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# REFLECTIONS ON CONSTITUTION-MAKING

Laurence H. Tribe\*  
Thomas K. Landry\*\*

## I. INTRODUCTION: THE BREADTH AND LIMITS OF GENERALIZATION

We in the United States are flattered that our constitutional system has been regarded as a major source — although certainly not the *only* source — of inspiration and guidance by other nations involved in the daunting task of constitution-making. If we are able to be of any help at all (and only time will tell), it will only be because of the possibility of generalizations that span the gap between our nations: a possible commonality of institutions, aspirations, and politics. And yet we cannot blind ourselves to the disparities between us — to the inevitability that our constitution cannot be exported, and cannot be, part and parcel, your constitution.

One has to ask, faced with dramatically different cultures and histories, where does any fertile ground for generalization lie? This conference demonstrates that our two nations, the United States and South Africa, share an obvious commitment to constitutionalism. Constitutionalism has been defined simply as “a state of mind . . . in which politics must be conducted in accordance with standing rules or conventions, written or unwritten, that cannot be easily changed.”<sup>1</sup> In the context of a representative democracy, this means rules cannot be

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1. See Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 465 (1991) [hereinafter *Constitutionalism*].

changed by ordinary majoritarian politics, even as filtered through deliberative assemblies. A constitution, once established, is something of an immovable object. Consequently, the temptation to hammer out a constitutional accord as quickly as possible — to seize the historical moment — must be balanced against the somber reality that speed is not the only desideratum if the constitution is to be more than simply one stop among many in a series of radical transformations.

The assumption that a constitution ought to be enduring conceals an anterior question: why would we want to bind ourselves to something that is enduring — to “precommit” ourselves in a constitution? And why has that become so nearly axiomatic throughout the world? One answer is that we regard our “selves” as differentiated. We acknowledge that each of us has a better and worse nature — a “good side” and a “bad side” — and we want to put the “good side” in charge of our actions. So we have the better self, if we can arrange to bring it to the fore, make rules by which we then agree to live.<sup>2</sup> The peoples of the United States and South Africa share that aspiration, irrespective of ideology. As humans, we know we are fallible, and as people of good will, we want to forestall our failures. If we can arrange anything approximating philosopher John Rawls’s veil of ignorance about whose ox will be gored by the particular rules of the game that we put in place,<sup>3</sup> then perhaps we can succeed.

Another reason for precommitment is more pragmatic. Rules and presumptions structure and facilitate later decision-making, making life easier — whether the life is that of an individual or that of a government.<sup>4</sup> The peoples of the United States and South Africa no doubt share that motive as well.

Is it enough to posit a motive of “goodness” or “facilitation” as a

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2. JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 109 (1979) (imagining “a situation where several selves coexist simultaneously and hierarchically, representing the lowest, the intermediate and the highest forms of ethical life . . .”) [hereinafter *ULYSSES*].

3. JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1971).

4. *ULYSSES*, *supra* note 2, at 52 (stating that “‘automatic’ or ‘customary’ belief [permits one] to act rightly without having to mobilize at each instant the whole battery of arguments”). As Cass Sunstein points out, precommitments regarding institutional arrangements enable, rather than limit, self-government and democracy, because they eliminate the need to start from scratch on every decision-making occasion; “[l]ike the rules of grammar, such provisions set out the rules by which political discussion will occur, and in that sense free up the participants to conduct their discussions more easily.” Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 638 (1991).

basis for constitution-making? Professor Jon Elster made the point in a recent law review article that constitutions are usually adopted in response to severe injustices or widely perceived emergencies.<sup>5</sup> In fact, he argues that those are the only circumstances in which constitution-making is legitimate.<sup>6</sup>

Illustrations abound. Although there are differences of view about the need for radical change in 1787, the United States Constitution was urged upon Americans as "necessary . . . to rescue us from impending anarchy."<sup>7</sup> And as we speak, the United States Congress considers whether deficit spending — the multi-trillion dollar debt that is accumulating — has become so desperately uncontrollable that a balanced budget constitutional amendment is needed. The volatile state of affairs in South Africa makes a considerably more compelling case for constitutive action.<sup>8</sup> Yet, whether the issue is constitutional formation at an initial point of massive discontinuity or constitutional reformation at a later time of significant need for amendment, the nature of the event is essentially the same. Legitimate times of constitution-making in the United States or in South Africa share the status of critical and defining moments in our respective political and economic histories.

We also share a belief in the possibility of beneficent administration of government. To that end, there is a yearning for mechanical institutions that can guide and control our political energies. In that sense,

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5. See *Constitutionalism*, *supra* note 1, at 477 (explaining that constitution-makers are influenced more by past disasters than by past successes).

6. ULYSSES, *supra* note 1, at 94-95.

7. THE FEDERALIST NO. 15, at 105-06 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

8. South Africa's exigencies arguably surpass those in America's history (except for Reconstruction). Historian Gordon Wood casts the gravamens of American revolutionary discontent as trivial by contemporaneous standards of political injustice, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 3-4 (1969), and opponents of the Constitution's ratification doubted the urgency of the situation. See e.g., *The Federal Farmer No. 1*, reprinted in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 257, 258 (Ralph Ketcham ed., 1986) ("If we remain cool and temperate, we are in no immediate danger of any commotions; we are in a state of perfect peace, and in no danger of invasions; the state governments are in the full exercise of their powers; and our governments answer all present exigencies, except the regulation of trade, securing credit, in some cases, and providing for the interest, in some instances, of the public debts; and whether we adopt a change, three or nine months hence, can make but little odds with the private circumstances of individuals; their happiness and prosperity, after all, depend principally upon their own exertions.").

engaging in constitution-making is something like working in the research and development department of a political science enterprise. Drafters conceive their task to be that of engineering the political technology that will make society stronger, more coherent, more efficient, and more just. Those design specifications are given, and appropriate institutions are invented. Viewed in that light, a constitution might appear to be complete when it rolls off the assembly line.

Such instrumental constitutions are viewed by a small minority as the only legitimate variety.<sup>9</sup> But of course we know that is not the case. A better characterization of the process would additionally recognize its forward-looking nature: its *enabling* as well as *institutionalizing* components. Drafting a constitution offers not just an opportunity to design successful mechanisms for righting past wrongs, but it also offers a glimmer of hope to compose the atmosphere in which the politics of the future will be conducted. Thus, drafters stand in a daunting circumstance. Unlike many engineers, constitutional drafters need a truly prophetic capacity to conceive the world in "virtual" terms: to imagine a reality that has not yet arrived; to imagine the problems that will be faced by future generations; and to equip those generations for a wise and effective politics.

This may sound quite oracular, and indeed it seems all but impossible to predict problems that have not arisen, and then to design solutions to them. The saving grace is that a constitution worthy of being deemed a constitutive document will incorporate mechanisms for its own adaptation, so that when the foresight of the founders' prophecy is not equal to the task, the machine will not just dissolve of its own heat. There are several mechanisms apart from enabling the technocratic institutions of modern democracy, by which a constitution *can* prepare future generations for the problems they will confront.

First, a constitution has symbolic value. The portrait of a society painted by its constitution can help bring about the social cohesion that will be needed for any constitutional order to endure. In recording constitutional rules, whether they are rules for party representation in the legislature or rules about positive rights, there is more at stake than designing institutions. *Principles* are being affirmed, principles that may not yet be truly reflective of the society in question. The words "We the

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9. JAMES M. BUCHANAN, FREEDOM IN CONSTITUTIONAL CONTRACT 289-92 (1977) (arguing that a constitution must only establish pre-political constraints in which politics is to occur, and must not be seen as teleological or in pursuit of a social good).

People" with which the United States Constitution begins, say more than any other three words — or thirty — in the entire document. They are not operative words, they delegate no power, they establish no structure, but they are empowering and ennobling, and they say a great deal to people about the nature of the society that the constitution aspires to describe.

Second, a constitution can serve as a source (however imperfect) of security and philosophical identity for a great many citizens having plural and even conflicting views and desires. The constitution subjects those who are politically "in" at any given moment, not just in the majoritarian sense but also in the sense of power and dominance, to criticism from those who are "out," while simultaneously communicating to all their common national membership. That kind of constitution need not, and perhaps cannot, have an unmistakable coherence. It is the pursuit of an illusion to seek, in a constitution, a music of the spheres in which all parts are in complete harmony. In fact, complete constitutional consistency would be surprising, even troubling, in a diverse society.

Finally, a constitution can allocate constitutive power — power to shape and reshape political and social reality — in ways that crucially affect the relationship between the founding generation and later generations. We cannot expect, or accept, that a founding generation will have determined for all posterity the specific meaning of all values worth recognizing as constitutional.

Precommitment, response to urgency, instrumentalism, and preparation of posterity constitute the grounds which our two nations no doubt share, and which make comparison and borrowing fruitful. But none of this is to deny that your historical situation is unique. The specific institutions you will choose must reflect your own best judgment of your governmental needs, and both your judgment and your needs are obviously different from ours. The symbols you invoke and induce will be unique to your social identity, which is different from ours. And the borders of your toleration — while one hopes they are as broad and progressive as possible — may not coincide with ours. In short, a constitution is historically and culturally contingent, and your history and culture are certainly not ours.

With that fundamental caveat in mind, we want to focus on several axes that are unavoidable in any act of constitution-making: process, structure, substance, and compromise. Each of these has its own inertia, its own insatiability and resistance to arrest. And yet it is the responsibility of the constitutional drafter, and later of those who construe and interpret the text, to tame the unruly absolutism of each of those proper-

ties.

## II. PROCESS

Process is certainly important. Those familiar with John Ely's now classic book, *Democracy and Distrust*,<sup>10</sup> know the merits of attending to the role of process when looking at constitutional matters. More deeply than that, the pages of American history tell a tale in which process can directly determine political life. The heterogeneity of the nineteen parties of CODESA<sup>11</sup> can be contrasted with the homogeneity of those who wrote the Constitution of 1787, but it must be recognized that ours was an artificially created homogeneity. The Constitution was not being written only for white, freeholding, property-owning males, yet they were the only ones consulted. Should we then be surprised that the exclusion of women and blacks from formal participation and representation in our processes of constitution-making coincided with the subjugation of those groups for much of the ensuing two centuries? Hardly. It is not at all a coincidence; indeed, we have paid an enormous price for the flawed process with which we began. The connections between form and substance are too strong for anyone to deny the importance of process, or to ignore its susceptibility to manipulation.

In spite of the gravity of process considerations — or perhaps exactly because of the extreme consequences of rigid processes — there are occasions when suspension of the “rules” is not tantamount to exiting the game. The weight of process considerations is contingent upon their relationship to the rest of the universe of constitutional values; their gravity is relative. In the United States, for example, in a death penalty case from the State of Virginia,<sup>12</sup> our Supreme Court was recently faced with the question of whether the Constitution’s “fundamental precepts of liberty and fairness”<sup>13</sup> overrode the state’s interest in adhering to a rigid procedural filing deadline. The question can be put in terms of which competing constitutional value had greater “mass” than the other, and thus which commanded the orbit of the other. The Supreme Court concluded that constitutional principles of federalism and finality required that the deadline be strictly enforced,<sup>14</sup> and the man was executed. But the Court need not have reached that conclusion.

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10. JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980).

11. CODESA is the acronym for the Convention for a Democratic South Africa.

12. *Coleman v. Thompson*, 111 S. Ct. 2546 (1991).

13. *Id.* at 2571 (Blackmun, J. dissenting).

14. *Id.* at 2546.

Missing a filing deadline — a procedural irregularity — is not always a compelling argument when measured against other values. Evidently, then, process is important, but not *all*-important.

As further evidence that process is not an absolute value, consider the fact that an existing generation will go only so far in continuing along the same constitutional path traversed by preceding generations. Jon Elster has noted that, in a democracy, each generation struggles to bind its successors — without being bound by its predecessors.<sup>15</sup> This is especially true in the realm of constitutional law, where existing majorities are thwarted by the supermajority requirement of past constitutional assemblies. Should the values expressed by the founding generation be alterable by later generations in the name of changed circumstances? If so, how? Those are among the enduring questions that must be addressed by any constitutional order.

The United States, for what it's worth, has in fact accepted significant shifts in constitutional law unaccompanied by formal amendment. Two types of "informal shifts" can be identified. First is a mode of adjustment in which the nation's judiciary revises its interpretations of the Constitution to fit changed conditions. Second is a mode of amendment in which an intense democratic majority — but not the officially required supermajority — asserts its constitutional will.

Some of the most imaginative work being done in America in the theory of constitution-making is by two professors at Yale: Bruce Ackerman and Akhil Amar. Ackerman, in particular, describes the judicial method as one of "intergenerational synthesis,"<sup>16</sup> in which the constitutional values of one generation are blended with those of another, with the possible result that an interpretation of the founding document that would have been radically unacceptable to the founding generation is legitimized by the altered value structure of those who come later.

It is not an unmixed blessing. Many who praised the regime of judicial activism during the tenure of Chief Justice Earl Warren now lament the activism of Chief Justice William Rehnquist and some of his judicial allies. Ample other episodes reveal dark days inaugurated by Supreme Court activity. If South Africa intends to rely upon a relatively independent judiciary for its authoritative constitutional interpretations — and it appears that it does — then it will want to consider how much responsibility those judges ought to be given for recasting the meaning of

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15. See ULYSSES, *supra* note 2, at 94 (noting the "paradox[es] of democracy").

16. BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 113 (1991) [hereinafter FOUNDATIONS].



the constitution to meet the conditions of the day. Is "intergenerational synthesis" an acceptable mode of constitutional adaptation for South Africa? That is necessarily a question to ponder; it has no single "right answer."

Some changes, though, are too momentous for any truly judicial method, perhaps requiring textual amendments that a judiciary could not successfully carry out by even the most extreme activism. The American experience, interestingly, shows that textual amendments can be effected in ways that people come to accept as legitimate, in spite of a failure to meet the formal procedural requirements — the filing deadline, as it were. An illustration includes the powerful (and perhaps compelling) argument that the United States Constitution of 1787 was itself produced in violation of the agreed-upon procedures for amending the existing Articles of Confederation<sup>17</sup> (which were the basis for our Union from 1781 until the adoption of the Constitution). There is no doubt that if we seek to trace the legitimacy of the 1787 Constitution to some anterior document, we will hit a dead end.

Similar arguments have been made regarding the Fourteenth<sup>18</sup> and Fifteenth<sup>19</sup> Amendments to the Constitution — amendments that were passed after our Civil War and that were, the more closely one looks, approved in a way that seems suspect in terms of the formal rules of ratification under Article V<sup>20</sup> of our Constitution. That these arguments are available is noteworthy, but not a cause for anguish. Few people seriously entertain the prospect of devoting themselves to the illegality of the United States Constitution rather than to its validity.

What does this say about the significance of process? Perhaps one can justify disregard for formal procedures in special circumstances, but how can one discern when those circumstances are present? Supreme Court Justice Potter Stewart once said of hardcore pornography that he could not define it, but "I know it when I see it."<sup>21</sup> It may just be that we recognize genuine constitutional moments when we see them, and that for reasons perhaps defying articulation, what we did in 1787 and what we did after the Civil War were both legitimate.

Disregard for formal procedures probably has something to do with the *intensity*, the depth of purpose and meaning, that we attribute to

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17. ARTS. OF CONFEDERATION (1781).

18. U.S. CONST. amend. XIV.

19. U.S. CONST. amend. XV.

20. U.S. CONST. art. V.

21. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

constitutional actors on certain occasions. Intensity is an ideal whose time, some say, can never come, because there is no way of measuring it.<sup>22</sup> Ideally, ordinary democratic lawmaking might account for the fact that some individuals care a great deal about a particular issue while others are ambivalent. But everyone is given an equal say at the ballot box because we do not know how to factor intensity into voting. And so it is with the intergenerational conflict that characterizes constitutional amendment. Even simple majority amendment of the Constitution might be acceptable, if it were assured to be the product of a thoughtfully intense group. But we do not know how to assure such thoughtful intensity. In order to prevent half-hearted democratic majorities from casually rewriting the Constitution, we employ procedural devices that filter out nearly all of the proposals for basic change and admit only those with the most extraordinary support.

Such procedural devices are among the more shallowly contrived provisions of our Constitution. The Framers did not enjoy the company of public choice econometricians calculating the mathematical percentage of a sure-fire Condorcet winner.<sup>23</sup> So we must realize that historical contingency — the finiteness of the Framers' knowledge and effort — plays a key role in the enforcement of amendment processes. We will not turn our backs on the Fourteenth<sup>24</sup> and Fifteenth<sup>25</sup> Amendments, or indeed the whole Constitution, because of procedural defects. And our reasons are more than pragmatic. If the amendment process of Article V<sup>26</sup> was ignored in 1868, that was not because it was procedurally unadministrable, but because constitutive values of the moment commanded greater respect. We are comfortable with treating the Reconstruction Amendments<sup>27</sup> as a constitutive act, although we may be unable to grasp our reasons with the precision afforded by the rules of a formal amendment process.

And yet even the certainty of an amendment that has been processed

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22. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 118-19 (1956) (discussing the inability to quantitatively or qualitatively measure intensity).

23. See FOUNDATIONS, *supra* note 15, at 357 n.13 (citing Andrew Caplin & Barry Nalebuff, 64% Majority Rule, 56 ECONOMETRICA 787 (1988), for a proposition that a 64% vote signifies a Condorcet-winner, i.e., a sure majority winner). See also *Constitutionalism*, *supra* note 1, at 470 (finding that amendment procedures should be designed to have optimal rigidity).

24. U.S. CONST. amend. XIV.

25. U.S. CONST. amend. XV.

26. U.S. CONST. art. V.

27. U.S. CONST. amends. XIV, XV.

in the most regular and formally documented way is elusive. The twenty-seventh<sup>28</sup> and most recent amendment to the United States Constitution — an amendment barring midterm congressional pay raises — was passed in a quite regular manner. James Madison proposed it in 1789, a group of states initially ratified it, and then it was forgotten for some time. A couple more ratifications sputtered in over the next two centuries, but the amendment did not gain the approval of the required three-quarters of States until May of 1992.<sup>29</sup> The amendment certainly met all of the formal requirements of constitutional ratification, but some questioned its legitimacy, urging among other things that it flunked the "I know it when I see it" test — that an amendment ratified in fits and starts over two centuries is not reflective of a sufficiently genuine contemporaneous consensus. To the skeptics' dismay, and for reasons probably more political than theoretical, the Congress of the United States decided to act as though the amendment were valid, and its place in the Constitution now appears to be all but universally conceded. That is just one of a myriad of interpretive issues surrounding the processes of constitution-making and constitution amending that come with the territory of trying to solidify in mere words the legal architecture of a political society.

For the moment, what we want to convey primarily is a sense that an amendment procedure is more than a mechanism — more than an architecture. It carries substantive meaning in its *de facto* definition of the relationship between an enacting generation and succeeding generations. Together with the devices for allocating interpretive authority among the divisions and branches of government, an amendment process — partly formal, partly informal — delimits a constitution's capacity to evolve with the needs of its citizens, and thus defines how tightly one generation claims to bind the next.

Thus process is important . . . but not always. It competes with other constitutional values, whether in the life of a single prisoner bound for electrocution or in the life of an entire nation. Just remember that processes are not established for their own sake; there is constitutional marrow within the bones of procedure.

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28. U.S. CONST. amend. XXVII.

29. For details, see Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 531-42 (1992).

## III. STRUCTURE

Structure is of course important as well. The design of institutions that will meet the needs of a nation is of central concern to constitutional drafters. Effectiveness of power — the capacity to coordinate in a complicated and dangerous world — must be carefully balanced against ill-advised concentrations of power, lest public office become a tyrant's perch. These issues of paralysis and efficacy will need to be addressed, for example, in South Africa's deliberation over parliamentary versus presidential government. One of the missions of any constitution is the establishment of governmental machinery that will avoid tyranny and usurpation on the one hand and deadlock and chaos on the other.<sup>30</sup>

The drafters of the American Constitution showed real ingenuity in that regard, but they did have a significant amount of groundwork already laid for them. There is a demonstrable genealogical relationship between our Constitution's power structure and the work of political thinkers like Montesquieu.<sup>31</sup> There are also connections to developments in behavioral sciences such as psychology. Again, Jon Elster's work is instructive. He explains the Cartesian idea that "[t]he will may overcome the passions through sheer will-power, but also by using the indirect strategy of pitting the passions against each other."<sup>32</sup> And as the political economist Albert O. Hirschman has documented, there was "widespread use of this notion in the seventeenth century."<sup>33</sup> Perhaps James Madison has been given a bit too much credit, although surely the application of these ideas to constitutional structure is an act of genius. Separation and division of powers remains of vital importance to our sense of structured liberty in the United States.<sup>34</sup>

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30. *Constitutionalism*, *supra* note 1, at 469 n.52.

31. See ANNE M. COHLER, *MONTESQUIEU'S COMPARATIVE POLITICS AND THE SPIRIT OF AMERICAN CONSTITUTIONALISM* 1 (1988) (discussing Montesquieu's work as one of the inspirations for the form and structure of the United States Constitution).

32. ULYSSES, *supra* note 2, at 55.

33. ULYSSES, *supra* note 2, at 55 (citing ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* 20 (1971)).

34. Bruce Ackerman's work bristles with an aggressive deployment of separation of powers ideas. Thus he finds that "we must systematically reject the idea that when Congress (or the President or the Court) speaks during periods of normal politics, we can hear the *genuine* voice of the American people." Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1027 (1984). Separation of powers ideas are also at the heart of his theory that constitutional amendments can occur outside the strictures of Article V. See FOUNDATIONS, *supra* note 15, at 45-46

While constitutional structure is important, not all important structures need to be embedded in a constitution. Political parties, for example, long played a central role in the operation of government in the United States (though less for us now than for South Africa). In the modern United States, interest groups, political action committees and "think tanks" throw their weight onto the scales. None of these organizations finds its origin in our Constitution, and none is given a constitutionally designated role. In fact, the only non-governmental institutions identified in the Constitution are Indian tribes, the press, and religion (if one thinks of religion as an institution). Yet our Constitution presupposes and protects the autonomous kinds of activity that various associations like political parties undertake. And if we cast our nets a little wider, we will find a plethora of extra-governmental institutions and structures that are vital in the fabric of American political life, but are not explicitly written into our Constitution.

The invisibility of certain institutions in the United States Constitution does not mean that South Africa should follow suit. American constitutional lawyers are comfortable with their own set of distinctions: separated and divided powers, states and nation. We are prone to skepticism about a constitution in which, for example, political parties are expressly recognized — thinking that it is one thing to have geographically-based representation and quite another to have ideologically-based representation. Such skepticism should be met with skepticism. The enormous tension that ideological representation would engender in our system because of conceptions of free speech and political freedom does not necessarily translate into an unacceptable tension for South Africa. As suggested earlier, complete coherence is an elusive and perhaps unattainable goal in any constitution.

The invisible protection extended by the United States Constitution creates a regime in which voluntary behavior is put at a premium. The Constitution thus serves not so much as a "four-point" or "five-year" plan, but as a source of inspiration — a symbol — in whose image we are exhorted voluntarily to construct ourselves. Such a constitution is only partially constitutive. The answers are not all there. The Constitution is more a set of *intimations* than it is a set of *instructions*. Although it edifies us in many ways, it does not program us.

Again, though, it is not clear that the Constitution, with its symbolic

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(stating that "the Reconstruction Republicans transformed the national *separation of powers* into an alternative to the Federalist system of constitutional revision that had been based exclusively on the *division of powers* between state and nation").

role that has prompted some to declare the existence of an American "civil religion,"<sup>35</sup> needs to be replicated in South Africa. Those who define their professional identity in terms of constitutional law tend to think that constitutions are all-important; the very word "constitution" commands a certain sense of magnitude and respect. But it may be that the tremendous symbolic freight that we attach to our constitution is a bit too great a burden for South Africa to bear in this critical moment. It was suggested earlier that the counsel of rapidity should be accepted with caution, but now consider a caution against that caution. Seizing the moment has its value, and an attempt to move forward with the full weight of history overhead may be paralyzing. It is not so clear that mistakes made and compromises struck need be fatal at this stage.

So structure is important, but not all-important. Individuals are resourceful; personality and character count for a significant amount. Useful structures may well be created independently even if they are not "given" by a constitution. The economic philosophy of the Constitution is basically one of free markets and incentives for useful private activity,<sup>36</sup> and the same can be said of its political philosophy.<sup>37</sup> Although a constitution can guide us toward acting with greater responsibility and fuller humanity, we can be left in many ways to our own devices.

#### IV. SUBSTANCE

Substance, too, is surely important. Drafters need to assume a kind of self-referential position — to step outside their work and ask: "What signals does this document send to future generations, beyond the literal shackles with which we bind them? What are the appropriate subjects of compromise?" Thankfully, the United States Constitution in its present form can be reflected upon by more of us with more respect than its original form would have permitted. The Constitution's principles of liberty, equality, and democracy have come to serve us well beyond the forum of the courtroom, reaching into the courtyards and classrooms to

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35. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 9-17 (1988).

36. The takings clause, due process clauses, and the patent and copyright clause are among the indicators of an underlying socioeconomic ideology. U.S. CONST. amend. V; U.S. CONST. amends. V, XIV; U.S. CONST. art. I, § 8, cl. 8. The Constitution may not "enact Mr. Herbert Spencer's Social Statics," *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), but nor would its present form permit the elimination of private property.

37. The system of free speech and association establishes the foundation of a privately ordered politics.

construct our shared vision of what it means to be an American, and even of what it means to be fully human.

The content of a constitution is likely to have an enormous impact in shaping the lives and character of the people who live under it, and who take steps to affirm it as their own even in the remarkable circumstance of their disagreement with what it requires of them. Realizing this, the task of drafting takes on especially demanding proportions, as drafters become responsible for a nation's capacity to engage in a complex constitutional give-and-take: to give through symbolism a shared sense of value to an enduring stream of diverse citizens, and to take from them an honest allegiance.

The question is, how can a document successfully claim the allegiance of every citizen? Is that not an attempt to be all things to all people? Certainly there are some areas that cannot be compromised or left ambiguous. A constitution cannot be neutral on basic questions of good and evil. The compromises that originally marred the Constitution have cast a dark shadow of shame over American history, and it is an imponderable question whether those compromises were inevitable or justified.

At the same time, drafters cannot hope to be too precise in defining the limits of substantive protection. The constitutional enterprise must be so embracing and enfolding — not encircling — that no one is excluded from the beginning. We in America made that mistake at our inception, and we continue to make it in many subtle ways.

Consider the issue of abortion. In a 1990 book on that volatile "clash of absolutes," one of us argued that requiring a woman to remain pregnant against her will denies her the "equal protection of the laws" guaranteed to all by the Fourteenth Amendment,<sup>38</sup> even if the fetus is regarded as a person.<sup>39</sup> If this is so, then perhaps the United States Supreme Court's 1973 opinion in *Roe v. Wade*,<sup>40</sup> by gratuitously insisting that the fetus *cannot* be deemed a "person,"<sup>41</sup> unnecessarily alienated those for whom the contrary view represents a bedrock article of faith. Perhaps, as Yale Law School Dean Guido Calabresi has suggested, the Supreme Court's opinion in *Roe* needlessly said to a large group of our people, "[y]our metaphysics are not part of *our* Constitution."<sup>42</sup> We

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38. LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 98 (1990) [hereinafter TRIBE, *ABSOLUTES*].

39. *Id.*

40. *Roe v. Wade*, 410 U.S. 113 (1973).

41. *Id.* at 158.

42. GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW* 95 (1985).

agree with Calabresi that "[i]n such situations it is far better to accept our complex and conflicting metaphysics for what they are. It is essential to recognize that *all* of them are part of our fundamental law and significant to it."<sup>43</sup> The Supreme Court could and probably should have said in *Roe v. Wade*: "The United States Constitution takes no position on the personhood of the fetus, and also takes no position on the question of when human life begins. Whether or not the fetus is a person, however, our Constitution forbids compelling a woman to carry it for nine months and to become a mother."<sup>44</sup>

This is not a minor semantic matter. It is not simply a matter of grace and tact but a matter of basic respect and inclusion for a constitution to recognize its citizens' desires as credible but insufficient rather than marking those citizens as outsiders whose claims have no relation to the constitutional order.<sup>45</sup> A promising approach to constitutional substance would therefore establish a comprehensive collection of substantive ideals — a fund of values — that can be drawn upon in the politics of the future. And it would not hurt to state, as our forebears did in the Ninth Amendment<sup>46</sup> to the United States Constitution, that the collection is not a closed set.<sup>47</sup>

The Constitution has had its successes as well as its failures in this respect. Citizens engaged in political discourse have been able to present conflicting arguments, all cogently rooted in constitutional values. For example, the principle of equality that prevailed in the Supreme Court's landmark 1954 decision finding racial segregation in public schools to be unconstitutional<sup>48</sup> was criticized even by many moderates as violating supposedly "neutral" principles of liberty and freedom of association that were said to protect the students who did not wish to be racially integrated.<sup>49</sup> Of course we think that the Court's desegregation decision

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43. *Id.* at 97.

44. See *TRIBE, ABSOLUTES*, *supra* note 37, at 135.

45. See Calabresi, *supra* note 41, at 98 ("[A] statement such as, 'Your views matter, and are worthy. They are part of our law and on many occasions will be upheld. On *this* occasion, however, they do not prevail,' is much less emarginating, and more hopeful for the future of the society, than a statement that our law excludes your metaphysics as worthless.").

46. U.S. CONST. amend. IX.

47. See *id.* (stating that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people").

48. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

49. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959).



represents the better argument, but that is not what is relevant here. Rather, the important issue is that the Constitution makes room for all claims that are dear to the hearts of its citizens, even as it declares a winner and a loser in a particular dispute.

Even unsuccessful results can bear the seeds of respect and inclusion. Several years ago the Supreme Court refused, by a 5-4 margin, to recognize a right to sexual liberty claimed in response to prosecution under an anti-sodomy statute.<sup>50</sup> It was a bittersweet loss for the homosexual petitioner in that case, and for others who identify with him. To have come so close was a clear disappointment: one of the Justices — Lewis Powell — later stated publicly that he had changed his mind, and should have cast the deciding vote in favor of the petitioner.<sup>51</sup> But it was also an affirmation of the progress that has been and will be made in gaining recognition. None of this would have been possible with a constitution set in stone.

Thus, it is important to state your principles, and state them broadly. An inclusive and preferably open-ended body of substantive ideals communicates respect for the ideals of all, and promises that recognition in individual cases, if not yet realized, is never foreclosed. Progress of ideals over the generations does not have to mean progressive estrangement from the constitution. No constitution will magically bring people together and eliminate deep differences, but it can orchestrate, manage and absorb conflict, so that conflict is played out under conditions where *all* of the participants can continue to bear devotion to the larger constitutional order. If the constitution becomes a structure for identifying a certain perspective on the world as legitimate and all else as illegitimate, it becomes a source of oppression rather than a creative device of aspiration.

Such a comprehensive fund of values may seem incoherent and likely to engender confusion and even dismay. But that need not be so. As individuals, we regard ourselves as more or less coherent, although we are each in truth, a constellation of conflicting selves. When a person says "I am of two minds" (or ten minds) about something, that reflects the deep truth that we are all ultimately divided about many of the issues that divide a society. If we, as individuals, can nonetheless manage to stumble our way through life openly acknowledging our internal divisions without creating an artificial pastiche of homogeneity and

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50. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

51. Barry Friedman, *How a Supreme Court Vote Set Back Gay Rights*, S.F. CHRON., Jan. 14, 1991, at A17.

uniformity about our personalities, then it should come as no surprise that an entire society might do the same. A document that can be used as a fund of ideals for criticism of social, political or economic conditions — no matter what social attitudes prevail, no matter what party holds office, and no matter who wields economic power — is not incoherent. It is reality. It is constitutive.<sup>52</sup> Substance is important, but not all-important.

## V. COMPROMISE

Compromise, too, is important. Some compromises will prove to be of great utility and long-term viability. Others will prove the dangers of sell-out and the short-sightedness of expediency.

Marks of deep compromise pervade the United States Constitution. The states of the United States agreed to divide the houses of Congress so that one house would be represented according to population (giving populous states greater representation) and the other house would be represented according to states<sup>53</sup> (giving all states equal representation). That bargain has by and large proved acceptable, and was absolutely necessary to the smaller states' decision to join the union. Yet the same Constitution is shamed to recite forever two of the great Faustian bargains of American history: that slave importation be protected until the year 1808,<sup>54</sup> and that each slave count as but three-fifths of a person in determining a state's congressional representation.<sup>55</sup>

One moral of the story on compromise is simply that there are such things as morals. Compromise, then, is important — but not *all*-important; the inertia of deal-making must not obscure the nature of the deal. Another moral of the story is that the constitutional assembly must be organized in a manner that gives representation to all affected parties. This has been said before, but it bears repeated emphasis because the American experience shows so vividly the bitter fruit of exclusion. The result for us was a Constitution that to this day symbolizes the depth of

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52. See Laurence H. Tribe, *The Idea of a Constitution: A Metaphor-morphosis*, 37 J. LEGAL EDUC. 170, 173 (1987) (stating that "the Constitution's greatness is in large measure its resistance to ideological reductionism—its resistance to neat encapsulation in any one grand tradition that defines the aspirations of some of the dispossessed as outside the boundaries of the constitutive and defining charter of the society").

53. U.S. CONST. art. I, §§ 2-3.

54. U.S. CONST. art. V.

55. U.S. CONST. art. I, § 2, amended by U.S. CONST. amend. XIV, § 2.

human failures and the dangers of a politics of the few.

It is comforting that the areas of agreement and disagreement in South Africa's constitution-making process appear to warrant comparison with the United States of 1992 rather than with the United States of some earlier era. So many of history's pernicious contrivances are now beyond the pale. In these circumstances, there is little downside risk in decent compromise, and tremendous potential for gain. We do not mean to belittle the importance of issues regarding representation in the constituent assemblies and beyond. But South Africa should keep a sense of perspective about its place in history, and not let the opportunity for convergence slip away.

## VI. CONCLUSION — PRECOMMITMENT REVISITED

Why a constitution? If you can all agree on a constitution, then you can all agree on the same things in the course of democratic lawmaking. Or can you? One of the fascinating things about a constitution is that it is an irrational act or, as Jon Elster put it, an act of "imperfect rationality."<sup>56</sup> Elster made the point that a constitution is equivalent to the commands of Ulysses, who ordered his sailors to bind him to the mast and to disobey his later pleas to be released.<sup>57</sup> The democratic majority, like Ulysses, is not fully rational because it is unable to act consistently.<sup>58</sup>

Modern constitutionalism, like the inspiration of Ulysses, embraces a precommitment strategy. There are two necessary conditions for precommitment: first, that a change be anticipated, and second, that it be a change for the worse.<sup>59</sup> That is easily observed in the case of constitutions. A supermajority agrees to bind itself (and future generations) because it expects to be tempted to act against its own highest principles as expressed in the constitution.

The message for constitution-making is simple: be opportunistic, and

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56. ULYSSES, *supra* note 2, at 36.

57. ULYSSES, *supra* note 2, at 94.

58. See ULYSSES, *supra* note 2, at 66 (stating that "some consistency requirements should be imposed both upon the actor's *choice of successions* and upon his *succession of choices*"). See also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 10-12 (1988) (analogizing countermajoritarian features of constitutional democracy to behavioral experiments in which pigeons learned to prefer delayed but more substantial gratification to immediate lesser gratification).

59. Richard H. Thaler, *Illusions and Mirages in Public Policy*, in JUDGMENT AND DECISION-MAKING: AN INTERDISCIPLINARY READER 161, 167 (Hal R. Arkes & Kenneth Hammond eds., 1986).

get as much from the ratifiers as you can. Get it while the getting is good. This advice reinforces the earlier suggestion that a constitution can serve as a fund of values, including conflicting values. The constitution-making process is an opportunity to recognize the legitimacy of a variety of human desires — and to symbolize the diversity of the human condition. It is an opportunity to take advantage of the idea, as expressed by philosopher Richard Rorty, “that a belief can still regulate action, can still be worth dying for, among people who are quite aware that this belief is caused by nothing deeper than contingent historical circumstance.”<sup>60</sup> Yet that impulse may not last long in any society. It is the task of the constitutional framer to harness the opportunity — for all it is worth.

Above all, we want to urge South Africa not to be deterred by the possible discontinuity between present conditions and the vision you embody in a constitution. The development of devotion to a constitution will take time. But precommitment strategies have the marvelous characteristic that they can work to induce belief in principles not initially believed. It was Pascal who long ago posited the case of an individual who “chooses” to believe in god because of a kind of “cost” comparison: the costs of being wrong could be severe, but beliefs can be adopted freely.<sup>61</sup> That person does not really believe in god — at least not at first. Over time, though, Pascal’s wagerer may well come to *forget* the original reason for his belief in god, and come to a truly held belief as a result of that “precommitment strategy.”

A process much like this one can be applied in the constitutional setting. Even if parties do not fully believe that certain constitutional principles are in their best interest, they may yet come to believe it. And in the constitutional setting, the precommitment strategy outlives the immediate generation — and grasps the next from its infancy. As constitutional drafters, you have a unique opportunity to take advantage of this principle and to ask your constituents — perhaps implicitly — for an extra leap of faith.

There are strains of the manipulative and the Machiavellian in this behavioral perspective on the making of constitutions. But such a perspective may express the very essence of constitution-making: somehow to get past the brute who stands guard on the surface of popular attitudes, and gain an audience with the better self within. Representatives of the various competing factions know better than anyone how a pride-

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60. RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 189 (1989).

61. ULYSSES, *supra* note 2, at 47-48.

ful constituency can push harder for victory than for harmony. And resistance can be especially strong when the forces pressing for change are foreign.

In that respect, comparison to the American experience may not seem profitable. Our revolution, Edmund Randolph of Virginia said, "seemed to be peculiarly 'the result of reason,'"<sup>62</sup> and our Constitution was likewise the intellectual product of an assembly meeting in an atmosphere of relative tranquility. But maybe that was the *difficulty* with the United States Constitution. Once again we refer to Jon Elster, who finds that constitutions tend to lack legitimacy unless the imperative comes from outside of the political system.<sup>63</sup> Elster's view undermines contractarian notions of constitutional formation by elevating duress to a necessary condition. The legitimacy of the United States Constitution may thus have been weakened from the start to the extent that it was the result of cool and deliberate social contracting.

South Africa, by contrast, faces no shortage of inescapable historical, international, and moral demands. That raises the stakes of success or failure, but it can also be turned to your advantage. On one hand, as persons of stature in your respective parties at an urgent time, you are able to get past that brutish guard that stands in the way of compromise, and to request commitments on the part of your constituents' better selves. On the other hand, additional concessions can be chalked up to the exigencies of the situation. Of course, your willingness to do the right thing depends on bringing your own highest ethical selves to the fore. With that we cannot help you. But do remember that history will surely be your judge.

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62. WOOD, *supra* note 8, at 4 (quoting Edmund Randolph).

63. ULYSSES, *supra* note 2, at 94.