Reason, Interest, Rationality, and Passion in Constitution Drafting

Nathan J. Brown

Liberal constitutionalism is founded in part on a desire to build a polity on the basis of reason and the public interest. At its most ambitious, the result can verge on a prepolitical or even apolitical view of constitution writing. To be sure, most liberal constitutionalists have backed away from the extreme view by increasingly recognizing that passion and bargaining will inevitably play a role in constitution writing. But few have moved beyond grudging acceptance of passion and bargaining to active incorporation. In addition, the terms themselves are used in increasingly slippery ways. Yet while greater terminological precision is desirable and possible, it cannot overcome a key feature of constitution drafting: reason and interest are easily confused in practice as are passion and rationality. Even if reason and deliberation over the public interest could be distinguished from passion and private bargaining, they are unlikely to be able to deliver what is demanded of them. Constitutional politics differs from normal politics less in the role for rationality and the public interest and more in the means used and the number of actors with veto power. In such an environment, partisan interest and passion are not merely inevitable contaminants but essential elements.

In 2005, Iraq's occupiers—and some of its new leaders—focused their energies and hopes on an effort to write a new constitution. Neither the process nor the document it produced proved to be helpful, however, in founding a stable and just political community. If anything, the Iraqi constitutional effort aggravated the slide toward civil war.

Those who have studied constitution drafting efforts are not surprised by the frequent failures. Walter F. Murphy, one of the most accomplished and influential constitutional scholars active today, confesses that "most constitutionalists . . . are more pessimistic about human nature than are democrats; they are concerned, sometimes obsessed, with humanity's propensity to act selfishly and abuse power. They fret about the human capacity to rationalize private gain as public good."[1] Writing a constitutional document is said to call for uncommon virtues. Murphy writes a fictional dialogue among members of a drafting body in which the character most closely reflecting his own views explains: "Few, if any, of us can continuously act selflessly. You are not like John Rawls's 'free and rational persons' operating behind a veil of ignorance. You know who you are and hope to become, where and when you live, and at least some of your general values and specific interests. You also know, if not fully understand, the ambitions you harbor for yourselves and possibly corrupting dimension to your work."[2]

Thus the problem for Iraq—and for scores of other societies that failed in their constitutional efforts—would seem to be that those involved were wanting in reason, inflamed by passion, reluctant to overcome their own shortsighted views and self interest, and unwilling to focus on the long-term good of the whole.

I argue almost exactly the opposite. The problem is not too much passion and interest but too little attempt to engage them.

Much scholarly analysis of the process of writing a constitution—and much of the public discussion that occurs during such processes—lays great stress on the distinction between normal politics and constitutional politics. Of course, nobody is naïve enough to believe that it is possible to construct a pristine constitutional process, utterly aloof from partisan interest, momentary passions, and short-term political maneuverings. But some influential strains of the liberal constitutional tradition view a constitution that is merely the product of partisan horse trading, emotional appeals, and short-sighted calculations as liable to be both unstable and unjust. Many scholars have therefore come to explore how deliberation, considerations of the general public interest, and long-term political reasoning can come to inform the constitutional process. At its most ambitious, the result can verge on a prepolitical or even apolitical view of constitution writing.

In this article I argue that those who place their hopes in deliberation, the public interest, and long-term political reasoning will usually be disappointed. However laudable these may be, they are generally difficult to distinguish

Nathan J. Brown is Professor of Political Science and International Affairs, The George Washington University (nbrown@gwu.edu). *He would like to thank Melissa Schwartzberg, Dina Bishara, and the anonymous reviewers for their constructive and helpful suggestions.*

doi:10.1017/S1537592708081851

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press

in practice from short-term self-interested political maneuvering and passionate mobilization. And even if they could be distinguished, they are unlikely to be able to deliver stability and justice. These will likely come, if they do at all, from the ways that bargaining, short-term interest, and passions are engaged directly by the constitutional process. While I acknowledge that constitutional politics can be different from normal politics, I find the differences more subtle and limited than is often held to be the case (at least by theorists): constitutional bargaining is characterized by the object of negotiations (fundamental political structures) and often by an unusually generous distribution of veto power among various contending groups. Constitutions are stable (and perhaps serve justice better) not by minimizing interest and passion but by incorporating them in the constitutional process.

Seeking Refuge from Bargains and Self Interest

Constitutions that cannot contain private interest, short-term bargaining, and political passions are often seen as doubly problematic: they are viewed as less likely to survive and they are more likely to be unjust. Precise arguments justifying such views vary—specialists in comparative politics are more likely to emphasize the instability of such constitutions; normative political theorists are likely to be concerned more with their injustice.

For comparativists, a constitution that merely reflects the outcome of bargaining among various political actors may not survive the circumstances that brought it into being. Adam Przeworski is fairly skeptical about the ability of such constitutional arrangements to survive, arguing that durability is likely only in what seems like a very restrictive set of conditions—when contending parties are balanced, agree to a set of arrangements in order to avoid costly conflict, and then discover that those arrangements entrench a new balance of forces that has the ability to maintain the arrangements. Absent these conditions, he holds that constitutional arrangements are likely to be redrawn as soon as the balance of forces shifts.[3]

Not all scholars share Przeworski's pessimism, primarily because they see a way for constitutional politics to rise above partisan and self-interested bargaining. Bruce Ackerman's "dualist" conception of American democracy (which he has heartily endorsed for export) posits "private citizens"—"unashamed to look to their private interests"—as operating in normal political times but "public citizens"—concerned with higher law making in the service of the public good—operating in rare moments of constitutional politics.[4]

Perhaps the most influential writer on the practical possibilities for constitution writing to rise above simple short-term bargaining is Jon Elster, who has contributed two central ideas. First, he portrays constitutions as exercises in self-binding—leading to a series of metaphors ranging from the poetic (Ulysses having himself bound so that he can safely hear the sirens) to the earthy (Peter drunk governed by rules made by Peter sober).[5] Some of those who view constitutions as precommitment devices use another metaphor as well: grammatical rules in language. Constitutional rules, like grammatical rules, make other things (action or communication) possible.[6] Self-interested actors operating in accordance with a long-term vision wish to construct a political system that places constraints on their own future actions in order to make it possible to build political institutions that will protect and pursue their interests. It is not merely writers in Anglo-American traditions who have developed such images. The idea of a constituent assembly, most identified with the French tradition but emulated in many different settings, rests on a similar (if less demanding) image: the nation assembled deliberates and then establishes the fundamental basis of the political order.

A second contribution—explored most by Elster but used by others—involves faith less in public reason and far-sightedness and more in people's wish to be seen as acting in accordance with public reason. Recognizing that arguments differ according to the nature of the audience, Elster and others have claimed that publicity can encourage more deliberative politics. This view is fairly modern—historically, mass politics has generally (if not universally) been seen as the enemy of public reason. In recent years, however, perceptions have reversed: it is more often argued that moving deliberation out into a broader sphere privileges public-interested arguments. The association between publicity and public reason may be a recent (and, as will be seen, often a dubious) trend, but it is an influential one. A recent joint effort by Elster, Clause Offe, and Ulrich K. Preuss explains:

> Although interest may be the most important motivation in most constituent assemblies, it will not always dare to speak its name. Especially when the process is under strong scrutiny from the public, the parties will feel constrained to present their argument in terms of the common good or the public interest. Self-interest, in other words, may induce the speakers to adopt non-self-interested language. Small parties, when arguing for proportional voting, appeal to democratic values rather than to the interest of small parties. Conversely, large parties tend to rest their case for majority voting on the claim that it is more likely to produce a stable government.[7]

But even those who claim that publicity may encourage speakers to appeal to public reason admit that it can hardly prevent them from using private interest at the basis of their own (undisclosed) calculations. To untangle public reason from private interest in such a setting is necessarily difficult. Recently, therefore, liberal constitutional theorists have tried quite literally to make a virtue out of this necessity—or, more precisely, to follow the spirit Elster shows in quoting La Rochefoucauld: "Hypocrisy is the

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press

homage that vice pays to virtue."[8] Jeffrey Tulis describes hypocrisy as "an institutional virtue intended by the design of the Constitution, and perhaps by the nature of modern liberalism more generally."[9] More specifically, Elster and his colleagues speak of the "civilizing force of hypocrisy;" that is, "when discussing under public scrutiny, actors may be forced or induced to pull their punches and refrain from the most blatant expressions of self-interest."[10] Hypocrisy is no panacea; to mix a metaphor, there is recognition that private interest still plays a powerful role. Instead the claim is more modest: when leaders discover that they are speaking the prose of public reason, they will paint themselves into rhetorical corners and commit themselves firmly to positions that they initially adopted for tactical reasons.[11]

These arguments do not apply exclusively to a constitutional setting—indeed, they might be used for any decision-making situation. But given the strong interest in ensuring that constitutional politics be more than short-term bargaining, there is a natural link between interest in liberal constitutionalism and deliberative politics. Indeed, Elster himself has explored the role of deliberation in constitution making most explicitly.[12] And many normative theorists interested in deliberative democracy have shown a special interest in constitutional politics precisely because it seems the most appropriate sphere for reasoned discussions about the public good.

Deliberation is often defined in contradistinction to other decision-making methods (such as voting or bargaining) in that the various actors attempt to change each other's preferences.[13] Many liberal views of constitutional politics rest on a broader vision of the proper nature of politics, one grounded in what John Rawls has described as public reason, in which citizens deliberate in a framework "that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably to endorse."[14] For many, Rawls's requirement that the endorsement "reasonably be expected" (rather than explicitly given) grants the powers of citizens to theorists, and much effort has therefore been devoted to understanding how such an endorsement might actually (and not merely theoretically) take place. Cass Sunstein writes: "I contend that a constitution should promote *deliberative democracy,* an idea that is meant to combine political accountability with a high degree of reflectiveness and a general commitment to reason-giving."[15] Murphy writes of "the chaos that preceded Yahweh's work and, in the form of human passions, continues to wreak havoc in our lives. Law is among the more obvious efforts to channel those passions. Writing constitutional charters and creating theories to justify them are also products of that project."[16]

Comparativists and normative theorists writing in this vein do not insist that all constitutional politics be public-spirited, reasoned, and deliberative. But they rely heavily on such characteristics to prevent constitutions from becoming merely ephemeral recordings of the balance of interests and power at the time that they were written. As Murphy writes, "the justification for any constitutional document, indeed any constitutional order, ultimately rests on arguments from political philosophy, moral theology, or both. Every such charter depends on its acceptance as a higher law."[17]

Backing Out of Precommitment

Any hope of basing constitution writing on a higher plane of politics encounters three problems. First, it rests on distinctions between public and private interest and between passion and rationality that are extremely difficult to make in practice. Second, rationality, deliberation, and public reason cannot deliver all that they are supposed to. Third, passion is an integral part of any viable constitutional process.

Conceptual Precision and Imprecision

Three concepts—reason, passion, and interest—have emerged as central to many writings on constitution writing. But they are as slippery as they are common. It is not simply the case that various authors use these terms with slightly different inflections; sometimes the same author moves among meanings without explicitly addressing the conceptual shift. Actually—as Albert Hirschman has observed—the history of these terms shows enormous shifts in the way they are joined and opposed.[18] But in recent years their meanings not only shift but also slide into each other.

The term "reason" can mean two very distinct things: rationality and what is generally called "public reason." Rationality is generally understood to refer to selection of efficient means to achieve given ends; those who speak of reason in this sense often tend towards a marked agnosticism on the nature of the ends themselves. Public reason, by contrast, refers not merely to means but also to ends; it is disinterested—or rather, the object of its interest is the entire society rather than an individual, faction, or party. Rawls defines the ideal of public reason:

> Citizens are to conduct their political discussions of constitutional essentials and matters of basic justice within the framework what each sincerely regards as a reasonable political conception of justice, a conception that expresses political values that others as free and equally also might reasonably be expected reasonably to endorse.[19]

Rationality and public reason may thus be potentially quite distinct. Most authors who address the issue do explicitly differentiate between the two.[20] Yet the elision between them has a long and even noble history. It is sometimes based on either Enlightenment or natural-law faith in the ability of reason to illuminate what is good, especially the common good. Alternatively, it may be based on an assumption that individual self-interest is compatible with the public interest—that pursuit of self-interest will likely

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press

benefit the public or that "self-interest rightly understood" (to use Tocqueville's famous phrase) at least diminishes the clash between individual and societal interest.[21] More recent liberal writings have increasingly come to terms with the deep divisions that mark modern societies and rarely rely on Tocqueville's sometimes ambivalent acceptance that self-interest rightly understood will prevent most socially destructive selfish actions. But they still see public reason as best understood through rational discussion (Habermas) or rational philosophical inquiry (Rawls).

The term "passion" occurs less frequently in recent writings on constitutionalism, and its centrality to political theory more generally has waned. But the frequent references to passion in the *Federalist* papers lend its usage considerable and continuing resonance in discussions of constitutional design, especially among authors well versed in the American constitutional tradition. The *Federalist* uses the term"passion in several very general senses. It is often coupled with "interest" and "prejudice." Unlike interest, passion generally (though not always) refers to less material concerns. Passions often appear capricious, impulsive, unthinking, selfish, and potentially violent. They reside both in self-loving individuals and in multitudes. Perhaps the most consistent use of passion is in juxtaposition to reason; indeed, *Federalist No. 49* goes so far as to proclaim that "it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government."

The shifting—and largely pejorative—meanings we have inherited have colored recent writings. The result is that we have not a clear definition of passion but a series of connotations—it is ephemeral, myopic, and impulsive. It might characterize an individual or group but is particularly dangerous—especially in a democracy—when it characterizes a majority. Often, passion is simply used to denigrate the private interest of an individual, faction, or majority. We cannot even turn to Elster for clarification of the meaning of passion, since he consciously abandons his customary precision on the point. At one point, Elster does refer explicitly to "majoritarian passions" in contrast to "factional interest."[22] Thus the difference between interest and passion would seem to lie in numbers. But he also equates passion with emotion and further notes that passions have been historically juxtaposed to reason but are now frequently counterpoised to "rational self-interest."[23] Finally, he effectively endorses the elision in the *Federalist* between "short-lived passion" and "shortsighted interest."[24]

Finally, interest may be the most difficult term of all, simply because it is used so frequently. When not preceded by "public," it refers to the concerns, motivations, and especially (though not exclusively) the material welfare of an individual, class, subnational group, or population of a limited geographical area. Occasionally writers might refer to "private interest" to distinguish it from "public interest" (with the latter term occasionally being conflated with "public reason"). Indeed, if we are to use "public reason" to refer to general social interests, then it might be seen as the polar opposite of "private interest."

Implicit in writings in the liberal constitutional tradition (such as those of Ackerman and Murphy) —and sometimes explicit (in writings from the *Federalist* to Elster)—is that reason is good and must be encouraged and that passion and interest are potentially destructive if not contained. Yet as is clear from the shifting definitions of the terms, the concepts are simply not sufficiently distinct to allow clear juxtaposition. An individual or group interest can be pursued quite rationally but might violate public reason. Passion in some senses might contravene rationality but still be public spirited; at the same time the term might also be used (as it sometimes seems to be in the *Federalist*) to refer to contraventions not of rationality but of public reason in favor of private interests.

Given this family of meanings, the fundamental problem would seem to be that passion and interest are difficult to disentangle; interest and reason may also overlap according the definition used. For instance, Ackerman sees his dualist conception of American democracy as fully expressing the constitutionalist vision of the *Federalist.* But one wonders whether Ackerman's "public citizens" would be so highly mobilized and dedicated to implementing their notion of public good that they would likely have frightened the authors of the *Federalist* as a passionate mob. If applied internationally, Ackerman's constitutional politics might bring to mind the situation in the immediate aftermath of the Iranian revolution more than his preferred example of the United States under Roosevelt. Sometimes the problem is less with the definitions as with their application. Even if we wished to juxtapose public reason with private interest, they often (as will be seen) appear in public in each other's guise.

With shifting conceptions of passion, public reason, interest, and rationality, it is difficult to ascertain the preferred method of writing a constitution. Unless given far more conceptual precision or used in consistent ways, the terms can hardly be mutually exclusive; indeed, there may be reasons to avoid using them as such. And unless we have reliable ways of distinguishing among them, the usefulness of clearer definitions will be limited.

But to be fair, nobody seeks to exclude partisan interests totally, nor is anyone blind to the passions that writing a constitution can provoke. Recent writings therefore often seek to "civilize" them by encouraging that they enter deliberations cloaked, even if disingenuously, in rational and public-spirited garb.

The Failure of Public Reason and Hypocricy

Those who speak of the "civilizing force of hypocrisy" may be getting their hopes up far too high. The problem

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press

is partly on the "civilizing" side—they underestimate political leaders' shamelessness. Leaders do occasionally paint themselves into corners but they also often escape by explaining that the seemingly principled position they took on yesterday's issue does not apply to today's question. Nor is it clear that "civilizing" private interest in public garb offers very much—a threat that purports to appeal to the public interest may differ little from one that is uncloaked by any higher appeal. A political leader who explains to her interlocutors something like "We share with you the goal of preventing civil conflict, but we are worried that if you do not concede, reasonable people like us may lose control over our less reasonable followers" is likely to be understood by all speakers and listeners as attempting naked intimidation.

But a deeper problem with relying on the "civilizing force of hypocrisy" is that publicity may not deliver what is expected. Its advocates assume (but do not demonstrate) that publicity privileges appeals to public reason. As was observed earlier, this claim may be fashionable but it is very much contrary to older prejudices about democracy. It is also dubious. Political leaders speaking in public often seek to appeal to and mobilize their own constituencies far more than they work to persuade their opponents. They may sometimes seek to do so in ways that avoid alienating others, but just as often they may find that alienating others helps mobilize their own constituency. At other times they may appeal to the uncommitted by exciting prejudices and promoting divisions rather than arguments cast in terms of public reason. But in the highly politicized world of constitutional politics as well as in some democratizing polities, many leaders may calculate that they will gain most by proving their credentials to—or energizing—their supporters.[25] They will be especially tempted if their constituency exercises a veto over possible constitutional outcomes—and, as will be seen below, this is frequently the case. In other words, publicity will often encourage leaders to preach directly to the choir of their own party, ignoring the pews of the citizenry.[26]

In many situations, publicity and transparency actually privilege appeals to private interest. Publicity may induce those who actually do think in terms of public reason to cast their language in the terms of private interest. Such a tactic is especially likely when the boundaries of the polity are themselves contested. Kurdish leaders in Iraq were able to justify their agreement to the country's Transitional Administrative Law in March 2004 only by explaining that it met the specific needs of Kurds. Any reference to Iraqi interests—sincere or not—would have only undermined their case among their own constituency. Indeed, Kurdish leaders were far more willing to concede to genuine national concerns in private than they were in public. Thus, to claim that private interest must masquerade as public reason offers us less than has been claimed.

And the confusion between the two may have deeper roots than hypocrisy. Not only might we encounter private interest masquerading as public reason, but we might also meet public reason masquerading as private interest. And sincerity itself may go unrecognized in a cynical political world.

Publicity may confuse matters more deeply than has been acknowledged in two further ways. First, in any forum with more than a dozen or so participants, the number of those speaking will be very small. And even in a highly politicized society, the amount of time citizens devote to constitutional discussion will be limited. Publicly debating the contents of a constitution—a matter that concerns all members of the society—will necessarily be carried out in terms of slogans, symbolic shorthand, and, at best, abbreviated reasoned arguments. Distinguishing among passion, private interest, and public reason is not easy when interlocutors use rhetorical shorthand by rushing to stake rival claims to the flag, the nation, the homeland, the people, or God.

Second, what seems as public reason to its adherents will appear as private interest to its opponents. This is most easily illustrated in the case of religion: what has been ordained by God can hardly be seen as a narrow interest by members of a religious community. But for those who subscribe to other religions (or none at all), efforts to draw on the teachings of a particular denomination will seem to confuse public reason and private interest quite profoundly. And the values at issue need not be religious—any "comprehensive doctrine," to use Rawls's term, carries with it a similar potential to set off struggles over what qualifies as public reason and private interest. Privatizing religion and fundamental moral truths is a standard liberal response, but it has not always been an effective one. This is perhaps the most difficult problem that liberal political thought has had to confront in recent decades, and the various solutions offered need not detain us—for present purposes, it is enough to note that the distinction between public reason and private interest might not only be fuzzy; it is also likely to be bitterly contested.[27]

Is Passion a Problem?

If publicity and public reason cannot be relied upon to constrain private interest, can reason and rationality constrain passion? If we define passion dispassionately rather than simply use it to refer to an interest we do not like, we would have to do so in terms of the weakness of, or decreased reliance on, rationality. This would strip away many of the pejorative connotations it has had in constitutional analysis. And we find that constitution writing can become passionate for two reasons. Considering each of these will show passion to be far from inimical to constitution writing and—under some constitutional

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press

circumstances—very difficult to disentangle from either public reason or more instrumental rationality.

First, constitutional debates often spark passions when they involve core identity issues. There is, of course, no reason why identity cannot be discussed rationally. But it can also spark nonrational argumentation. In many situations, actors are not so much motivated by a desire to achieve specific ends through efficient means as to express core values.

The significance ascribed to constitutions varies widely according to the society, time, and circumstances. Sometimes they are viewed as little more than a set of programmatic statements by an entrenched leadership; at other times they are regarded as foundational political and legal documents. And sometimes constitutions—or at least parts of them—are seen as still more significant: clauses or phrases become viewed as fundamental statements of values and authoritative proclamations of basic truths. Murphy refers to a constitution as an attempt "to shape a way of life."[28]

In such a context, in the eyes of those involved, the purpose of a document goes beyond creating the basic legal framework for governing; at such times the task is not simply to form a government but to constitute (or define) a people. Indeed, as observed earlier, moving constitutional discussions into public often encourages symbolic arguments at the expense of purely rational ones. Some of the most heated debates in constitutional bargaining take place over issues with few legal or institutional implications. This is perhaps most frequently the case with religion. Unsuccessful attempts to insert mention of God and Christianity in the draft European constitution were based in part on the insistence that a fundamental document must refer to timeless truth. Of course, an undertone of the resulting debate tied it to a matter of very practical consequence—the prospect of Turkey's EU membership—yet beyond that issue (handled more directly through other means), the debate focused far more on history and values than on consequences. In Poland, an intense struggle over religion and national identity was carried out largely over the text of the constitution's preamble rather than any of its specific clauses.[29] Europe should not be singled out for its entanglement with political symbolism. Constitutional debates there are not idiosyncratic except in their particular details. Many Muslim societies have had similar abstract debates about how to enshrine Islam in their constitutional texts.[30] The salience of these issues has risen in the past few decades, and arguments have begun to focus on how to refer to Islamic law. Yet with a very few exceptions (such as Iran), abstract debates about the proper relationship between divinely-inspired and man-made law have rarely influenced matters of institutional design. For the most part, arguments have remained on the symbolic level, with surprisingly little attention often devoted to the practical consequences of adoption of different language.

And religion is hardly the only verity demanding expression. Palestinians drafting a constitution in preparation for statehood heatedly debated how their document should define Palestine's borders and the rights of refugees—seemingly oblivious to the fact that most constitutions specify neither and that any decisions on borders or refugees were hardly to be made by Palestinians acting alone.

In such circumstances, constitutional debates become vehicles far more expressive than utilitarian. Such debates often seem perplexing and distracting at best and dangerously divisive at worst.[31] Outside observers often are deeply troubled by passionate arguments over identity for two reasons. First, they often involve nationalist or religious issues that confuse or even frighten foreigners. Second, they often seem extremely difficult to resolve since they are less amenable to bargaining and compromise.

We should steady our nerves. The actual record of constitution writing suggests that these concerns, though justified, are exaggerated. Not all such symbolic debates are insoluble, and indeed, to the extent the differences are motivated largely by symbolic arguments they can often be resolved by creative wording that allows various parties to secure the phrases they wish. Despite the frustrations that such passionate debaters cause for drafters and scholars, they do have the effect of provoking far greater public interest and engagement in the constitution drafting process.[32]

A second way in which constitutional moments can provoke passions is when they occur in the midst of dramatic, even revolutionary political change. (Of course, not all such constitutions are written at such times; many are composed by existing regimes seeking merely to rearrange institutions or secure new bases for legitimacy as will be explored more fully later.) It is easy to see how radical political change might make it difficult to make useful rational calculations.

In many of the dramatic moments of political transition that have occurred in the past quarter century, the sensation most frequently mentioned in the recollections of leading participants has been extreme and exhilarating uncertainty. In Spain in 1976 and 1977, the far left did not know whether daring language or audacious action would provoke a reversal of liberalization; in Poland in the mid- and late-1980s, the likely reaction of the Soviet Union to events was both critical for calculating likely outcomes and completely unclear. In many South American transitions, the position and resolution of the military was discovered only by probing. In many cases in which a founding election has not been held, the relative electoral strength of various actors is a matter of much uncertainty. Aristide Zolberg referred to periods in which everything seems possible as "moments of madness." Writing in 1972, he describes such moments by using what seems now to be an uncannily prescient allusion to the revolutions of 1989: "the wall between the instrumental and the expressive

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press

collapses."[33] And it is precisely such a phenomenon that makes rational calculation extremely difficult: one knows neither one's own strength nor the strength of other potential allies and opponents; one does not even know where others stand with any certainty.[34] In some countries, not only is the relative strength of various actors unknown, but the identity of the actors themselves and the context in which they act may radically shift. As one survey of the 1989 transitions noted, "The question of the moment was not 'What is to be done?' but 'Is there anyone who might be able to do anything—including defining what needs to be done?'"[35]

To be sure, many of these features of such moments have been noted before. Elster admits that the image of Peter sober binding Peter drunk may be less than apt because "it is not obvious that the framers will be particularly sober."[36] Or, less metaphorically, there is

> an inherent paradox in the constitution-making process. On the one hand, because they are written for the indefinite future, constitutions ought to be adopted in maximally calm and undisturbed conditions. On the other hand, the call for a new constitution usually arises in turbulent circumstances. The task of constitution making demands procedures based on rational argument, but the external circumstances of constitution making generate passion and invite resorts to force.[37]

But Peter's problem is not of drunkenness but of thick fog. His clear thinking will not be supported by clear vision. He will not be able to make out where he stands or who else is nearby; his guesses about his options and the effects of his actions will be unreliable and are likely to shift rapidly as shapes come into view and unexpected consequences pop up. Przeworski has argued that such uncertain situations are likely to lead conflicting political forces to "seek institutions that provide guarantees against temporary political adversity, against unfavorable tides of opinion, against contrary shifts of alliances."[38] But this reasoning recognizes only some of the uncertainty in such moments of madness—it still assumes that the identity of the actors and their preferences are fairly constant.

The problem is not that actors lose their rationality but that rationality becomes a less certain tool. In a "moment of madness," whatever calculations are to be made are likely to be tentative and shift rapidly along with the situation. Perhaps most importantly, short-term rationality will have no advantage over long-term. In normal times, short-term calculations are usually easier because one can hold much constant. That is no longer the case when rapid and radical change seems possible. When yesterday's impossible dream becomes today's imaginable, even imminent goal, many political actors may be tempted to think in terms of long-term changes; those who feel no such temptation will still likely feel forced by the pressure of events to stake out positions. And as actors shift in their goals and identities, they may dissolve and recombine in dizzying ways as yesterday's partner turns into today's mortal adversary (or vice versa).

Thus actors will likely be infused with what might be termed "passionate rationality." They will act rationally in that they will seek to use efficient means to pursue given ends—but they are likely to be uncertain as to which means are most efficient and the ends may be less than given (and indeed evolve rapidly as the impossible and unthinkable are possible and thinkable, and perhaps even realized). They may become less certain who is on their side, who or what they are struggling against, and even who they themselves are. The metaphor of "rebuilding the ship at sea"—used to describe how framers after 1989 had to use whatever tools they had at their disposal in order to reconstruct their societies—is more fortunate than its authors realize.[39] It implies that framers must focus on long-term issues of design at a time when it is virtually impossible to overlook short-term considerations. Ignoring the immediate effects of one's actions and concentrating only on ultimate design could easily lead to sinking or scuttling the ship; ignoring the ultimate design will mean missing an opportunity that may never be repeated. It may not even be possible to tell the difference between the short-term and long-term issues.

Passionate rationality does not imply acting without regard to consequences. In that sense, it is perfectly rational, but it may have all the predictability of quirky passionate impulses—it means acting amidst tremendous uncertainty about the consequences of one's actions, radical shifts in the consequences desired, and even fundamental debates about who one is (and who the adversaries are). When consequences, preferences, and identities are both unsettled and difficult to predict, rational actors will behave in surprising and shifting ways. However, as Murphy recognized, the resulting uncertainty is hardly Rawlsian in nature. Actors are likely to purse their own interests—even as their interests change and calculations prove to give little guidance. The emphasis on the long-term is not disinterested; participants view the future through a gauzy veil of confusion rather than a totally opaque veil of ignorance.

Beginning to Cope with Partisanship and Passion

If interest and passion cannot be clearly distinguished or constrained, will they make it impossible to write a durable and just constitution? Some of the same constitutional scholars who pursued the ways of constraining them have recently retreated in their enthusiasm for the virtues of public reason and deliberation. Cass Sunstein recognizes that deliberation must be carefully structured to avoid polarized politics. He also relaxes requirements for agreement on fundamental principles, allowing "incompletely theorized agreements"—in which "people agree

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press

on practices, or outcomes, despite disagreement or uncertainty about fundamental issues"—a "central role in constitution-making."[40] Jon Elster, whose earlier work led to the tremendous interest in constitutions as acts of self-binding, has developed a greatly restricted use for the metaphor, confessing to have been much influenced by a colleague's comment that "in politics, people never try to bind themselves, only to bind others."[41] And he has also noted that "much of constitutional politics is similar to routine politics as far as motives are concerned."[42] Jurgen Habermas, whose early work emphasized "critical rational discourse" and demonstrated a consequent discomfort with mass politics, is far less insistent that his later "discourse ethics" be so pristine.[43] Martin Shapiro (1992) begins his examination of the "giving reasons requirement"—the demand that public officials be able to adduce reasons to explain their actions—by noting that it is essential to the distinction between power and authority.[44] But he then describes an extremely wide range of ways that courts have approached the requirement. The (perhaps unintended) effect is to show that "reason giving" can be less determinative of politics than it initially appears.

Despite offering such concessions, these theoretical efforts have only tempered rather than replaced the idealistic hope for reason and deliberation. Przeworski's speculations on constitutional bargaining referred to above still finds bargains among unequal parties unstable; he believes that bargains will be more stable the closer they are concluded under more Rawlsian conditions. (Such efforts may place more of a burden on Rawlsian reasoning than it is meant to bear: while Rawls himself famously reasoned in terms of founding a polity, he rarely ventured beyond tracing the implications of such a context for a society that did not already have features of a liberal democracy.)

Stephen Holmes and Cass Sunstein (1995) examine constitution writing in Eastern Europe, arguing that while it is generally better to insist on a sharp distinction between constitutional and normal politics, the special circumstances prevailing in the region made it desirable to depart from that general principle.[45] But the special circumstances they speak of seem prosaic indeed to a student of constitutional moments: they include the persistence of old regime elements; uncertainty; the inchoate nature of democratic politics; and the need to strengthen rather than limit state institutions. These features could describe many countries; indeed, the most influential constitutions written, such as the American, Belgian, French, as well as many later ones, were written under precisely these conditions. In a sense, the argument appears to be made by two liberal constitutionalist theorists who have been mugged by reality.

Thus the fundamental conceptual tools used to understand constitution writing are being supplemented rather than replaced. In most recent writings for instance, interest and passion are accommodated more than incorporated. There are some limited but important exceptions—Elster has attempted to explore the role of emotions systematically (though he has not yet applied this work to a constitutional setting).[46] Andrew Arato has perhaps gone in the most promising direction, exploring the critical role of civil society in successful constitutional experiments, with the result that the profoundly political nature of the process is embraced rather than minimized or merely tolerated.[47]

In other words, it is becoming increasingly clear that passion, egoism, and short-term political maneuverings cannot be totally eliminated when writing constitutions. While it may be possible to come up with clearer and more consistent definitions (a modest contribution has been attempted in that regard here), they can neither be clearly distinguished nor rooted out. And they are as necessary as they are murky. How might we embrace them more effectively? Beyond the initial explorations of a few scholars like Elster and Arato, there are few systematic attempts to go beyond greater realism and fully integrate the seemingly less high-minded elements that inevitably motivate much constitutional politics. Indeed, even as Elster himself has backed away from the self-binding metaphor, Sunstein (2001) has dedicated a book to Elster (and Stephen Holmes) that still relies heavily on the idea of precommitment. For most recent writers, the emphasis on reason has been tempered by realism that interest and passion can play a role, but the tone is one of resignation, or, at most, accommodation.

Are those who write constitutions compelled to do so under conditions that are little different from normal politics? No, but the differences between constitutional moments and normal politics do not lie in the free rein constitutions give to public reason and rationality. They lie in the way that interests and passions are deployed.

How Constitutional Politics Can Be Different

One distinctive aspect of constitutional moments should be immediately apparent: they generally occur in moments of political crisis, when fundamental political structures are subject to invention or redesign. But a second aspect is less apparent: such moments frequently allow a larger than normal number of actors the ability to veto the creation or reform of proposed institutions—or at least seriously hamper their operation.

To understand the significance of these features, we should return to Przeworski's speculation that constitutional arrangements will survive only when contending parties are balanced, agree to a set of arrangements in order to avoid costly conflict, and then discover that those arrangements entrench a new balance of forces that has

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press

the ability to maintain the arrangements. If these conditions are absent, he holds that constitutional arrangements are likely to be redrawn as soon as the balance of forces shifts (Przeworski 1991: 81–88). Przeworski's presentation is partly accurate, but his conditions are less restrictive than he implies. In particular, he overlooks both distinctive features of constitutional moments: that they occur during crises involving fundamental political structures. It is such crises that make power seem far more balanced.

When a political system is being constituted, when it stands on the brink of collapse, or when it encounters possibilities for fundamental change, veto power over new arrangements is generally widely distributed. Groups that might be subordinate in normal political circumstances emerge as capable of preventing or at least complicating the construction of a new political system. They might push a fragile existing system from crisis to total collapse (even civil war). In such a crisis, a recalcitrant party confronts rivals with a difficult choice: attempt to appease the demands of the subordinate group or vanquish it. Vanquishing is often the preferred option. But with political (and security) institutions often operating on a shaky basis, defeating rivals may be more difficult as well as costlier than normal, because it carries the risks not only of violence but also of political collapse.

And potentially dissident groups are more prepared in constitutional moments to use their vetoes for several reasons. First, the legitimacy of the existing system is generally low. Second, the stakes are higher when fundamental choices are being made. Third, a weaker party is unlikely to comfort itself with the thought that it could become dominant in the future; instead, it is likely to fear that its subordinate position could be entrenched for generations. In such an environment, there is far more room for instrumental (and partisan) rationality than for public reason.

It is therefore not surprising that procedures for adopting constitutions have come to incorporate mechanisms for ensuring that the negotiated settlement is acceptable not only to the drafters or to the majority, but to all contending groups. Sometimes that makes it almost impossible to write a constitution. France (under the third republic) and Israel were forced at their founding to abandon the attempt to write comprehensive constitutions precisely because it seemed impossible to satisfy all parties; constitutional arrangements were therefore based on an ad hoc mixture of previously existing and provisional structures. Other countries—Iraq in 2005 and arguably Germany under Weimar—forged ahead by writing and ratifying documents over strenuous objections of key parties, only to discover that those parties effectively used their vetoes to undermine the new constitutional structures.

Constitutional scholars might take heart that this nature of constitutional bargaining may operate as the functional equivalent of public reason in promising durability and justice. Inclusiveness, consensus, and design of long-term institutions might lead the actors to an outcome that is more durable and just, even if it takes place wholly through a combination of haggling, threats, and partisanship that leaves little room for public-spirited deliberation. Thus, constitutional politics might be better distinguished from normal politics less by its hostility to private interest and more by the means employed (devising structures that convincingly and reciprocally bind various actors), and by time frame (allowing current understandings to become institutions). Thus engaging interests, identity issues, and passion will be often be messy, ugly, and difficult—but it will help make a constitution more just and durable. It will not deliver a pristine process or document and it will certainly reflect prevailing power relations. But the consent of factional leaders and contentious groups may be more helpful than the deliberations of philosopher-kings in securing a longer lasting and less oppressive document.

A second reason for embracing passion and interest is ironic indeed: it is more likely to lead to a document that escapes the highly specific circumstances of its birth. Constitutional moments are distinguished by a little-noticed feature: much of the bargaining and reasoning that does take place is extremely bad. This is unsurprising in the circumstances favoring "passionate rationality" discussed above. In a moment of madness, even instrumental rationality may be very unreliable. Actors will certainly attempt to try to view their options through rational calculations, but they will do so in the dark. In Iran, the drafting of the constitution saw a contest between advocates of a liberal system and those favoring a political role for the clergy; the latter camp fought fiercely (and successfully) for provisions that had never been put in practice before. The result was a document that operated in ways that nobody could accurately predict.[48] The 1989 transitions were full of unexpected surprises—the results of the 1989 Polish elections, for instance, forced Solidarity into a more powerful position than it had wished to have in the short run. Not all such surprises are pleasant. And plausible but misleading reasoning can sometimes undermine what seem to be viable bargains. For instance, the consideration of slavery in the American constitution focused on the slave trade (rather than the territorial expansion of slavery, the issue that actually led to bloody constitutional collapse), and the language reached was based on erroneous demographic assumptions.[49] At other times there are rude shocks or ultimately fatal residues, as in Germany in 1919; or bloody destruction, as in Iraq in 2005. It may be the difficulty of navigating such waters that led many of the central and eastern European states to postpone constitution writing until more normal politics had resumed.

But not all constitutional moments are full moments of madness. What of more prosaic constitutional moments? Removed from the madness of extraordinary times, will reason be a better guide? Most constitution drafting efforts

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press

take place in societies undergoing some change, to be sure, but few are as disoriented as those described by Zolberg. France toward the end of the Fourth Republic was in a state of political crisis, but the situation was far clearer than it was in Iran in 1979 or Hungary in 1989. And in such situations, it is far easier to think about the consequences of different constitutional choices.

Yet in such more normal times, there has generally been a strong (and quite rational) tendency to think about short-term rather than long-term effects. When weighing schemes for proportional representation against single-member districts, how is one to know how one's supporters will be geographically distributed a generation from now? If sitting judges are an obstacle to one's political program, diminishing judicial independence is an obvious solution for the short term; the long term effects of an attack on the judiciary may not be clear until all the protagonists have passed into the next world, perhaps taking their political programs with them. Given the role of private interest discussed earlier, it should not be surprising that much constitutional rationality is extremely shortsighted. Perhaps one way to illustrate this is the maneuvering that sometimes takes place over the position and prerogatives of the president. Many strong presidencies have been introduced with a particular, often aged, individual in mind: this was the case in varying degrees in South Africa, Poland, Afghanistan, the Palestinian Authority, and Fifth Republic France. The American constitution and the Israeli experimentation with direct election of the prime minister are arguable—if less clear—manifestations of the phenomenon of writing constitutional provisions for an executive with a specific individual in mind.

Indeed, it is striking how much constitutional rationality does not even look to the near-term future but instead focuses on the immediate past. Constitutional texts regularly feature footprints of recent political contests. This may be understandable, but it makes most constitutional architects often appear to be generals fighting the last war. Large parts of the German basic law—which has been in effect since five years before the country's current chancellor was born—were consciously designed to prevent a Weimar-like collapse. Similarly, Iraq's constitutional architects in 2004 and 2005 specifically sought to prevent a reversion to a coup-prone political order even though the military was not a functioning organization at the time. Palestinian constitutional reformers in 2002 and 2003 used their powerful international backing to take tools away from President Yasser Arafat that wound up in the hands of Hamas in 2006.

Up to this point, we have discovered two reasons for embracing passion and interest and dropping our concern that we cannot always discern them—they are more likely to lead to wide consent and they can sometimes help a constitution outlive the circumstances of its birth. While these reasons may be persuasive individually, they seem at first blush to contradict each other. One rests on a constitution operating with wide consent; the other rests on its operating despite the intentions of its authors. To address this tension, we need to turn to a third feature of constitutions: their stickiness.

Why Do Constitutions Stick? Can Bargaining, Interests, and Passion Help?

We seem to have made the pitfalls of constitution writing even deeper and more numerous. We have seen that bargaining, partisan interest, and passion are unavoidable and difficult to tame by (or even distinguish from) deliberation and public reason; we have also seen that it is difficult to tell which forces are actually at play. And now we have discovered that constitutional moments do not suppress short-term calculation and often give rise to conditions that make instrumental rationality less reliable. Przeworski's worry that constitutional arrangements may be rewritten the moment the balance of power shifts now seems in some ways excessively optimistic: even those who design a constitution are likely to be disappointed by their own creation. Why does any constitution stick?

This question should not be dealt with lightly: in fact, many constitutions do not stick. They are replaced, scrapped, forgotten, or rendered irrelevant. Oddly, however, it will be seen that it is those efforts that successfully distinguish and minimize bargaining, minority vetoes, and passion that often prove most ephemeral. Constitutions can survive as viable documents even when they deliver unexpected results or the balance of power shifts, and not only for the reason that Przeworski mentions—that actors behind the constitution discover that the arrangements they designed entrench a new balance of forces that has the ability to maintain the arrangements. In addition to this restrictive condition, there are three more common factors that often sustain the viable life of constitutions.

First, the costs of reopening constitutional arrangements are quite high and the benefits unpredictable. A dominant party might easily calculate that it does not want to provoke a return to a constitutional moment, with its generously distributed vetoes.

Second, a shift in the balance of forces—especially in the form of an alternation in power—often leads not to constitutional revision but to formerly subordinate actors delightfully discovering that tools that had been designed for use against them have fallen into their hands. This happened when the Socialists won the French presidency in 1981—a presidency they had denounced as too powerful when it was created. In Egypt, the Wafd party became the staunchest defender of a 1923 constitution it had opposed—but only after it had won a parliamentary majority and wished to take advantage of its provisions. Hamas

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press

stood aloof from the effort to write a constitutional document for the Palestinian Authority but then found—after it had won an election—that it provided real (if ultimately insufficient) institutional protection against attempts to overturn the results of popular voting.

Third, when constitution drafting goes well (and it often does not), it can be educative. Messy, protracted drafting serves the underappreciated purpose of preparing various parties for the operation of normal democratic politics. Something of the sort seems to have happened in South Africa. Of course, the educative features of constitution drafting have long been recognized. But we should have our eyes out for something grittier than what is usually meant by such learning opportunities. Instead of expecting the elevation of public discourse through constitutional deliberation, we should be alert to the possibilities to cultivate the practice of healthier forms of normal politics. Forming alliances, crafting consensus (or at least majority) positions, compromising, and trading are critical elements for leaders in any democratic system. In this sense, insisting that constitutional politics be superior to normal politics captures the importance of constitutions but devalues normal political skills and may pass over an opportunity to develop them and demonstrate their value.

When constitutions based on bargains among core groups falter, they generally do so not because of a change in the balance of power but because the bargaining was incomplete. There are times in constitution drafting processes where willingness to compromise and trade runs out. In such cases, a recognition of the legitimacy of private interests often leads constitution drafters to defer such issues by avoiding explicit mention of them or offering ambiguous wording that allows various interested parties to read the final document in a way that favors them. Such devices must be used carefully and sparingly lest the constitution be filled with time bombs and trap doors. (And indeed, a real pitfall of bargaining—one that needs much greater exploration—is that it builds in a strong bias towards excessive silence). Ambiguity and silence differ from "gag rules"[50] that seeks to foreclose discussion (even if temporarily); in some instances they might represent a preference that sensitive issues be settled by normal (rather than constitutional) politics. But most often, they simply reflect the decision to paper over differences with clever drafting—or occasionally, the failure of even clever drafters to devise any formula and therefore the lapse into total silence. The much-emulated 1831 constitution of Belgium was silent on the most critical constitutional struggle in nineteenth century Europe: the nature and extent of ministerial responsibility to the parliament. This silence served Belgium well, since it allowed for fairly continuous constitutional evolution. But when other countries resorted to the same silence, hoping that this issue would be worked out in practice (as the Ottoman Empire did in 1876, giving the parliament fairly weak tools), it resulted in an immediate crisis when the parliament decided to question ministers and move toward greater political accountability. The crisis was resolved by suspending the constitution.

Conclusion

It is possible to write a constitution that is devoid of the influence of passion and bargaining among self-interested parties. Indeed, many of the world's constitutions are written precisely in such a manner. Such documents are often derided as "facade" constitutions that are routinely violated.

But the term facade is misleading—the problem is not so much that the constitutions are violated (they sometimes are, but much less often than is supposed) but that they express only the will of an existing regime.[51] So-called facade constitutional documents often present the political system with as much candor and comprehensiveness as their supposedly authentic counterparts. Perhaps the most cited example of a country with a facade constitution was the Soviet Union. But Soviet constitutions were far too honest and clear to be simply disingenuous facades. The first such constitution—that of the 1918 Russian Socialist Federal Soviet Republic—proclaimed that its fundamental aim was "to establish (in the form of a powerful All-Russian Soviet Government) the dictatorship of the urban and rural workers, combined with the poorer peasantry, in order to secure the complete crushing of the bourgeoisie, the abolition of the exploitation of man by man, and the establishment of Socialism, under which neither class divisions nor state coercion arising therefrom will any longer exist."[52] The document explicitly stated: "In the interest of the working class as a whole, the Russian Socialist Federal Soviet Republic shall deprive individuals and sections of the community of any rights used by them to the detriment of the interests of the Socialist revolution."[53] Subsequent Soviet constitutions were less brutally frank, but they were equally clear; the final, 1977 version included a clause on the leading role of the Communist Party that one observer described as abolishing "not only the rest of its text, but the rest of legislation also."[54] Nineteenth-century Latin American constitutions similarly established the basis for nonconstitutionalist government with essentially unchecked executive authority and extensive and poorly supervised provisions for emergency rule.[55]

The flaw of such documents is not that they have fallen under the sway of passionate and partisan drafters but that they are robbed of all passion and do not reflect any plurality of interests. They are written by existing regimes entrenching themselves. Abstract deliberation becomes easy but pointless in such an environment. In 1971, Egypt received its third constitution in fifteen years. The constitution was drafted by a large committee of political and community leaders and legal experts. The committee's minutes have never been published, but they can be accessed in the library of the Egyptian parliament. They reveal how

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press

the members of the committee deliberated on the relationship between socialism and democracy, the role of Islam, women's rights, the emergency authority of the president, the role and structure of the judiciary, the role for the Arab Socialist Union (the sole political party at that time), and the structure of local and central government. In so doing, they looked to a variety of models: previous Egyptian constitutions obviously served as their starting point, but frequent references were also made to the French constitutional tradition and to constitutional documents of Eastern Europe (generally Yugoslavia, Czechoslovakia, and the German Democratic Republic). The records suggest a tone similar to the one that Walter Murphy fictionally conjures to illustrate different approaches to constitution writing.[56] Discussions were wide-ranging, philosophical, and sophisticated—sometimes resembling a graduate seminar more than a trading floor. And that was the problem. The resulting document served the purpose of proclaiming a new ideological direction for the regime, as many constitutions in authoritarian systems do, but it did little to serve liberal constitutionalist ends.[57]

The liberal constitutionalist vision rests in an essential part on a belief in a human ability to regulate power through law and reason. Murphy—hardly alone—portrays constitution drafting as an act of creation, and locates the problem in the necessity of entrusting humans with the task of gods. Those who view constitutions more prosaically as precommitment devices have likened them to grammar. Constitutional rules, like grammatical rules, make other things (action or communication) possible. But if such a metaphor is accepted, it must be recognized that the language in question is no ordinary one. For the advocates of precommitment and deliberation, constitutional language is Esperanto. Writing a constitution, in this view, consists of consciously and carefully creating rules; it is based upon a faith in the ability of human reason to structure society in purposeful and peaceful ways. Constitutions, if they resemble grammar, are taken to form the basis of an artificial and highly rationalized language.

Such a view is more inspirational than helpful. Elsewhere, I have tried to present a different view of constitutions: rather than Esperanto, constitutions in reality speak a language like English, with its inconsistent and almost inexpressible rules and exceptions, multiple origins, idiosyncratic spelling, and rich vocabulary.[58] Here I have tried to extend upon the idea that constitutions have been clearly based far more on the human capacity to bargain than on the ability to reason.

The alternative image of constitutions I have offered here—of passionate, often self-interested haggling—may help us understand why those with a more practical bent focus on the messier aspects of constitution writing and thus become far less shy than scholars in embracing bargaining, sloganeering, and democratization in constitution making. As demands from the demos for participation have extended to the drafting process itself, even terms like deliberation, discussion, and conversation take on grittier but perhaps more helpful connotations:

> Where the premise of constitutionalism as conversation is taken on board, constitution making can no longer be confined exclusively to the domain of "high politics" and negotiations among elites who draft texts behind closed doors. In the context of a traditional constitution, presumed to stand above and to structure democratic politics, the extension of democratic process to include free, open, and responsive discussion of the constitutional settlement itself represents a radical departure, but one that attempts to overcome the problems of entry of new participants and of an equal voice for all concerned regardless of their expertise.[59]

Talk of grievances, formerly excluded groups, ethnicity, race, and class move to the fore:

> When there is broad democratic representation, there is a greater likelihood that all aggrieved parties will have an opportunity to express their views on key constitutional issues of importance to them, and perhaps more importantly, there is a greater likelihood that their views will be taken into consideration in the drafting of the final document. Where this is the case, the constitution can serve to resolve conflict and provide mechanisms and reliable institutions for peaceful resolution of conflicts in the future.[60]

The analysis presented in this article may help explain why it is so difficult to write a constitution that will guide politics in ways that will be seen as legitimate. It is difficult to bring a hall full of passionate leaders—operating under the watchful eyes of their aggrieved followers—to bargain to a successful conclusion. And even if they reach a deal, it is easy for the resulting document to paper over rather than resolve fundamental differences (as noted above, bargaining among private interests often results in constitutional silence—a critical tool for reaching agreement but also a potentially dangerous one). Even in those areas in which an earnest agreement is reached, enforcement and interpretation may quickly become issues.

Public-spirited deliberation can do little harm in such an environment, but it will help far less than its advocates hope. The recent—and fairly spectacular—constitutional catastrophe in Iraq alluded to in the beginning of this essay illustrates the point. In the summer of 2005, as their country descended into civil war, Sunni and Shi'i constitutional drafters did what they were supposed to do: they cast their public arguments in reasoned terms and disavowed sectarian and partisan interests. They refused to speak of Sunnis and Shi'a (when Sunni representatives were brought onto the drafting committee, they were referred to not by their sect but only as "representatives of those who boycotted" the election for the assembly that was supposed to write the constitution). Such concessions to public-spirited deliberations only delayed the formal process and was finally jettisoned in favor of a series of informal bargaining sessions among a small number of

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press

political leaders. And Sunni leaders were simply excluded at that point. The result was a constitution that resolved little but the terms of a brutal civil war. Iraq's leaders failed simply because the partisan and sectarian interests they represented ultimately could not be reconciled in a single text in a few weeks (the deadline imposed by the country's interim constitution and reinforced by the Americans). The constitutional process aggravated the conflict not because of too little public reason but because of insufficient bargaining.

Many of the theoretical writings by those dedicated to liberal constitutionalism may inspire us, but they also can lead us to devalue what may be essential to the process.

In the past three years, Egyptian political debates have turned sharply in a constitutional direction. The debates are passionate, personal (often focusing on the question of whether the current president's son can or should succeed his father), and highly partisan. Judges, political activists, the ruling party, and the Muslim Brotherhood have all put forward suggestions for constitutional reform that often bear a surface resemblance to each other—but when one reads the details, one finds that the suggestions reflect very much the interests of the various parties involved. It is doubtful that the high hopes of Egypt's various communities and parties can be met. But an observer comparing current Egyptian debates to the abstract deliberations of 1971 cannot escape the conclusion that passion and interest—and, along with them, politics—have returned to Egyptian constitutional debates.

Notes

1 Murphy 2007, 8.
2 Murphy 2007, 63.
3 Przeworski 1991, 81–88.
4 Ackerman has pursued the image of dualist democracy in a number of works; it is perhaps most fully explored in Ackerman 1991. On the attractiveness of the American model for post-communist societies, see Ackerman 1992.
5 The image of self-binding was most fully explored in Elster 1984. It also underlies some of the contributions to Elster and Slagsted, 1988. Ackerman 1991 develops a slightly different, "two-track" approach to constitutional and regular law making.
6 For a full elaboration of this idea, see Stephen Holmes, "Precommitment and the Paradox of Democracy," in Elster and Slagsted 1988.
7 Elster, Offe, and Preuss 1998, 77.
8 Elster 1998c, 111.
9 Tulis 2003, 205.
10 Elster et al. 1998b, 78.
11 Elster 1998a.
12 Elster 1998a.
13 Elster 1998c.
14 Rawls, 1999, 140.
15 Sunstein 2001, 6–7.
16 Murphy 2007, 185.
17 Murphy 2007, 185.
18 Hirschman 1997.
19 Rawls 1999, 1.
20 See, for instance, Elster 1998b, in which he uses "rationality" to refer to the first sense of reason and "reason" exclusively for the second.
21 Tocqueville, bk. II, ch. 8.
22 Elster 2000, 119.
23 Elster 2000, 7–8.
24 Elster 2000, 133.
25 LeBas 2006.
26 Stasavage 2007.
27 See the various arguments regarding religion in Macedo 1999.
28 Murphy 2007, 193.
29 Zubrzycki 2001.
30 Brown and Sherif 2004.
31 Elster, Offe, and Preuss 1998 suggest that it is sometimes advisable not to write a constitution in circumstances in which such divisive debates cannot be resolved.
32 For a different argument about the need to incorporate passion, see Walzer 2002.
33 Zolberg 1972, 183.
34 See Kuran 1995. I find Kuran too superficial in his consideration of the social origins of many preferences but far more convincing on what he refers to as "preference falsification"—the tendency to mask real but unpopular preferences and the consequent surprises.
35 Elster, Offe, and Preuss 1998, 25.
36 Elster 2000, 159.
37 Elster 1998a, 117–118.
38 Przeworski 1991, 87.
39 The subtitle of Elster, Offe, and Preuss 1998.
40 Sunstein 2001, 9.
41 Elster 2000, ix.
42 Elster 2000, 173.
43 Habermas 1991 and 1998.
44 Shapiro 1992.
45 Holmes and Sunstein 1995.
46 Elster 1998b.
47 Arato 2000.
48 Arjomand 1988; Schirazi 1998; Bakhash 1984.
49 On the second point—the demography—I am relying on Schwartzberg 2007. She in turn bases her analysis on Rakove 1997, 71–73.
50 In "Gag Rules or the Politics of Omission," (Elster and Slagsted 1988), Holmes explores reasons for constitutional democracies to exclude particularly divisive issues from public discussions.
51 Brown 2003.

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press

52 Article 9 of the 1918 Russian Socialist Federal Soviet Republic constitution.
53 Article 23, text from Blaustein and Sigler 1988.
54 Grazin 1993.
55 Loveman 1993.
56 Murphy 2007.
57 Arjomand 1992.
58 Brown 2001.
59 Hart 2003.
60 Kritz 2003.

References

Ackerman, Bruce. 1991. *We the People: Foundations*. Cambridge: Belknap Press.

———. 1992. *The Future of Liberal Revolution.* New Haven: Yale University Press.

Arato, Andrew. 2000. *Civil Society, Constitution, and Legitimacy.* Lanham: Rowman and Littlefield.

Arjomand, Said. 1992. Constitutions and the struggle for political order: A study in the modernization of political traditions. *Archives Européennes de Sociologie* 33 (1): 39–82.

———. 1988. *The Turban for the Crown: The Islamic Revolution in Iran.* New York: Oxford University Press.

Bakhash, Shaul. 1984. *The Reign of the Ayatollahs: Iran and the Islamic Revolution*. New York: Basic Books.

Blaustein, Albert P., and Jay A. Sigler, eds. 1988. *Constitutions that Made History.* New York: Paragon House.

Brown, Nathan J. 2001. *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government.* New York: SUNY Press.

———. 2003. Regimes reinventing themselves: Constitutional development in the Arab world. *International Sociology* 18 (1): 33–52.

Brown, Nathan J., and Adel Omar Sherif. 2004. Inscribing the Islamic shari'a in Arab constitutional law. In *Islamic Law and the Challenges of Modernity,* ed. Barbara Stowasser, Yvonne Yazback Haddad and Barbara Stowasser. Lanham: Altamira Press.

Elster, Jon. 1984. *Ulysses and the Sirens: Studies in Rationality and Irrationality.* Cambridge: Cambridge University Press.

———. 1998a. Deliberation and constitution making. In *Deliberative Democracy,* ed. Jon Elster. Cambridge: Cambridge University Press.

———. 1998b. *Alchemies of the Mind: Rationality and the Emotions.* Cambridge: Cambridge University Press.

———. 1998c. *Deliberative Democracy.* Cambridge: Cambridge University Press.

———. 2000. *Ulysses Unbound.* Cambridge: Cambridge University Press.

Elster, Jon, Claus Offe, and Ulrich K. Preuss. 1998. *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea.* Cambridge: Cambridge University Press.

Elster, Jon, and Rune Slagsted, eds. 1988. *Constitutionalism and Democracy.* Cambridge: Cambridge University Press.

Federalist Papers. http://www.yale.edu/lawweb/avalon/federal/fed.htm, accessed June 13, 2005.

Grazin, Igor. 1993. The rule of law: But of which law? Natural and positive law in post-communist transformation. *John Marshall Law Review* 26: 719–737.

Gutmann, Amy, and Dennis Thompson. 2004. *Why Deliberative Democracy?* Princeton: Princeton University Press.

Habermas, Jurgen, 1991. *The Structural Transformation of the Public Sphere.* Cambridge: MIT Press.

———. 1998. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy.* Cambridge: MIT Press.

Hart, Vivien. 2003. "Democratic Constitution Writing," United States Institute of Peace Special Report No. 107, http://www.usip.org/pubs/specialreports/sr107.html, accessed 6 December 2004.

Hirschman, Albert O. 1997. *The Passions and the Interests.* Princeton: Princeton University Press.

Holmes, Stephen, and Cass R. Sunstein. 1995. The politics of constitutional revision in Eastern Europe. In *Responding to Imperfection: The Theory and Practice of Constitutional Amendment,* ed. Sanford Levinson. Princeton: Princeton University Press.

Klug, Heinz. 2000. *Constituting Democracy: Law, Globalism, and South Africa's Political Reconstruction.* Cambridge: Cambridge University Press.

Kritz, Neil. 2003. "Constitution-making Process: Lessons for Iraq." Testimony before a joint hearing of the Senate Committee on the Judiciary's Subcommittee on the Constitution, Civil Rights, and Property Rights, and the Senate Committee on Foreign Relations' Subcommittee on Near Eastern and South Asian Affairs, June 25.

Kuran, Timur. 1995. *Private Truths, Public Lies: The Social Consequences of Preference Falsification.* Cambridge: Harvard University Press.

LeBas, Adrienne. 2006. Polarization as craft: Party formation and state violence in Zimbabwe. *Comparative Politics* 38 (4): 419–438.

Loveman, Brian. 1993. *The Constitution of Tyranny: Regimes of Exception in Spanish America.* Pittsburgh: University of Pittsburgh Press.

Macedo, Stephen, ed. 1999. *Deliberative Politics: Essays on Democracy and Disagreement.* New York: Oxford University Press.

Mendelberg, Tali. 2002. The deliberative citizen: Theory and evidence. In *Political Decision Making, Deliberation and Participation: Research in Micropolitics,* vol. 6, ed. by Michael X. Delli Carpini, Leo-

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press

nie Huddy, and Robert Y. Shapiro. Greenwich, CT: JAI Press.
Murphy, Walter. 2007. *Constitutional Democracy: Creating and Maintaining a Just Political Order.* Baltimore: Johns Hopkins University Press.
Przeworski, Adam. 1991. *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America.* Cambridge: Cambridge University Press.
Rakove, Jack N. 1997. *Original Meanings.* New York: Vintage Books.
Rawls, John. 1999. *The Law of Peoples.* Cambridge: Harvard University Press.
Schirazi, Asghar. 1998. *The Constitution of Iran: Politics and the State in the Islamic Republic.* London: I. B. Tauris.
Schwartzberg, Melissa. 2007. *Democracy and Legal Change.* Cambridge: Cambridge University Press.
Shapiro, Ian. 2003. *The State of Democratic Theory,* Princeton: Princeton University Press.
Shapiro, Martin. 1992. "The Giving Reasons Requirement." *University of Chicago Legal Forum,* 179–220.
Stasavage, David. 2007. Polarization and publicity: Rethinkng the benefits of deliberative democracy, *Journal of Politics* 69 (1): 59–72.
Sunstein, Cass R. 2001. *Designing Democracy: What Constitutions Do.* New York: Oxford University Press.
Tocqueville, Alexis de. 2000. *Democracy in America.* New York: Bantam Classic.
Tulis, Jeffrey. 2003. Deliberation between institutions. In *Debating Deliberative Democracy,* ed. James Fishkin and Peter Laslett. Oxford: Blackwell.
Walzer, Michael. 2002. Passion and politics. *Philosophy and Social Criticism* 28 (6): 617–633.
Zolberg, Aristide. 1972. Moments of madness. *Politics and Society* 2 (2): 183–207.
Zubrzycki, Geneviève. 2001. "We, the Polish Nation": Ethnic and civic visions of nationhood in post-communist constitutional debates. *Theory and Society* 30 (5): 629–68.

https://doi.org/10.1017/S1537592708081851 Published online by Cambridge University Press