From Words to Worlds

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Constitutional Order

An exploration of constitutional functionality logically begins with an understanding of constitutions. Almost every regime around the world boasts a constitution. From the most tolerant to the most oppressive, polities are consistently able to point to some form of constitutional documentation as their own. It is true that not all political regimes adhere to the principle of constitutionalism, the idea that political power is both created and controlled; but few societies in the modern era have deliberately spurned the practice of crafting and adopting a constitutional charter.

And yet we know that not all constitutions are alike. A quick glance at the constitutions currently governing the roughly 260 nations of the world reveals that they appear to be quite distinct. Texts are structured differently; they protect a variety of diverse priorities and constituencies; they articulate an assortment of aspirations; they aim to promote a range of political goals; and, perhaps most importantly, they derive from very different political and social realities. Some even remain unwritten. In light of this widespread diversity, it is appropriate to begin to comprehend the range of constitutional functions by sketching a few basic definitions. More specifically, we ought to identify the difference between constitutions, as fundamental legal documents, and the principle of constitutionalism.

The push during the summer of 2005 to draft a new constitution for Iraq highlights some of the confusion that inevitably plagues discussions involving terms like constitutionalism and order. Iraq has a new constitutional document. The text includes provisions for free and fair elections, governmental checks and balances, and accommodation of the religious pluralism that so obviously defines the nation. The problem, it seems, is that for many casual observers the existence of a constitutional text is sufficient to turn Iraq, with a recent tradition of totalitarian rule, into a liberal-democratic regime—the text, in short, is the remedy for decades of authoritarian control. The reality, however, cannot be farther from the perception. A constitution alone is not enough to turn any regime, let alone one
that has no experience in democratic rule, into a model of political justice. More is required, and once we introduce additional principles and concepts, the waters begin to get muddy. A constitution is easy to imagine. What is difficult to imagine are the components needed to make the document workable.

For some time now, the definitional lines separating the concepts of constitution and constitutionalism have become blurred. Perhaps due to the sudden increase in constitution-making in the latter half of the twentieth century, what was once a relatively simplistic understanding of constitutional government—one that was based entirely on the existence of a constitutional text—has taken on greater nuance. Presently, a definition of constitutional government that merely acknowledges some constitutional document no longer suffices. Some regimes boast constitutional texts, but we would not call them constitutionalist. Others are constitutionalist in principle but have decided, for whatever reason, to do without a written charter. A few regimes, in fact, embrace neither concept: they do not own a constitutional text, nor do they subscribe to the principles of constitutionalism.

On this broad point, Graham Walker notes, “Every polity, insofar as it is a polity, has a constitution, but not every polity practices constitutionalism.” Similarly, Giovanni Sartori claimed that “[e]very state [has] a constitution but only some states [are] constitutional.” Constitutions are public “texts” that organize and empower a political regime; they pattern the political institutions in a specific way, and they constitute (or create) a citizenry. They may be written or unwritten, but at their most basic level they identify political authority and authorize it to make particular decisions on behalf of the common good. Moreover, they organize the polity for certain clearly defined aims or goals; effective constitutions, that is, help to cultivate imagined political communities. Albert Blaustein and Jay Sigler understand this concept with unique clarity. They contend that modern constitutional documents represent a dramatic shift in the way political power is ordered. Prior to the introduction of the written constitutional text, political authority was based on the sovereign’s mostly conceptual, and thus intangible, political ideology. After the birth of written charters, Blaustein and Sigler insist, constitutions were able to “reduce the abstractions of a political ideology [by placing it] into a concrete reality.” That is, these documents were aimed at textualizing what was mostly a shifting and elusive conception—the specific priorities of the sovereign. The result was the birth of modern constitutionalism.
Constitutions

What qualifies as a constitution has changed dramatically over time. Some might describe constitutions in just one way—as documents whose main purpose is to organize, regulate, and govern political territories. Yet *constitution* refers to order, regardless of whether that order is formally recorded or documented. In fact, prior to the introduction of the modern constitutional charter in the eighteenth century, what might accurately be defined as constitutional looked quite a bit different than what we presently recognize. Constitutions typically consisted of a combination of formal and informal institutions. Pre-Enlightenment constitutions consisted of all or some of the following descriptive features and informal conventions: (1) a description of the polity’s political organization; (2) a series of customary beliefs that acted as a means of informal social control; and (3) a set of longstanding traditions that helped to maintain some semblance of political order. In all, constitutions were a compilation of formal but often unconnected texts and informal and largely unwritten conventions.

Each of these components of a premodern constitution served a few basic purposes. The organization of a polity’s political divisions, for example, characteristically implicated questions related to sovereignty: Where does the locus of power lie? Which departments (monarch, parliament, etc.) control the governing process? The interplay between a kingdom’s specific political institutions might not be formally recorded, since they were often maintained through force and/or tradition, but they were almost always evident, at least to those embedded within them. These relationships, in other words, were not likely to be formally recognized in a written document, but more often than not the monarchy, the parliament, and the subjects of the regime were cognizant of their roles in relation to one another.

Customs and traditions, those informal institutions that also comprised early constitutions, were by contrast far less transparent. These institutions sought to regulate the actions of the sovereign by appealing to longstanding religious and secular beliefs. The thinking was that perhaps the sovereign king would be limited in the sweep of his potentially coercive power if he were regularly reminded of the intimate relationship he maintained with God. God’s force, coupled with a monarch’s conviction that he ruled at the mercy of a higher power, suggested that tyrannical behavior would be curtailed. The problem was that the idea was often more compelling than the reality. Success in controlling the actions of the king through internally derived mechanisms like religious teachings and historical customs was all too rare. In fact, monarchical leaders regularly justified abu-
sive measures in the name, not in spite of, God. The principle that the king is law, rather than that the law is king, often prevailed.

Classical constitutions were thus unique reflections of a particular time and place. In Hegel’s words, “A constitution is not just something manufactured; it is the work of centuries, it is the Idea, the consciousness of rationality so far as that consciousness is developed in a particular nation.” In one sense there were actual “texts” that served constitutional functions prior to the Enlightenment: the Iroquois Constitution is considered by many to be a species of modern fundamental law. Certain famous written agreements between sovereign and subject—documents such as the Magna Carta in 1215, the British Declaration of Rights in 1689, and the early American social compacts—also qualify as constitutions. Even so, it is more likely that any restrictions on the authority of the monarch came not from parchment barriers but from internal laws and parochial beliefs. Bolingbroke put it best in 1733: “By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed.”

As it did in so many other ways, the Enlightenment challenged the basic assumptions of the classical style of constitutions. In fact, the most successful constitutional forms that emerged during and after the Enlightenment looked far different than those that preceded man’s journey into rationalism. Whereas constitutions were vague, undocumented, and primarily lodged in the mind of the sovereign prior to the late eighteenth century, they were transformed by the spirit of the Enlightenment into altogether different things. To put it simply, constitutional framers, after the mid-eighteenth century, aimed to achieve a certain degree of political transparency and objectivity through the constitutional instrument. In most cases these constitutions were also written. They were laid out for the world to see; subjects of the sovereign now had a tangible record—a written document—that articulated and fixed the scope of governmental power.

State constitutions in the former British colonies of eastern North America, followed eventually by the general U.S. Constitution, led the way in establishing a new paradigm of constitutional government. A formal written text that both created and empowered governmental institutions, that identified political authority and yet simultaneously curtailed it, and that emerged not from force but from deliberation and discourse, was at the time a radically new idea. Both the Articles of Confederation and later the U.S. Constitution represented a thorough departure from the classical version of constitutions where the scope and depth
of political power were mostly intangible. Two of the most influential American framers, John Jay and Alexander Hamilton, said it best. Jay wrote that Americans were “the first people whom heaven has favoured with an opportunity of deliberating on and choosing forms of government under which they should live.” Similarly, Hamilton declared in the first Federalist, “It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”

The shift in the design of constitutions could not have occurred if the founding generation in America had not embraced the core principles of the Enlightenment. Figures like James Madison, Benjamin Franklin, Gouverneur Morris, James Wilson, and others were profoundly influenced by the political writings of the major Enlightenment philosophers, especially such thinkers as Montesquieu, Locke, and Blackstone. They borrowed liberally from the earlier writers’ specific ideas about proper governmental systems, but perhaps more importantly, they bought into the broader Enlightenment themes of the period such as popular rule, consent of the governed, equality, liberty, and constitutionalism. The American Founders were committed to an idea that humans were in some sense free of the influence of a higher religious authority. As such, the principles of the Enlightenment inspired the fledgling nation to seek independence and to abandon the old rules that dampened their colonial experience. The first generation of Americans sought to carve out a new world that was not subject simply to the often-inflexible rules of religious faith. Indeed, the American Revolution was as much a revolt against the tyranny of ignorance and superstition as it was a revolution against the British Crown.

An important component of the rejection of the dominance of religion during the Enlightenment was the belief that man was responsible for his own destiny. Logic further dictated that communities of men—political societies, in other words—could control their own collective destinies so long as the institutions of government were properly designed. That, of course, accounted for a dramatic shift in the definition of sovereignty in the late eighteenth century. Rather than lodging primary decision-making power in the institutions of government, as prior regimes had done, the American Revolution marked a turning point in the very nature of political power. The people were now sovereign. They could now decide what design of government they preferred. Political authority was relocated from the few to the many, and as long as the republican frame-
work held up, it would forever be situated in the collective peoples of the United States.

But more significantly, the American Founders also believed that reason through deliberation could ensure a political future that was both energized and stable. Enduring political regimes, in other words, could be achieved through careful planning and rational thought; designing political systems to maximize stability and freedom, the Founders thought, was mostly a scientific endeavor. That philosophy helps explain the widespread use of conventions as instruments to both create and ratify constitutional texts. A convention is a deliberative body summoned together for a common purpose. Any constitutional convention resembling the one in Philadelphia in 1787 serves multiple purposes: it provides individuals from different backgrounds the chance to participate in the crafting of a shared future. In a liberal-democratic regime, it empowers the product—the constitution itself—with a higher degree of legitimacy than if the text was the creation of a single individual. And, finally, a constitutional convention—a body meeting for a fixed moment in time, with a single purpose, and that will sunset after the process of drafting is complete—helps to differentiate the ordinary from the fundamental, the regular or common law from the primary or supreme law. This exact principle was repeated frequently during the Massachusetts Constitutional Convention of 1779; it was often noted that the body charged with creating the fundamental law could not be the same body that enacts ordinary law.

Yet their greatest virtue is that constitutional and ratifying conventions of the sort that gave rise to the American polity rest entirely on the principle of faith—not faith in some deity, but faith in the ability of humans to design their own political lives and create their own political communities. It is perhaps illuminating that, according to Madison’s notes, not once during the long summer of 1787 did the delegates to the constitutional convention formally resolve to seek the wisdom of God. In Franklin’s words, “The Convention, except three or four persons, thought prayers unnecessary.”

Beginning in the eighteenth century, therefore, constitutions took on a new appearance. In addition to their now tangible or written quality, these modern constitutions were very public documents. They were shared by a population that, at least in a limited sense, experienced a sense of ownership in the documents themselves. Most were born out of tyranny, and thus constitutions created by representatives and ratified by citizens were viewed as evolutionary. To many, they represented a significant advance in the theory of just political systems. The idea of formal, written texts to control man’s coercive instincts had been embraced; the question remained whether the Enlightenment experiment
with constitutional government would be successful. The answer to that question would come only if modern political states were to embrace the principle of constitutionalism.

Constitutionalism

The principle of constitutionalism is of course distinct from the constitutional text itself. The principle derives from a subset of modern constitutions whose architecture clearly places primacy on the very specific themes of limited and restrained government, or rather, on the idea that “basic rights and arrangements [should] be beyond the reach of ordinary politics.” In Charles McIlwain’s words, “Constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.” Daniel P. Franklin and Michael J. Baun further note that constitutionalist government can be defined as government by rules. “Every society,” they write, “must make decisions concerning the distribution of scarce resources, and those decisions must be enforced. This being the case, the constitutional regime of a state requires not only the enumeration of rules of public behavior but the establishment of an institutional structure for the implementation of that law. Thus, the concept of constitutionalism rests on two pillars, a theory of justice and process.” Jon Elster offers a similar definition: “[Constitutionalism] is a state of mind—an expectation and a norm—in which politics must be conducted in accordance with standing rules and conventions, written or unwritten, that cannot be easily changed.”

The principle of constitutionalism is actually quite complex, and a more complete definition will emerge in chapter 8. For now, a basic sketch is all that is necessary. In part, constitutionalism is the rule of law applied to constitutional charters: a regime that adheres to the dictates of constitutionalism is a polity that endeavors to divorce fundamental substantive and procedural decisions about the good from the human impulse to think self-interestedly. Broadly understood, constitutionalism refers to the principle that ideas and words can act as a safeguard against the inevitable tendency of political leaders to place power over the right. One should not equate a constitutionalist text with a “workable” text or even with a Western style of constitutional charter. There are plenty of examples of constitutions that purport to protect individuals from the potentially abusive powers of political leaders but that are filled with empty promises. Again, the distinction between constitutional texts and constitutional practice is important to keep in mind.
Perhaps no one has captured the essence of constitutionalism quite as completely as Thomas Paine. Writing in the late eighteenth century, Paine described with profound subtlety the requirements of constitutionalist government. He was not satisfied to rest on the notion that good government was simply limited government. Instead, he identified what is necessary for a government like that in the newly constituted United States to qualify as legitimate. To begin, he noted that a constitution must exist independent of the government it creates. It must, in other words, be “antecedent” to the actual political institutions charged with the responsibility of crafting ordinary law. Secondly, there must be an acknowledgement that the constitution is a reflection of the will of the sovereign people. It should capture a particular belief, idea, or ethos. Thirdly, Paine insisted that as part of its reflective quality, there must also be a general admission that the constitutional text is supreme. That is, when juxtaposed against ordinary acts of the legislature, the constitutional text is paramount. The overall thrust of his general theory of constitutionalism can be observed in the following quote: “A constitution is not the act of a government, but of a people constituting a government, a government without a constitution is power without right. A constitution is a thing antecedent to a government; and a government is only the creature of a constitution.”

Thomas Paine understood that the definition of constitutionalism included two basic components. The first was the idea that constitutions create power. Their purpose is to identify those institutions that will carry on the ordinary and sometimes mundane business of running a complex political society; thus the need for a clear separation between the constitution, as fundamental law, and the legislature, as purveyors of ordinary law. The second component of constitutionalism is the requirement that polities identify specific mechanisms that will successfully limit the power of the sovereign. Techniques to limit governmental power through constitutional force can take many forms, including separation of powers, federalism, checks and balances, and the most popular tool, the list of safeguards and protections more commonly recognized as the bill of rights. Yet regardless of whatever form(s) it may take, the principle of constitutionalism insists that mechanisms are grounded within the constitution itself that successfully offset the possibility of unfettered and capricious rule.

The U.S. Constitution provides a ready example. Most obviously, the American constitution embraces the notion of limited or constrained power by virtue of its being a constitution of enumerated powers. Paraphrasing Hamilton in Federalist 84, the Constitution itself acts as a buffer against tyrannical rule because “government cannot claim more power than it is constitutionally granted.”
Yet even within the American text there are a number of additional safeguards that inhibit the abuse of power. Political authority, for one, is distributed among three coequal branches and two distinct governmental levels. That power is further diffused through the process of checks and balances or shared political authority. Finally, as a concession to the Anti-Federalists, the Bill of Rights was added to further provide insurance against the concentration of federal political power.

The American case is obviously not the only illustration. Take America’s neighbor to the north. The 1982 Canadian Charter of Rights and Freedoms is a unique experiment in the potential power of constitutionalism. Through political negotiation, Canada was able to craft a constitutional document that not only supports traditional freedoms such as that of free expression but also protects freedoms that may be unique to countries with deep-seated cultural differences. Canada’s constitution, in other words, takes seriously the Montesquieuan notion that successful political regimes must be aware of their own particular features. For example, by virtue of chapter 23 of the Charter, encroachment on the right of French-speaking Canadians to educate their children in their native tongue violates the constitution. Similarly, the Charter goes so far as to stipulate: “Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.” The point is that Canadians are using the power of the constitutional text to constrain the English-speaking majority from trampling on the rights of minority linguistic communities. The principle of constitutionalism is aimed squarely at the protection of Canadian linguistic pluralism; its power is being expended to promote the principle of tolerance.

To those in the West, the model of constitutional government is one in which citizens, who presumably have been granted some voice in the political process, agree to certain rules that regulate their conduct and, more critically, the conduct of their elected (and certain unelected) officials. This model—the liberal-democratic model of constitutional government—relies on the principle that legitimate government is (and should be) restrained by the rule of law. The main purpose of a constitutional text, many modern Westerners would admit, is to constrain the inevitable tendency of political leaders to extend, and even abuse, their power. From Locke to Publius to contemporary draftsmen around the world, controlling the passions and appetites of government leaders for increased power has been the primary ambition of the liberal-democratic constitutional text.
Nonconstitutionalism

Now contrast that vision of restrained political power through constitutional mechanisms with its opposite—nonconstitutionalism. To be sure, liberal-democratic polities—constitutionalist polities—are not the only examples of constitutional government. Nathan J. Brown has noted that the Arab experience with constitutional texts seems to counter the experience of most Western regimes. Arab countries have constitutional texts; some even resemble those in the West. However, Brown is quick to point out that constitutional charters in Arab nations are often used to empower leaders rather than limiting or constraining them: “[Arab] Constitutions have generally been written to augment political authority; liberal constitutionalism (aimed at restraining political authority) has generally been at most a secondary goal.” Similarly, H. W. O. Okoth-Ogendo has concluded that some polities, particularly those located in central and northern Africa, do not view constitutions as mechanisms to promote limited and stable government. Instead, these texts often have a much simpler and pragmatic purpose: they serve to declare the regime a sovereign state within the international community. They are, in the words of Ivo Duchacek, a nation’s “birth certificate.” Okoth-Ogendo insists that many African constitutions perform other functions beyond a simple announcement of sovereignty, but securing liberal-democratic institutions and controlling the potential for abuse of power are typically not among them.

Again, a liberal-democratic constitution would resemble the one animating the U.S. political system. This constitutional text is constitutionalist precisely because its various sections are designed to define and subsequently restrain the power of the government. Furthermore, by every measure the U.S. Constitution is authoritative—the institutions of government mostly obey the broad contours of its wording. Consider the example of Kenya as a contrasting illustration. Recently, the Kenyan constitution has been altered to “reflect the full complement of powers already being exercised by the police under penal and public security legislations.” It was amended in the 1980s, not to provide greater freedom for the citizens or to further restrain the power of the Kenyan leadership, but rather to enhance the authority of the state. Such a constitution would not be considered constitutionalist because of its lack of concern for limiting the power of government, yet no one can suggest that those in power carelessly refuse to observe the text’s principal provisions either. The text was carefully amended precisely because the Kenyan polity is committed to some form of constitutional government. Differing in function and ambition from liberal-democratic texts, the Kenyan constitution is therefore both authoritative and nonconstitutionalist.
The absence of constitutionalist principles does not necessarily make a constitution any less of a constitution; it just makes it different. A number of factors can help explain the lack of constitutionalist traditions in those countries that still possess constitutional texts. Most involve economic inequalities, political abuses, and/or social constraints. Certain Latin American countries, for example, support a distinctive style of capitalism and free market economics that often impedes the prioritization of constitutionalism. Societies where farmers are not always free and industrial production is often inefficient are typically societies where the principle of constitutionalism has not yet found root. Put differently, the vast inequalities in wealth and opportunity will often hinder any revolution in favor of greater constitutionalism. On this point Atilio Boron remarks, “Latin American capitalism [has] produced, as a result of the secular decay of the old order, a host of extremely unequal societies in which the spirit of constitutionalism and democracy could hardly survive.”

These same Latin American countries must also contend with a legacy of political rule where authority is mainly concentrated in order to protect the interests of the elite few. A sense of conservatism thus pervades powerful segments of Latin American society. The conservative outlook shared by most in power is of course antithetical to a constitutionalist posture in which the principle of limited or constrained government is viewed as paramount. Leaders, in other words, secretly ask: why seek radical transformation of the political society when the few individuals who have the capacity for successful revolution are the one's most benefiting from the status quo?

Similarly, political authority in certain countries is of such a nature that any potential transition to constitutionalist or limited government would require initial, but equally dramatic, political changes. Countries with socialist traditions, for instance, must make the difficult transition from autocracy to democracy before they can even hope to tackle the issue of constitutional legitimacy. Those regimes that seek simply to transplant constitutional systems (like that found in the United States) onto their soil often find that what works well in one environment does not always work well in another. It will be interesting to see over the next few decades whether the imposition of constitutionalist charters in parts of the world that are not accustomed to that particular style of fundamental law will be successful. What happens, in other words, when superpowers in the West seek to transplant a constitutionalist text on a nonconstitutionalist culture? It’s a difficult endeavor. The current situation in Iraq is just one case in point.

There are, of course, other illustrations. Consider the example of the Philippines. The 1935 Filipino Constitution was almost an exact replica of the Ameri-
can text. And yet conditions in the Philippines were not conducive to a constitutional regime based largely on the principles of shared powers and restrained government. The feudal system in the Philippines, combined with the country's economic dependency on the United States and its centralized political power, doomed the transplant to failure. The 1935 constitutional text was eventually replaced in 1987, but even that document suffers because it supports political principles that do not yet have a foothold in the region. Perhaps Montesquieu was correct: the difficulties in transplanting legal and constitutional systems from one arena to the next are both real and significant.

Overall, the greatest hurdle for countries struggling with the idea of constitutionalism is a lack of faith on the part of citizens. In drafting the American text two centuries ago, James Madison wrote that a document espousing the fundamental law was necessary precisely because human nature is so corruptible. Constitutionalists like Madison were by nature pessimists; they sought to design political institutions (including the constitution) that would successfully forestall the concentration and subsequent abuse of political power. Contemporary framers are no different. They regularly remind us that the primary benefit of an authoritative text is the restraint it places on political authority. To be sure, a degree of reverence encircles a constitutional text in places that value principles such as democracy, equality, and the rule of law; and that reverence is part of what gives the constitutional document its principal force. Still, respect does not come immediately, and even when it is present, it is often very fragile. Support for a constitutionalist regime can erode quickly. Thus the great irony in framing a constitutionalist system is that the mission of a constitutional founder is to embrace a view that humans cannot be trusted to control political power but that constitutions can.

Sham versus Fully Operative Texts

Scholars have tried to make sense of the variety of constitutions throughout the world by assigning various terms to their particular idiosyncrasies. Nathan J. Brown, for example, refers to the type of constitutions governing regimes in Africa and the Middle East as “nonconstitutionalist” in that they may serve the primary purpose of identifying political authority and organizing governmental institutions, but they do not in any way limit governmental power. Nonconstitutionalist constitutions, he insists, are authoritative in the truest sense of the word; their provisions are reliable, and the governmental institutions that enforce them rarely violate their terms. The same can be said for constitutionalist texts like
those found primarily in liberal-democratic regimes. Where liberal-democratic and nonconstitutionalist constitutions differ is in their capacity to control potentially abusive political authority; we should not confuse the fact that, insofar as political officials are unlikely to ignore nonconstitutionalist texts, they share with their constitutionalist cousins a degree of authority. Like the most enduring constitutionalist models of the West, nonconstitutionalist constitutions also carry a certain influence or power. The difference between constitutionalist and nonconstitutionalist constitutions is not that one is respected and the other is ignored, but that one (the constitutionalist example) regulates or restrains political power and the other (nonconstitutionalist) does not.

It may be useful at this point to resurrect Walter Murphy’s theory that constitutions actually fall along a “spectrum of authority.” At one end are what he calls “shams,” constitutions that are mostly ignored or violated by those in power. Murphy notes that the “principal function of a sham constitutional text is to deceive.” Its provisions are meant to disguise the location of the real power within the state, which often can be found in a single tyrannical or authoritarian leader. Giovanni Sartori referred to these texts as “façade constitutions,” while Herbert J. Spiro’s preferred term was “paper” constitutions, and Karl Loewenstein’s was “fictive” constitutions. Finn correctly posits that the distance between “sham” or “fictive” constitutions and ones that are authoritative can often be calculated by considering the distance between “political aspirations” and “reality.” The constitutions of the Soviet Union under Stalin or the People’s Republic of China under Mao, all agree, are paradigmatic examples of “sham” or “fictive” constitutional texts. There was quite a divide between the promises of those texts and the reality of the nations’ politics.

At the other end of the spectrum are those constitutional texts that Murphy describes as “fully operative.” These are the texts that enjoy significant authority (although Murphy insists that no constitution enjoys “complete” authority) and are mostly successful at both binding a citizenry and (in the case of most constitutionalist texts) regulating the power of government. These constitutional designs are ones in which the promises articulated in the document represent the political reality of that particular nation-state. Pledges of rights protections or divisions of power, or, on the other side, concentrations of power in the hands of an autocratic leader, would render the text fully operative if those pledges were manifest in the state’s political practices. Accordingly, many of these constitutions would be described as constitutionalist, but not all. The U.S. Constitution is an appropriate example of the former; Arab constitutions are examples of the latter.
Constitutions therefore actually operate along two intersecting axes: constitutionalist versus nonconstitutionalist, and “sham” versus “fully operative.” A constitutional text can purport to be constitutionalist insofar as it includes all the traditional mechanisms that limit the power of the sovereign. But that constitution can still be considered a sham. The governing charter of the former Soviet Union was just such a text. It included provisions for the protection of individual rights, and yet those provisions were mostly violated by Communist Party elites. Similarly, a constitution can be nonconstitutionalist in that it augments rather than constrains the authority of the sovereign, but that same constitution may be fully operative insofar as it remains reasonably authoritative. Brown argues that Arab constitutions fall into this category: “The Saudi basic law, to give one example, is largely followed [and yet] no reader would take it to aim at establishing a constitutionalist democracy.”

The simple diagram above provides a graphic illustration of the varieties of constitutional texts. Those constitutions that seek to limit the power of the sovereign and whose specific provisions are mostly respected or obeyed by those in political office fall somewhere in quadrant A. Those nonconstitutionalist texts whose aim is not to restrain the power of the government but instead to enhance it can be found in either quadrant B or C. Of course, there is a significant difference between quadrants B and C: quadrant B is reserved for those constitutions that are fully or reasonably operative but that do not portend to regulate or limit the will of the regime’s political leadership. Brown indicates that Arab constitutions fall into this quadrant. Quadrant C, on the other hand, includes
those texts that are neither authoritative nor constitutionalist; they are nonconstitutionalist shams. It is reasonable to assume that quadrant C cannot logically host any examples. Recognizing that in the post-Enlightenment era, a regime that shuns the principal features of a constitutionalist text will in some sense be condemned for its lack of commitment to individual rights, equality, and/or due process, few countries (if any) would go through the trouble of constructing a constitutional text that rejects constitutionalist maxims (and thereby empowers political leaders rather than limiting their authority) and would then decide that the best course of action is to ignore its own already unpopular constitutional text. That is, it seems doubtful that there are constitutional framers who believe it is wise to design a nonconstitutionalist political order, only to then see their design disregarded by political officials in favor of the opposite: justice and limited government. As far as I know there have not been any benevolent dictators for quite some time.

Finally, quadrant D hosts those constitutional texts that promise to abide by certain constitutionalist maxims but are then ignored by those in positions of authority. Sadly, this scenario occurs with frequency in every corner of the globe. The most famous example is the former Soviet Constitution, which included grand claims of individual freedom and justice but which was largely overlooked by Communist Party elites. Other texts that belong in Quadrant D can be found in polities ranging from Africa to Asia, to Central America, and so on; indeed, dictatorial or tyrannical regimes are the typical political systems that abandon constitutional promises of limited government. Similarly, military coups often result in an identical situation, where the new leadership has to “suspend” those constitutionalist safeguards that may have been enforced in the past (yet obviously not with enough frequency to deter the ambitions of an oppositional force) but that now must be sacrificed in the name of “maintaining public order.” The example of Nicaragua comes to mind.

The example of the military coup presents an interesting possibility: that some constitutions can be located in different quadrants at different times in their evolution. Constitutions, in short, can start out in one quadrant yet can, through a series of events or circumstances, shift fairly easily into another. In fact, history recounts numerous examples of political leaders temporarily ignoring the dictates of a constitutional text because they believed that doing so would ultimately benefit themselves or the polity. And these illustrations are not just limited to self-interested dictators. Abraham Lincoln’s suspension of the writ of habeas corpus during the American Civil War comes to mind as an instance where political authority was expended to temporarily marginalize a constitutional text whose
primary role is to ensure that such an event never happens. We may insist that Lincoln’s decision was correct, especially in light of the circumstances surrounding it. Even so, those instances cannot be labeled differently. Once an individual or group that enjoys political power deceives the public by ignoring or suspending the constitutional text, the text—even just for that temporary period—becomes some variation of a sham. So long as the polity’s governmental institutions disregard the constitution, in other words, the message of its articles and clauses is rendered mostly meaningless.

Conclusion

The majority of constitutions around the world can be located within the quadrant that combines both constitutionalist principles and reasonably or fully operative authoritativeness. For that reason, the focus of this book will be entirely on those constitutions that purport to be constitutionalist and authoritative. It will not examine those instances in which a constitutional regime does not subscribe to the doctrine of constitutionalism, nor will it focus on constitutions that are deemed shams. Yet this book is not limited only to narrow categories. It is not, for example, focused solely on liberal-democratic constitutions, although the principle of constitutionalism is often confused with both liberal ideology and the practice of democracy. There are, in fact, examples of nonliberal constitutions that contain certain constitutionalist ideals. There are also examples of nondemocratic constitutions that support modern constitutionalist maxims. This work will therefore try to outline the features of all varieties of constitutionalist and authoritative texts. Its central questions will be: Might there be something that all fully operative constitutionalist constitutions—whether they derive from Western or Eastern polities, or whether they govern liberal or illiberal, democratic or nondemocratic regimes—share in common? Is there a thread that runs through all constitutionalist and authoritative charters? The answers, I believe, can be found by examining constitutional functionality.