
**DYSFUNCTIONAL? DISSONANT? DÉMODÉ? AMERICA’S
CONSTITUTIONAL WOES IN COMPARATIVE
PERSPECTIVE**

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INTRODUCTION

Many signs indicate that systemic political malaise and government dysfunction have taken hold in America. Sarcasm is prevalent in discussions of politicians and government institutions. Talk in the media is characterized by nonstop self-lamentation and doomsaying. International observers are becoming more and more concerned. All of this creates an impression of a fatally gridlocked, if not an altogether lost, political and constitutional system. Certainly, government shutdown is not a sign of good political health in any polity, let alone in a major economic and military powerhouse that professes to be the motherland of modern democracy. That certain “hard-wired” structural elements of America’s constitutional order are to blame for some of the country’s political woes seems indisputable.¹ The challenge of constitutional obsolescence and the distorted policy outcomes it yields seems particularly pressing. It is clear that a constitutional order adopted in the late eighteenth century is no longer entirely suitable for a twenty-first century powerhouse democracy with a population of over 300 million, let alone for addressing new-age challenges such as the megacity and the environment. But it is only by

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¹ See, e.g., ROBERT DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 91-118 (2d ed. 2002) (“[C]ompared with other democratic countries our performance appears, on balance, to be mediocre at best. How much does our performance have to do with our constitutional system? To tease out the extent of that connection would be extraordinarily difficult” *Id.* at 118.); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

turning our gaze overseas for some comparative insight that we can assess how bad America's constitutional woes truly are.

In this brief Article I wish to place America's constitutional shortcomings in a broader context by considering them in light of four types of constitutional gridlock and dysfunction that are prevalent around the world. First, the "fundamental constitutional disharmony" scenario is characterized by discordant constitutional orders that disagree about the very definition and *raison d'être* of the polity as such, and fierce debate about sources of law and the form of government that result in an apparently oxymoronic constitutional framework (for example, Egypt, Israel, Pakistan, Malaysia, and Turkey).² Second, the "synthetic constitution" scenario occurs where "artificial," bi- or multiethnic polities live under a pragmatic, second-order, problem-solving, unprincipled constitutional mode that perpetually faces a realistic possibility of breakdown (for example, Belgium, Bosnia and Herzegovina, and perhaps also the pan-European constitutional order). Third, the "opportunistic constitutional wars" scenario features frequent political struggles and strategic quarrels between rival self-interested elites that are disguised as principled constitutional disagreements, and may occasionally escalate into all-out constitutional wars (for example, constitutional battles between rival political elites in Romania or the Philippines, and challenges to fiscal federalism and reallocation of resources in oil- or mineral-rich federations such as Bolivia or Nigeria). Finally, the "inadequate constitution" scenario – this occurs where there are dated or otherwise deficient constitutional designs that impede effective government and that may yield derisory political outcomes (for example, Italy has had sixty-two governments over the last sixty-seven years; the population in Canada's 308 federal electoral ridings varies from 35,000 to over 125,000 so that a vote in certain parts of the country is "worth" 3.5 times more than a vote in other parts).

The U.S. constitutional order appears to share some features of the latter two scenarios, but fortunately none of the former, deeper, and more life-threatening two. Relatively speaking, and when assessed against the backdrop of these four scenarios, the American situation, serious as it may be, is not even close to being in the "terminal" state in which some observers portray it. Granted, America's major role in global economic, political, military, and cultural affairs makes its governance problems far more consequential than those of most other countries. From a purely analytical or "diagnostic" standpoint, however, that is a background story (much like how high blood pressure is a universal medical condition with well-documented causes and effects, whether the person suffering from it is Jane Doe, Mohammed Lee, or the President of the United States).

² See RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010); Gary Jeffrey Jacobsohn, *The Disharmonic Constitution*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* 47, 47-65 (Jeffrey Tulis & Stephen Macedo eds., 2010).

I. THE “FUNDAMENTAL CONSTITUTIONAL DISHARMONY” SCENARIO

We can call this the “frozen hot chocolate” (a coffeehouse chain hit beverage) or the “vegetarian meatballs” constitutional condition. Several years ago Gary Jacobsohn introduced the intriguing idea of “constitutional disharmony” between a polity’s deep and enduring constitutional identity and its actual constitutional order, and discussed the near-systemic quest to mitigate or resolve this disharmony.³ Constitutional disharmony may emanate from a polity’s commitment to apparently conflicting values⁴ (for example, Ireland’s overarching Catholic morality and European Court of Human Rights (ECHR) membership, or Israel’s self-definition as both a Jewish and a democratic state), or it may reflect a tension between the values protected in a country’s constitution and the values prevalent among its populace (think of the tension between Turkey’s constitutional legacy of militant secularism and the fact that the vast majority of Turks define themselves as devout Muslims).⁵ In short, constitutional disharmony describes a polity that struggles with fundamental disagreements (sometimes violent battles) about the very definition and *raison d’être* of the polity as such, that subscribes to apparently opposing core values, and that must deal with basic disagreements over the source of law, the form of the government, and the most basic parameters of collective identity and nation formation. In both versions of constitutional disharmony, the constitutional order suffers from a deep “geological tension,” which stretches it in two opposite directions.

Consider what I have elsewhere termed constitutional theocracy – an increasingly common constitutional order that on the one hand enshrines the “rule of God,” religion, and its interlocutors as “a” or “the” source of legislation (effectively mandating that every piece of legislation must comply with the basic tenets of the religion), and at the same time adheres to core ideals and practices of modern constitutionalism, including popular sovereignty, rights, and judicial review.⁶ A unique, some would say organically confused, hybrid of apparently conflicting worldviews, values, and interests emerges.

³ See Jacobsohn, *supra* note 2.

⁴ See *id.* at 55 (“Pursuing identity along dialogical paths may thus require reconsideration of the juri-centric model that has long dominated contemporary constitutional theorizing . . .”).

⁵ This scenario is more common than is often acknowledged. In a new empirical study, Mila Versteeg finds that the link between nations’ specific constitutional choices and their citizens’ values has generally been weak, at times even nonexistent. See Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. (forthcoming 2014) (manuscript at 5), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2267320 (“Drawing on an original dataset that spans the right-related contents of all national constitutions, the Article shows that constitutions do not usually align with popular opinion.”).

⁶ See HIRSCHL, *supra* note 2.

In the past four decades at least thirty of the world's predominantly Muslim polities have declared Shari'a (Islamic law) "a" or "the" source of legislation (meaning that legislation must comply with principles of that religion).⁷ The new constitutions of Afghanistan (2004)⁸ and Iraq (2005),⁹ as well as the Constitutional Declaration of Libya (2011),¹⁰ reflect a commitment to principles of Shari'a as the "state religion" and "source of legislation" alongside a commitment to general principles of constitutional law, human rights, and popular sovereignty. Early post-"Arab Spring" election results in Tunisia and Egypt, to pick two examples, indicate that the trend towards an increased role for religion in law and in public life is not likely to subside.¹¹ Regimes throughout the nonsecularist world struggle with foundational questions:

[These regimes] have been forced to navigate between cosmopolitanism and parochialism, modern and traditional metanarratives, constitutional principles and religious injunctions, contemporary governance and ancient texts, and judicial and pious interpretation. More often than not, the clash between these conflicting visions results in fierce struggles over the nature of the body politic and its organizing principles. These tensions are evident in virtually every aspect of public life, from court hearings to university lectures, [and] from crowded soccer stadiums to secluded board meetings.¹²

"Constitutional courts find themselves at the forefront of this struggle, as they attempt to address constitutional theocracy and translate its uneasy bundle of seemingly contradictory aims and commitments into practical guidelines for public life."¹³ Consequently, "throughout the world of constitutional theocracies—be they soft or rigid, formal or informal— [we find] fascinating, largely unexplored [constitutional] and jurisprudential landscapes . . ."¹⁴ These reflect complex "amalgams of universal aspirations and domestic realities."¹⁵

In Egypt an intense and possibly unbridgeable tension between secularist and religious visions of the good society has been brewing for decades. As has

⁷ See Saïd Amir Arjomand, *Islamic Constitutionalism*, 3 ANN. REV. L. & SOC'Y 115 (2007).

⁸ See CONST. OF THE ISLAMIC REPUBLIC OF AFG.

⁹ See *Doustour Joumhouriat al-Iraq* [The Constitution of the Republic of Iraq] of 2005.

¹⁰ See LIBYA TRANSITIONAL NAT'L COUNCIL, DRAFT CONSTITUTIONAL CHARTER FOR THE TRANSITIONAL STAGE (2011), archived at <http://perma.cc/CM2-SK9B>.

¹¹ See BAUDOIN DUPRET, INSTITUT DE RECHERCHE STRATÉGIQUE DE L'ÉCOLE MILITAIRE, LA CHARIA AUJOURD'HUI: USAGES DE LA RÉFÉRENCE AU DROIT ISLAMIQUE (La Découverte 2012).

¹² HIRSCHL, *supra* note 2, at 5.

¹³ See *id.* at 242; see also *id.* at 103-61 (addressing dozens of such rulings).

¹⁴ *Id.* at 242.

¹⁵ *Id.*

been widely documented, this tension has brought about, within the last two years alone, the outlawing of a popular political movement, mass demonstrations, crude military intervention in the political sphere, political intervention in the judicial sphere, and two major constitutional revolutions.¹⁶

Other examples of profound tensions of this nature abound. Since its inception as an independent country, Pakistan (one of the world's few "nuclear nations") has been torn on the question of Islam as a pillar of collective identity. The process of the "Islamization" of Pakistani law goes back to 1973 and has known many twists and turns.¹⁷ Its pinnacles have been the 1978–1980 establishment of a Shari'at court system at the provincial and federal levels as well as a Shari'at Appellate Bench (SAB) at the Supreme Court¹⁸:

[T]he introduction in 1985 of a set of amendments to the constitution, effectively stipulated that "[a]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunna, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions of Islam." . . . In theory, this means that legislation must be in full compliance with principles of Shari'a.¹⁹

The Supreme Court of Pakistan (SCP), however, has begged to differ.²⁰ In response to the possible conclusiveness of the Islamization reforms, SCP developed its "harmonization doctrine," according to which no specific provision of the constitution stands above any other provision.²¹ In a landmark ruling in 1992, the SCP held that the "Islamization amendment" shall not prevail over the other articles of the constitution, as the amendment possessed the same weight and status as the other articles of the constitution and therefore "could not be placed on a higher pedestal or treated as a *grund norm*."²² SCP's

¹⁶ See, e.g., *Egypt News – Revolution and Aftermath*, N.Y. TIMES, <http://topics.nytimes.com/top/news/international/countriesandterritories/egypt> (last visited Feb. 28, 2014), archived at <http://perma.cc/X8RY-5G3M>.

¹⁷ See Daniel P. Collins, *Islamization of Pakistani Law: A Historical Perspective*, 24 STAN. J. INT'L L. 511, 563 (1988) ("Pakistan's third constitution was promulgated on August 14, 1973. Like its predecessors, the 1973 constitution contained a repugnancy clause and established an advisory Council of Islamic Ideology to recommend changes for conforming the law to the *shari'ah*." (footnote omitted)).

¹⁸ See *id.* at 570 ("[T]he establishment of the Federal Shariat Court represented a potentially dramatic shift in the nature of Pakistan's legal system. The idea of judicial review according to the *shari'ah* . . . had finally become a reality.").

¹⁹ HIRSCHL, *supra* note 2, at 38 (quoting PAKISTAN CONST. art. 227, § 1, cl. a).

²⁰ See *Khan v. Gov't of Pak.*, (1992) 42 PLD (SC) 595 (Pak.) (rejecting the claim that *shari'ah* law can be directly applied by courts as a source of law).

²¹ See *id.* at 597 ("A Constitution has to be read as a whole and that is the duty of the Court to have recourse to the whole instrument in order to ascertain the true intent and meaning of any particular provision . . . [and] harmonise them, if possible.").

²² AJMAL MIAN, A JUDGE SPEAKS OUT 135 (2004) ("Apart from these broad features

subsequent judgments of this key issue have firmly precluded and strongly warned against an interpretation of the Islamization amendments that “would raise it to the point of being a litmus test for gauging, evaluating, and potentially justifying the judiciary to strike down any other constitutional provisions.”²³ Any reading of the amendments as elevated “special clauses” would undermine the entire constitution.²⁴ “The constitution as a whole must be interpreted in a harmonious fashion so that specific provisions are read as an integral part of the entire constitution, not as standing above it.”²⁵ As the Court explained: “It may be observed that the principles for interpreting [C]onstitutional documents as laid down by this Court are that all provisions should be read together and harmonious construction should be placed on such provisions so that no provision is rendered nugatory.”²⁶ In a nutshell: harmonious disharmony.

Malaysia is another example of a country that has been grappling with existential dilemmas pertaining to religion, ethnicity, nation building, and modern constitutional law. The Constitution of 1963 establishes Malaysia as an Islamic State, but one with liberal principles (dare we say “Islamic and democratic”?), where “Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation,”²⁷ and where “every person has the right to profess and practice his religion and . . . to propagate it.”²⁸ Furthermore, “every religious group has the right to manage its own religious affairs,”²⁹ and state law (along with federal law in the Federal Territories of Kuala Lumpur and Labuan) “may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.”³⁰ To further complicate matters, Malaysian law draws on religious ascriptions to establish what has been termed an ethnic democracy: despite the existence of some ethnic power-sharing mechanisms

noted there are settled, classic, and accepted principles of interpretation of Constitutional provisions.”).

²³ Osama Siddique & Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan – Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INT’L L. 303, 368 (2008).

²⁴ See *Kahn*, 595 PLD at 597 (stating that if one provision was elevated above the others, it “would result in undermining [the constitution] and pave the way for its eventual destruction”).

²⁵ HIRSCHL, *supra* note 2, at 122.

²⁶ *Id.* (quoting *Hussain Ahmed v. Musharraf*, (2002) 54 PLD (SC) 853, 938 (Pak.)); see also *Kahn*, 595 PLD at 597 (“And even if Article 2A really meant that after its introduction it is to become in control of the other provisions of the Constitution, then most of the Articles of the existing Constitution will become questionable on the ground of their alleged inconsistency with the provisions of the Objectives Resolution.”).

²⁷ FED. CONST. MALAY. art. 3(1).

²⁸ *Id.* art. 11(1).

²⁹ *Id.* art. 11(3)(a).

³⁰ *Id.* art. 11(4).

and a general façade of interracial harmony, the political system ensures Malay dominance.³¹ Core elements of the system are organized to benefit members of the Malay ethnic group to the detriment of others, and members of minority ethnic groups are not granted proportional access to power.³² Although Islam is constitutionally enshrined as Malaysia's state religion, over one-third of Malaysia's population consists of members of other denominations, mainly Buddhists, Hindus, and Christians.³³ Ethnic Malays (*Bumiputra* or "sons of the soil"), who are generally Muslim, however, are granted constitutionally entrenched preferential treatment in various aspects of public life over members of other ethnic groups.³⁴ Malaysian citizens who convert out of Islam are no longer considered Malay under the law and hence forfeit the *Bumiputra* privileges afforded to Malays under article 153.³⁵ In other words Malaysia is a country of all its citizens yet at the same time a country that privileges its Muslim citizens over its non-Muslim ones – all while fostering a national metanarrative of interethnic peace and harmony.

The religious-secular duality embedded in the Malaysian legal system is further reflected in the changing jurisdictional interrelation between the civil and Syariah courts. Muslims (and non-Muslims who marry Muslims) are obliged to follow the decisions of Syariah courts in matters concerning their religion, most notably marriage, inheritance, apostasy, conversion, and custody.³⁶ "Historically the civil and Syariah courts existed side by side in a dual court structure established at the time of Malaysia's independence, with the prevalent understanding that Syariah courts were subordinate to the civil courts and that the common law was superior to other laws."³⁷ In a landmark ruling in 1984, the Federal Court, then known as the Supreme Court of Malaysia, held that the common law had not been ousted or otherwise affected by the introduction of the Federal Constitution and that it would allow secular

³¹ See generally Sammy Smooha, *Ethnic Democracy: Israel as an Archetype*, 2 ISR. STUD. 198 (1997); Sammy Smooha, *The Model of Ethnic Democracy: Israel as a Jewish and Democratic State*, 8 NATIONS & NATIONALISM 475 (2002).

³² See FED. CONST. MALAY. art. 153(3) (stating that the government must ensure "the reservation to Malays and natives of any of the States of Sabah and Sarawak of positions in the public service and of scholarships, exhibitions and other educational or training privileges").

³³ See DEP'T OF STATISTICS, MALAY., POPULATION DISTRIBUTION AND BASIC DEMOGRAPHIC CHARACTERISTIC REPORT 2010, archived at <http://perma.cc/AA56-3928>.

³⁴ FED. CONST. MALAY. art. 153(1) ("It shall be the responsibility of the Yang-di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this article.").

³⁵ See *id.* art. 160 (defining "Malay" as "a person who professes the religion of Islam"); *Joy v. Majlis Agama Islam Wilayah Persekutuan*, [2007] 4 MLJ 585 (Malay.).

³⁶ FED. CONST. MALAY. list II(1) ("Syariah courts . . . shall have jurisdiction only over person professing the religion of Islam.").

³⁷ HIRSCHL, *supra* note 2, at 132.

courts to resolve legal issues even where the parties to the case were Muslims.³⁸ A 1988 amendment to the constitution, Article 121(1A), however, was introduced, providing that civil courts “shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.”³⁹ “Even after this 1988 amendment the civil court system continued to view Syariah courts as subordinate and, at any rate, subject to general principles of administrative and constitutional law.”⁴⁰ Confused? Welcome to Malaysia.

As already mentioned, such existential constitutional tensions are not confined to the Islamic world. Israel, for instance, is arguably one of the world’s capitals of embedded, but near-oxymoronic constitutional norms. The title of the utopian novel, *Altneuland: The Old New Land*, by Theodor Herzl,⁴¹ the founder of political Zionism, captures some of the existential paradoxes that are at stake. Israel’s constitutional system is based on two fundamental tenets: the state is Jewish and democratic. Since the establishment of the state of Israel, a fundamental – and unresolved – collective-identity issue has been whether the country is a *medinat hok* (a state based on civil or secular law) or a *medinat halakhah* (a state based on Jewish law).⁴² The “commitment to the creation of an ideologically plausible and politically feasible synthesis between particularistic (Jewish) and universalistic (democratic) values has proved to be the major constitutional challenge faced by Israel since its foundation.”⁴³ Achieving such a synthesis is especially problematic “given that non-Jews—primarily Muslims, Christians, and Druze—constitute approximately one-fifth of Israel’s citizenry (excluding the Palestinian residents of the West Bank and Gaza Strip).”⁴⁴ The tension between a commitment to democratic values and a commitment to a religion and ethnicity-based collective identity manifests itself in various aspects of public life, most notably in the area of public funding and allocation of goods and opportunities. One of the main vehicles for pro-Jewish preferential treatment in Israel has been the requirement that one must serve in the military to receive certain government funds and benefits. Because most non-Jews are not drafted while all Jews are (including the exempted ultra-Orthodox, who officially have their draft deferred), the military service requirement provides a proxy for ethnic discrimination against non-Jews by allowing the government to deny them access to welfare, housing, education, employment, or the other forms of direct assistance granted to those who serve. The precise meaning of Israel as a “Jewish” state is highly

³⁸ *Che Omar bin Che Soh v. Public Prosecutor*, [1988] 2 MLJ 55, 56 (Malay.) (“Thus all laws including administration of Islamic laws had to receive this validity through a secular fiat.”).

³⁹ FED. CONST. MALAY. art. 121(1A).

⁴⁰ HIRSCHL, *supra* note 2, at 132.

⁴¹ THEODOR HERZL, *ALTNEULAND: THE OLD NEW LAND* (WLC ed. 2009) (1902).

⁴² *See* HIRSCHL, *supra* note 2, at 140.

⁴³ *Id.*

⁴⁴ *Id.*

contested even within the Jewish population.⁴⁵ Opinions differ sharply not only “on whether Jews are citizens of a nation, members of a people, participants in a culture, or co-religionists, but even among adherents of the last opinion – arguably the most established of these constructions – there are widely divergent beliefs and degrees of practice.”⁴⁶ These adherents range from the ultra-Orthodox to millions who define themselves as “traditional” (*Masorti* or *Shomer Masoret*), and include those who pursue a fully secular lifestyle yet celebrate their children’s bar/bat mitzvah and acknowledge the Jewish high holidays.

For many political and historical reasons, the State has, for a long time, formally recognized only the Orthodox branch of Judaism.⁴⁷ This status has allowed the Orthodox community near total control over the provision of religious services⁴⁸ – a lucrative business entailing countless civil service jobs at the national and municipal levels, monitoring of business compliance with legalized, religion-infused standards, and the handling of religious ceremonies ranging from circumcisions to weddings to burials.⁴⁹ As I argue elsewhere, it has also enabled the Orthodox community “to impose rigid standards on the process of determining who is a Jew. This question has crucial symbolic and practical implications because . . . according to Israel’s Law of Return, Jews who immigrate to Israel are entitled to a variety of benefits, including the immediate right to full citizenship.”⁵⁰ As mentioned, a contested draft-deferment arrangement that has been in place since the establishment of the state allows Orthodox yeshiva students to receive draft deferments (conscription is otherwise compulsory for Jewish citizens of Israel) as long as they maintain their religious studies.⁵¹ Relatedly, *Hok Yesodot Ha’Mishpat* (the foundations of law), the potentially far-reaching law that passed in 1980, made Jewish Law (*Mishpat Ivri*) into a formal source of interpretation in cases

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ *Id.*

⁴⁸ Ran Hirschl, *Constitutional Courts as Bulwarks of Secularism*, in *CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE* 311, 327 (Diana Kapiszewski et al. eds, 2013).

⁴⁹ HIRSCHL, *supra* note 2, at 140-41.

⁵⁰ *Id.* at 141.

⁵¹ *Id.* at 142. The issue became one of the main items on the public agenda in the months leading to the 2013 general elections, as part of a social struggle for “equality in sharing the burden” (*shivyon ba-netel*). The number of Orthodox yeshiva students receiving such deferrals grew from several hundred in the 1950s to tens of thousands in recent years. In the January 2013 elections, some of the secular resentment against this arrangement was channeled into support for the newly established *Yesh Atid* (Hebrew for “there is a future”) Party, whose leader, Yair Lapid, was perceived as an opponent of statutory privileges to the Orthodox community. Initial attempts to legislate a new conscription policy were made in 2014. How much of this new agenda will eventually be implemented remains to be seen.

without precedent or legal lacunae.⁵² This has all taken place while more than two-thirds of the world's Jewish population, on which Israel is dependent for "essential symbolic, material, and strategic support," does not live in Israel and does not subscribe to Orthodox Judaism.⁵³ Any way one looks at it, America's constitutional woes do not belong in the same category as the disharmonies, or perhaps even oxymorons, embedded in the Egyptian, Pakistani, Malaysian, or Israeli constitutional order.

II. THE "SYNTHETIC CONSTITUTION" SCENARIO

"Unlike Bruce Ackerman's idealist notion of constitution making that is shaped by [popular will and reflects a principled vision of politics], a pragmatic vision of constitution making sees it as constituting the demos and providing a framework for its establishment and evolution."⁵⁴ Indeed, "it is little wonder that this view of constitutionalism has been popular among advocates of a European Union constitution," which would be, much like an E.U. currency, a pan-European *demos*-building instrument.⁵⁵ "When constitution drafting is treated as a pragmatic, rather than a principled, matter, it can be employed to mitigate tensions in ethnically divided polities – for example, "through the adoption of federalism, secured representation, and other trust-building and power-sharing mechanisms."⁵⁶ "The literature on constitutional design of this kind, often referred to as 'consociationalism,' [(or 'accommodation-centered' constitutionalism)] emphasizes the significance of joint-governance institutions, mutual veto points, power-sharing mechanisms, and the like."⁵⁷ In its more strategic, "centripetal" (or "integrationist") guise, "this brand of scholarship advocates the adoption of institutions that would make the political process more attractive to recalcitrant stakeholders,

⁵² *Id.* at 141.

⁵³ *Id.* In practice, Jewish law is seldom used for substantive guidance in Supreme Court cases; when it is referenced by Supreme Court judges, it is done largely for ornamental or decorative purposes. A notable exception is Menachem Elon, a prominent Jewish law scholar, judge of the Supreme Court of Israel from 1973 to 1993, and an advocate of substantive use of Jewish law as a main interpretive source. See Steven F. Friedell, *Some Observations About Jewish Law in Israel's Supreme Court*, 8 WASH. U. GLOBAL STUD. L. REV. 659 (2009).

⁵⁴ HIRSCHL, *supra* note 2, at 43. The discussion *infra* notes 56-65 draws from the Author's previous work. See *id.* at 163-64.

⁵⁵ *Id.*

⁵⁶ Ran Hirschl, *The Constitutional Jurisprudence of Federalism and Theocratic Challenge*, in THE GLOBAL PROMISE OF FEDERALISM 139, 140-41 (Grace Skogstad et al. eds., 2013). See generally CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES (Sujit Choudhry ed., 2008).

⁵⁷ HIRSCHL, *supra* note 2, at 44; see Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96, 96-109 (2004) ("In such deeply divided societies the interests and demands of communal groups can be accommodated only by the establishment of power sharing . . .").

encourage moderation, and defuse potential causes of strife by providing incentives to vote across group lines.”⁵⁸ “The entire exercise is driven by pragmatic political bargaining thinly disguised as principled constitutionalism. From Fiji and Kenya to Lebanon and Nepal, dozens of constitutions worldwide reflect such a ‘second-order’ problem-solving form of constitutionalism that is not driven by sophisticated ideational platforms but by political necessities,” whether domestic or international.⁵⁹

Empirical evidence on the actual success of this mode of constitutionalism is mixed. Zachary Elkins, Tom Ginsburg, and James Melton, for example, report that enduring constitutions tend to result from a relatively open drafting stage that promotes “buy-in” from diverse constituencies, and are typically adaptable via “practicable amending formulae and provisions for incorporating modern practices.”⁶⁰ These design choices, they argue, “result from the constitution-making process itself, but are also features of ongoing practice. All three mutually reinforce each other to produce a vigorous constitutional politics in which groups have a stake in the survival of the constitution.”⁶¹ Astute constitutional design may also enable transition to democracy by decreasing the costs of preserving the democratic bargain, among other things, through “allowing outgoing authoritarians a role in the new democratic order, as happened, for example, in post-Pinochet Chile.”⁶² Strategic constitution-making is also apparent in drafting and evading term limits.⁶³ Dozens of

⁵⁸ HIRSCHL, *supra* note 2, at 44; see DONALD HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 628 (1985) (“Electoral systems have a role in fostering or retarding ethnic conflict. The delimitation of constituencies, the electoral principle . . . , the number of members per constituency, and the structure of the ballot all have potential impact on ethnic alignments . . .”).

⁵⁹ Ran Hirschl, *The Strategic Foundation of Constitutions*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 157, 164 (Denis J. Galligan & Mila Versteeg eds., 2013).

⁶⁰ *Id.*; see ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 78 (2009) (“[C]onstitutions whose provisions are publicly formulated and debated will more likely be able to generate the common knowledge and attachment essential for self-enforcement. . . . When they are passed with great public involvement, there is likely to be more common knowledge about the content of the constitution.”).

⁶¹ ELKINS ET AL., *supra* note 60, at 89.

⁶² Hirschl, *supra* note 59, at 164 (citing Susan Alberts et al., *Democratization and Countermajoritarian Institutions: Power and Constitutional Design in Self-Enforcing Democracy*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 69, 88 (Tom Ginsburg ed., 2012) (“The [1980 Chilean] constitution contained transitory articles extending military rule until 1989 as well as permanent articles that would go into effect after a plebiscite scheduled for 1988.”)).

⁶³ See Tom Ginsburg et al., *Do Executive Term-Limits Cause Constitutional Crises?*, in *COMPARATIVE CONSTITUTIONAL DESIGN*, *supra* note 62, at 350, 350-79 (“Overall the data suggests that term limits are an almost universal and enduring part of presidential democracy. They are prominent not only in Latin America – a region where their usage has eroded in recent years – but also in other regions where presidentialism . . . ha[s] become fashionable.” *Id.* at 359.).

countries have tinkered with constitutionally imposed executive term limits, ranging from Algeria to Venezuela to Colombia, and from Russia to Uganda to Niger; term limits have, however, worked in the decided majority of cases.⁶⁴ The role of strategic constitutional design in the stabilization of troubled polities nonetheless remains an open question. As Ginsburg and his colleagues admit elsewhere: “[C]onstitutional design processes are loaded with expectations about endurance, efficacy, the resolution of conflicts, and political reconstruction In the real world, however, most constitutions fail.”⁶⁵

Two prime illustrations of polities that barely cling to an agreed-upon constitutional order and that face a realistic chance of collapse and disintegration are Belgium, and Bosnia and Herzegovina (B&H). With respect to Belgium, much has been written about the ethnic, linguistic, and economic tension between the Flemish community (approximately six million) and the Walloon community (approximately 3.2 million).⁶⁶ A simple train ride through central Belgium (the Belgian capital Brussels is the headquarters of the emerging pan-European political entity) requires the passenger to listen to several language changes in public announcements as the train passes from French-speaking towns or neighborhoods to Dutch-speaking ones and then back (to complicate matters further, there is a small German-speaking minority near the German border). The existential crisis in which Belgium has been mired for decades reached its zenith in 2010 with a political collapse that ultimately resulted in the country going without an elected government for 589 days (more than a year and a half), a record for a democracy, from June 2010 to December 2011.⁶⁷ In the June 2010 elections the New Flemish Alliance (N-VA) party won the most votes in the Flemish-speaking areas of Belgium, whereas the Socialist Party (PS) won in the French-speaking areas.⁶⁸

⁶⁴ *Id.* at 374 (“Constitutional enforcement of term limits appears to operate routinely in democracies, and even in many autocracies . . .”).

⁶⁵ Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201, 219 (2009).

⁶⁶ See *Belgium*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/be.html> (last updated Feb. 26, 2014), *archived at* <http://perma.cc/A4RG-C3AB> (stating that the population of Belgium is approximately 10.5 million; Flemish citizens make up fifty-eight percent of the population, while Walloons make up thirty-one percent).

⁶⁷ Richard Allen Greene, *Belgium Ends Record-Breaking Government-Free Run*, CNN (Dec. 6, 2011), <http://www.cnn.com/2011/12/06/world/europe/belgium-government/index.html>, *archived at* <http://perma.cc/N3JQ-SA27> (“Belgium . . . went 589 days without an elected government. . . . There were even street parties when Belgium claimed the world record title from Iraq earlier this year.”).

⁶⁸ See Charles Forelle, *Belgian Poll Split by Linguistic Row*, WALL ST. J., June 14, 2010, at A10 (“An upstart group of right-leaning Flemish nationalists was poised to become the largest political party in Belgium after federal elections Sunday. But francophone socialists also had a strong showing, suggesting the linguistically riven country faces weeks or months more without a government.”).

Nationally, the two parties were almost even, with twenty-seven seats (28.2% of popular vote) for N-VA, and twenty-six seats (35.7% of popular vote) for PS; the remaining ninety-seven seats in the 150-seat parliament were split among ten other parties, with the largest share going to the far-right Flemish nationalist *Vlaams Belang* (Flemish Interest), which won twelve seats.⁶⁹ For nineteen months after the elections, no agreement could be reached among the parties to build a coalition that would form a new government.⁷⁰ During this long stalemate, Belgian politicians and intellectuals were openly considering the possibility of disintegration and partition.⁷¹ “[D]ay-to-day country affairs were tended to by a temporary government run by a former prime minister, while the two main political parties fought over everything “from Flemish collaboration during the Second World War to allegations of francophone cultural imperialism seeking to impose the Gallic language in Flanders . . .”⁷² The divisions, suspicions and mutual distrust ran so deep that they made the American constitutional experience, troubling as it may be, look enviable in comparison.

In B&H there is no single nation or people in any true sense of the term other than the political community that was created by the pragmatist pact affected by the 1995 Dayton Accords.⁷³ (It may well be that the event that brings the country together for the first time will be the 2014 World Cup, for which the B&H national soccer team qualified for the first time in its history). The events of the vicious Bosnian war of 1992–1995 are well documented, and the demographics of the new country are complex: Croats comprise about fourteen percent, Bosniaks forty-eight percent (with both residing largely in the Federal “Federation of Bosnia and Herzegovina” entity), and Serbs a little over thirty-seven percent, with many of them concentrated in the semiautonomous enclave of Republica Srpska and sharing little in common with the other two

⁶⁹ *See id.*

⁷⁰ Bruno Waterfield, *Finally, a New Government for Belgium After 541 Days*, TELEGRAPH (London), Dec. 6, 2011, at 21.

⁷¹ *See, e.g., Far-Right Party Calls for ‘Dissolution’ of Belgium*, EXPATICA (Apr. 4, 2010), http://www.expatica.com/fr/news/french-news/far-right-party-calls-for-dissolution--of-belgium_62914.html, archived at <http://perma.cc/9DV4-CGMS>. *But see* Eben Harrell & Leo Cendrowicz, *Belgium: Divided Together*, TIME (July 22, 2010), <http://content.time.com/time/magazine/article/0,9171,2005778,00.html>, archived at <http://perma.cc/4LUC-5TSB> (discussing the lack of public support for a partition).

⁷² Valerie Strauss, *589 Days with No Elected Government: What Happened in Belgium*, WASH. POST (Oct. 1, 2013, 1:55 PM), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/10/01/589-days-with-no-elected-government-what-happened-in-belgium>, archived at <http://perma.cc/6HDA-A3V3> (quoting *Belgium Marks a Year Without a Government*, TELEGRAPH (London) (June 13, 2011, 6:00 AM), <http://www.telegraph.co.uk/news/worldnews/europe/belgium/8571756/Belgium-marks-a-year-without-a-government.html>, archived at <http://perma.cc/5T4D-B6GH>).

⁷³ *See* General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Bosn. & Herz.-Croat.-Yugo., Dec. 14, 1995, 35 I.L.M. 75 (1996).

ethnic groups.⁷⁴ According to the constitution of B&H, the new country has three “constituent peoples”; those who are neither Bosniak, Croat, or Serb are designated as “Others.”⁷⁵

The country’s constitutional court comprises two judges of Croat decent, two of Serb decent, two of Bosniak origin, and three international jurists appointed by the ECHR, who cannot be citizens of B&H or any of its neighboring states.⁷⁶ This formulation assures that no coalition of judges representing two ethnic groups can outvote the third without the support of the three international judges.

As experts have observed, the B&H constitutional pact is under constant attack.⁷⁷ Calls for external secession (by Serbs), for internal secession (by Croats), for further centralisation (by Bosniaks), and for de-ethnicization of B&H (by Others) constantly burden the system and illustrate the organic limits of constitutional attempts to accommodate a diverse range of interests in a multiethnic state without a single, relatively cohesive *demos*.⁷⁸ In 2009 the ECHR overruled B&H’s consociational arrangements in the case of *Sejdić & Finci v. Bosnia & Herzegovina*, finding in favor of two applicants (one Roma, the other Jewish) who challenged the provision of the Bosnian Constitution restricting certain political offices to members of the three “constituent peoples” to the exclusion of “Others.”⁷⁹ The ECHR held that the constitutional restrictions on “Others” standing for office violated the European Convention’s prohibition on discrimination in article 14.⁸⁰

In short, those who think that the American constitutional order suffers from all sorts of terminal illnesses may find solace in the fact that, unlike the

⁷⁴ See *Bosnia and Herzegovina*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/bk.html> (last updated Feb. 26, 2014), archived at <http://perma.cc/G3NR-VGBM>.

⁷⁵ BOSN. & HERZ. CONST. art. I(3).

⁷⁶ See *id.* art. IV(1)(a) (“The constitutional Court of Bosnia and Herzegovina shall have nine members. Four members shall be selected by the House of Representatives for the Federation, and two members by the Assembly of the Republika Srpska.”).

⁷⁷ See, e.g., *The Sejdić-Finci Question*, ECONOMIST (Oct. 9, 2013, 12:11 PM), <http://www.economist.com/blogs/easternapproaches/2013/10/bosnia>, archived at <http://perma.cc/T9YM-KFM3> (discussing a European Court of Human Rights case in which the court found the Bosnian Constitution to be discriminatory “because certain electoral posts, for example on the tripartite presidency, can only be held by Serbs, Croats or Bosniak Muslims”).

⁷⁸ See Nedim Kulnović, *General Elections in Bosnia and Herzegovina Reveal Ethnic Frustrations*, I-CONNECT: INT’L J. CONST. L. BLOG (Oct. 4, 2010), <http://www.iconnectblog.com/2010/10/general-elections-in-bosnia-and-herzegovina-reveal-ethnic-frustrations>, archived at <http://perma.cc/LJW8-PMYL>.

⁷⁹ *Sejdić v. Bosnia & Herzegovina*, 52 Y.B. Eur. Conv. on H.R. 113, 116 (2009).

⁸⁰ For a passionate critique of the ruling, see Christopher McCrudden & Brendan O’Leary, *Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements*, 24 EUR. J. INT’L L. 477 (2013).

American constitutional order, the basic foundations, legitimacy and validity of which are seldom questioned, some constitutional orders overseas – those of Belgium and B&H and possibly even the emerging European constitution itself being merely three examples – constantly face fundamental questions concerning their legitimacy, and rest on a thin, synthetic, and pragmatist conceptualization of the founding *demos* and its national collective identity.

III. THE “OPPORTUNISTIC CONSTITUTIONAL WARS” SCENARIO

Opportunistic elites and powerful interest groups are quick to wage supposedly “principled” constitutional wars that are intended in no small part to advance their own interests, worldviews, and policy preferences. Comparative examples of this are many. Any student of comparative federalism or regional/national politics can cite examples of rich regions (think Northern Italy) that vie for preferential status vis-à-vis less well-off regions. In federal countries this often takes the form of oil- or mineral-rich subnational units pushing to renegotiate basic parameters of fiscal federalism or to prevent the adoption of more egalitarian distribution of goods in order to pocket a larger proportion of natural resource revenue.⁸¹

More relevant still to our discussion are instances of blatant elite power struggles that escalate into all-out constitutional wars. In Romania a fierce rivalry between two main parliamentary blocs (sound familiar?) has brought the country’s political and constitutional spheres to the brink of collapse. Over the past few years, the country (a member of the European Union since 2007) has seen its president’s office (held by one bloc) and its prime minister’s office (held by the other bloc) accuse each other of corruption, several presidential impeachment votes by parliament, two national impeachment referendums, blatant political attempts to tinker with the constitutional court’s composition and jurisdiction, a string of constitutional court rulings on the validity of these schemes, a constitutional amendment aimed at lowering the voter turnout threshold that must be reached before impeachment referendum results are valid, a proposed constitutional amendment to curtail the Constitutional Court’s powers to review the constitutionality of future amendments once they

⁸¹ A textbook illustration is the fierce protests in Bolivia’s oil- and mineral-rich eastern provinces against President Evo Morales’ proposed “equalization” constitutional reform that would transfer a larger portion of natural resource revenue from the eastern provinces to other parts of the country; the fact that the eastern provinces were controlled by Morales’ political rivals certainly did not help contain the crisis. See Rory Carroll & Andrés Schipani, *Bolivian Referendum: Morales Awaits Verdict on His Revolution: Voters to Decide Whether to Back President Who Promised Radical Change*, GUARDIAN, Aug. 8, 2008, at 23; Simon Romero, *A Crisis Highlights Divisions in Bolivia*, N.Y. TIMES, Sept. 15, 2008, at A6 (“The violence points to renewed tension over Mr. Morales’s attempts to redistribute petroleum royalties and overhaul the Constitution to speed land reform and create a separate legal system for Bolivia’s indigenous majority.”). See generally Almut Schilling-Vacaflor, *Bolivia’s New Constitution: Towards Participatory Democracy and Political Pluralism?*, 90 EUR. REV. LAT. AM. & CARIBBEAN STUD. 3 (2011).

have been approved by the legislature, and an ugly public feud about whether the president or the prime minister was to be considered the head of state and therefore represent Romania at the Council of Europe.⁸² Virtually all of these political manipulations and countermoves were justified by their proponents as necessary to protect the values embedded in the Romanian constitution.

The Romanian Constitutional Court has been constantly called upon by powerful political stakeholders to provide legitimacy to their self-interested moves. In 2012, to provide one example, the Romanian Constitutional Court ruled that the impeachment of President Traian Basescu through a national referendum was invalid because less than 50% of the electorate had cast their vote.⁸³ A 69% support for removal in parliament and 87.5% support in the national referendum were deemed insufficient by the court because only 46% of the electorate participated in the referendum.⁸⁴ This decision triggered a massive political backlash against the court, a backlash orchestrated by Prime Minister Victor Ponta, Basescu's main political rival and the clear winner of the December 2012 parliamentary elections.⁸⁵ And so, in July 2013, less than a year after its initial ruling on the matter, the reconstructed court (now including three new Ponta-appointed judges) approved a proposed amendment to the referendum law that lowers the validity threshold to 30% of the electorate.⁸⁶ The main basis for the 2013 decision was respect for "the sovereignty of the Romanian people." The court did not explain why this was such an important principle in 2013 but not in 2012. To support its ruling, the Court drew heavily on the Council of Europe's Venice Commission Code of Good Practice on

⁸² See, e.g., Ian Traynor, *Romanian PM Is Abusing Constitution, Report Says*, GUARDIAN, July 18, 2012, at 14; Roberta Radu & Ian Traynor, *Romanian Leader Faces Impeachment Vote: President Suspended Until Sunday's Referendum: EU Keeps Close Eye on His Political Enemy, the PM*, GUARDIAN, July 27, 2012, at 24.

⁸³ See Associated Press, *Romania: Vote Too Low to Impeach President, Court Rules*, GUARDIAN, Aug. 22, 2012, at 18. For a thorough analysis of the Romanian constitutional crisis see Vlad Perju, *The Fragility of Constitutionalism: An Analysis of Romania's 2012 Constitutional Crisis* (n.d.) (unpublished manuscript) (on file with author).

⁸⁴ See Bianca Selejan-Guțan, *The Illusion of the Romanian Constitution?*, I-CONNECT: INT'L J. CONST. L. BLOG (Dec. 7, 2012), <http://www.iconnectblog.com/2012/12/the-illusion-of-the-romanian-constitution>, archived at <http://perma.cc/C7HN-6M33>; see also Kim Lane Scheppele & Vlad Perju, *Guest Post: Separating Law and Politics in Romania*, N.Y. TIMES (July 12, 2012), http://krugman.blogs.nytimes.com/2012/07/12/guest-post-separating-law-and-politics-in-romania/?_php=true&_type=blogs&_r=0, archived at <http://perma.cc/N79U-XTWU>.

⁸⁵ See, e.g., Julian Borger, *Romania's PM Prepared to End Conflict with President "If He Sticks to Constitutional Role": Cohabitation Likely If Ousting of Basescu Fails Ponta Insists Pledges to EU Will Be Fulfilled*, GUARDIAN, Aug. 15, 2012, at 16.

⁸⁶ See Bianca Selejan-Guțan, *One Year After: How the Romanian Constitutional Court Changed Its Mind*, I-CONNECT: INT'L J. CONST. L. BLOG (July 14, 2013), <http://www.iconnectblog.com/2013/07/oneyearafter>, archived at <http://perma.cc/W3HK-YTDQ>.

Referendums 2007, which strongly disapproves of the imposition of a participation quorum.⁸⁷ In 2012, by contrast, the then pro-Basescu court disregarded the recommendation of the Venice Commission Code altogether.⁸⁸

Fights between political elites that were presented as constitutional battles have also taken place in the Philippines. In 2000 President Joseph Estrada was accused of bribery, graft and corruption, “betrayal of public trust,” and “culpable violation of the Constitution.”⁸⁹ He was subjected to an impeachment trial before the Senate, with eleven members of the House of Representatives serving as prosecutors.⁹⁰ Complex political and constitutional maneuvering ensued.⁹¹ Ultimately, Estrada was succeeded by Gloria Macapagal-Arroyo, who herself faced impeachment complaints on four different occasions, including once for allegedly cheating, stealing, and lying during the 2004 presidential election campaign.⁹² All impeachment cases failed, however, due to insufficient votes from the members of Congress.⁹³ In May 2010, two days after her electoral loss to the current president of the Philippines, President Benigno Aquino III, and a month before her term expired, then-President Macapagal-Arroyo appointed Renato Corona Chief

⁸⁷ See *id.* (“[O]ne year ago, the Court completely disregarded the Venice Commission Code of Good Practice on Referendums, which clearly disapproves the imposition of a participation quorum for obvious reasons, in the present decision, this Council of Europe document underpins the Court’s entire argumentation.”).

⁸⁸ See *id.*

⁸⁹ CONST. (1987), art. XI, sec. 2 (Phil.).

⁹⁰ See Thomas Fuller, *The Impeachment of Estrada: Day of Political Tumult in Manila*, INT’L HERALD TRIB., Nov. 14, 2000, at 1 (“President Joseph Estrada of the Philippines was impeached Monday without any debate or vote in a stormy session of Congress that lasted just five minutes.”).

⁹¹ See Sabrina M. Querubin et al., *Legitimizing the Illegitimate: Disregarding the Rule of Law in Estrada v. Desierto and Estrada v. Macapagal-Arroyo*, J. INT’L L. & POL’Y, 2004-2005, at 1, archived at <http://perma.cc/D5P-QZPK>; see also *Former President Takes Stand in Plunder Trial*, L.A. TIMES, Mar. 22, 2006, at A10 (quoting ousted President Estrada as saying “I have mixed feelings. I welcome this opportunity to present my side because I was denied the right in the impeachment trial when prosecutors walked out. I was not able to defend myself. I was convicted in the streets”). For a full version of the Philippines Supreme Court rulings in these two cases, see *Estrada v. Macapagal-Arroyo*, G.R. No. 146738 (S.C., Mar. 2, 2001) (Phil.), archived at <http://perma.cc/YE3B-RZSG>.

⁹² See *Upheaval in Philippines*, N.Y. TIMES, July 8, 2005, at A2 (“Six of President Gloria Macapagal Arroyo’s ministers called for her to step down on Friday [She] rejected demands that she leave office over allegations that she cheated her way to victory in last year’s election . . .”).

⁹³ Dwyer Acre, *Philippines House Defeated Presidential Impeachment Bid*, JURIST (Nov. 26, 2010), <http://jurist.org/thisday/2010/11/philippines-house-defeated-presidential-impeachment-bid.php>, archived at <http://perma.cc/L44V-CNZC>; Katerina Ossenova, *Philippines House Quashes Presidential Impeachment Bid*, JURIST (Nov. 26, 2007), <http://jurist.org/paperchase/2007/11/philippines-house-quashes-presidential.php>, archived at <http://perma.cc/6P7R-5EM2>.

Justice of the Philippines Supreme Court. This apparent violation of a constitutional prohibition on last-minute (so-called “midnight”) appointments required a timely and helpful decision from the supreme court, a ruling that the pro-Arroyo court happily delivered a couple of months prior to the appointment, ensuring that Corona was allowed to take office (he was later impeached by President Aquino through a senate hearing).⁹⁴

And closer to home: The attempt to impeach President Clinton, the *Bush v. Gore*⁹⁵ courtroom saga, and the ongoing struggles over the right to bear arms, religion in the public sphere, voter registration, and electoral campaign financing are often presented as grounded in genuine ideational differences that are then translated into supposedly principled constitutional disagreements. But as in the admittedly cruder constitutional wars in Romania or the Philippines, it is hard not to see in each of these ostensibly honorable disputes the considerably earthlier political and economic interests driving these apparently principled battles.

IV. THE “INADEQUATE/DATED CONSTITUTION” SCENARIO

Even a cursory look overseas indicates that, for all its constitutional shortcomings, the United States does not have a monopoly over inadequate, démodé constitutional design. Italy’s regional variation and understandable fear of a strong executive (think Mussolini) brought about a post–World War II constitutional system with a distinctly weak executive. The electoral threshold is low, small parties abound, and the prime minister needs a majority in both the House of Deputies and the Senate to govern.⁹⁶ “Forming a government, and then keeping it together [and ensuring its active functioning,] depends on the co-operation of a [multitude] of groups, often with diverging interests. If a small party falls out with its coalition partners, it can bring down the government.”⁹⁷ The result: Since its political reconstruction in 1946, Italy has had no less than sixty-two separate coalition governments, each lasting for a little more than a year on average.⁹⁸ That is a stunning figure for one of

⁹⁴ See Arturo M. De Castro v. Judicial & Bar Council, G.R. No. 191002 (S.C., Mar. 17, 2010) (Phil.), *archived at* <http://perma.cc/D59F-EX8G> (ordering the Judicial Bar “[t]o resume its proceedings for the nomination of candidates to fill the vacancy to be created by the compulsory retirement of Chief Justice Reynato S. Puno” despite stating that “[T]he Constitution prohibits the President or Acting President from making appointments within two months immediately before the next presidential elections and up to the end of his term”).

⁹⁵ *Bush v. Gore*, 531 U.S. 98 (2000).

⁹⁶ *Why Is It So Hard to Form a Government in Italy?*, *ECONOMIST* (Apr. 24, 2013), <http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-8>, *archived at* <http://perma.cc/8ZZ5-63VL> (“The prime minister needs a majority in both the House of Deputies and the Senate to govern. In a system filled with small parties, this is hard to do.”).

⁹⁷ *Id.*

⁹⁸ *Id.*

Europe's major polities, even without taking into account the colorful personality of some of Italy's heads of state over that period (Silvio Berlusconi served as head of state three times since 2001).⁹⁹

In Canada – itself a country that for more than twenty years, stretching from the mid-1970s to the late-1990s, faced a realistic possibility of unilateral secession and disintegration – the House of Commons has been prorogated three times since 2008 (most recently for two months in 2013) to save the serving government from harsh parliamentary scrutiny.¹⁰⁰ A similar “kosher but fishy” maneuver was used in Ontario (Canada's most populous province) in 2012–2013 to save a serving government from collapsing.¹⁰¹ According to the Constitution Act 1867, the Senate (upper house) is an entirely nominated body (that is, not democratically elected).¹⁰² What is more, for historical reasons, provincial representation in the Senate is disproportional; whereas the provinces of Ontario and Quebec have 24 Senate seats each, and the provinces of New Brunswick and Nova Scotia have 10 seats each, Alberta and British Columbia, for example, have merely 6 seats each. When variance in provincial population size is factored in, the over- or under-representation of certain provinces becomes even starker. According to the amending formula adopted as part of the 1982 Constitution Act, to transform the Senate fundamentally, the unanimous consent of all ten provinces, the federal government and the House of Commons is required.¹⁰³ In its recent landmark ruling in the *Senate Reform Reference*, the Supreme Court of Canada followed that principle in interpreting the constitutional ground rules for such a major Senate overhaul or abolition.¹⁰⁴ And there is more. Canada's smallest province, Prince Edward Island (PEI) (with a population of less than 140,000) has a constitutionally guaranteed representation of four House of Commons seats, that is, one parliament member per less than 35,000 residents.¹⁰⁵ Ontario (with a

⁹⁹ See *Profile: Silvio Berlusconi, Italian Ex-Prime Minister*, BBC (Nov. 27, 2013), <http://www.bbc.co.uk/news/world-europe-11981754>, archived at <http://perma.cc/E6NL-2Q6M>.

¹⁰⁰ See *Stephen Harper to Seek Prorogation of Parliament*, CBC NEWS (Aug. 19, 2013), <http://www.cbc.ca/news/politics/stephen-harper-to-seek-prorogation-of-parliament-1.1378924>, archived at <http://perma.cc/32Q6-ESJ8>. See generally PARLIAMENTARY DEMOCRACY IN CRISIS (Peter H. Russell & Lorne Sossin eds., 2009).

¹⁰¹ See *Ontario's McGuinty Surprises with Resignation, Prorogation*, CBC NEWS (Oct. 15, 2012), <http://www.cbc.ca/news/canada/toronto/ontario-s-mcguinty-surprises-with-resignation-prorogation-1.1156014>, archived at <http://perma.cc/EYS5-DDFA>.

¹⁰² See Constitution Act, 1867, art. IV, § 32, 30 & 31 Vict., c. 3 (U.K.).

¹⁰³ Constitution Act, 1982 pt. IV s. 41(1)(b), being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

¹⁰⁴ Reference re Senate Reform, 2014 SCC 32 (decision released April 25, 2014).

¹⁰⁵ The constitutional source for this anomaly is section 51a of the Constitution Act, 1867, which establishes a “Senate floor” rule (adopted in 1915) whereby “a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province.” Constitution Act, 1867, art. IV, § 51A, 30 & 31 Vict., c. 3 (U.K.). When PEI joined the confederation in 1873 it was guaranteed four

population of thirteen million)¹⁰⁶ has 106 guaranteed House of Commons seats, that is, one parliament member per approximately 125,000 residents.¹⁰⁷ In other words an average Ontarian is about 3.5 times less represented than an average resident of PEI.¹⁰⁸ Furthermore, in 1991, the Supreme Court of Canada rejected a “one person one vote” approach in the context of electoral district boundaries and in favor of an “effective representation” approach, taking into account factors such as community history, minority representation geography, and how sparse and spread out the riding population is.¹⁰⁹ These factors may be accommodated “within a variance of 25 percent above and below the average constituency population (the electoral quotient), except in undefined ‘extraordinary’ circumstances.”¹¹⁰ The result is that even within Ontario itself, electoral districts (ridings) vary in population from less than 65,000 (for example, in the largely rural Kenora riding) to over 130,000 (for example, Toronto Centre), over 150,000 (Vaughn), and even near 200,000 per riding (for example, Brampton West).¹¹¹ And these stark differences do not reflect the

seats in the appointed Senate. With respect to House of Commons seats, PEI was allotted six seats. Section 51 of the Constitution Act, 1867 stated that the number of seats allocated to each province would be recalculated after each ten-year census, starting with the 1871 census. Due to population decline in the late 19th and early 20th century PEI and other maritime provinces began to lose House of Commons seats. Following pressure from PEI (Charlottetown, PEI hosted the confederation talks in 1864 and is often regarded as the birthplace of Canada), the “senatorial clause” was adopted in 1915. It remains in effect today.

¹⁰⁶ *Population and Dwelling Counts, for Canada, Provinces and Territories, 2011 and 2006 Censuses*, STATISTICS CAN., <http://www12.statcan.ca/census-recensement/2011/dp-pd/hlt-fst/pd-pl/Table-Tableau.cfm?LANG=Eng&T=101&S=50&O=A> (last updated Jan. 13, 2014), archived at <http://perma.cc/JB57-MJ2L>.

¹⁰⁷ *Distribution of House of Commons Seats at General Elections (Election Results 2011)*, STATISTICS CAN., <http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/govt10a-eng.htm> (last updated Sept. 11, 2009), archived at <http://perma.cc/8T7Q-6EE4>.

¹⁰⁸ According to the Fair Representation Act passed in 2011, the number of members of parliament is set to increase from 308 to 338; the number of Ontario seats is set to increase to 121 in the next Canadian federal election, so that there will be one seat for every 107,000 Ontarians, still three times the ratio as in PEI. See Fair Representation Act, S.C. 2011, c. 62 (Can.).

¹⁰⁹ *Att’y Gen. for Sask. v. Carter*, [1991] 2 S.C.R. 158, 162 (Can. Sask.) (“Given the initial premise of equality, the Commission should be free to consider such factors as geography, demography and communities of interest in drawing constituency boundaries and allocating ridings between rural and urban areas.”).

¹¹⁰ Jennifer Smith, *Community of Interest and Minority Representation: The Dilemma Facing Electoral Boundaries Commissions*, ELECTORAL INSIGHT, Oct. 2002, at 14, 14; see also *id.* at 190.

¹¹¹ See *Population and Dwelling Counts, For Canada and Federal Electoral Districts*, STATISTICS CAN., <http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/pd-pl/Table-Tableau.cfm?LANG=Eng&T=501&SR=1&S=1&O=A&RPP=25&PR=0&CMA=0> (last updated Jan. 13, 2014), archived at <http://perma.cc/XP8R-3S3V>.

concentration of nonvoting immigrant populations in major urban centers, an issue which further exacerbates the relative under-representation of ridings in big cities.

And in the hotly contested 2013 general elections in Malaysia, the populist-ethnic PKR party (led by the colorful and charismatic Anwar Ibrahim) received the majority of the popular vote (approximately 5.49 million votes or 50.9% of the popular vote), whereas the establishment BN party, headed by PM Najib Razak, garnered approximately 5.22 million votes, or 47.3% of the popular vote.¹¹² Nonetheless, as a result of Malaysia's rather odd electoral system, the BN managed to secure 133 seats (sixty percent) in the 222-seat parliament, with only eighty-nine seats won by PKR.¹¹³ Go figure. To paraphrase Leo Tolstoy's famous quote, while there are quite a few peculiar constitutional systems, each seems to be peculiar in its own way.

CONCLUSION

There is a major debate in the political science literature on constitutional design between those who stress the significance of institutional arrangements to making constitutional democracy work and those who emphasize cultural and societal factors. While proponents of both scholarly camps can stage credible evidence to support their respective arguments, a major phenomenon such as political dysfunction in the world's most powerful democracy must be understood as resulting from a confluence of factors rather than any single cause, institutional or societal. Either way, the significance of constitutional structures in affecting political outcomes seems undeniable.

To understand and appreciate America's serious constitutional shortcomings and peculiarities one needs to do little more than read Sanford Levinson's majestic trilogy of *Constitutional Faith* (1988),¹¹⁴ *Our Undemocratic Constitution* (2006),¹¹⁵ and *Framed: America's 51 Constitutions and the Crisis of Governance* (2012).¹¹⁶ There is little doubt that a late-eighteenth-century constitutional framework that is very difficult to change may suffer structural or organic deficiencies that hinder its ability to sustain effective, rational government for the twenty-first century. The litigious nature of contemporary American society, and in particular the frequency with which the Constitution is invoked to support "for" or "against" arguments on virtually every aspect of

¹¹² See *Malaysia's Election Result Exposes Divided County*, CBC NEWS (May 6, 2013), <http://www.cbc.ca/news/world/malaysia-s-election-result-exposes-divided-country-1.1344840>, archived at <http://perma.cc/3WFV-EMPB>.

¹¹³ See Simon Roughneen, *Difficult Post-Election Period Beckons for Malaysia*, DIPLOMAT (June 20, 2013), <http://thediplomat.com/2013/06/difficult-post-election-period-beckons-for-malaysia>, archived at <http://perma.cc/5PTB-B7JP>.

¹¹⁴ SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

¹¹⁵ LEVINSON, *supra* note 1.

¹¹⁶ SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012).

public life, further accentuates these shortcomings. But some perspective may be added by a comparative standpoint. When we turn our gaze overseas at least four types of serious constitutional dysfunction may be identified: the “fundamental constitutional disharmony” scenario; the “synthetic constitution” scenario; the “opportunistic constitutional battles” scenario; and the “inadequate constitution” scenario. When viewed through this comparative prism, the U.S. constitutional order seems to suffer from the latter, relatively lighter, two problems, but not from the former, more life-threatening two.

A Jewish joke seems to capture it all. Two Jewish women were speaking about their sons, each of whom was incarcerated in a state prison. The first says: “Oy, my son has it so hard. He is locked away in maximum security; he never even speaks to anyone or sees the light of day. He has no exercise and he lives a horrible life.” The second says: “Well, my son is in minimum security. He exercises every day, he spends time in the prison library, takes some classes, and writes home each week.” “Oy,” says the first woman, “You must get such naches (Yiddish for “pride” or “pleasure” especially at the achievements of one’s children) from your son.” The take-home message is clear: it is all relative. America’s constitutional deficiencies are substantial, serious and many, but from a comparative standpoint they appear not to be terminal by any stretch.