From Words to Worlds

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Notes

Introduction

1. See Jacobsohn, Apple of Gold. See also Breslin, Communitarian Constitution.

2. See “Knowing It by Heart: Americans Consider the Constitution and Its Meaning,” a survey conducted by Public Agenda for the National Constitution Center, 2002.

3. Recent federal legislation now mandates that those institutions of higher education that receive federal funds must commemorate the anniversary of the signing of the constitutional text in what the legislation calls “Constitution Day.”

4. See Finn, Constitutions in Crisis.

5. See, among others, Sunstein, Designing Democracy; Schneier, Crafting Constitutional Democracies; and Murphy, Constitutional Democracy.

6. See Harris, Interpretable Constitution.


8. For a concise description of the division between attitudinalists and scholars of judicial review, see Kersch, “Review of The Democratic Constitution.”

9. Consider what Sotirios Barber, himself a noted constitutional theorist, says: “The postwar constitutional consensus shifted most of the legal academe to a court-centeredness that took the Constitution’s authority and goodness more or less for granted and concentrated either on what the Court had to say and should say about constitutional meaning (academic law) or on the extralegal determinants of judicial behavior and decision (political science)” (“Notes on Constitutional Maintenance” 162).


11. Larry D. Kramer takes a slightly different approach in critiquing the judicial supremacy literature, arguing that such scholarship misunderstands the rich history in the United States of popular constitutionalism, the principle that the people, not the courts, are the supreme authority in interpreting the Constitution. See Kramer, The People Themselves.

12. Sanford Levinson recognizes the division between text and political institution. He writes: “To reject the ultimate authority of the Supreme Court is not in the least to reject
the binding authority of the Constitution, but only to argue that the Court is to be judged
by the Constitution itself rather than the other way around” (Constitutional Faith, 43).
George Thomas also defends a view of the Constitution that acknowledges this important
distinction. His words resemble Levinson’s: “If we take the Constitution seriously, we are
bound by the Constitution and not the Court’s interpretation of it, which are hardly the
same thing” (“Recovering the Political Constitution,” 239).
13. “Address by President Nelson Mandela to the Constitutional Assembly on the Oc-
casion of the Adoption of the New Constitution,” Cape Town, May 8, 1996.
14. It is telling that when one of the leading contemporary scholars of constitutional
theory called for a constitutional convention to draft a new charter for the United States,
his first concern was to convince us to abandon our veneration for the Constitution. See
Levinson, Our Undemocratic Constitution.
15. The Federalist, no. 1.
16. To be sure, founders are concerned with all questions related to the constitutional
form, but their more immediate and necessary role as creators is captured most accurately
in questions related to transformation, aspiration, and design.
17. I will argue, implicitly, that constitutions are the primary force in performing these
various functions, but I am not so naïve as to think that a polity’s constitutional text is the
only force behind many of these tasks. A country’s aspirational claims, for example,
cannot rest entirely within a single constitutional charter. Other documents and/or social
movements also contribute to the formation of a polity’s primary goals and objectives.
Such was the case with the American Revolution and, perhaps even more tangibly, with
its Declaration of Independence. But my argument is a bit different. My claim is that the
nature of constitutions in general—the fact that they are, in most cases, the country’s
primary organizing document—compels them to perform most (or all) of the seven con-
stitutional functions.
18. These functions follow a rough temporal sequence. I have placed “Constitutional
Transformation”—the chapter devoted to a discussion of how constitutional foundings
do violence to an old way of life and usher in a new political vision—first because the en-
tire principle of constitutional functionality commences with the birth of a new nation.
After that, it seems appropriate to comment on a constitution’s aspirational qualities, es-
pecially since they are typically announced in the text’s preamble. Constitutional design
is next, followed by a discussion of conflict, recognition, empowerment, and, finally, con-
stitutional limitation.
19. In a fascinating new book, Donald S. Lutz has contemplated the “general principles
of constitutional design” that might lead to a successful political order. His overall conclu-
sion is that in order for a constitution to be successful, it must reflect the particular ideals
of the specific nation. In other words, success depends on recognizing national distinc-
tions. See Lutz, Principles of Constitutional Design.
20. See Murphy, “Constitutions, Constitutionalism, and Democracy.” See also Eisgru-
ber, “Judicial Supremacy and Constitutional Distortion,” and Perry, “What Is ‘the Consti-
tution?’”
22. Ibid., 42.
25. Amar, “Rethinking Originalism.”

*Chapter One • Constitutional Order*


10. Ibid.
12. This is not to suggest that constitutions are perfect; they are most often compromises, inspired not by what is possible but by what can be implemented. Nonetheless, they do represent an “advance” in the evolution of controlled political power.
18. Ibid. (emphasis his).
19. *Federalist* 84.
20. See Brown, *Constitutions in a Nonconstitutional World*.
21. Ibid., xiii.
24. Ibid., 73.
25. See Boron, “Latin America.”
26. Ibid., 344.
28. See *Federalist* 51.
30. See Murphy, “Constitutions, Constitutionalism, and Democracy.”
31. For an informative discussion of the variety of terms used to describe sham texts, see Finn, *Constitutions in Crisis*, 22–23.
32. It is important not to confuse constitutionalism with a fully operative constitut-
Some constitutionalist texts that purport to limit the authority of the sovereign are in fact ignored by those in power.

33. Nathan J. Brown has insisted that the Soviet constitutions were not shams because their fundamental goal was to “establish 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” (Constitutions, 6).

34. Ibid., 7.

Chapter Two • Constitutional Transformation

1. Constitutional transformation can also occur without the abandonment of past texts and the adoption of new ones. In chapter 6, I talk about the important work of Bruce Ackerman in this area.

2. Consequently, we will return to the idea of constitutional foundings numerous times over the next three chapters.

3. To be sure, the founding moment is not always the “aha” moment; it is not always the case that a constitution is founded in a highly dramatic way. Constitutional change can take place over a period of time.

4. Wheare, Modern Constitutions, 8.


8. Ibid., 394.

9. See Gordon, Controlling the State.

10. Webster’s dictionary defines alteration as “the process of making something different.” Thus, even if we are considering only minor changes to a polity’s structure or identity, that change represents a destructive act. The old is gone, even if the institutions present in the old regime still remain.


13. School children in the United States are regularly reminded that the major constitutional framers were intimately familiar with the failures of past republics when they proposed a new constitutional order.


15. Secessionists were the victims of America’s second constitutional transformation, the one that occurred as a result of the Civil War.

16. For an interesting discussion of the impact of amendments on the theory of (American) constitutionalism, see Sanford Levinson, ed., Responding to Imperfection, especially “How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change.”
17. The Constitution of the Republic of South Africa, Chapter 1, Section 1(a).
19. Ibid.
20. See Benjamin, “Critique of Violence.”
23. See Tully, Strange Multiplicity.
25. Amar, Bill of Rights, 27.
26. Murphy, “Civil Law,” 129.
27. Ibid., 125.
28. See the Czech Sociological Review, Issue Number 6 (2005), an entire volume devoted to the topic of civic engagement in Eastern Europe.
30. Ibid., 102.
33. Ibid., 155 (emphasis in original).
34. Ibid., 126.
35. Ibid., 172.
36. Ibid., 120–21.
37. See Duchacek, “National Constitutions.”
38. See Jacobsohn, Apple of Gold.
39. See Breslin, Communitarian Constitution, esp. chap. 6.

Chapter Three • Constitutional Aspiration

2. See Levinson, Constitutional Faith, and Grey, “The Constitution as Scripture.”
3. Whittington, Constitutional Interpretation, 64.
4. By its very nature, the “spirit” of a constitution, whether it be aspirational or not, is difficult to capture; it is a complicated, often subjective enterprise that requires one to defend a specific interpretation of the “ideals” or “principles” that one believes are embedded in the text. In that sense, therefore, any discussion about the spirit of a constitutional text inevitably becomes a political discussion about the meaning of the text. And yet I think some of that subjectivity can be transcended, especially if the focus is placed on the aspirational qualities of a constitutional document.
7. See Jacobsohn. The Supreme Court and the Decline of Constitutional Aspiration, esp. chap. 6.
9. Ibid.
10. On August 28, 1963, King spoke these words: “When the architects of our country wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir.”
12. Ibid., 66.
13. The Massachusetts Constitution of 1780 was the rare exception.
16. For a more detailed explanation of the meaning of this concept, see Wayne D. Moore’s excellent book, *Constitutional Rights and Powers of the People*.
20. Found in Blaustein and Sigler, eds., *Constitutions That Made History*.
21. The Mozambican constitution can be defined as mostly constitutionalist and, especially after the end of the civil war of 1975–92, roughly fully operative.
24. The Democratic Republic of Congo has adopted several more constitutional texts since 1992, including an interim constitution in 2003 and a permanent one in 2006. The preamble of each of these successive constitutions closely resembles the 1992 text.
25. In certain parts of the world, national identity is used as shorthand for “ethnic identity,” especially in those areas (like Eastern Europe) where national borders often reflect ethnic divisions. I use the term “national identity” throughout this discussion for consistency.
27. See Klug, *Constituting Democracy*.
28. Elster remarks that since 1989 there has been a “snowballing process in which events in one [Eastern European] country inspired and accelerated those in others.” See Elster, “Constitutionalism in Eastern Europe,” 448.
29. Comparing the Eastern European constitutions drafted in the early 1990s with those from the Soviet era reveals that many discarded constitutional texts also included assertions of sovereignty. The difference, of course, is that that the earlier constitutions were shams.
31. It warrants mentioning that prior to the fall of the Berlin Wall, Eastern European countries regularly included positive rights in their constitutional texts as part of the Soviet Union’s socialist agenda. Insofar as these constitutions were shams, they are obviously not considered here.
33. In the South African text, the provision discussing the enforcement of rights can be found in Chapter II, Article 38. The equivalent provision of the Canadian Charter of Rights and Freedoms is Article 24.


36. See Whittington, Constitutional Interpretation, 66.

37. See Murphy, “Constitutions, Constitutionalism, and Democracy,” 7.

38. Stephen Elkin refers to this multigenerational rationality in terms of a chain novel. Like future generations of constitutional citizens, “those who follow [the original entry into a chain novel] write the next chapters of the novel, building on what has come before. The authors of new chapters, in turn, are free to move the novel’s characters in different directions, add new ones, and so forth. But to participate in the writing of this new novel [or in the interpretation of constitutional texts] requires that authors first pay attention to what has come before them in the text” (Reconstructing the Commercial Republic, 8).

Chapter Four • Constitutional Design

1. Murphy, “Constitutions, Constitutionalism, and Democracy,” 8.


4. See Baron de Montesquieu, The Spirit of the Laws.


6. Murphy, Fleming, Barber, and Macedo, American Constitutional Interpretation, 118.

7. The Constitutional Court was asked to review the new text and it dealt a blow to the entire process by insisting, “We are unable to and therefore do not certify that all of the provisions of the Constitution of the Republic of South Africa 1996 comply with the Constitutional Principles contained in schedule 4 to the Constitution of the Republic of South Africa Act 200 of 1993.” Accordingly, the Constitutional Assembly was mandated to return to the table to revise the text in accordance with the central principles stipulated in the interim constitution.


9. Ibid., 251.

10. See Waldmeir, Anatomy of a Miracle.


13. See “Knowing It by Heart: Americans Consider the Constitution and Its Meaning,” a survey conducted by Public Agenda for the National Constitution Center, 2002.


15. See Federalist 84.

16. Ibid.
17. See Blaustein and Sigler, eds., *Constitutions That Made History*.
20. Ibid.
21. I am not suggesting that earlier constitutions were not concerned with individualism, rights, and equality. They certainly were. I am merely suggesting that the explicit language aimed at these values has altered the composition of many constitutional forms.

Chapter Five • Constitutional Conflict

2. The most famous discussion of the need for constitutions to combat the impulses of humans to seek greater power can be found in *Federalist* 51.
3. Two of the most important books on constitutional theory published in the last decade have focused directly on these themes: Levinson, ed., *Responding to Imperfection*; and Barber and George, eds., *Constitutional Politics*.
6. The principle of constitutional empowerment will be discussed in chapter 7.
7. Even if a regime has multiple documents that constitute the fundamental law (e.g., Israel), there is still but one constitution.
8. It is hard to fathom that any constitutional framer in the modern era would accept a definition of constitutionalism that did not include the recognition that the text itself represents a unique force, one that acts as an important mechanism to control the institutions of government, for to reject that definition would be to reject constitutionalism itself.
10. Ibid.
11. See Article 33 of the Canadian Charter of Rights and Freedoms.
12. Many of those rules have an aspirational quality, but they are still rules.
14. For more on why it may be inadvisable, see the earlier discussion of the increasing length of recent constitutions in chapter 3, above.
15. Many commentators have spent the better part of their careers considering this exact question. The most interesting recent addition to the debate comes from Kramer’s book, *The People Themselves: Popular Constitutionalism and Judicial Review*.
17. Consider also the arguments made by Publius in *Federalist* 78–84 on this topic.
18. George Thomas has written about the American experiment that “constitutional conflict is a perennial, and uneven, feature of our constitutional framework” (*Madisonian Constitution*).
20. Ibid., 21 (emphasis in original).
23. Glancing briefly at the Israeli illustration, it also seems clear that Raz may have noticed something important about constitutions when he insisted that each has a particularistic quality. Certainly, Israel’s constitution can be called particularistic; Gary Jacobsohn (Apple of Gold) is just one of a number of scholars who sees the unique components of the Israeli constitutional polity.


29. See Levinson. Constitutional Faith, esp. chap. 3.

30. For a wonderful discussion about the continual ratification of the constitutional text, see Harris, The Interpretable Constitution.


32. Ibid., 197.

33. See Raz, “On the Authority and Interpretation of Constitutions.”

34. See de Tocqueville, Democracy in America, vol. 1.


36. See Wood, Creation of the American Republic, esp. chap. 15.

37. Ibid., 614.

38. See Ackerman, We the People: Transformations.

39. The example of the Twenty-first Amendment overturning the Eighteenth Amendment of the United States Constitution is a good illustration.

40. A fascinating debate about the comparative benefits to a simple amending process emerged when Eastern European Constitutions were being drafted. See Holmes and Sunstein, “The Politics of Constitutional Revision in Eastern Europe.”

41. Surely, Publius would be delighted with this idea, for it represents the essence of “deliberation and choice.” See Federalist 1.


43. Patriation is a uniquely Canadian term for making the constitution more reflective of the interests and personalities of all citizens.

44. See Russell, “Can the Canadians Be a Sovereign People?”

45. See Parkin, “CRIC Poll.”

46. Ibid.

47. See Hogg, “Formal Amendment of the Constitution of Canada.”


49. Ibid., 255.

50. See Federalist 51.

51. Federalist 1.
Chapter Six • Constitutional Recognition

1. See Tully, *Strange Multiplicity*.
3. See Cover, “Nomos and Narrative.”
4. There are certain populations (African Americans, women, etc.) who were not part of the drafting and ratification process in the United States and for whom the original, unamended Constitution does not speak. The primary thesis of this chapter is that those (and many other) groups are not fully vested in the polity until they achieve a degree of constitutional recognition.
5. See Tully, *Strange Multiplicity*.
6. See Ackerman, *We the People*, vols. 1 and 2.
8. See Ackerman, “Higher Lawmaking.”
10. Publius was concerned that, having “neither force nor will,” the institution of the judiciary would be largely impotent in comparison to the legislative or executive branches. It was, after all, the nature of a judiciary to be “the least dangerous to the political rights of the Constitution.” In response, the framers were forced to utilize more creative methods to strengthen the judiciary. See *Federalist* 78.
11. See McKenna, ed., *The Canadian and American Constitutions in Comparative Perspective*; Romney, *Getting It Wrong*.
12. Peter Russell has suggested that Canada has undergone no less than “five rounds of macro-constitutional politics.” Each round, Russell argues, consists of a separate moment in Canadian history where the constitution has been either challenged in a fundamental way or changed dramatically. See Russell, “Can the Canadians be a Sovereign People?”
14. See Watts, “The American Constitution in Comparative Perspective.” See also Wroth, “Notes for a Comparative Study.”
15. See Wheare, *Federal Government*; Waite, ed., *Confederation Debates in the Province of Canada*.
16. Alan Cairns has described the original Canadian constitution “as a body of understandings which in turn define the basic institutions of government, the relationship between them, plus the relationships between governments in the federal system and between the citizens and those governments” (“The Living Canadian Constitution,” 31).
18. The Constitution Act, 1867, provides for two separate tools to maintain cultural diversity: (1) Section 133 guarantees the right of persons to use either English or French in the institutions of national government (including the federal courts) as well as the courts
of Quebec; and (2) Section 93 protects “established religions” with regard to funding for denominational schools.


20. See Russell, “Can the Canadians be a Sovereign People?”

21. See Weinrib, “Canada’s Constitutional Revolution.”

22. See Article VII, section 1 of the Canadian Charter of Rights and Freedoms.

23. See Article VI, section 2 (a) and (b) of the Canadian Charter of Rights and Freedoms.

24. See Article XV, section 1 of the Canadian Charter of Rights and Freedoms.

25. Cairns. “Citizens (Outsiders) and Governments (Insiders) in Constitution Making.”

26. See Article XV, section 1 of the Canadian Charter of Rights and Freedoms (emphasis added).

27. See Article XVI, section 1 of the Canadian Charter of Rights and Freedoms.

28. See Article XXIII, section 1 (a) and (b) of the Canadian Charter of Rights and Freedoms.

29. The legislature in Quebec had earlier passed a number of laws relating to language, including statutes that regulated who could send their children to English schools and ones that mandated that all signs must be written in French. It was a significant achievement, however, and one that contributed greatly to the community’s cultural survival, that in 1982 the rest of Canada acknowledged these priorities and safeguarded them in the national constitution.


31. Section 33 of the Charter of Rights and Freedoms reads: “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.”

32. See Tushnet, “Policy Distortion and Democratic Debilitation.”

33. See *Ford v. Quebec* (Attorney General) [1998] 2 S.C.R. 712 (Can.). The case involved a challenge to Bill 101, a law passed by Quebec’s parliament mandating that all public signs and advertising be written in French. Ford, a shop owner, challenged the law (and thus the use of the notwithstanding clause) on the grounds that it violated the principle of free expression. The Canadian Supreme Court agreed.


35. In October 1995 a referendum on independence was defeated—50.6 percent against, 49.4 percent in favor.

36. Peter Russell argues that the failure of the Charter within Quebec precipitated the call for another constitutional moment where Canadian leaders—this time meeting at Meech Lake—attempted to hammer out an agreement that would forestall the possibility of secession. The Meech Lake accords attempted to accommodate further the French Quebeccois by giving them a greater sense of self-determination through representation in
certain governmental offices, as well as the claim that Quebec will be “recognized as a distinct society within Canada.” These accords, however, were not ratified by English Canada. See Russell, “Can the Canadians Be a Sovereign People?”

Chapter Seven • Constitutional Empowerment

1. Federalist 70.
2. See Klug, Constituting Democracy.
4. Ibid.
5. See Fiske, American Revolution, esp. vol. 1, chap. 2.
6. Ibid., 81.
7. See Adams, Revolutionary Writings of John Adams, 118.
8. Ibid., 120.
10. Revolutionary Writings of John Adams, 118.
11. Ibid., 122.
12. Ibid., 132.
13. See Holmes, “Precommitment.”
14. For a more detailed discussion, see Breslin, Communitarian Constitution, 175–81.
15. Whittington, Constitutional Construction, 8.
16. Ibid., 10.
17. Ibid., 18.
19. Stephen Elkin puts the point this way: “Liberty is a product of government” (Reconstructing the Commercial Republic, 246).
22. Storing, Toward a More Perfect Union, 119.
23. Hamilton, Federalist 63, quoted in Storing, Toward a More Perfect Union, 121.
24. It does not seem to matter if the rights derive from negative expressions of liberty (as in the U.S. Constitution) or positive expressions of liberty (as in many European and Third World constitutions).
25. Quoted in Storing, Toward a More Perfect Union, 124.
26. Ibid., 116.

Chapter Eight • Constitutional Limits

1. Congressional Globe, 11 April 1871, 574. Quoted in Finn, Constitutions in Crisis, 5.

6. The term originated in England in 1832, according to the *Oxford English Dictionary*.


8. Ibid.


12. Many of these contracts were inspired by the social contract theorists of the time, especially thinkers such as John Locke.


16. President Mandela’s Address to the Constitutional Assembly, May 8, 1996.

17. Aristotle insisted that leaders should rule by law so as not to be influenced by personal passion.


20. *Federalist* 51.


23. This was the essence of the debate over the need for a Bill of Rights. Madison, Hamilton, and others thought it was unnecessary to include a list of freedoms within the constitutional text because a constitution is itself a bill of rights. See *Federalist* 84.

24. The Magna Carta (1215) and the British Declaration of Rights (1689) were the only contracts that effectively limited monarchical power.


27. Schochet adds to Bolingbroke’s definition of constitutionalism by claiming, “Constitutional limitations included the accumulated traditions, folkways, and practices of a people as well as the overarching dictates of nature and/or divinity.” See Schochet, “Introduction: Constitutionalism,” 2.


30. That is not to say that they should be immune from interpretation.

31. The characteristics of modern constitutionalism are developed more fully in Breslin, *Communitarian Constitution*, 120–33.


34. Madison, “The Virginia Report.”
35. The British Constitution is in every sense modern and constitutionalist. What helps to make it so are the agreements like Magna Carta and the British Declaration of Rights that set out fixed and stable rules.
37. Publius goes on to say, “This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them the communion of interests and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny.” See Federalist 57.
40. In fact, Locke believed that liberty would be maximized in a political society because individuals would be free to pursue passions and interests, knowing that their safety was more or less secure.
41. Lutz also reminds us that Locke himself refers to the “social compact.” Only in the last century has the concept of social contract replaced the social compact. See Lutz, Origins of American Constitutionalism.
42. Ibid., 16–17.
43. Wood, Creation of the American Republic, chap. 7.
44. Ibid., 282–91.
46. I am using the term “amended” loosely here. A change in values could come from a variety of sources, including judicial interpretation, legislative action, or even cultural revolution.
47. Found in McIlwain, Constitutionalism, 2.
49. See Thomas, Madisonian Constitution.
51. Amar, America’s Constitution, 8.
52. See Breslin, Communitarian Constitution, chap. 4.
54. Ibid.
56. I am especially grateful for Douglas Edlin’s insight into the Act of Settlement and British jurisprudence. For an excellent discussion of these and other weighty topics, see Edlin, ed., Common Law Theory.

Conclusion • Constitutional Futures

2. See Klug, Constituting Democracy.

5. See Murphy, “Constitutions, Constitutionalism, and Democracy.”


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