of either the 215 years to develop these rights and few, if any, start out with a powerful judiciary. They can and should build on American and other experience, and write these fundamental rights and principles into their constitutions without having to wait for the courts.

This does not of course mean that the constitution should be very detailed. Constitutions that include too much can block the necessary flexibility. Deciding what should go into a constitution, what should be left to the legislature, and what should not be regulated at all, is one of the most basic and difficult initial questions.

Ter Ellingson
**The Nepal Constitution of 1990:
Preliminary Considerations**

Himalayan Res. Bull. (1991),
<http://inic.utexas.edu/asnic/countries/nepal/nepconstanalysis.html>

With its 133 articles, the Nepal constitution is considerably longer and more complex than the U.S. constitution (1789/1979), with its 7 articles and 26 amendments, and much shorter and simpler in structure than the Indian constitution (1950/1983) with its 395 articles, 10 schedules, and 3 appendices. It closely approximates the constitution of the People's Republic of China (1982/1987) in number of articles (the Chinese constitution has 138); but, owing to greater length and complexity of the articles, the Nepal constitution is perhaps two to three times longer than the Chinese. In overall comparison, the Nepal constitution falls fairly high on the scale of length and complexity, but below some others such as the Sri Lanka constitution (1978), to say nothing of the Indian constitution, which forms a widely-recognized class in itself.

Following a general rule to which the 1990 Nepal constitution is no exception, length and complexity increase with the amount of detail of administrative law and procedures superimposed on the more widespread and basic prescriptions of principles and governing structures shared by all constitutions. Thus, for example, not only do over half of the 24 articles of the section of the Nepal constitution which deal with the legislature (Part 8, Articles 44–67) concern matters of procedure, but also the entire section is followed by two more sections with an additional 16 articles (Parts 9–10, Articles 68–83) devoted entirely to procedural matters. While shorter constitutions leave administrative and procedural details to be worked out by means such as enacted laws, legal challenges and test cases, custom and consensus, longer constitutions with explicit prescriptions of such details embed them in the basic law of the land. It can be expected that in such cases, procedures are more difficult to adjust and adapt to changing circumstances, as a constitutional amendment would theoretically be required in every case. On the other hand, constitutional encoding of such details can provide safeguards against easy abuses and arbitrary changes in procedure at the administrative level. Whether this additional protection is worth the tradeoff in procedural rigidity and resistance to change remains to be seen.

Notes

1–12. What particular circumstances might dictate whether a constitution should be short or long? How long would you expect the new constitutions of Afghanistan or Iraq to be?

1–13. The Nepal constitution deals with procedures in detail. What circumstances might cause drafters to opt for this approach? How does the U.S. Constitution, though short, deal with procedure? Why?

III. AMENDMENT

Must a constitution be amendable? Or does it defeat the fundamental, entrenched quality of a constitution that a current majority can change it?

PRIVACY OF COMMUNICATIONS CASE [THE KLASS CASE]

30 Bverfge 1 (1970) (F.R.G. Fed. Const. Ct.)

Translated in Norman Dorsen et al., *Comparative Constitutionalism, Cases and Materials* 92 (2003)

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[Article 79(3) of the Basic Law provides: “Amendments to this Basic Law affecting the division of the Federation into Lander, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited. Article 1 declares human dignity to be inviolable and Article 20 sets out the elements that define Germany as “a democratic and social federal state.” A constitutional amendment to another article of the German Basic Law allowed for a broader range of secret surveillance of individuals than had previously been permitted and altered some aspects of judicial review.]

Judgement of the Second Senate:

. . . .

2.a. The purpose of Art. 79, par. 3, as a check on the legislator’s amending the Constitution is to prevent both abolition of the substance or basis of the existing constitutional order, by the formal legal means of amendment . . . and abuse of the Constitution to legalize a totalitarian regime. This provision thus prohibits a fundamental abandonment of the principles mentioned therein

b. . . . Restriction on the legislator’s amending the Constitution . . . must not, however, prevent the legislator from modifying by constitutional amendment even basic constitutional principles in a system-immune manner. From this point of view, the subsidiary principle derived from the rule of law [of which, some of its

specifics are set out in Art. 20], that a maximum of judicial protection must be available to the citizen, does not belong among the “principles laid down” in Art. 20

C. Art. 79, par. 3, does exempt from possible amendment the protection afforded by Art. 1 to the dignity of man. But whether a constitutional amendment violates human dignity can only be decided in the context of a specific situation

III. [The amendment] is compatible with Art. 79, par. 3

Dissenting opinion by Justices Geller, Dr. v. Schlabrendorff, and Prof. Dr. Rupp.

a) Art. 79, par. 3, declares inviolable certain principles laid down in the Constitution. The Basic Law also . . . limits constitutional amendments. Such an important, far-reaching, and exceptional provision must certainly not be interpreted in an extensive manner. But it would be a complete misunderstanding of its meaning to assume that its main purpose was only to prevent misuse of the formal legal means of a constitutional amendment to legitimize a totalitarian regime Art. 79, par. 3, means more: Certain fundamental decisions of the Basic Law maker are inviolable.

. . . .

[W]e conclude: the principle based upon Art. 1 that man must not be treated as a mere object of the state and that his rights must not summarily be disposed of by authorities and Art. 20’s constitutional call for a maximum of individual legal protection are among the “principles laid down in Arts. 1 and 20.” These two principles contain fundamental decisions of the Basic Law that decisively shape the image of a state based upon the rule of law Art. 79, par. 3, specifies that these constituent elements shall be irrevocable.

C) The constitutional amendment “affects” the principles laid down in Arts. 1 and 20.

The wording and meaning of Art. 79, par. 3, do not merely forbid complete abolition of all or one of the principles. The word “affect” means less The constituent elements are also . . . to be protected against a gradual process of disintegration.

Notes

1–14. In the *Klass* case, the German Constitutional Court recognized the possibility of an “unconstitutional constitutional amendment.” Is such a thing possible under the U.S. Constitution? Consider the following:

A constitution, among other things, is a document that is unusually difficult to change. Constitutionalism hinges upon a

distinction between the procedures governing ordinary legislation and the more onerous procedural hurdles that must be overcome in order to recast the ground rules of political life. To understand the amending power and its limits, therefore, is to understand the balance of rigidity and flexibility, or permanence and adaptability, that lies at the heart of constitutional government. . . .

. . . .
 A theory of the amending power must prove the difficult relationship between constitutional limits on power and the limbo-inhabiting power to revise those limits. . . .

Amendability suggests, to put it crudely, that basic rights are ultimately at the mercy of interest-group politics, if some arbitrary electoral threshold is surpassed and amenders play by the book. . . . Does Article V of the U.S. Constitution imply the triumph of procedure over substance, formal rules over moral norms? Are there no goods that are protected absolutely, rather than depending on a percentage of votes?

This question can be reformulated in practical terms. Does the political system of a specific country, say the United States or Germany, admit judicial review of procedurally correct constitutional amendments? The United States does not, on the ground that the constitution-remaking power is superior to the power of judicial review; but Germany does, on the ground that an amendment, even if passed in the formally correct manner, may be inconsistent with the core or fundamental features of the constitution. Germany entrenches certain rights in the sense that it places them beyond not only politics, but even the kind of revision represented by constitutional amendment.

The form taken by the amending power, in other words, sheds light on the variety of theories underlying different Liberal democracies. It helps us identify the broad norms and basic commitments behind the constitutional fine print. It helps explain how various framers conceived the relationship between procedure and substance, for instance, or the distinction between the core and the periphery of the constitutional order. In the American case, the amending power builds upon a democratic conception of popular sovereignty, of the authorizing democratic will that stands above the constitution and is able to change it in toto. This idea fits well with the self-conscious American revision of the English understanding of sovereignty. The German Constitution, while gesturing in the direction of popular sovereignty, declares many provisions unamendable, allowing the unelected court effectively to block certain attempts by the elected branches to change the constitution.

Stephen Holmes & Cass Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in *Responding to Imperfection* 275, 275–79 (Sanford Levinson ed., 1995). Why do you think the German Basic Law

makes some provisions unamendable? Is it worrisome that the U.S. Constitution, with two exceptions, does not?

1–15. Constitutions employ a broad range of amendment procedures, as the following excerpt explains.

Almost all constitutions specify procedures for rewriting or replacing the constitutional text, and they are almost always more stringent or demanding than ordinary legislative procedures. However, a wide range of formal amendment procedures potentially satisfy this condition, and, this allows the stringency of amendment processes to vary widely. More stringent amendment procedures help make constitutional commitments stable and thus credible. Such procedures, consequently, help to create a higher legal system that will stand above and limit ordinary legislation (Ferejohn 1997). Less stringent amendment procedures allow constitutional mistakes to be readily corrected and institutional experimentation to be more readily conducted.

The stringency of a formal amendment process reflects a commitment by constitutional designers to *entrench* certain rules and procedures or specific programs and prohibitions. Often formal amendment procedures are quite complex, and in many cases different methods of amendment are stipulated for different provisions in the constitution or allowed in more or less urgent times. Finland, for example, has a main procedure requiring delay and decision by two-thirds of the members of parliament (MPs), as well as an urgency procedure in which the threshold is increased to a five-sixths majority for adoption of an amendment via a single vote. Estonia also has an urgency procedure. All the Baltic States have tried to protect the most important articles of their constitutions by saying that they cannot be amended unless the voters agree (referendum). In Lithuania, no less than a qualified majority of three-fourths is needed to change the first article of the constitution.

Other constitutions rule out particular formal constitutional reforms altogether. For example, Article V of the U.S. Constitution says that “no state, without its Consent, shall be deprived of its equal Suffrage in the Senate.” In Germany, the federal system is protected against changes. Similarly, amendments of the basic principles of Articles 1 (on human dignity) and 20 (on basic principles of state order and the right to resist) are inadmissible (see Article 79). A recent example to the same effect is found in the constitutional framework of Bosnia–Herzegovina, based on the Dayton agreement. Paragraph 2 of Article X states that “No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.”

. . .

In general, it becomes more difficult to change a constitution as the number of actors and decision points increase, and as the required degree of consensus increases. To put it differently, the stability of a constitution depends to some extent on the number of veto players, that is, actors whose agreement is necessary for amending the constitution. . . .

Although amending processes are often strikingly complex, usually a relatively small set of devices are actually used in constitutions around the world. . . .

[C]onstitutional stability is typically achieved in two ways. First, some form of *repeated decisions or a series of decisions by multiple actors* may be used. The purpose of these devices could simply be delay in order to ensure that society acts on well-founded and stable expectations about the consequences of reform and sufficient time is provided at the preparatory stages of the decision process. Second, ratification may require a broader consensus than ordinary legislation. Consensus can be broadened through supermajority rules or by including extra-parliamentary actors, such as the voters by means of a referendum or an intervening election, or subnational units of the state by means of a decentralized ratification method in federal systems. In most constitutional systems the elected representatives of the citizenry play a prominent, but not necessarily exclusive, role in amendment processes.

With respect to the Nordic region, constitutional amendments require multiple decisions in parliament in all the countries but Norway. In Norway, it is sufficient to submit the constitutional amendment to parliament one year before the next election, and it is the task of the next parliament to decide on the proposal after the election. Denmark, Sweden, Finland, and Iceland require consent from two different parliaments, that is, those assembled before and after an election. The Baltic states require repeated decisions in parliament, but none of them demands that proposals must rest over an election (as in all the other countries [surveyed]). Denmark is the only Nordic country requiring direct voter involvement as part of any constitutional process, not only with respect to the most important changes.

Bicameral and presidential systems normally require separate approvals by both chambers of the legislature and/or by an independently elected president. Germany illustrates this possibility. The consent of both the Bundestag and the Bundesrat is needed, but not an intervening election. In the Netherlands, both chambers must agree to the constitutional amendment before and after an election, which requires a total of four separate decisions (or perhaps five, if the intervening election is counted). In several countries, separate constitutional referenda are also required, as in Denmark and Switzerland. In federal states, consent of regional

governments as in the United States, Canada, and Australia is also required for constitutional reform.

Bjonn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, in *Democratic Constitutional Design and Public Policy: Analysis and Evidence* 319, 325–31 (Roger D. Congleton and Birgitta Swedenborg eds., 2006).

IV. THE INFLUENCE OF THE UNITED STATES CONSTITUTION ON OTHER NATIONS' LAW

As the first, the U.S. Constitution has always been available as a model for others in drafting their constitutions. What prompts nations to accept or reject the American example?

Louis Henkin
A New Birth of Constitutionalism: Genetic Influences and Genetic Defaults

14 *Cardozo L. Rev.* 533, 536–39 (1993)

It is neither chauvinistic nor unduly self-congratulatory to claim for the United States major credit for establishing and spreading the constitutionalist ideology. Our Declaration of Independence includes perhaps the most famous articulation of the principles of popular sovereignty, of limited and accountable government, and of individual rights. The United States Constitution also provided essential precedents. Ours was the first written constitution—a prescriptive constitution that is supreme law, that governs the governors, that cannot be suspended, and that is not subject to derogations even in national emergency. The United States Constitution is difficult to amend. The United States, which sought an alternative to the Westminster parliamentary system, developed the “presidential system” as a model of democratic government. The United States adopted the first national, constitutional, lasting Bill of Rights. The United States established constitutional review by the judiciary.

The United States Constitution has been an inspiration to others. It spread the idea of inherent human rights, and its Bill of Rights served as a source and a model. The United States concepts of constitutional monitoring and constitutional review have been widely imitated. Above all, the United States has set an example of a successful “culture” of constitutionalism.

. . .

[But i]n light of contemporary constitutionalism, the system of government established by the United States Constitution was deficient in key respects. At its inception, the Constitution did not

reflect strong commitment to popular sovereignty, to democracy, or to representative government. “We the People” ordained and established the Constitution, but those who authorized and approved the Constitution represented a small fraction of the inhabitants of the United States. The system of government established by the Constitution was not democratic and not representative. Only one branch of the legislature was representative and was, therefore, called the House of Representatives. The Senate represented states, not people. The President represented no one. Even the House of Representatives was elected by a process that would not satisfy the requirements of constitutionalism today, since only a small proportion of the inhabitants voted for representatives. Women, slaves, most free blacks, and those who did not meet property qualifications did not vote for their representatives.

Today, the United States system would presumably pass the requirements of constitutionalism. Senators are elected by the citizens of their states. All citizens vote for the president in fact if not in theory or in form. As a result of imaginative constitutional construction of the Bill of Rights and of the Equal Protection Clause of the Fourteenth Amendment, all citizens now have the right to vote for representatives, for senators, and for the president.

The ideology of constitutionalism is not sufficiently developed or precise to determine whether our presidential system and our kind of bicameral legislature meet the requirements of “will of the people,” “democracy,” and “representative government.” Our jurisprudence has no coherent view of representative government, and the election of senators by states rather than according to population, and the system of electing the president, need justification and rationalization. As conceived, the presidency was perhaps too weak; now it has perhaps grown too strong. Surely, checks and balances are not working as planned. Does our system satisfy the demands of constitutionalism? Surely, constitutional text, and even the jurisprudence that emanates from the opinions of the Supreme Court, do not tell a whole, coherent constitutionalistic story.

Donald P. Kommers
**Comparative Constitutional Law:
Its Increasing Relevance**

in Defining the Field of Comparative Constitutional Law 61,
62–64 (Vicki Schultz & Mark Tushnet eds., 2002)

Writing in 1996, Giovanni Sartori reported that “[o]f the 170 or so written documents called constitutions in today’s world, more than half have been written since 1974,” not to mention the remodeling in recent decades of some post–1945 Western European constitutions. These new constitutions include those of Greece

(1975), Portugal (1976), Spain (1978), and Brazil (1988), along with Canada's Charter of Rights and Freedoms, adopted in 1982. Equally notable is the cascade of constitution-making that took place in post-Communist Eastern Europe. A comparison of these documents with the American Constitution reveals a common core of basic rights and liberties, both substantive and procedural. Although many of these constitutions are still on trial, especially those adopted in Eastern Europe's transitional democracies, they nevertheless incorporate an emerging constitutional morality in tension with certain basic precepts of American constitutionalism. Whether this should give Americans pause or disturb their self-certainty is an issue worthy of discussion and debate.

. . .

One finds that many of the constitutions drafted since 1974, particularly those of Eastern Europe and Latin America, not to mention Spain, Greece, Portugal, and South Africa, have been heavily influenced by Germany's Basic Law. Institutional structures such as dual executives, specialized constitutional courts (including abstract judicial review), and systems of proportional representation largely imitate their corresponding German models. They also imitate the Basic Law in combining rights with duties and in their incorporation of state objectives. It is no exaggeration to suggest that Germany's Basic Law is the preferred model of constitutional governance today, a reality that should prompt Americans to take stock of their constitution by assessing its capacity to meet the aspirations and needs of a society of a new millennium.

In recent decades, accordingly, the U.S. Constitution has served mainly as a negative model of constitutional governance around the world, not only with respect to governmental structures and relationships, but also . . . with respect to certain guaranteed rights. The positive influence of the United States on the development of constitutionalism abroad during the nineteenth century, especially in Latin America and Europe, has been well documented. American influence was also important in the reconstruction of democracy in Europe and Asia after World War II. Since then, however, the world's constitution makers have been disinclined to follow the lead of American constitutionalism. Rather, as noted, they are more inclined toward the model of constitutional governance and morality represented by Germany's Basic Law.

Three interrelated themes, conspicuous for their absence in the U.S. Constitution, distinguish many of the world's new constitutions. First, they unite liberal constitutionalism with a strong commitment to social solidarity. Second, they speak in the language of individual duties as well as rights. Finally, they impose on

government an obligation to foster and protect the dignity of persons. As with Germany's Basic Law, these constitutions celebrate negative liberties against government but qualify them with an overlay of positive rights and institutional guarantees that the state is required to honor, defend and promote.

Dullah Omar
**Constitutional Development:
The African Experience**

in Defining the Field of Comparative Constitutional Law 175,
183–85 (Vicki Schultz & Mark Tushnet eds., 2002)

In our [the drafters of South Africa's post-Apartheid constitution's] survey of constitutions and constitutional systems in different parts of the world, we learned quickly that we could not be mechanical and simply take over, willy-nilly, aspects of constitutions and systems from other parts of the world. Therefore, in our constitution we adopted measures that are not found in any other constitution.

Further, while we learned from many countries, we did not always follow them. Canada, for example, has no property clause in its Bill of Rights. We adopted a bill of rights that did have a property clause in our Interim Constitution, and our final constitution has a property clause. There is still a great deal of debate as to whether we made the right choice, but here it was not only a question of deliberate choice, but also of compromise.

In terms of the core values of our constitution, we had to take into account our history. The system of apartheid built up massive inequalities between the minority, which enjoyed privilege, and the overwhelming majority, which suffered at the hands of apartheid. Hence, an important component of the core values of our constitution is equality. Dignity assumes a central position in our constitution due to the many indignities suffered by our people over such a long period of time. Liberty is not the main core value of our constitution, rather it is equality and dignity. We deliberately chose the word "freedom" rather than liberty because of the connotation of liberty in the American constitution jurisprudence.

We also wanted to ensure that we distanced ourselves from the divisions of the past. Apartheid had divided our country. It fragmented our country and our people. Building the unity of our people, and therefore national unity, was an important component of the liberation struggle. And yet, due to the diversity of our people in terms of religion, language, and culture, we had to take care to develop a constitution that made it possible for us to build that nation, and, at the same time, to respect diversity. That is why our constitution includes a specific provision that the state shall set

up a special commission to protect and promote the rights of religious, linguistic, and cultural communities. Of course, our new democracy is only five years old, and it is too early to judge success. But thus far I think we have managed to protect both the right to be the same and the right to be different. We also borrowed from the Indian experience. There was great pressure that South Africa should be declared a religious state. But the view of the ANC prevailed that the state shall be a secular state: not an irreligious state, but a secular state with many religions. There we looked closely at the Indian Constitution and modeled ourselves somewhat on that experience.

Again, while building a nation and building the unity of a single country, we wanted to ensure that there was real democracy for our people and that there was an evolution of power. Therefore, we created nine provinces in our country. But to ensure that the apartheid-based racial fragmentation of the past did not persist, we looked at the way Germany dealt with its problem and modeled the second chamber of our Parliament after the German experience. We have a second chamber called the National Council of Provinces, to which each of the provinces sends ten delegates. There is a strong bond beginning to pull the provinces together, but at the same time each province is able to deal with matters of concern to it.

We also paid a lot of attention to what rights should be entrenched in our Bill of Rights. Our Bill of Rights contains civil and political rights as well as social and economic rights. Because of our history, we chose to include social and economic rights in the Bill of Rights itself, not just as guiding principles.

In sum, I think we benefited from a comparative approach to constitutional drafting. We learned a great deal from the U.S. experience—both positive and negative. For seventy-five years, the United States existed with both a Bill of Rights and slavery. Because we live in a globalized world, South Africa does not have the luxury of time to make our Bill of Rights work . . .

A classical liberal democratic constitutional framework is inadequate to address the problem of democratic transformation and the renewal of the African continent. Civil and political rights are very important, but they are not enough in the context of our continent. While it had the trappings of the Westminster type of constitution, independence ultimately turned out to mean very little for people in African countries. We need to deal with the legacy of the past and with a cultural of violence that is the result of the repression that went on for many hundreds of years. We need a developmental state in the countries of Africa. We need to promote nation-building and we need to address the massive in-

equalities and poverty in Africa, and the state has to play a role in this.

Notes

1–16. Do you think the system of government set out in the U.S. Constitution meets the demands of constitutionalism? What defects do you perceive in the U.S. constitutional guarantees of rule of law, separation of powers, popular sovereignty and individual rights? How might these defects be remedied?

1–17. Should the fact that nations are choosing the German over the U.S. constitutional model “give Americans pause or disturb their self-certainty”? What about the criticisms implicit in the South African Constitution’s drafters’ rejection of a U.S.-style Bill of Rights?