



CONSTITUTIONAL
DEMOCRACY

*Creating and Maintaining
a Just Political Order*

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Introduction

The general introduction explained the objectives of this book, discussed some of its principal terms, and outlined the central problems to be addressed. Part I targets one of those problems, the founding of a constitutional democracy, a task that not only confronts tight knots of substantive difficulties but also imposes a dilemma that is partially analytical, partially literary. Speaking in abstract terms allows an author to examine general theories, but testing theories requires tons of data. And there are too few nation-states that have converted to constitutional democracy to allow meaningful statistical testing. Even demonstrating that a theory is plausible involves producing waves of “for instances.” Focusing on concrete situations entails either concentrating on a few highly detailed case studies, from which generalization is seldom possible,¹ or offering many case studies whose nuances can only be cursorily described, thus presenting what Alfred, Lord Tennyson called “a wilderness of single instances,” equally unlikely to gestate broad understanding.

To avoid these difficulties and also to vary the pace of this lengthy tome (Part II returns to more conventional analysis), I have created a mythical nation, Nusquam, that is emerging from a long period of authoritarian rule by a dictatorial junta of military officers and wealthy civilians.² Many of this country’s difficulties have been quite common during the last several centuries of Western, and now Eastern, political history: how to cope with competing economic interests and sometimes antagonistic ethnic groups while educating a population that has almost no firsthand experience with the norms of either democratic or constitutionalist rule. In sum, although Nusquam is not without impressive resources, it badly needs not only economic but also civic development to encourage a culture conducive to governance based on popular participation but also limited in power. Those sorts

1. Case studies can, of course, suggest theories (or at least hypotheses) and, carefully chosen, can allow analysts to test theories. See Harry H. Eckstein, “Case Study and Theory in Political Science,” in his *Regarding Politics* (Berkeley: University of California Press, 1992).

2. For a study of the same general problem from a very different set of perspectives, see Richard Rose, William Mishler, and Christian Haerpfer, *Democracy and Its Alternatives: Understanding Post-communist Societies* (Baltimore: Johns Hopkins University Press, 1998).

of needs have faced and most likely will continue to face people who wish to establish a civil society.

Members of what is, in effect, a constitutional convention will debate among themselves as well as with professional scholars who will address problems at a more general level than most of the delegates. Some members of the caucus will also speak as sophisticated political analysts. For example, one, who in his youth did graduate work at Yale, will push Robert A. Dahl's ideas, while another, a product of the University of Chicago, will reflect Richard A. Posner's economic interpretation of the roles of law. All of these people, however, will debate as practical, intelligent, and educated men and women who are deeply concerned about the long-range future of their nation and its political system. Some may be wrongheaded, insensitive, acerbic, or even rude, but each will be a patriot according to his or her own lights.

I hope this device will allow easy intellectual access back and forth between broad principles and concrete circumstances and so sharpen understanding of the nature and scope of many of the obstacles that confront founders of a new constitutional order. Perhaps this literary mode will also silhouette ways of coping with, if not removing, barriers to governance that is based on popular support, furthers justice, and protects what have become known as fundamental human rights.

Nusquam *The Political Setting*

Nusquam is a medium-sized nation with a population of forty million. For seven decades, it was ruled by a coalition of military officers and prosperous landowners, merchants, and entrepreneurs. Juan J. Linz and Alfred Stepan would classify that regime as authoritarian rather than totalitarian or post-totalitarian.³ Amos Perlmutter would characterize Nusquam's governance as close to classic "authoritarian praetorian," that is, "a coalition of military and civilian governing with little or no external political control."⁴ In keeping with the simpler classification explained in the general introduction, I shall refer to this regime merely as tyrannical.

POLITICAL CENTRALIZATION AND SOCIAL PLURALISM. Political parties had not been tolerated. Despite operating branches in every city and hamlet in the country, the National Alliance of Nusquam, the junta's po-

3. *Problems of Democratic Transition and Consolidation* (Baltimore: Johns Hopkins University Press, 1996), ch. 3.

4. *The Military and Politics in Modern Times: On Professionals, Praetorians, and Revolutionary Soldiers* (New Haven, CT: Yale University Press, 1977), p. 95. I say "coming close to" rather than exactly meeting Perlmutter's criteria because his ideal model would have pictured the civilians in the junta as "bureaucrats, managers, and technocrats" but would not have included businessmen.

litical organization, was small, elitist, and structured so that all authority flowed from the top to the bottom. Its members were carefully chosen and local officials appointed from above. The five hundred delegates to the so-called parliament were chosen by the central government. People who publicly criticized the government were fined, imprisoned, or exiled. All television and radio stations, newspapers, magazines, and publishing houses were owned by the Ministry of Education. Dissidents' writings, however, were published by underground or foreign presses, and several radio stations broadcast to Nusquam from nearby countries. More effective were notices posted on websites located in Asia and Europe and e-mails sent by reformers through cleverly disguised networks of ISPs.

Although the junta tried to eliminate political dissent, it allowed some social and much economic pluralism. The junta never persecuted any religious group, but it did restrict religious organizations. For instance, it was a crime for any person to contribute money or any other thing of value to a church, temple, mosque, or other religious institution or person. The Ministry of Religious Affairs published a list of "approved" sects and paid an annual stipend to a small number of clergy whom each such group designated. In addition, the government allocated funds to construct and maintain church buildings, but no new buildings could be put up without the ministry's financing. No permit was issued until after an existing building had been razed.

Legally, churches, mosques, and synagogues could be used only for religious rituals; they could not be the site of men's or women's social-religious associations or even Sunday or Shabbat schools. The junta also monopolized the charitable and educational activities that such organizations typically undertake. Every hospital, hostel, home for the elderly, daycare center, and orphanage was run by the Ministry of Human Resources. Medical personnel and social workers were employees of the government. The government operated a national health plan and a system of social welfare that, the junta claimed, took care of all citizens.

Schools, from kindergartens to universities, were operated by the Ministry of Education, which also ran a program that financed graduate study abroad for a limited number of students. Mostly "hard scientists," these people were thoroughly vetted for loyalty to the regime. Indeed, more than three-quarters of those admitted to the program were relatives of members of the junta.

The junta encouraged accumulation of wealth and treated private property as quasi-sacred. Most commercial operations were in private hands, but the government tightly controlled unions, appointing officers, forbidding strikes, and requiring any labor disputes to be subject to arbitration by public officials. Private trade associations flourished, but they were also closely

regulated. Each was chaired by a public official. The legal system modeled its provisions for sales, contracts, and liabilities on Spain's version of the Civil Law.

Formally, at least, professional associations did not exist. There were no bar associations. The most gifted of graduates of law faculties who passed the professional examinations were drafted into public service, serving as magistrates (judges and procurators), as advisers to various state agencies, or as officials whose main task was to negotiate with foreign corporations. Private citizens accused of "normal" crimes could engage an attorney at their own expense, but the state provided no legal assistance. Furthermore, there was no right to counsel in cases involving national security. All such charges were tried before military tribunals, behind closed doors. Corporations and private citizens could hire lawyers for advice and for suits against one another, but there was no right to sue the government or any of its agencies.

LEADERSHIP. When "the Great Revolution" occurred in 1936, its leader was a charismatic general. For almost six years he ruled as head of a troika; the other two were an admiral and a banker. During World War II, the general accused these two of treason, executed them, and graciously acceded to Parliament's bestowal of the title "President General for Life." The reign of terror that followed seemed directed as much at friends as at foes among the economic elite. Fortunately for these people, in 1950 the president general died from a strange case of food poisoning, and a new, more broadly based leadership, which included representatives from all four branches of the armed services as well as industry and finance, initiated "the Second Revolution," this one peaceful. Officially, neither governmental organization nor public policies changed; but rule became more bureaucratized, and an efficient method of cooption into and "retirement" from the junta operated. Never again was a member of the junta executed or imprisoned.

IDEOLOGY. What ideology the junta professed loosely resembled an authoritarian form of Franklin D. Roosevelt's First New Deal. Governmentally coerced cooperation among all sectors of the economy was the centerpiece of economic policy, and monopoly of power was the core of its political operations and organization. Opponents labeled the regime fascist, but that charge was exaggerated. Although the junta was quite ready to use brute force against citizens to maintain its political power, after 1950 it relied not on terror but on harsh and explicit rules enforced by zealous procurators and judges. Long prison terms and capital punishment were common penalties. Although Nusquam's domestic policies discriminated against Muslims, Sephardic Jews, blacks, Gypsies, and recent immigrants of any genre, official propaganda exhibited neither racism nor belligerent nationalism. The ab-

sence of the latter was due more to realism than to idealism: Nusquam's economy had not allowed it to acquire much modern military equipment.

MOBILIZATION. High among the junta's goals was an obedient and economically productive nation, but the regime was more successful in achieving docility than productivity. Not until its final days did the government try to organize mass, enthusiastic support. Fearing that involving citizens in political activities would threaten the system, the junta had been content with the acquiescence of a passive population.

The Economic Setting

Nusquam's neutrality during World War II earned some prosperity, but peace brought a competition that squeezed the country out of many foreign markets. Only steel manufacturers were able to compete effectively with foreign firms. Because a large share of the land is fertile and receives about forty-eight inches of rain a year, agricultural production meets domestic demands. Ranching and fishing do well and provide exports that bring in welcome foreign currency.

At one time, Nusquam had small but rich petroleum deposits. Then, during the embargo that followed the Yom Kippur War of 1973, the government encouraged its oil barons to produce and sell as much as they could. The result was an immediate windfall of profits but also a quick exhaustion of reserves. Thus, when the second embargo came in 1979, the country was economically devastated. Beginning in 1989, however, the junta began to use tax policies to encourage research in electronics and also created a legal environment friendly to the less savory aspects of "offshore" banking, making Nusquam attractive to foreigners. Although the country has never known anything like the prosperity of Germany, Italy, or Singapore, Nusquam's per capita income is higher than Turkey's but lower than that of Greece. Still, the distribution of income is badly skewed, with one-fifth of families living on incomes below the poverty level. And since 1979, unemployment has usually hovered between 18 and 20 percent.

In 2000, the junta announced its New Economic Program, essentially a modification of extant policies. It completely deregulated banking and guaranteed absolute confidentiality to all depositors and investors with foreign passports and also encouraged trade in arms by exempting transshipments of such "goods" from all customs inspections and import and export duties. Arms merchants would only pay a transactional fee. Needless to say, some of the uninspected crates included cocaine and heroin as well as guns.

The Social Setting

One of the happier aspects of Nusquam's history is that early in the nineteenth century its government began to take education very seriously and

established an excellent system of primary and secondary schools. Realizing that few people outside of the country spoke Nusquam's language or felt any need to learn it, officials required that English be taught from the second grade onward. Thus, by the time of the junta's collapse, most of the people were fluent in English, and the well educated were likely to be truly bilingual. Nevertheless, the country's economic problems caused drastic reductions in spending for education, with a consequent drop in quality.

Even had educational standards remained high, the country's ethnic fissures would have complicated transition from authoritarian rule. The last census reported that 80 percent of respondents listed a religious affiliation: about one-quarter of these people claimed to be Catholics, and 8 percent said they were Jews, a slightly larger proportion than identified themselves as Muslims. Most of the remainder claimed to be Protestants of various denominations. Several thousand said they were Buddhists. Most Jews are Ashkenazim whose roots run back several centuries in Nusquam's history. Almost a third, however, are ultra-orthodox Sephardim, whose families migrated from North Africa and the Persian Gulf.

Most Protestants in Nusquam are white, native-born citizens, but about a hundred thousand are blacks whose ancestors escaped from slavery in the United States and the Caribbean two centuries ago. Catholics are divided into four groups. A majority are from old families; about 20 percent are relatively new immigrants from Central America; a group of seventy-five thousand Catholics are Vietnamese émigrés and their children from the years 1978–1981; and last is a group of about twenty-five thousand Armenians whose great-grandparents had fled Turkey after World War I. Nusquam also has about sixty thousand Gypsies and about twice that number of Chinese, whose families arrived near the end of the nineteenth century. Nonbelievers are spread rather evenly across the spectrum of ethnic groups except Hispanics and Vietnamese, almost all of whom are Catholic.

White Protestants have the highest incomes, followed by Chinese, Ashkenazim, Vietnamese and other non-Hispanic Catholics, Muslims, Sephardim, black Protestants, Hispanics and, far behind all, the Gypsies. Ashkenazim have attained the highest educational levels, closely followed by non-Hispanic Catholics. Gypsies receive the least schooling; few of them have graduated from the equivalent of grade school. Only eighteen of those interviewed in the last census said they had attended a university, and of these only four were graduates.

Hostility within and among these groups is rife. Sephardic Jews tend to scorn the Ashkenazim for having assimilated into Nusquam's general culture. In turn, Ashkenazim are apt to look on Sephardim as ignorant urban peasants. Although a significant minority of Muslims are descendants of Turks who came to work in the steel mills, the majority are first- and second-generation exiles from Palestine, and some emigrated from Pakistan and

Indonesia. Most of Nusquam's Muslims are Sunni. Nevertheless, they hold diverse religious and political attitudes. About 150 are members of the Wahhabi sect, the fundamentalist group who spawned Osama bin Laden. They despise Nusquam's other Muslims as hypocritical atheists. In turn, more educated Muslims fear the Wahhabites as fanatics who are looking for excuses to murder Muslims whom they deem apostates.

For their part, white Protestants and Catholics have never been warm toward each other, and both have evidenced distrust of all immigrant groups of whatever religion or ethnicity. Moreover, relations between Turks and Armenians as well as between Sephardic Jews and Palestinian Arabs have several times fired riots. No group has fully accepted the Hispanics, and most citizens openly say they despise Gypsies, though few claim to know a Rom personally. The result has been a large amount of self-imposed segregation. Gypsies tend to live nomadic lives, and most Hispanics work as hired laborers on farms, while poorer members of other minority groups typically cluster together in urban ghettos. Because of this separation, immigrants and many of their children continue to use ancestral languages for day-to-day living.

The Junta's Demise: "The Third Revolution"

The junta collapsed more from corruption and a failure of will than from violent overthrow. Although there had been some uncoordinated acts of terrorism, the secret police and the Special Guards, an elite military force, had been efficient in squelching organized dissident groups. The first of what proved to be fatal cracks began to appear less than three months ago, when the first five years of the highly touted New Economic Plan succeeded in raising the gross domestic product by 1.6 percent but without significantly improving maldistributions of income or lowering the unemployment rate below 17 percent. According to widespread rumors, most of the gains were going into the Swiss bank accounts the ruling elites maintained. Hitherto docile unions started a series of illegal strikes that escalated in seriousness; the last of them left the capital without either electricity or public transportation for several days. University students began taking to the streets, protesting that while tuition was being raised, there were no jobs for them after graduation.

The government's first reaction was to try to break the strikes; but when officials realized how quickly unrest was spreading, they began to make sympathetic noises. "We feel your pain," the junta's president said on television. "Let us sit down together and discuss how we can make Nusquam a happier place." To provide a facade for that discussion, he announced that the government was installing a licensing system to grant autonomous status to some groups. Within a week of the announcement, more than three thousand embryonic organizations were seeking permits. During that time,

the junta's leaders used a combination of threats and bribery to try to co-opt leaders of the new dissidents. These efforts produced little success.

Meanwhile, in the capital, students at the National University ignored the licensing option and again took to the streets. Changing course from their previous protest, they now had a single demand: the junta must resign. One afternoon, during a particularly raucous demonstration by women students in front of the presidential palace, secret police fired on the crowd, killing six of the women and wounding several dozen more. The next morning, the Presidential Plaza was filled with more than thirty thousand women from all around the country, shouting for the junta's resignation. The general president ordered a regiment of marines, led by Colonel Nestor Martin, to disperse the demonstrators. By the time the regiment arrived, the protesters had established a tent city in front of the palace and were being fed by the capital's inhabitants.

Colonel Martin met with the students' self-selected leaders, listened to their arguments, and suggested that they go back to their homes. They refused. The president then commanded Martin to use force to disperse the group. Instead, the colonel announced that he found the students' case persuasive and their sole demand reasonable. He immediately deployed one of his battalions around the palace and placed the other two in defensive positions in the city. The junta then ordered a tank battalion of Special Guards and a mechanized division from the regular army to attack Martin and crush the rebellion. As the seventy-two tanks of the Special Guards were strung out along a mile-long bridge in the city's center, Marine demolition experts blew all four spans, sending the bridge and sixty tanks into the river.

As the mechanized division was entering the capital, the colonels commanding the three infantry and one artillery regiment declared their solidarity with Martin and surrounded the central barracks of the secret police. Around the country, a dozen army and air force units began to move to relieve the government but were met by still other units. The fighting was sporadic, largely because desertions depleted most of the loyal forces before they could engage the rebels. Lacking the courage for a sustained civil war and fearing a fate like that of Romania's Nicolae Ceaușescu and his wife Elena, the junta speedily negotiated a settlement with Martin and the four army colonels: The leaders and their families got safe passage out of the country. Left behind were all their minions, including the chief of the secret police and the commander of the Special Guards. Both men and their staffs were quickly arrested and imprisoned along with several dozen judges and procurators.

The Colonels (now capitalized) prorogued the junta's sham parliament and took control of the government. To the surprise of the population and foreign diplomats, these officers immediately issued a proclamation:

We, officers and men of the armed forces loyal to the nation of Nusquam, have wrenched command of government from the hands of despots. As soon as public order and safety permit, we shall surrender that power to lawfully constituted civilian officials. But the nation's political health cannot be restored merely by removing a single nest of tyrants. Without new and vibrant political institutions and processes that both promote justice and reflect the wishes of our citizens, Nusquam is doomed to further cycles of oppressive rule by small cliques. Thus our nation has an urgent need for a system of governance that will help our people live in peace, justice, order, liberty, and prosperity. To speed the day when we can in good conscience return to our dedicated careers, we summon a Caucus for a New Political System to propose a fresh constitutional order for our nation.

As convened, the caucus consists of twenty-five members, mostly civilians, and is authorized to meet for as long as necessary and to do so in splendid isolation in the presidential villa on Lake Lakshmi. The Colonels have also specified that the caucus can draft as research assistants any or all members of the faculties of Nusquam National University. In addition, the Colonels have made money available so that the caucus, as the Estonian constitutional convention of 1991-92 did, can invite such foreign consultants as it might deem helpful to its deliberations.

The Caucus for a New Political System

The ideal founders of a constitutional order would be, as Socrates understood, both philosophers and statesmen. Such paragons, however, are rare, and none of them was selected as a member of this constitutional convention. Still, the chosen people are all intelligent and have a variety of experiences. To some extent, their diversity represents Nusquam's population, though their educational level is far superior to that of most citizens. Some had been officials under the old regime, some are academics; others journalists; several are labor leaders who had struggled for independence from governmental domination; still others had been leaders of dissident groups; one is a banker; one is a Jesuit; two are Protestant ministers; and one of the Jewish members is president of his temple. Two members are Muslims, one is of Chinese descent, one is Hispanic, and yet another is a Gypsy. Pointedly absent from the group are people who had been sympathetic to the junta.

Only two founders are currently in the military. One is a mathematician who teaches at the country's naval academy; he has the official rank of commander, though he has never served aboard a combat vessel. The other is Nestor Martin himself. He probably owes his stiff-backed posture and penchant for short, brush-cut hair (now steel gray) to his family's genes. The patriarch of that clan was an Irish officer who, after Wolfe Tone's failed

rebellion in 1797, emigrated to Nusquam. Standing first in his class at the naval academy, Martin had opted for a Marine commission, realizing that being built like a linebacker on a American football team would be an asset in an organization that valued physical strength as much as, if not more than, intelligence. After four years of service, he resigned and became a soldier of fortune, fighting in the Sudan for the rebels, again for the rebels in East Timor, and then for Croatian Muslims against the Serbs. After the Dayton Accords, he returned to Nusquam, exuding gravitas, and because of his unique combat experience was reinstated in the Marine Corps with the rank of lieutenant colonel. He was promoted to colonel shortly before the women took to the streets. His reputation as a soldier of fortune and dramatic action against the junta made him the most prominent of the Colonels, the one to whom the others looked for leadership. Foreign journalists who had covered coups in Latin America refer to him as "El Jefe," and unconfirmed rumor has it that he wrote the statement convening the caucus and personally selected its members. Whatever the truth of these reports, at its first meeting the caucus prudently elects him chairman.⁵

Despite the presence of academics, most members, even the clerics, are reputed to be practical men and women concerned about the real-life consequences of their choices. (The Colonels, as reporters were quick to note, did not appoint a professional philosopher to the group.) Because of Nusquam's jagged sectarian divisions, most members believe it would be wise to avoid using theological arguments to justify decisions. Nevertheless, many of them also realize that some of their own politically relevant values rest on religious convictions and that sooner or later they must face up to the impact of these potentially divisive norms within the caucus as well as within the nation as a whole.⁶

Dramatis Personae

Of the twenty-five members of the caucus, the chair, Colonel Martin, and the following delegates will play particularly active roles in debate:

Ibrahim Ajami: A Sunni Muslim who is a professor of Islamic Studies at the National University. Learned in the Qur'an, the Shari'a (literally the

5. Colonel Martin's biography shows marked similarities with that of Colonel (later President) Lucio Gutiérrez of Ecuador. Here, however, life followed art (at least temporally), for I wrote the original draft of this chapter in 1997, some three years before Gutiérrez launched his political career by joining forces with a populist insurrection.

6. For John Rawls's development of the concept of "public reasons," see esp. his "Kantian Constructivism in Moral Philosophy" and "The Idea of Public Reasons Revisited," both in *John Rawls: Collected Papers*, ed. Samuel R. Freeman (Cambridge, MA: Harvard University Press, 1999). For critical analyses, see Robert P. George, *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis* (Wilmington, DE: ISI Press, 2001), pp. 45–55; and the articles by Samuel R. Freeman, Dennis F. Thompson, Abner S. Greene, David A. J. Richards, and Michael Baur in "Symposium: Rawls and the Law," 72 *Fordham L. Rev.* 2021 (2004).

path to the watering place), and the theology implicit and explicit in both, he has the honorary title Mufti.⁷ His scholarly reputation, enhanced by his gaunt, saintly appearance and the long white beard that droops almost to his waist, has given him the status of a wise and holy man. Non-Muslims sometimes (mistakenly) refer to him as "Imam." He must struggle constantly to differentiate the Muslims with whom he works from the Wah-habites, who regard him as an atheist.

Anita Baca: A twenty-five-year-old Hispanic graduate student in sociology from National University. Short, dark haired, and noted for a fiery temper and cold courage, she had nominated herself to be leader of the women demonstrators and had been accepted by acclamation. Although wounded in the first volleys against the women, she had refused hospitalization and had presented to Colonel Martin the women's demand for the junta's departure. Her imprimatur on a new constitutional order would, in the minds of many women, confer legitimacy on the political system.

Rudolf Glückmann: A Lutheran pastor who at first glance seems meek and unimposing, a heavy, balding Caspar Milquetoast. Yet he had used his pulpit to call for the junta to show greater respect for human rights. In keeping with its policy of not directly confronting religious leaders, the government pretended to ignore him. His church, however, had mysteriously burned down, and his congregation was denied a permit to rebuild. In the meantime, the state cut off his salary.

Atilla Gregorian: A Jesuit who, with his provincial's permission, had gone to the steel mills as "a worker priest." There, he built up support among the steelworkers, publicly called for democratic elections to Parliament, and offered himself as a candidate. The junta's initial reaction was to imprison him on trumped-up charges of sedition, but later the leaders traded his freedom for a promise to stay out of electoral politics. Instead, with the cooperation of his provincial and a local bishop, he began preaching in churches around the country. A short, dapper man who wears his silver hair tied in a ponytail that reaches halfway down his back, he was fiercely eloquent, a master at criticizing the junta through sarcastic allegory. His most famous punch line was that the members of the junta were true Christians who meticulously followed Christ's admonition "to make friends with Mammon." Gregorian is a humble man who interprets God's giving Nusquam a priest as wise and holy as he to be a sign of divine love for humanity.

Jessica Jacobsohn: A former professor of comparative constitutional law on the faculty of Nusquam's National University. She had been fired because of telling her classes that Nusquam urgently needed sweeping constitutional reform. Once considered attractive and well dressed, she appears to have

7. For brief descriptions of the titles and roles (usually unofficial or quasi-official) of those who perform Muslim religious functions, see Leon Carl Brown, *Religion and State: The Muslim Approach to Politics* (New York: Columbia University Press, 2000), esp. chs. 1–3.

aged a decade during the past several years. Having had to earn her living as a helper in a flower shop, she can no longer afford stylish clothes.

Jon Kanuri: An economist whose ancestors had escaped from slavery in West Africa. Six feet four inches tall and weighing 245 trim pounds, he is blessed with a physical appearance that adds force to his words. For a time, when he was preaching that an authoritarian state was useful for economic development, he had been the darling of the junta. Appointed minister of finance, he had quickly embarrassed his patrons by charging that a large part of the nation's wealth was being siphoned off into Swiss bank accounts. Shortly after his accusations, an auditor found "errors" in the minister's own accounts, and when the Colonels revolted, he had been awaiting trial for fraud.

Tuncer Kirca: A Turkish émigré who had come to Nusquam in 1980 as an unskilled worker in the steel industry. Later, he secretly organized other Turkish laborers and tried to found a labor union independent of the government's control. Short, muscular, and strong, he had several times manhandled goons whom the government sent to harass him. Indeed, on one occasion he broke the arm of one such worthy and cost another three teeth and a serious concussion. For that crime, he spent four years in prison; he was released after the Colonels' revolt. Kirca is acutely sensitive to the prejudice directed against Muslims in Nusquam and places much of the blame for the continuation of such bias on the rantings of the Wahhabi.

Václav Pilsudski: At the fall of the junta, he was still minister of justice. He had been a distinguished professor of criminal law at the National University. Thinking that he would lend legitimacy to the government and, at the age of seventy-six, would be politically tame, the junta had appointed him to the cabinet. Once in office, however, he initiated disciplinary actions against several procurators and judges who had been draconian in enforcing the junta's policies. Fearing loss of much-needed public support, the leaders did not fire him; instead, they surrounded him with hacks who sabotaged his policies. With a flowing mane of white hair, he looks like Walt Disney's animation of Pinocchio's father.

Demos Pykmites: Nephew of an immensely wealthy Greek shipping magnate who was a member of the junta, Demos became a famous—and famously tall, slim, and handsome—television commentator. A graduate of the National University, he had been allowed to pursue graduate study for three years at Yale, where he completed the coursework and passed the examinations required for a Ph.D. in political science. He did not, however, finish his dissertation. A decade after returning to Nusquam, he was imprisoned when the secret police discovered he was the author of a series of tracts attacking the junta. He, too, had been freed only after the Colonels' revolt.

Federika Strega: After graduating first in her class from the law faculty of

National University, she joined the civil service and quickly earned promotion. She was one of the few people selected for study abroad who were not related to a member of the junta. At the University of Chicago, she studied law and economics. Although endowed with a husky voice, soulful brown eyes, and silky black hair, she was better known for her keen intelligence and a tongue that cracked like a bullwhip. While still a middle-level bureaucrat, she had persuaded the junta to subsidize the electronics industry and to change the legal system to make foreign bankers welcome. Last year, at thirty-six, she became deputy minister of finance. In that post, she was trying desperately to improve Nusquam's rickety system of health care. Throughout her career, she had managed to stay out of the beds, ideological as well as recreational, of all members of the junta.

Minxin Wei: A member of a wealthy family of bankers and now CEO of Nusquam's largest bank. Some people view him as tightly self-contained, others as arrogant, perhaps because his pencil-thin mustache gives him a sneering look and his use of traditional Mandarin robes indicates disdain for the dominant white culture. Nevertheless, all people with whom he deals recognize him as a brilliant financier, and the junta had courted him and his family because of their links to financial institutions around the world. It had seemed that he had no contact with politics other than to facilitate the government's revised banking policies. After the Colonels' revolt, however, it became evident that he and his family had been using their connections abroad to help finance the dissidents.

Ion Zingaro: The only Gypsy in the group, he is a dark, diminutive man whose deep brown eyes warn that he does not tolerate intimacy. As a teenager, he had followed his father as an itinerant tinker. Convicted twice for larceny, he learned to read and write while in prison and, during his second three-year term, discovered that he had a talent for serious poetry, both in Nusquam's ancient language and in Shelta, the Gypsies' dialect. Several members of the junta adopted him as their tame dissident and, perversely, seemed to enjoy the sarcastic barbs his poems hurled at them. Later he learned English as well as French and Spanish but could never write poetry in those languages.

CHAPTER TWO

Alternative Political Systems

The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.

BENJAMIN N. CARDOZO

Much to Colonel Martin's annoyance, the recess lasts twenty-one minutes; then Professor Retlaw Deukalion continues.

Your reading "Constitutions, Constitutionalism, and Democracy"¹ has reminded you that blending constitutionalism and democracy poses huge difficulties of political engineering. This mixture sometimes produces cacophony rather than harmony. But the promises, too, are huge: a fair chance for citizens to work peacefully together for a good life for themselves and their families within a just society.

Freedom from governmental oppression, equality before the law, and the right to political participation allow citizens to enjoy far better lives than under authoritarian regimes. But constitutional democracy's record is far from perfect. Americans' oft-proclaimed love of liberty was long accompanied by slavery as well as rejection of the social, legal, and political equality of women and people who have different-colored skin.² Today, their so-called Patriot Act allows police to obtain secret warrants to search citizens' homes when they are absent, and their president claims authority to listen in, without a warrant, on their telephone conversations. So, too, when constitutionalism does focus on protection against governmental oppression, it often exposes some individuals' rights to abuse by private citizens and corporations. One might even argue, as Rousseau did, that elections restrict the people's right to self-government.

There is some truth in Lee Juan Yew's comment that the American

1. In Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley, eds., *Constitutionalism and Democracy: Transformations in the Contemporary World* (New York: Oxford University Press, 1993).

2. For an excellent survey, see Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, CT: Yale University Press, 1997).

political system, which spends about as much public money for prisons as for higher education, is menaced by "guns, drugs, violent crime, [and] vagrancy."³ Nor is this situation unique to the United States. Crime "has become an obsession in the new South Africa,"⁴ with a murder rate seven times that of America. In Russia, "[t]he terror of a police state is gone," a reporter wrote in 1995, "but it has been replaced by a fear of gangsters and corrupt police officers."⁵ The rate of violent felonies there more than doubled between 1987 and 1992, and within a decade some estimates claimed that criminal activities accounted for as much as 40 percent of the national economy. The Russian Mafia now operates in New York and London as well as in Moscow and St. Petersburg. In Eastern Europe generally, the *Economist* claims, a similar pattern of official corruption combined with privatized gangsterism prevails: "Much of the wealth has stealthy origins, corruption is endemic, and the quality of Central Europe's politicians, civil servants and judges is poor to dire. . . . Anger bubbles up."⁶ In Afghanistan, American occupation coincided with an increase in the opium trade. In Iraq, the situation remains so muddled by civil war that it is difficult to separate exploding terror, peacekeeping fire, and official corruption.

To be fair, although political liberalization has typically been accompanied by a rise in crime, connections between crime and freedom are complex. Under dictators, as in Haiti, Iraq, Kenya, North Korea, Paraguay, Syria, or Zaire, violent crime was or is common. One cause of the apparent increase in crime in the former Soviet bloc lies in the fact that much criminal activity that was once a monopoly of government is now privatized. Another cause may be that the old regimes failed to generate civic virtue. A third may be that increased liberty and decreased probability of being punished do encourage crime. Edward S. Corwin sketched the dilemma: "[W]e enjoy *civil liberty* because of the restraints which government imposes upon our neighbors in our behalf." Freedom,

3. Quoted by Fareed Zakaria, "Culture Is Destiny: A Conversation with Lee Kuan Yew," *73 For. Affrs.* 109, 111 (Mar./Apr. 1994).

4. *Economist*, Aug. 10, 1996, p. 30, and May 31, 1997, p. 43. For more general analyses, see the pair of articles by Mark Shaw and Peter Gastrow: "Stealing the Show? Crime and Its Impact in Post-apartheid South Africa," 130 *Daedalus* 235 (2001), and "In Search of Public Safety: Police Transformation and Public Responses in South Africa," 130 *Daedalus* 259 (2001).

5. Alessandra Stanley, "Gorbachev's New Battle: Overcoming His Legacy," *N.Y. Times*, Mar. 10, 1995. See more generally and more recently David Satter, *Darkness at Dawn: The Rise of the Russian Criminal State* (New Haven, CT: Yale University Press, 2003).

6. "Special Report: Eastern Europe," Oct. 26, 2002, pp. 24-25. See, more generally, Avinash K. Dixit, *Lawlessness and Economics: Alternative Modes of Governance* (Princeton, NJ: Princeton University Press, 2004). In 2005, the *Economist* was still reporting that "corruption in Russia is everywhere." "Corruption in Russia: Blood Money," Oct. 22, 2005, p. 53.

he added, "may be infringed by other forces as well as by government; indeed, [liberty] may require the *positive intervention* of government against these other forces."⁷

On your second goal, peace, constitutional democracy's record is also mixed. "Democratic Republicanism," said Sam Adams, the American revolutionary, would bring the world "perfect Peace and Safety till time shall be no more."⁸ He was overly optimistic. A nation may want peace, but aggressors are not noted for respecting others' wishes. Moreover, as founders you must worry about the systemic proclivities of the governmental structures you establish: during the period 1813–1980, democracies were no less likely than other kinds of regimes to wage war.⁹

Scholarship offers no help in choosing between constitutional and representative democracy on this count. Most relevant studies analyze the records of *democracies*, not *constitutional democracies*. For democratization, scholars rely on Ted Robert Gurr's ranking of nations across almost two centuries and, for war, on the Correlates of War Project directed by Melvin Small and J. David Singer.¹⁰ In defining democracy, Gurr specified such elements as institutionalized protections of individual rights. On the other hand, his "operational indicator" of democratic rankings includes only a small portion of these elements.¹¹ Hence, although research relying on Gurr's rich database has great utility for many purposes, it cannot be conclusive for this caucus.

The claim that democracies are not apt to fight each other did not hold up in earlier eras. Between 1817 and World War I, there was "no significant relationship" between types of regimes that went to war with each other.¹² Furthermore, "militarized interstate disputes"¹³ in which

7. *Constitutional Revolution, Ltd.* (Claremont, CA: Claremont College Press, 1941), pp. 7, 67 (italics in original). Jack Knight puts it more formally: "[I]f self-interested individuals want institutional arrangements that favor them as individuals, they will prefer institutional rules that constrain the actions of others with whom they interact. . . . [B]ut they are faced with the fact that social institutions constrain the choices of all actors in some ways." *Institutions and Social Conflict* (New York: Cambridge University Press, 1992), p. 64.

8. Quoted in Pauline Maier's review of Gordon S. Wood, *The Radicalism of the American Revolution*, *N.Y. Rev. of Bks.*, Mar. 1, 1992.

9. Henry S. Farber and Joanne Gowa, "Politics and Peace," 20 *Int'l Security* 123 (1995) and, more generally, their *Ballots and Bullets: The Elusive Democratic Peace* (Princeton, NJ: Princeton University Press, 1999).

10. *Resort to Arms: International and Civil Wars, 1816–1980* (Beverly Hills, CA: Sage, 1982).

11. Gurr's exact wording is important: "our operational indicator of democracy is derived from codings of the competitiveness of political participation, . . . the openness and competitiveness of executive recruitment, . . . and constraints on the chief executive." *Polity II: Political Structures and Regime Change, 1800–1986*, electronic manuscript, Center for Comparative Politics, Boulder, 1989, distributed by Inter-university Consortium for Political Research, Ann Arbor, MI, p. 38.

12. Farber and Gowa, "Politics and Peace," pp. 141–42 (italics in original). For a contrary conclusion, see Spencer B. Weart, *Never at War: Why Democracies Will Not Fight One Another* (New Haven, CT: Yale University Press, 1998).

violence is overtly threatened, as in the Cuban missile crisis, or occurs at a low level, as in various American retaliations against Iraq between the Gulf War and the invasion in 2003, have been far more common than full-fledged wars. Before 1914, democracies were more likely to engage in such disputes with each other than were other types of regimes.¹⁴ Since then, and especially since the close of World War II, the pattern has changed dramatically. "Mature" democracies are apt to retreat from strategic overcommitments, seldom battle each other, and rarely fight "preventive wars."¹⁵ When democracies do wage war, they are likely to win, as Saddam Hussein and Slobodan Milosevic learned.¹⁶ We should be wary, however, of labeling democratization as the sole or even primary cause of the paucity of intrademocratic wars since 1945. Europeanization and the dominance in the free world of the United States were probably equally, if not more, important.¹⁷

But even if there is a democratic tendency toward peace, becoming a representative or constitutional democracy is seldom a sudden event. Edward D. Mansfield and Jack Snyder looked at 150 years of data and concluded that during the early stages of democratization "countries become more aggressive and war-prone, not less, and they do fight wars with [more mature] democratic states."¹⁸ Furthermore, during that period, states that had recently become more democratic were "much more war-prone" than those that underwent no change, and they were "somewhat more war-prone" than those that became more autocratic.¹⁹ Worse, rapid passage did not lower the risks of war. Comparing changes from autocracy to a mixed democratic-autocratic regime with those from autocracy directly to democracy, Mansfield and Snyder discovered that the latter had been "more likely to promote wars."²⁰

It is fair, then, to conclude that although the long-term record is mixed, recent history shows that democracies' promise of peace is realistic.²¹ On the other hand, the caveat about belligerence and youth is

13. Charles S. Gochman and Zeev Maoz, "Militarized Interstate Disputes, 1816–1976," 28 *J. of Conflict Resolution* 585 (1984).

14. Farber and Gowa, "Politics and Peace," p. 143.

15. George W. Bush's invasion of Iraq in 2003 to protect the United States against nonexistent weapons of mass destruction is a famous exception.

16. Edward D. Mansfield and Jack Snyder, "Democratization and the Danger of War," 20 *Int'l Sec.* 5 (1995).

17. See Sebastian Rosato, "The Flawed Logic of Democratic Peace Theory," 97 *Am. Pol. Sci. Rev.* 585 (2003).

18. Mansfield and Snyder, "Democratization and the Danger of War," p. 8.

19. *Ibid.*, p. 8. Snyder has amplified this point in *From Voting to Violence: Democratization and Nationalist Conflict* (New York: W. W. Norton, 2000), arguing that in the early stages of democratization, nations are often beset by fits of belligerent nationalism.

20. Mansfield and Snyder, "Democratization and the Danger of War," p. 17.

21. Colonial wars constitute another savage form of combat, but one in which two nation-states

relevant. Like human beings, democracies would be better off if they could skip adolescence.

Next is the economy. Everyone agrees that your new system must foster prosperity. But, again, directly relevant studies of political economy make no distinction between constitutional and representative democracies. In addition, democracy grew up with capitalism, with proponents of each offering similar justifications.²² And despite persistent affairs with mild forms of socialism and continuing efforts to dull capitalism's crueler edges, all representative and constitutional democracies have retained some version of that economic system. Thus it is difficult to sort out how much of their economic achievements is due to capitalism, how much to political structure, how much to habits of heart and purse that each encourages, and how much to accidents of time and place. You must somehow crank this complication into your calculations.

Worse, the situation does not become crystalline when you look at other kinds of regimes. Comparing economic performances of constitutional democracies and fascist systems is difficult because we have few full-blown cases of the latter and each was short lived: the Thousand-Year Reich began well but lasted a mere dozen years, Benito Mussolini's poverty-plagued Roman Empire barely twenty,²³ and Francisco Franco's reign only about twice that long. Moreover, none consistently gave priority to economic theory over political domination.²⁴

Anita Baca, the graduate student who had led the demonstrations against the junta, interrupts: "May I ask a factual question? Wasn't it Kurt von Schleiser, Hitler's predecessor as chancellor, who authorized the cool public works program that led Germany out of the Depression?"

are not directly involved, so they are not included in many studies. For example, one of the most systematic studies of relationships between war and democracy limits its scope to "conflicts between two independent states": David L. Rousseau et al., "Assessing the Dyadic Nature of the Democratic Peace, 1918-1988," *90 Am. Pol. Sci. Rev.* 512n1 (1996). Nevertheless, a plague of such conflicts afflicted constitutional democracies well into the second half of the twentieth century.

22. See Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (Princeton, NJ: Princeton University Press, 1977).

23. For studies of Mussolini, see R. J. B. Bosworth's work: *Mussolini* (New York: Oxford University Press, 2002); *Mussolini and the Fascist Destruction of Liberal Italy* (Adelaide: Rigby, 1973); and *The Italian Dictatorship: Problems and Perspectives in the Interpretation of Mussolini and Fascism* (London: Arnold, 1998). Nicholas Farrell, *Mussolini: A New Life* (London: Weidenfeld and Nicolson, 2003), is less critical.

24. Among the best political analyses of fascism are Michael Mann, *Fascists* (New York: Cambridge University Press, 2004), and Robert O. Paxton, *The Anatomy of Fascism* (New York: Alfred A. Knopf, 2004). For studies focusing on economic policies, see Avraham Barkai, *Nazi Economic Ideology, Theory, and Policy*, trans. Ruth Hadass-Vashitz (New Haven, CT: Yale University Press, 1990); Dan P. Silverman, *Hitler's Economy* (Cambridge, MA: Harvard University Press, 1998); and, generally, Ronald Wintrobe, *The Political Economy of Dictatorship* (New York: Cambridge University Press, 1998).

Certainly Henry Ashy Turner claims that von Schleiser approved this plan before Hitler assumed power.²⁵ But the Nazis deserve credit for, before John Maynard Keynes's *General Theory of Employment, Interest, and Money*²⁶ was published, operationalizing such an innovative strategy.

Whoever created that public works program, Hitler's megalomania soon produced total war and near-total destruction. After 1936, El Caudillo tried to create a fascist economy; but like his mentors, Franco subordinated economic theory to personal power.²⁷ Furthermore, by the mid-1960s, Spain was drifting toward a capitalist system more in accord with the rest of Western Europe. Asia's Tiny Tigers have done well, but most authoritarian governments have sad records. The military regimes of Sub-Saharan Africa have coexisted with gross poverty. So, too, except in Pinochet's Chile, Latin American dictatorships have not provided models of growth and prosperity, despite what the World Bank claimed to believe in the mid-1980s.²⁸ And your own junta had only slight economic success.

As for Marxist regimes, the Soviet Empire often teetered on the brink of poverty.²⁹ Famines in Mao's China took somewhere between thirty and fifty million lives, and North Korea has suffered catastrophic famines. Meanwhile, most constitutional democracies have dramatically raised their standards of living. Yet the correlation is not perfect. According to the World Bank, soon after Beijing eased Mao's controls, the average Chinese was almost twice as likely as the average citizen of

25. *Hitler's Thirty Days to Power: January 1933* (Reading, MA: Addison-Wesley, 1996).

26. 1936; reprint New York: Harcourt, Brace, 1964.

27. Whether Franco was merely an old-fashioned military dictator who exploited fascist ideology or was a true fascist is contested. See Robert O. Paxton, "The Uses of Fascism," *N.Y. Rev. of Bks.*, Nov. 28, 1996, 48, 51; Robert O. Paxton and Stanley G. Payne, *A History of Fascism, 1914-1945* (Madison: University of Wisconsin Press, 1996); Walter Laqueur, *Fascism: Past, Present, and Future* (New York: Oxford University Press, 1996); and George L. Mosse, *The Fascist Revolution: Toward a General Theory of Fascism* (New York: Fertig, 1998). For discussions of Franco's economic policies, see Victor M. Pérez-Díaz, *The Return of Civil Society: The Emergence of Democratic Spain* (Cambridge, MA: Harvard University Press, 1993), chs. 1, 4; Howard J. Wiarda, *The Transition to Democracy in Spain and Portugal* (Lanham, MD: American Enterprise Institute for Public Policy Research, 1989), chs. 1, 8; and Phillippe Schmitter and G. Lehmbruch, eds., *Trends toward Corporatist Intermediation* (Beverly Hills, CA: Sage, 1979). For the transition from fascism to constitutional democracy, see Arvid John Lukauskas, *Regulating Finance: The Political Economy of Spanish Financial Policy from Franco to Democracy* (Ann Arbor: University of Michigan Press, 1998).

28. See Karen L. Remmer, "Democracy and Economic Crisis: The Latin American Experience," *42 World Pol.* 315-16 (1990). For a broader study, see Morton H. Halpern, Joseph T. Siegle, and Michael M. Weinstein, *The Democracy Advantage: How Democracies Promote Prosperity and Peace* (New York: Routledge, 2004).

29. For a study of the systemic problems with the Soviet economy, see Paul R. Gregory, *The Political Economy of Stalinism: Evidence from the Soviet Secret Archives* (New York: Cambridge University Press, 2003).

India's constitutional democracy to be literate and could expect to receive a larger income, live five years longer, and have healthier children. And China's GNP has continued to grow faster than India's.

The story is not unmixed, but the economic records of constitutional and representative democracies have tended to be much better than those of Marxist, fascist, or military dictatorships. The real rival here is coercive capitalism, but even its performance has not been constantly positive, and its growth has come at a high price in personal freedom.

Your goals include political stability, and here constitutional democracies score high. Although they frequently rotate ruling parties and sometimes alter particular governmental structures, the basic political system has endured. Even Italians, who changed governments fifty-eight times during the Republic's first fifty years, have remained staunch constitutional democrats. France might also seem an exception, but it has had only one major change of regime since World War II, and that added constitutionalist elements to democratic processes. Many of the less sweeping changes since, notably the Conseil Constitutionnel's decision that it could enforce the Declaration of the Rights of Man of 1789,³⁰ have further augmented the system's constitutionalist elements.

A common explanation for this stability stresses the legitimating power of public opinion. As David Hume noted, all governance rests on public acceptance, and more than any regime except representative democracy, constitutional democracy involves citizens in peaceful politics. Within broad limits, the electorate can even revise the rules of the political game. Another explanation relates to the putative legitimizing effect of judicial review. Public policies often raise questions not only of wisdom but also of congruence with the polity's basic principles. At least in Australia, Germany, Ireland, Japan, and the United States, judicial review much more often than not sustains the validity of challenged policies.³¹ Such decisions may quiet doubts among losers as well as neutrals.³²

30. Decision of Jan. 16, 1982; reprinted in part in Louis Favoreau and Loïc Philip, *Les grandes décisions du Conseil Constitutionnel*, 6th ed. (Paris: Sirey, 1991), pp. 470ff. For a discussion of this decision, see Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992), esp. pp. 80–86.

31. See Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy Maker," 6 *J. of Pub. L.* 279 (1957); and Charles L. Black, *The People and the Court: Judicial Review and Democracy* (New York: Macmillan, 1960), esp. ch. 3. The Japanese Supreme Court had, as of 2000, invalidated only a half-dozen of several hundred challenged statutes. Lawrence W. Beer and Hiroshi Itoh, *The Constitutional Case Law of Japan, 1970 through 1990* (Seattle: University of Washington Press, 1996), p. 24. Irish judges are less agreeable to the government than the Japanese but have been more likely to sustain than invalidate a statute. In its first few decades, the German Constitutional Court invalidated more statutes than the U.S. Supreme Court had in its first century; nevertheless, the German judges have upheld the validity of more than two thousand challenged governmental acts.

Obviously, constitutional democracy is not always successful, but neither is representative democracy. Latin America and Sub-Saharan Africa have opened yawning graveyards for democratic regimes, and the records of Greece, Pakistan, the Philippines, South Korea, and Turkey are checkered. Alas, we have few representative democracies to compare with the many (efforts at) constitutional democracies. New Zealand stands out, but even the United Kingdom, for centuries the case par excellence, has taken on many of constitutional democracy's institutionalized protections of rights through its membership in the European Union and its many treaties. In any event, the most you can expect of any form of democracy is that it will facilitate political stability, *if* it takes root—a huge *if*.

Your goal of a civic culture that demands respect for duties as well as rights is also enormously difficult to achieve. Both Britain and the United States illustrate the problems you face. During the 1920s, when Britain's regime more closely conformed to the Westminster model, critics such as Beatrice and Sidney Webb and R. H. Tawney attacked their country for fostering selfishness and greed. Furthermore, an influx of immigrants from Pakistan, India, East Africa, and the Caribbean has brought out the same charges of bigotry that have bedeviled the United States.³³ That the United States as a constitutional democracy has not fully lived up to its supposed societal norms has been charged not only by right-wing candidates trumpeting "family values" but also by eminent scholars such as Daniel Bell, Robert N. Bellah, Mary Ann Glendon, and Michael J. Sandel.

Two kindred beliefs underlie these critiques. The first is that capitalism facilitates a culture committed to "ceaseless change," accepts inequality, and works synergistically with Liberalism to create an "acquisitive society." The real norms become those of the competitive market of "possessive individualism."³⁴ The second belief is that these characteristics make it very difficult to maintain a sense of community and civic obligation. In its American incarnation, constitutional democracy has come to be defined less in terms of such public purposes as concern for social justice and more in terms of protecting individual rights. A negative form of constitutionalism has joined with capitalism to produce a

32. For citations of some of the relevant literature, see Walter F. Murphy and Joseph Tanenhaus, "Publicity, Public Opinion, and the Supreme Court," 84 *Nw'n. L. Rev.* 985, 989n17 (1990). Our findings do not lend strong support to the basic hypothesis.

33. See, for example, the *Economist's* editorial "Racism in Britain's Police," Feb. 29, 1999, p. 18.

34. Daniel Bell, *The Cultural Contradictions of Capitalism* (New York: Basic Books, 1976); R. H. Tawney, *The Acquisitive Society* (New York: Harcourt, Brace, 1920); C. B. McPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (New York: Oxford University Press, 1962).

public philosophy that venerates “the unencumbered self,”³⁵ free from all obligations not personally chosen. The notion that some duties and values are inherent in the human condition and thus shared not only with members of the current but also with past and future generations—Bellah’s “community of memory”³⁶—has been succeeded by atomistic individualism and moral relativism. What has emerged is a double caricature: of Karl Marx’s view of a bourgeois state built “upon the separation of man from man”³⁷ and of a Protestant image of a society that has privatized and thereby marginalized not only institutional churches but also religious values.³⁸

“Some of us,” Federika Strega interrupts, “think that individualism, moral relativism, and marginalization of religion are politically healthy.” “I heard,” Deukalion replies, then continues.

In politics, Sandel says, this culture has spawned a “procedural Republic”—Mr. Pyknites referred to that concept earlier—whose public philosophy is concerned less with the substance of decisions than with the processes of decision making.³⁹ In fact, however, procedures shape substantive outcomes. And when substantive choices are hidden behind a procedural screen, they seldom need to be justified. Liberalism’s demand for governmental neutrality among individual choices is usually either self-deceptive or hypocritical. Even government as “night watchman” supports current distributions of economic, social, and political power, as Sotirios Barber has devastatingly demonstrated.⁴⁰ From a different perspective, Mary Ann Glendon complains that individualistic “rights talk” poisons “the principal seedbeds of civic and personal virtue,” impoverishes political discourse, enlarges social conflict, and inhibits dialogue that might lead to discovery of common ground among individuals and groups.⁴¹ Amy Gutmann and Dennis Thompson are less pessimistic, but they, too, label the public discourse of interest-group politics

35. Michael J. Sandel, “The Procedural Republic and the Unencumbered Self,” 12 *Pol. Th.* 93 (1984), and *Democracy’s Discontent* (Cambridge, MA: Harvard University Press, 1996).

36. Robert Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* (New York: Harper and Row, 1985), pp. 152–55.

37. “On the Jewish Question,” reprinted in *The Marx–Engels Reader*, ed. Robert C. Tucker (New York: W. W. Norton, 1972), p. 40.

38. See Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: BasicBooks, 1993).

39. For a defense of a focus on procedure, see Stuart Hampshire, “The Reason Why Not,” a review of T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1999), *N.Y. Rev. of Bks.*, Apr. 22, 1999, pp. 21–23.

40. *Welfare and the Constitution* (Princeton, NJ: Princeton University Press, 2003), esp. ch. 2.

41. *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), p. 14.

“impoverished.”⁴² As founders, you must ask if these critics are merely attacking transient manifestations of “American exceptionalism” or have identified deficiencies inherent in constitutional democracy and perhaps in representative democracy as well.⁴³

Data from other constitutional democracies are mixed. Italy, especially the south, suffers from individualistic difficulties of greater proportions than does the United States.⁴⁴ On the other hand, Canadian, German, and Irish versions of constitutional democracy operate in cultural settings quite different from those of the United States and the Mezzogiorno. While the broader American constitutional order stresses individual liberty, Donald P. Kommers argues, the broader constitution of Canada underscores “fraternity” and community, though not necessarily between Anglo- and Francophones. The German constitutional order emphasizes dignity, the incalculable worth of each human being, demonstrated through not only rights but also duties.⁴⁵ In Japan, “self-realization,” Lawrence W. Beer says, is “achieved *within* rather than against or separate from the community, the family, or the in-group. Individual obligations are correlative, mutualist.”⁴⁶ At first glance it seems that Ireland is stumbling along the American path. Irish culture is now far less pietistic than when James Joyce wrote, “O Ireland, my one and only love, where Christ and Caesar are hand in glove”; indeed, as the country has become more prosperous, its people have also become less formally religious. Moreover, the Irish Church has been shaken by scandals, and its opposition to divorce, birth control, and even abortion has become far less effective.⁴⁷ Nevertheless, Ireland’s constitutional order

42. *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996).

43. Some scholars argue that American culture was once much more civic-republican than it now is: e.g., Sandel, *Democracy’s Discontent*, chs. 5–8; and Barry Alain Shain, *The Myth of American Individualism: The Protestant Origins of American Political Thought* (Princeton, NJ: Princeton University Press, 1994).

44. See Robert D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, NJ: Princeton University Press, 1993). See also Edward Banfield, *The Moral Basis of a Backward Society* (Glencoe, IL: Free Press, 1958); Ann Cornelisen, *Torregeca* (New York: Holt, Rinehart and Winston, 1969), and *Strangers and Pilgrims: The Last Italian Migration* (New York: Holt, Rinehart and Winston, 1980); and, of course, Carlo Levi, *Christ Stopped at Eboli* (New York: Farrar, Straus, 1947). Despite southern Italians’ lack of attachment to the state, their commitments to family, neighborhood, and even city appear strong. For an analysis that challenges Putnam et al. and stresses institutional design and misdesign, see Filippo Sabetti, *The Search for Good Government: Understanding the Paradox of Italian Democracy* (Montreal: McGill–Queen’s University Press, 2000).

45. “Freedom of Speech, Democracy, and Constitutionalism: United States, Germany, and Canada,” inaugural lecture for the Robie Chair, University of Notre Dame, Oct. 1994.

46. “Human Rights and ‘Freedom Culture’ in Eastern Asia,” in A. Anghie and G. Sturgess, eds., *Legal Visions of the 21st Century* (The Hague: Kluwer, 1998), p. 159. For a fascinating study of change and stability in Japanese culture, see Paul Garron, *Molding Japanese Minds: The State in Everyday Life* (Princeton, NJ: Princeton University Press, 1997).

47. James F. Clarity, “Scandals and New Beliefs Changing Ireland’s Church,” *N.Y. Times*,

still reflects the social teachings of papal encyclicals: men and women exist, as fully human, only within society; an objective morality binds every person in public as well as private affairs; and all people have a duty to take care of each other. The Irish continue to believe we are our brothers' keepers.

A new constitutional order must help build a new political culture. In your case, you must also replace parts of your old culture. Each of these tasks is daunting. Culture can suffer from inertia of rest as well as of motion. And to what extent does the kind of civic cohesion you want to create depend on religiously rooted beliefs?⁴⁸ Can a purely secular political theory provide the necessary civic glue? I am not sure of the answer here. Indeed, I suspect humanity will be debating these questions centuries after all of us have joined that Great Caucus in the Sky.

I believe that your objectives may be easier to attain under constitutional than representative democracy. By providing a web of institutional checks on governmental power, you provide institutional protections for rights of people who are religiously, culturally, and economically divided. If life, liberty, and property depended on the outcome of the next election, thoughtful citizens might be reluctant to accept that decision-making process. Constitutional democracy increases trust in the political system not only because it protects the rights of diverse groups but also because it is seen to do so by guarding substantive rights and by ensuring that procedural rules are followed in official decision making. And I

June 13, 1999. Clarity also speaks of increased anticlericalism. Similarly, Mary Kenny writes: "The church has been rocked; society is more secularized; prosperity is altering culture; Catholic power has receded." *Goodbye to Catholic Ireland: A Social, Personal, and Cultural History from the Fall of Parnell to Mary Robinson* (Springfield, IL: Templegate, 2001). Changes in Irish religious devotion are difficult to measure, given the scarcity of accurate public-opinion polling in earlier periods. It is important, however, to distinguish among being anticlerical, anti-Church, and antireligion. Anticlericalism has long flourished in Ireland. In the nineteenth century when the British, with some success, tried to enlist the Vatican to help keep the Irish in political and economic subjection, a popular battle cry sounded the theme: "We get our religion from Rome, but our politics from home." In the 1920s, during the civil war, Irish bishops excommunicated leading members of the rebel Irish Republican Army, a decree that had little effect, in part because many priests were sympathetic to the IRA and continued to administer the sacraments to those supposedly excommunicate. One long-term result of the bishops' action was that Fianna Fail, De Valera's party and the one that has since 1932 usually had at least a plurality of seats in Parliament, has been noted for its anticlericalism but also for its devotion to the Catholic religion and the Catholic Church as a concept, if not to its hierarchy. When they reject religion and not merely the historic narrowness of their bishops, the Irish are among the most eloquent and pious of atheists.

48. Carl J. Friedrich believed that constitutional democracy was "rooted in Christian beliefs." *Transcendent Justice: The Religious Dimension of Constitutionalism* (Durham, NC: Duke University Press, 1964), p. 17, and ch. 1 generally. If he is correct and if those roots can grow only in Christian soil, most Africans and Asians should not seriously consider constitutional democracy. The experience of Japan and India offers hope, however.

mean the rights of the majority as well as the minority. In representative democracies, where restrictions on power are typically functions of the conscience of a civil culture, public policies are often determined by shifting coalitions of minorities rather than by a single, unified majority. The ephemeral nature of such coalitions increases temptations to cannibalism. Furthermore, even a majority may sometimes shoot itself in the foot. Constitutional democracy can't prevent that mistake, but it does make it more difficult for the majority to shoot itself in the head.

In sum, constitutional democracy has done pretty well in achieving the goals you have adopted. Its record of freedom under law is impressive though uneven. Constitutional democracy's greatest attraction is that it lowers the stakes of conflict. Different groups whose interests conflict can be assured of basic protections to their life, liberty, and property. South Africa offers a classic case for constitutional democracy. Not only did whites dread the revenge that a majoritarian government dominated by blacks might wreak, but some black groups, especially the Zulus, feared rule by the coalition of other black groups under the African National Congress, whose leadership was largely Xhosa. "Coloureds," a legal classification under apartheid that included persons of mixed race and Malays, also had cause to worry about such a regime. And, of course, Indians, remembering not only the results of black rule in Kenya but also the riots against them in Durban in 1949 and several near-riots after, feared for their status under parliamentary supremacy.⁴⁹ On the other hand, the leaders of the ANC wanted wide room to dismember apartheid's effects and create a less unjust society. Constitutional democracy provided the obvious—perhaps the only practical and peaceful—solution.⁵⁰

My analysis has two important implications for this caucus. First, for a divided society constitutional democracy offers a greater promise of success than does any other system. Second, to fulfill that promise you must design institutions and processes with a mixture of bold imagination and exquisite care.

As Professor Deukalion finishes his formal presentation, the chair speaks: "I suggest that we postpone questions and debate until we hear from all of

49. For ethnic divisions and conflicts in South Africa before adoption of constitutional democracy, see esp. Donald L. Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (Berkeley: University of California Press, 1991).

50. For the decision-making processes that led to South Africa's decision to adopt constitutional democracy, see Heinz Klug, *Constituting Democracy: Law, Globalism, and South Africa's Political Reconstruction* (New York: Cambridge University Press, 2000); for developments since 1996, see symposium, "Why South Africa Matters," 130 *Daedalus* 1. (2001), and James L. Gibson and Amanda Gouws, *Overcoming Intolerance in South Africa: Experiments in Democratic Persuasion* (New York: Cambridge University Press, 2003).

our presenters." The colonel looks around, but no one speaks. "Very well, so ruled. Next, our colleague Demos Pyknites has asked that he be allowed to make the case for representative democracy. No one in this country is better qualified." Pyknites comes up to the rostrum.

I admire the learning that underpins Professor Deukalion's epithalamion for constitutional democracy. I do not challenge his judgment regarding the potential of constitutional and representative democracy to facilitate peace, prosperity, and stability. He honestly concedes that arguments for constitutional and representative democracy are equally strong on those points. What I challenge is his relative evaluation on the goals of protecting rights and fostering a civic culture. I shall make the case for the genus of representative democracy, which answers the question "Who governs?" very simply: The people, through free, open, and periodic elections. For now, I leave open the relative merits of particular species of that political genre.

The most obvious advantage of representative over constitutional democracy is that it can achieve our goals without infringing what I believe is a people's most fundamental interest, to govern themselves. In representative democracy, officials, chosen for limited terms, enact public policies without such institutional restrictions as judicial review. At elections, the voters know whom to hold responsible for enacting or not enacting public policies. Candidates can blame opponents, but no one can transfer responsibility to officials of another institution. Individual delegates and their parties must take full credit or blame for public policies or for their opposition to the government's plans.

The critical difference between constitutional and representative democracy lies in the means each uses to protect substantive rights. Constitutional democrats want to lower the stakes of politics. They would fracture governmental power, entrench a bill of rights, and confer much of the authority to interpret those rights on officials who are not directly responsible to an electorate. In contrast, representative democracy leaves it to the people's freely chosen representatives to formulate public policy as well as to determine that policy's legitimacy. It thus allows the people to govern themselves. The basic question representative democracy poses to constitutional democracy is, Whom do we trust to rule? Those who contend that elites should be able to block putatively unconstitutional policies or that elite guardians should have the functional equivalent of a veto over public policies that directly touch on the interests of minorities are really contending that these guardians are better qualified to rule than are the people as a whole. Robert A. Dahl puts it this way: "In an ideal system of guardianship, only the guardians can exercise the most fundamental of all freedoms, the freedom to participate

in the making of laws that will be binding on oneself and one's community. But in an ideal democracy, the whole people enjoy that freedom."⁵¹

Constitutionalists typically make the moralistic argument that every human being has equal worth and dignity. Yet most constitutionalists contend that elites are better able to judge whether certain popular public policies accord with basic goals or harm interests of minorities that government should respect. The response of representative democrats is that this conclusion does not logically follow. If we agree that each of us possesses equal worth, how can the moral judgment of a minority be privileged on a matter to which a majority of the adult population has given careful consideration? The answer that the elite are more intellectually or morally capable contradicts the premise of equal worth.

Of course, some adults are mentally handicapped or politically indifferent. The obvious response is that it is difficult, but not impossible, to restrict the ballot to those who are not mentally ill and, if political institutions and processes are carefully constructed, to minimize the number of indifferents so that they do not decisively affect public policy.

The second basis of an argument for guardianship rests on a claim of the intellectual or technical superiority of a group of "optimals."⁵² An honest representative democrat must concede that some people are smarter, more educated, better technically trained, more industrious, more informed about, and more concerned with, politics than are others. But identifying these people by objective criteria and placing them in public office defied even Socrates. Look at the U.S. Supreme Court. Some of the justices have been brilliant; some have been dumb; most have been people of much, but not great, intellect. I would ask Professor Deukalion if he could imagine—I mention only the dead—Peter V. Daniel, John McClean, Morrison Waite, Rufus Peckham, Pierce Butler, Edward T. Sanford, Frank Murphy, Sherman Minton, Harold Burton, Fred Vinson, Tom Clark, Charles Whittaker, or Warren Earl Burger getting tenure at Princeton.

Smiling, Deukalion shakes his head.

No evidence supports a claim that elites like judges better understand the needs and interests of the whole people than do the people them-

51. *Democracy and Its Critics* (New Haven, CT: Yale University Press, 1989), p. 78.

52. Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W. W. Norton, 1988), p. 103, credits Anthony Ashley Cooper, Earl of Shaftesbury, with using the term *the optimacy* in 1675 to describe the English nobility, through whom, he thought, the king should rule. If Morgan did not himself invent the term *optimals*, he still deserves credit for reviving the notion. For an argument that judicial review aids democracy, see Tom Ginsburg, *Judicial Review in New Democracies* (New York: Cambridge University Press, 2003).

selves. The people are often wrong, and so are their representatives, but so, too, are judges. Charles Evans Hughes, later chief justice of the United States, wrote about the Supreme Court's "self-inflicted wounds"⁵³ and the grievous harm that court had done itself and the nation. Over the long haul, the majority of the people are the best judges of their own interests—the best protectors, Jefferson said, of their rights.⁵⁴

Even if it could be shown that a group of optimals are politically more astute than the rest of us, does it follow that they would not be swept along by the passions of the day? During World War II, the Supreme Court joined racist hysteria against American citizens of Japanese ancestry.⁵⁵ In 1961, the German Constitutional Court displayed paranoia about a free, if somewhat scurrilous, press.⁵⁶ These are not isolated incidents. Furthermore, why should we believe that optimals will not be influenced by their own interests or those of the class from whom they have been drawn? American constitutional history certainly shows that justices of the Supreme Court have often read their biases into the constitutional text.

My second challenge to Professor Deukalion concerns achieving a civic culture in which duties and legal rights are correlatives rather than competitors. Like constitutional democracy, representative democracy can function only in a hospitable culture; but political institutions and processes can help push, change, or even create such a culture. It is, I think, precisely because the political system of the United States has lowered the visible stakes of politics so much that Americans are so bored by politics that usually only half of them bother to vote, that campaigns are characterized by "sound bites" rather than by intelligent debates about real issues.⁵⁷

In contrast, representative democracy makes the stakes of politics seem to be what they are: matters of utmost seriousness for all citizens. It

53. *The Supreme Court of the United States* (New York: Columbia University Press, 1928), p. 50.

54. After a magisterial analysis of the development in the United States of the rights to freedom of speech, press, and petition until the end of the Civil War, Michael Kent Curtis concluded that "courts provided little protection. . . . [J]udges sentenced political critics of John Adams to jail. Likewise, no Southern court struck down bans on antislavery speech as a violation of a state's constitution. . . . Nor did the United States Supreme Court ever void any Southern statute banning antislavery speech. . . . During the Civil War, a federal court refused to issue a writ of habeas corpus to free Clement L. Vallandigham, who faced a military trial for making an antiwar speech in Ohio." *Free Speech, the People's Darling Privilege: Struggles for Freedom of Expression in American History* (Durham, NC: Duke University Press, 2000), p. 416.

55. *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944).

56. Schmid-Spiegel Case, 12 BVerfGE 113, trans. and reprinted in part in Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (Durham, NC: Duke University Press, 1997), pp. 369ff.

57. Cf. E. E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* (New York: Holt, Rinehart and Winston, 1960).

encourages them to learn about politics, to worry about politics, and to act in politically meaningful and responsible ways. At the core of democratic theory, Joseph Tussman has written, is "the faith that all men can, if encouraged and given the opportunity, develop the arts, the skills and habits necessary for a life of responsible deliberation and decision making. Democracy seeks to universalize the parliamentary state of mind."⁵⁸ Similarly, Dahl claims that life in a representative democracy is itself a form of political education toward that mental state. No more than any other form of education does representative democracy guarantee happy outcomes: "The democratic process is a gamble on the possibilities that a people, in acting autonomously, will learn how to act rightly."⁵⁹ Carefully crafted political institutions greatly increase the odds here.

As Pyknites takes his seat beside Deukalion, Colonel Martin taps his gavel on the block. "It is now almost half-past six. We have had serious discussion among ourselves and heard two stimulating talks. Let us recess until tomorrow at 0930 and allow these ideas to percolate through our brains." He looks around the room. "Hearing no objection, it is so ordered."

At forty-two seconds after 0929, the colonel begins to tap his gavel on the dais. "We now," he says as the minute hand of the clock touches 6, "turn to another hyphenated democratic regime, consociational democracy. Hans Hendrik Smitskamp, Gordenker Professor of Political Science at Columbia University, will explain that system to us." Smitskamp is a tall, graying, middle-aged man with a gait that, compared to Deukalion's shuffle, seems athletic. He looks around the room, smiles sheepishly, then begins speaking in a flat, staccato tone.

Consociationalism attempts to cope with volatile ethnic or religious divisions that stifle a sense of common citizenship. In some societies, members of different groups see each other as aliens or even enemies. Consociational regimes utilize agreements among leaders of these groups to enable the state to function peacefully. Many such regimes display constitutionalist and/or democratic elements, yet a consociational political system need be neither.⁶⁰ When Austria became consociationalist, it already had judicial review and a bill of rights along with free elections.⁶¹

58. *Government and the Mind* (New York: Oxford University Press, 1977), p. 143.

59. *Democracy and Its Critics*, p. 192.

60. Hans Daalder, "The Consociational Democracy Theme," 26 *World Pol.* 604, 617 (1974).

61. But, according to one Austrian writer, before 2000 and Jörg Haider's joining the ruling coalition "[w]e were a predemocracy, a state without opposition, nestled by the Iron Curtain, where only stability counted." Quoted by Roger Cohen, "A Haider in Their Future," *N.Y. Times Mag.*, Apr. 30, 2000, p. 5 of Internet version.

The Netherlands had only democratic processes. On the other hand, under Tito, Yugoslavia had a harshly authoritarian consociational regime. Malaysia, a consociational, coercive capitalist state, has only the trappings of free political processes and little constitutionalism. When linked with democracy, consociationalism seeks to maintain at least a mask of popular government. Like constitutionalism, consociationalism tries to lower the stakes of politics. Its essential mark is cooperation among leaders of hostile groups. They agree to govern through a benign conspiracy.⁶² Political parties may campaign on platforms that are mutually threatening, but leaders agree, like principals in a cartel, to settle most divisive issues through consensus among themselves. These regimes, Arendt Lijphart notes, usually have four characteristics:

- (1) grand coalition governments that include representatives of all major linguistic and religious groups, (2) cultural autonomy for these groups, (3) proportionality in political representation and civil service appointments, and (4) a minority veto with regard to minority rights and autonomy.⁶³

Many aspects of consociationalism are attractive to multicultural nations. Although ethnic enmity seldom reaches levels seen in Rwanda, the shards of Yugoslavia, or post-Saddam Iraq, it often imperils public peace. I cite only Canada and South Africa. To dampen such antagonisms, constitutionalists protect minority rights by listing safeguards in a constitutional text. Elected officials typically augment these provisions with less formal arrangements. The give-and-take of pluralist politics in the United States displays some consociational features, as in "affirmative action" and appointments of members of minorities to important public offices. Canada provides clear examples of such efforts: French is an official language along with English; the constitutional text allows public support of religious schools (in fact, mostly Catholic); by custom,

62. In a consociational system with democratic ambitions, Daalder says, "elites must consciously eschew the competitive practices which underlie the norms of British-style democracy. Instead, they must regulate political life by forming some kind of elite cartel." "Consociational Democracy Theme," p. 607.

63. "The Puzzle of Indian Democracy: A Consociational Interpretation," 90 *Am. Pol. Sci. Rev.* 258, 258 (1996), citing much of the literature on consociationalism, including Lijphart's earlier work: *The Politics of Accommodation: Pluralism and Democracy in the Netherlands*, 2nd ed. (Berkeley: University of California Press, 1975); "Consociational Democracy," 21 *World Pol.* 207 (1969); *Democracy in Plural Societies* (New Haven, CT: Yale University Press, 1977); *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries* (New Haven, CT: Yale University Press, 1984). Hans Daalder has also been important in this field: "Consociational Democracy Theme," and "On Building Consociational Nations," 23 *Int'l Soc. Sci. J.* 355 (1971). See also G. Bingham Powell Jr., *Conflict Resolution in Divided Societies* (Stanford, CA: Stanford University Press, 1970).

three of the nine justices of the Supreme Court are from Quebec; that province retains its French Civil Code; and the Liberal and Conservative parties take pains to promote Québécois to influential positions. Not infrequently, prime ministers have been Francophones; Pierre Trudeau and Jean Chrétien are only the most recent in this line.

Fully consociational states are few in number and relatively recent in operation. Thus it is difficult to compare their records on peace, prosperity, and stability with those of other political systems. Only India, a consociational constitutional democracy, has waged a war of conquest. The others have been too small or weak to do so or even to defend themselves if attacked by a major power. Economically, Malaysia did extremely well for several decades, toppled into a recession in 1997, and then recovered quickly. India, despite impressive economic growth in recent years, remains mired in poverty. The Netherlands, when it was a consociational state, ranked among the wealthiest nations.

Domestic stability and tranquillity are consociationalism's great promises, and it has often delivered on those pledges. Its peculiar form of power sharing certainly helped preserve peace and national unity in Austria, Belgium, Switzerland, and the Netherlands. On the other hand, Lebanon erupted in civil war, though largely because of Arab-Israeli conflicts in which it was an unhappy pawn.⁶⁴ India presents a more troubling case. The scale and frequency of its interethnic violence demonstrate that consociationalism does not always result in full domestic peace.⁶⁵

As far as freedom from government is concerned, consociationalism presents three problems. First, when constitutionalist controls are lacking, the only minorities who can demand close protection are those represented in the grand coalition. That alliance shields only groups and rights that leaders have agreed to protect.⁶⁶ Political culture might function as constitutionalist checks, but it is the absence of such a culture that argues for consociationalism. A related difficulty is that while autonomy for particular minorities may ease certain problems, it may also leave some members of those minorities without equal rights. India, for example, allows Muslims to be governed in many respects by Islamic law. Thus Muslim males can deny their divorced wives alimony and custody

64. For an analysis of Lebanon's troubled politics, see esp. Farid El Khazen, *The Breakdown of the State in Lebanon* (Cambridge, MA: Harvard University Press, 2000).

65. Whatever the arguments for viewing Colombia as a failed, or at best only minimally successful, consociational democracy, its constant and murderous civil strife is, in large part, a byproduct of drug cartels. See Lijphart, "Puzzle of Indian Democracy," for bibliography on which nations might be accurately categorized as consociational.

66. Jacob Levy, "Consociationalism as a Substitute for Constitutionalism?" seminar paper in *Politics* 561, Princeton University, 1995.

of their children. Canada has also had problems with equal rights between men and women within indigenous groups.⁶⁷

Consociationalism's third problem: insofar as it operates through an informal cartel of elites, it "inevitably reduces the importance of elections and even of the direct accountability of leaders . . . presuppos[ing] that the electorate on the whole plays a rather passive role as both a condition for and a consequence of stable politics in divided societies."⁶⁸ This arrangement strikes at representational democracy's central norm: The people govern through the officials they elect.

Consociationalism's record on freedom has been better than these problems indicate. The liberties of Belgians and Dutch—and Austrians even when Jörg Haider's NeoNazi Freedom Party was part of the government—have not been much different from those of Germans, Irish, and Americans. On the other hand, some consociational states have had major problems. Although Indira Gandhi's attempt to institute a dictatorship was an aberration, India's subjugating the rights of Muslim women seems permanent. Moreover, India has been quick to use troops to quell ethnic violence and slow to return affected regions to civilian rule.⁶⁹ And at the hinge of the twenty-first century, when the Hindu Nationalist Party ruled, government sometimes failed to protect religious minorities like Sikhs and Christians from mobs of Hindus. Worse, the threat of returning to a legally sanctioned caste system hung in the air. Ethnic differences in Malaysia have also occasionally exploded into mob violence, an excuse the government uses for its affirmative action to equalize wealth between the Chinese and Malays. The result has been a fragile *modus vivendi* between what Lucian W. Pye calls "two incompatible cultures."⁷⁰ To keep that peace—and, not incidentally, themselves in power—Malaysia's rulers have cracked down hard on dissent: "Indefinite

67. Freedom of religion also poses difficult problems for Canada. To protect the religious beliefs of indigenous peoples, James Youngblood Henderson, in John McLaren and Harold Coward, eds., *Religious Conscience, the State, and the Law* (Albany: State University of New York Press, 1999), has proposed that the government forbid "Eurocentric evangelization" that targets these groups. Regardless of whether such a policy would protect native religions, it would certainly interfere with the religious freedom of other Canadians as well as with the religious freedom of indigenous people who wished to learn about or convert to so-called Eurocentric faiths. For a fuller discussion of the problems of rights that minority groups accord their own minorities, see Will Kymlicka, *Multicultural Citizenship* (New York: Oxford University Press, 1995), esp. pp. 163–70. For a more general analysis of the problem of minorities within minorities, see James Madison, *The Federalist*, esp. No. 10; Russell Hardin, "The Fallacies of Nationalism," in Ian Shapiro and Stephen Macedo, eds., *Designing Democratic Institutions*, Nomos 42 (New York: New York University Press, 2000).

68. Daalder, "Consociational Democracy Theme," p. 608.

69. See the discussion in Stephen P. Cohen, "The Military and Indian Democracy," in Atul Kohli, ed., *India's Democracy* (Princeton, NJ: Princeton University Press, 1988).

70. The title of ch. 9 of his *Asian Power and Politics* (Cambridge, MA: Harvard University Press, 1985).

detention; rallies only by permission; no real opportunity to criticize."⁷¹ Cultural norms against open disagreement with authority reinforce governmental intolerance of opposition.

I summarize: The great benefits of consociationalism are domestic peace and autonomy of diverse ethnic groups. Its great costs are electoral unaccountability and uneven protection of individual rights. Where secession, civil war, or ethnic violence is a clear and present danger, consociationalism offers an attractive alternative.⁷² Still, although some consociational measures are often necessary for all multicultural societies, India is the sole large nation that has heavily deployed consociational arrangements. This singularity and India's checkered record may indicate that full-scale consociationalism is an optimal option only for small states. More significantly, there is no assurance that consociational governments will remain benevolent over the long haul. History offers scant hope that rulers who can ignore their own citizens will habitually use power benignly. The danger here is of oligarchic wolves camouflaged in clothing sheared from the sheep.

A more ominous threat to consociational democracy, indeed to all political systems in multicultural states, may be lurking in "a clash of civilizations," which, as Samuel P. Huntington argues, is replacing the old rivalry between superpowers: "the most pervasive, important, and dangerous conflicts will not be between social classes, rich and poor, or other economically defined groups, but between people belonging to different cultural entities. Tribal wars and ethnic conflicts will occur within civilizations."⁷³ To the extent that he is correct, consociationalism may be dysfunctional. By encouraging divergent groups to continue their solidarity—to identify as Hindus or Sikhs rather than as Indians, as Chinese or Malays rather than as Malaysians—consociationalism could hasten the breakdown Huntington predicts. Its homeopathic remedy for a society's divisions could stunt the growth of an inclusive national identity. If such a movement would create a congeries of small, tolerant countries, we might be satisfied. But there is little evidence that political systems dominated by a single culture moderate either rapacity or bigotry.⁷⁴

71. Editorial, "The Shaming of Malaysia," *Economist*, Nov. 7, 1998, p. 16. See, more generally, Edmund Terence Gomez and K. S. Jome, *Malaysia's Political Economy: Politics, Patronage and Profits*, 2nd ed. (New York: Routledge, 1999), and R. S. Milne and Diane K. Mauzy, *Malaysian Politics under Mahathir* (New York: Routledge, 1999).

72. See Timothy Sisk, *Power Sharing and International Mediation in Ethnic Conflicts* (Washington, DC: U.S. Institute of Peace, 1998).

73. *The Clash of Civilizations and the Remaking of the World Order* (New York: Simon and Schuster, 1996), p. 28.

74. One could cite Catholic Ireland as providing positive evidence here. It has not engaged in any foreign war, and, although dominated by Catholic culture for much of its first fifty years as a republic, it has been very sensitive to the interests of its Protestant and Jewish citizens, even ensuring

As I hope you can tell, I came to explain, not to convert. Yet all I have read and heard here makes me believe you must think very seriously about adapting some of consociationism's institutions and processes. Certainly, some promises of mutual respect should be included in informal agreements among groups, of which Professor Giuseppe Di Palma so eloquently spoke.⁷⁵ You must share power with each other—and be seen by each other to be sharing.

Smitskamp leaves the podium, and Colonel Martin stands up. "The professor was mercifully brief, a rare virtue in this hall. Let us take a coffee break for fifteen minutes—today, ladies and gentlemen, let fifteen equal fifteen, not seventeen or even sixteen—and reassemble to hear our colleague Federika Strega present the case for coercive capitalism."

Eighteen minutes later, Strega walks slowly to the podium, places a manuscript in front of her, and looks down at the caucus.

Unlike Professor Smitskamp, I do advocate a particular kind of political economy, but first I must correct our chair and two previous speakers. Their references to "coercive capitalism" are ideologically loaded. They probably got that term from a misleading article by an American whom the late Justice C. Bradley Walker of the U.S. Supreme Court charitably described as "vulgar."⁷⁶ "Guided capitalism" more accurately describes this regime, an alliance between economic experts in government and business. The state leads the economy, steers investment, and induces business and labor to work together. Just as war is too important to be left to generals, economic development is too important to be left to individual greed or impersonal markets. Public officials, primarily concerned for the national good, guide entrepreneurs, managers, and investors to put their resources where they will not only earn a fair return but also benefit the country as a whole.

We face a double crisis, economic as well as political, but we must find a single solution. We need to establish a regime that will maintain civil peace while fostering economic growth. Those objectives are closely

in a consociational fashion that each would hold political offices in excess of what a random distribution would provide. In addition, since the 1920s there has been agreement that both the Supreme Court and the High Court would include at least one Protestant jurist, allocating to 3 percent of the population about 16 percent of important judgeships.

75. *To Craft Democracies* (Berkeley: University of California Press, 1990).

76. Walter F. Murphy, "Alternative Political Systems," in Sotirios A. Barber and Robert P. George, eds., *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change* (Princeton, NJ: Princeton University Press, 2001). Walker's "vulgar" is quoted in Walter F. Murphy, *The Vicar of Christ* (New York: Macmillan, 1979), p. 174.

connected. Our current economic situation is an incitement to civic conflict. How much happier any particular increment of real income makes people is not our concern. They should have a chance to live in peace with as many tangible goods as they can lawfully amass. Those are the state's concerns, its sole concerns: the peaceful, material well-being of its citizens.⁷⁷ To accomplish that goal, we need a regime that protects, while closely regulating, rights of property.⁷⁸ Under this system, public officials—economic technocrats, if you prefer—not merely support growth but lead the economy in directions that will be most beneficial to the nation as a whole.

We do not need a political system that reflects our pious clerics' naive visions of divine justice but one that will generate material well-being. There is a connection here that should move us all to be wary of equating economic growth with what some people portray as crass materialism. A brilliant economist has demonstrated that prosperity also shapes—according to our religious colleagues' views, improves—the moral lives of a people: they become more sharing, more tolerant of diversity, and more favorably disposed toward democratic governance. Whatever our theology, or lack thereof, these developments would further the goals this caucus has endorsed.⁷⁹

I concede that the political records of states have not all yet—I stress *yet*—fully met these expectations. Even the World Bank, hardly a friend to civil liberties, concedes that guided capitalist governments have often been "authoritarian or paternalistic."⁸⁰ In punishing words or deeds officials consider threatening to public order, these officials have sometimes confused domestic peace with personal tenure in office. In Malaysia, Mahathir Mohamad ran a tight ship, going so far in 1998 as to arrest his

77. Those interested in medieval political theory will note that Deputy Minister Strega is offering her listeners a version of the argument of Marsilius of Padua. See *Marsilius of Padua*, Alan Gewirth's two-volume study of Marsilius, the first an analysis of his political thinking and the second a translation of the *Defensor Pacis* (New York: Columbia University Press, 1951–1956).

78. See esp. Alasdair Bowie and Danny Unger, *The Politics of Open Economies: Indonesia, Malaysia, the Philippines, and Thailand* (New York: Cambridge University Press, 1997); W. G. Duff, *The Economic Growth of Singapore* (New York: Cambridge University Press, 1997); Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton, NJ: Princeton University Press, 1992); and Edmund Terrence Gomez and K. S. Jome, *Malaysia's Political Economy*, 2nd ed. (New York: Cambridge University Press, 1999).

79. Benjamin M. Friedman, *The Moral Consequences of Economic Growth* (New York: Alfred A. Knopf, 2005).

80. World Bank, *The East Asian Miracle: Economic Growth and Public Policy*, Policy Report (New York: Oxford University Press, 1993), p. 13. As a senior adviser to Human Rights Watch described Soeharto's Indonesia, citizens were "expected to refrain from political activity, except for once every five years when, in what the government calls 'a festival of democracy,' they [re]elect the sitting parliament." Jeri Laber, "Smoldering Indonesia," *N.Y. Rev. of Bks.*, Jan. 9, 1997, p. 40. For a critique of East Asian politics that is sensitive to cultural differences, see Daniel A. Bell, *East Meets West: Human Rights and Democracy in East Asia* (Princeton, NJ: Princeton University Press, 2000).

chief deputy when he dared display independent judgment.⁸¹ Singapore does not suffer dissent gladly. Critics are seldom jailed; more likely, they are sued for libeling a public official. During Korea's long military rule, the government ostensibly tolerated some political dissent; in fact, however, the generals paid tame opponents to act out a charade.

But we need not blindly follow these patterns. If harsh restrictions on political and personal liberty were necessarily permanent parts of guided capitalism, I would oppose it. But they are not. Some restrictions are necessary, but not of the sort that rulers like Suharto,⁸² Mahathir, and Lee imposed. Let me explain more about the system and then return to this point.

Although the seven Tiny Tigers—Hong Kong, Indonesia, Malaysia, the Republic of Korea, Singapore, Taiwan, and Thailand—had or still have guided capitalist regimes, Singapore presents the paradigm. In the 1950s, as colonial rule was ending, Lee Kuan Yew helped organize the People's Action Party and, by allying with the communists, won control of the new government. He then ousted all and imprisoned many of his erstwhile allies and used his police to keep labor unions in check.⁸³ His program was ambitious, his economics brilliant. Success brought enormous charisma: as we sit, Lee continues to personify the city-state, even though he formally stepped down from office in 1990. For the sake of prosperity, he has unapologetically controlled his subjects' lifestyles: "I say without the slightest remorse, that . . . we would not have made economic progress if we had not intervened on very personal matters—who your neighbor is, how you live, the noise you make, how you spit, or what language you use. We decide what is right. Never mind what the people think."⁸⁴

The police keep the streets clean, quiet, and safe. The buses run on time. The government operates some large enterprises and others as joint ventures with foreigners; serves as the nation's largest employer; provides public utilities and port and airport facilities; censors the media; sets wages; and owns most of the land. While respecting private property, Singapore steers reinvestment of corporate profits into new technology and, building on its historic role as trader and banker, into other countries as well. Public officials court foreign corporations; they *direct* firms

81. Michael Pinches, ed., *Culture and Privilege in Capitalist Asia* (New York: Routledge, 1999).

82. Michael R. J. Vatikiotis, *Indonesian Politics under Suharto*, 3rd ed. (New York: Routledge, 1999).

83. For details, see Lee Kuan Yew, *The Singapore Story: Memoirs of Lee Kuan Yew* (New York: Prentice-Hall, 1998), and *From Third World to First: The Singapore Story, 1965–2000* (New York: HarperCollins, 2000); Christopher Tremewan, *The Political Economy of Social Control in Singapore* (New York: St. Martin's, 1994), ch. 1.

84. Speech at National Day Rally, 1986; quoted in Tremewan, *Political Economy of Social Control in Singapore*, p. 4.

TABLE I. Average annual real per capita growth in GDP, 1980–1994

Country	1980–1990 (%)	1985–1994 (%)
Singapore	5.2%	5.9%
Germany	2.1%	2.1%
United States	1.7%	1.6%

Source: James Gwartney, Robert Lawson, and Walter Block, *Economic Freedom of the World, 1975–1995* (Washington, DC: Cato Institute, 1995), pp. 145, 167, 197, 221.

based in the city-state. Public officials levy low taxes, encourage foreign investment, establish compulsory savings for citizens, help secure foreign markets, tolerate monopolies, and create a tame, disciplined labor force that is increasingly well trained. (In 2003, an international mathematics and science study ranked Singapore's students as best in the world, far ahead of American students.)⁸⁵

The mass of Singapore's citizens share in this boom, though Malays less than Chinese.⁸⁶ (The former make up only 14% of the population, the latter about 77%.) The law requires that workers be well compensated, and they are protected by a form of social security.⁸⁷ Among Lee's most visible accomplishment has been construction of public housing for more than 85 percent of the population. Soon after independence, the city state's per capita income exceeded that of the United Kingdom; although the Brits have regained the lead, Singaporeans' incomes are still impressive. Moreover, the average annual growth in real per capita gross domestic product has often been far higher than that of the United States or Germany, as Table 1—which is now on your computer screens—demonstrates. You might think these data are dated, but their time frame is critical for us, because it shows that guided capitalism quickly brought and long sustained real economic growth.

85. But only about 75 percent of Singapore's children attend secondary school.

86. Lily Zubaihad Rahim, *The Singapore Dilemma: The Political and Educational Marginality of the Malay Community* (New York: Oxford University Press, 1999).

87. In 1995, the hourly cost for labor was \$7.28 in Singapore, \$31.88 in Germany, \$17.20 in the United States, 71 cents in the Philippines, 60 cents in Russia, and 25 cents in China and India (*Economist*, Nov. 2, 1996, p. 77). Worker and employer in Singapore each contribute about 20 percent of salary to the Central Provident Fund, in which each worker holds several kinds of accounts to pay for items like life and medical insurance, education, and pensions. Meanwhile, the government can use these billions of dollars (Tremewan, *Political Economy of Social Control in Singapore*, pp. 53–55). For a succinct description of the Fund, see "Fiscal Providence, Singapore-Style," *Economist*, Jan. 13, 1996, p. 38.

Until mid-1997, guided capitalism richly fulfilled its promise of prosperity for the Tiny Tigers. Furthermore, in these states, the distributions of wealth, as shown by the Gini coefficient, one of the standard statistical measures for such allocations, were becoming more equal. The World Bank's accolade "the East Asian Miracle"⁸⁸ was fitting. Then, in 1997-1998, guided capitalism's economic record was tarnished. The surge that had produced thirty years of plenty for the Tiny Tigers was followed by crashes that shook the world. Only Taiwan's economy continued to yield substantial growth. But let us carefully examine the data from Singapore: In late 1998, the city's reserves of foreign currency were one and half times what they had been in 1993—hardly a sign of insolvency. In late 1998, growth did slip to 1 percent and unemployment rose to 4.5 percent.⁸⁹ Awful! How many years here in Nusquam have we had negative growth? Look back at Table 1. From 1980 through 1994 the United States averaged a growth rate of less than 1.7 percent. Next, look at unemployment. Four and a half percent would have seemed glorious that year in South Africa, where almost a third of workers were out of jobs, and wonderful in Germany, France, and Italy, where about 11 percent of the work force were unable to find employment.⁹⁰ Singapore's is the sort of bust that most people in the world love to enjoy.

"Order," Colonel Martin angrily raps his gavel to silence the snickers of several members. "Please proceed, Ms Strega." She looks stonily around the room, then continues:

It is critically important that by late 1998 the Tiny Tigers' economies were again thrusting ahead. Every economic order has recessions, even depressions, but few produce decades of continuous, dramatic growth in real wealth, suffer a major collapse, and then bounce quickly back.⁹¹ Let

88. *East Asian Miracle*.

89. Fareed Zakaria, "Op Ed: Will Asia Turn against the West?" *N.Y. Times*, July 10, 1998. Other analysts gauged lesser but still serious declines: "Still Sick and Gloomy, Now Rebellious," *Economist*, July 11, 1998, p. 41. In its weekly tables of "Emergent Market Indicators," that magazine chronicles the Tigers' rise, fall, and resurrection.

90. *Economist*, Oct. 24, 1998, p. 86, reports data from national statistics offices.

91. There had been early rumblings of trouble: "States of Denial," *Economist*, Aug. 10, 1996, pp. 56-57, that journal's editorial "Wobbly Tigers," Aug. 24, 1996, pp. 13-14, and "Emerging Asia's Sombre Era," same issue, pp. 55-56. Economists have heatedly disputed the causes of the Tiny Tigers' crash. The most plausible explanation for the collapse is that greedy speculation by bankers in those countries, as well as in the United States, Western Europe, and Japan, led them to make very risky loans. When debtors were unable to make good, something close to panic ensued. The easy and nearly instantaneous means of moving capital across national boundaries meant that bankers and other investors could rapidly withdraw funds. For more developed explanations, see World Bank, *Global Economic Prospects and the Developing Countries, 1998/99* (Washington, DC: International Bank for Reconstruction and Development / World Bank, 1998). This report tactfully

you reply, "Western Europe's more traditional marriage of democracy and capitalism," I remind you that the United States jump-started those economies with the equivalent in current currency of hundreds of billions of dollars from the Marshall Plan. It would not be prudent for us to count on similar charity.

That Asian miracle also unfolded in more human terms, such as life expectancy, as Table 2 indicates. It should appear on your screens. During this same period, lifespan also rose in other low-income nations from thirty-six to forty-nine years, while in Russia it decreased from seventy to sixty-four years between 1989 and 1994, with similar declines during those years in other former socialist states.⁹²

Table 3, which will appear on your screens in a moment, displays the most recent data from the CIA's *World Factbook*, available at the agency's website.

Singapore experienced another hiccup that lasted from the summer of 2001 until the summer of 2002; but soon its growth rate was again exceeding that of the United States. We can assume there will be other bumps along the economic road, but the direction is likely to be generally—and steeply—upward. A study by the World Economic Forum reported that in 2004-05, Singapore, not the United States, was the country best positioned to exploit informational and communication technologies. Overall the forum ranked Singapore as the seventh most competitive country in the world, ahead of Japan, Switzerland, and Australia.⁹³

I warn, I repeat, I stress: we need economic growth, and we need a political system that will facilitate economic growth. Our people were miserably poor under the junta. Six months ago, unemployment had again reached 17 percent. When I left the ministry two weeks ago, that

refrained from naming either the United States or the IMF. See also David E. Sanger, "U.S. and I.M.F. Made Asia Crisis Worse, World Bank Finds," *N.Y. Times*, Dec. 3, 1998; Nicholas D. Kristof and David E. Sanger, "How U.S. Wooed Asia to Let Cash Flow In," *N.Y. Times*, Feb. 16, 1999; Pierre-Richard Agénor, David Vines, Marcus Miller, and Axel A. Weber, eds., *The Asian Financial Crisis: Causes, Contagion, and Consequences* (New York: Cambridge University Press, 2000); Gregory W. Noble and John Ravenhill, *The Asian Financial Crisis and the Architecture of Global Finance* (New York: Cambridge University Press, 2000), and Paul Krugman, "What Happened to Asia?" <http://web.mit.edu/krugman/www/DISINTER.html>, Jan. 1998. John Gray, *False Dawn: The Delusions of Global Capitalism* (New York: New Press, 1999), and Thomas L. Friedman, *The Lexus and the Olive Tree* (New York: Farrar, Straus, and Giroux, 1999), offer more general critiques of global capitalism.

92. See the data reported in *Economist*, Aug. 3, 1996, pp. 45-46. For Russian males, the decline was even more dramatic, from sixty-five in 1989 to fifty-eight in 1995: *Economist*, Sept. 21, 1996, pp. 53-54.

93. See *Global Information Technology Report, 2004-2005*, summarized by *Economist*, Mar. 19, 2005, p. 104; and *Global Competitiveness Report, 2004-2005*, summarized by *Economist*, Oct. 16, 2004, p. 98. Both reports are available through the forum's home page at its website.

TABLE 2. Life expectancy at birth

	1960	1990
Guided capitalist states		
Hong Kong	64	78
Indonesia	46	59
Korea	53	72
Malaysia	58	71
Singapore	65	74
Thailand	52	68
Other		
India	47	58
China	43	69

Source: World Bank, *The East Asian Miracle: Economic Growth and Public Policy*, World Bank Policy Report (New York: Oxford University Press, 1993), p. 34.

figure had risen beyond 20 percent. Medical care has been bad; it will get worse in the next months. People will have less money and pay less taxes; many citizens are apt to use the current political confusion to hide the fact that they've stopped paying any taxes. Our system of social welfare in which we have great pride is threatened with bankruptcy. A huge segment of our population is sliding from bare subsistence to want. People out of work and without public welfare will go hungry. Without our medical coverage they will die sooner—or revolt against a “just” but inefficient economic system.

Our economic history and our immediate future, like those of Poland and Hungary in 1989, have left our people “highly materialist, atomized, and cynical.”⁹⁴ They support the Colonels' coup primarily because they are tired of being poor, and only secondarily, if at all, for political reasons. As Bill Clinton's staff repeatedly said during his presidential campaign of 1992, “It's the economy, stupid!” We are on the brink of disaster. Our only hope for the new system's being accepted by the people is that it quickly bring them a real measure of material well-being. Well-being requires peace but also money, and money requires economic growth that will dramatically lower unemployment and help refinance tottering systems

94. Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (New York: Cambridge University Press, 1991), p. 2. For a more general study of the complex relationships between political systems and economic development, see Adam Przeworski, Michael E. Alvarez, José Antonio Cheibub, and Fernando Limongi, *Democracy and Development: Political Institutions and Well-Being in the World, 1950–1990* (New York: Cambridge University Press, 2000).

TABLE 3. Social and economic life, 2003–2004

Country	Infant mortality rate ¹ (per 1,000)	Life expectancy (years)	Per capita GNP* (dollars)	Inflation (%)	Unemployment (%)
Singapore	2.28	81.5	23,700	0.5	4.8
Germany	4.2	78.5	27,600	1.1	10.5
United States	6.6	77.4	37,800	2.3	6.0
United Kingdom	5.22	78.3	27,700	1.4	5.0

*Purchasing power parity.

of medical and social welfare. Economic growth, in turn, requires—and guided capitalism provides—more and closer governmental regulation, more order, more discipline, than constitutional democracy's protections of individual liberty or representative democracy's frequent recurrence to a myopic electorate would permit.⁹⁵

Singapore and the other Tiny Tigers did well on several other indices important to us. Like consociational regimes, guided capitalist countries have usually been too weak to be aggressors. Only Taiwan and Korea have been involved in serious international conflicts, and both were threatenees rather than threateners. In 1975, Indonesia provoked what could have become a war by seizing East Timor, but the Portuguese offered no military opposition.

Stability in Singapore has been close to perfect. Its political system, governing party, and even de facto leader have not changed since independence in 1965. Korea and Indonesia lie near the opposite extreme. Korea has had six republics since World War II, and Indonesia has undergone spells of rioting against peaceful Chinese merchants and near civil war.⁹⁶ With the largest Muslim population of any nation in the world, the islands remain vulnerable to Islamic fundamentalism's demands for a religiously orthodox state. Like Malaysia, Indonesia has

95. See Jon Elster, “The Necessity and Impossibility of Simultaneous Economic and Political Reform,” in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley, eds., *Constitutionalism and Democracy: Transformations in the Contemporary World* (New York: Oxford University Press, 1993).

96. See Adam Schwartz, *A Nation in Waiting: Indonesia in the 1990s* (Boulder: Westview, 1994); Daniel Lev, “Social Movements, Constitutionalism, and Human Rights,” in Greenberg et al., *Constitutionalism and Democracy*; Donald K. Emmerson, ed., *Indonesia beyond Suharto* (Amorok, NY: Sharpe, 1999); Damien Kingsbury, *The Politics of Indonesia* (New York: Oxford University Press, 1999); Theodore Friend, *Indonesian Destinies* (Cambridge, MA: Harvard University Press, 2003), and Charles P. Corn, *Distant Islands: Travels across Indonesia* (New York: Viking Penguin, 1991). For a brief account of the rioting, see “Indonesia: Terror in the Spice Islands,” *Economist*, Mar. 6, 1999, p. 38.

additional problems stemming from differences in wealth and work ethic between Malaysian majorities and Chinese minorities.⁹⁷

Between lie Taiwan, Thailand, and Malaysia. Taiwan suffered bloodily after Chiang Kai-shek fled the mainland in 1949. A cowering rabbit before Mao's soldiers, the Generalissimo was a raging lion before unarmed Taiwanese, murdering thousands of potential as well actual opponents. Jonathan Mirsky described Taiwan of the late 1950s as "a Leninist state propped up by secret police, infamous for the torture, imprisonment, and murder of dissidents—most of them Taiwanese—and with a captive press."⁹⁸ After several decades, however, Chiang's successors and the Taiwanese arrived at a trade-off. One side retained public office, the other money. The Kuomintang's children controlled the military and civil service, while the Taiwanese had a near monopoly on commerce. By the mid-1980s, the government began easing authoritarian rule and allowed serious political competition and relatively free elections.⁹⁹ Then, at the next free election in 2000, the Kuomintang's party (KMT) lost and peacefully surrendered office. And although the new regime has not gained full control of the bureaucracy, Mirsky still concludes that the island has "been transformed since 1949, and Americans can feel proud that the island is indeed a triumph of economic and democratic development."

Thailand has staggered toward political democratization. Several decades ago, the military frequently intervened to restore its conception of order. In recent years, however, the army has remained strongly committed to capitalism guided by civilians, even during the economic turmoil of 1997-1998.¹⁰⁰ Hong Kong's retreat from the democracy the British belatedly initiated in the 1990s¹⁰¹ is a result of Beijing's refusal to tolerate restrictions on its power, not of local decisions. Mahathir Muhammad's twenty-two-year rule of Malaysia, which ended peacefully in 2003, was never democratic in any meaningful sense of that term. His successor has instituted a series of reforms, but it is not yet clear how soon these will allow vigorous political opposition.

97. See Lee Kam Hing and Tab Chee Beng, eds., *The Chinese in Malaysia* (New York: Oxford University Press, 2000).

98. "Taiwan Stands Up," *N.Y. Rev. of Bks.*, June 29, 2000, p. 37.

99. See John F. Cooper, *The Taiwan Political Miracle* (Lanham, MD: University Press of America, 1997); Bruce J. Dickson, *Democratization in China and Taiwan: The Adaptability of Leninist Parties* (Oxford: Clarendon, 1998); and Linda Chao and Ramon H. Myers, *The First Chinese Democracy: Political Life in the Republic of China on Taiwan* (Baltimore: Johns Hopkins University Press, 1998).

100. See Danny Unger, *Building Social Capital in Thailand: Fibers, Finance, and Infrastructure* (New York: Cambridge University Press, 1998).

101. See Alvin Y. So, *Hong Kong's Embattled Democracy: A Social Analysis* (Baltimore: Johns Hopkins University Press, 1999).

On personal freedom, guided capitalism's grades are mixed. Western notions of due process have not flourished. Certainly mainland China's control will not further civil rights in Hong Kong or elsewhere. On the other hand, in Singapore freedom from oppression by fellow citizens is much greater than in the West. Violent crimes occur there far less frequently, and abuse of narcotics is uncommon, though the city state's location makes it a hub for the international drug trade. Moreover, Korea's Sixth Republic seems firmly committed to constitutionalism.¹⁰²

Opponents assert that official corruption is one of guided capitalism's costs. I make three observations: First, long before guided capitalism, bribery was a way of life in most of Asia; and it remains a serious problem, even in mainland China.¹⁰³ Nevertheless—my second observation—Lee turned Singapore's political economy into one of the most open and clean in the world. According to a leading "opacity index," which measures such factors as corruption and clarity of regulations, Singapore continues to rank near the top, well ahead of Britain and the United States.¹⁰⁴

Third, corruption is no stranger to constitutional democracy. In Japan, bribery is a normal part of business-government relations.¹⁰⁵ In India, bribery of officials is so common that only the grossest forms stir public attention. In Italy during 1992-1993, half the members of the Italian parliament were under criminal investigation for corruption, and shortly before, Bettino Craxi had been convicted of accepting bribes when he was prime minister. In 1998, Ireland was shaken by the revelation that a former prime minister had accepted a gift worth about \$3 million and a relative of the sitting prime minister had ruled for the government that the gift was not taxable. In 1999, a similar scandal involved an Irish delegate to the European Community and gifts to the prime minister's party. Later that year, scandals involving Germany's Christian Democrats flared up, touching even the venerable Helmut Kohl.

In Washington, everyone knows that "campaign contributions" unlatch many locked doors. Political action committees regularly give dozens of millions of dollars to promote or block legislation.¹⁰⁶ Even presi-

102. James M. West and Dae-Kyu Yoon, "The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?" *40 Am. J. of Comp. L.* 73 (1992).

103. See, for example, Julia Kwong, *The Political Economy of Corruption in China* (Amoronk, NY: Sharpe, 1998).

104. Transparency International's Report for 2005, summarized in *Economist*, Oct. 22, 2005, p. 114; a more detailed account is available on Transparency's website. Earlier, the Kurtzman Group's *Opacity Index, 2004*, summarized in *Economist*, Sept. 18, 2004, p. 106, and available at the Kurtzman Group's website, had similar rankings.

105. Jacob Schlesinger, *Shadow Shoguns: The Rise and Fall of Japan's Post-war Political Machine* (New York: Simon and Schuster, 1997).

106. For studies of campaign contributions' corrupting influence on American politics, see esp.

dents may respond warmly to gifts. Bill Clinton opened the White House to donors, inviting the more generous to social affairs, photo ops, and nights in the Lincoln bedroom. During George W. Bush's reign, the federal government awarded, without competitive bidding, a multibillion dollar contract to Halliburton, Vice President Dick Cheney's former company, to help rebuild Iraq. Although the White House denied any favoritism or collusion, an e-mail from within the Pentagon indicated that the terms of the contract had been cleared with Cheney. And to no one's surprise, auditors soon found that Halliburton had overcharged the government by many millions of dollars.

Anita Baca interrupts: "If economic growth is your object, why not cite the People's Republic of China? That country's economic development has been, like, awesome. No one in the Third World, including Singapore, even comes close. In fact, when we talk about economic growth, Singapore has become so yesterday."

"I agree about China's growth, but the price has been too high. As a feminist, I favor abortion and birth control, but a police state and forced abortions offend me," Strega replies.

"A police state offends you?" Baca asks. "You who deny that human rights exist?"

The chair raps his gavel on the dais. "Please. Ms Minister is making her presentation. We shall soon have an opportunity to discuss all the alternatives. Please continue."

"Please," Baca continues, "just one more question: what about Ireland? It endured decades of poverty from its birth until the 1990s, when the so-called Whittaker Plan for economic development finally kicked in. By the mid-1990s, Ireland's per capita income was second only to Luxembourg's in Europe, and Galway was the fastest-growing city in the European Union. And all that time, through poverty and plenty, the Irish remained staunch constitutional democrats. They rejected coercive or, if you prefer, guided capitalism."

"One swallow does not a spring make, even if in Ireland that swallow is likely to be a gulp of whisky," Strega replies.

Martin wags his finger at the minister. "Please continue your presentation."

Herbert E. Alexander with Anthony Corrado, *Financing the 1992 Election* (Armonk, NY: M. E. Sharpe, 1995); Elizabeth Drew, *The Corruption of American Politics: What Went Wrong and Why* (New York: Birch Lane, 1999); Thomas Byrne Edsall, *The New Politics of Inequality* (New York: W. W. Norton, 1985); William Greider, *Who Will Tell the People? The Betrayal of American Democracy* (New York: Touchstone, 1993); Brooks Jackson, *Honest Graft: Big Money and the American Political Process*, rev. ed. (Washington, DC: Farragut, 1990); and the review article by Lars-Eric Nelson, "Undemocratic Vistas," *N.Y. Rev. of Bks.*, Aug. 12, 1999, pp. 9-12.

I thank the Chair. Of course, each of us would like complete personal freedom for herself, but we know that can't be. If political rights get far ahead of economic development, a coup is likely to turn the regime authoritarian. So let's approach the problems from the other side. Although individual rights do not promote, and may even retard, prosperity, prosperity tends to promote individual rights. Robert J. Barro, for example, views political freedom as a luxury: "Rich places consume more democracy because this good is desirable for its own sake and even though the increased political freedom may have a small adverse effect on [economic] growth."¹⁰⁷ We urgently need economic growth, and only a political system run by economic experts not immediately answerable to the electorate can make the hard, immediately unpopular decisions that are required. While representative democrats worry about voters' short-term reactions and constitutionalists worry about legal niceties, economists cut to the heart of the matter: how to allocate resources most efficiently. Thus they lay the foundations necessary for a kinder and gentler political system.

As for political and personal freedoms, guided capitalism can immediately provide some of those "goods." Later, as we enjoy economic growth, government can offer more. Historically, this has been more than a vague hope. Capitalism, Gabriel Almond tells us, has historically been "positively linked with democracy, shares its values and culture, and facilitates its development."¹⁰⁸ And recently, guided capitalism's initial opposition to both constitutionalism and democracy has eased in several nations. After economic successes, Korea, Taiwan, and Thailand moved toward democracy as well as constitutionalism. So did Hong Kong before its reabsorption into China. Even Soharto's successors in Indonesia have been acting more democratically; they have negotiated a form of political autonomy for East Timor and accepted, albeit reluctantly, that the opposition won the presidency in 1999. In turn, a different opposition won the elections of in 2004.

What would the political system I propose look like? Let us look first at the policies needed for growth: controls on wages, on prices, on the movement of capital; tight regulation of banks and similar financial institutions; governmental ownership of some of the means of production; restrictions on imports; and compulsory saving. We shall also need to direct labor, possibly to require certain kinds of training and certainly to

107. *Getting It Right: Market Choices in a Free Society* (Cambridge, MA: MIT Press, 1997), p. 11. For contrary views about authoritarian economic advantages, see Remmer, "Democracy and Economic Crisis"; José Maria Maravall, "The Myth of the Authoritarian Advantage," and Barbara Geddes, "Challenging the Conventional Wisdom," both in Larry Diamond and Marc F. Plattner, eds., *Economic Reform and Democracy* (Baltimore: Johns Hopkins University Press, 1995).

108. "Capitalism and Democracy," 24 *PS* 467, 468 (1991).

forbid strikes. The government may have to assign students to educational programs that best suit their talents and national needs. Perhaps we shall need the equivalent of a peacetime draft to assure that labor goes where the general interest requires it. All these and similar policies inevitably restrict choices, but they lay the economic foundation for freer political system.

Only a government run by economic experts could formulate and execute such a program. To facilitate that rule, our Colonels should remain in power under the tutelage of professional economists. To quell fears of continued despotism that many citizens and foreign investors may share, the Colonels should make it clear that their regime is transitional, aimed toward the ultimate goal of a democratic and, perhaps, constitutional state—but only after they have built a firm economic base. To show their seriousness about the regime's eventual reconstitution, the Colonels should legislate fair procedures in criminal and civil matters, establish truly independent courts, limit the police, and guarantee rights to property and some degree of privacy.

As Strega sits down, both Minxin Wei and Jessica Jacobsohn leap to their feet, shouting for recognition. The chair, however, stares at the ceiling and says sternly: "I remind my colleagues that we agreed to hold questions until after all of our presenters have addressed us. Besides, it is time for dinner. Let us take ninety minutes and return to this hall at nine p.m. To encourage attentive listening, I have directed the staff to keep the bar closed until we have finished tonight's session." Grumbling, the members file out.

Precisely at nine, Colonel Martin announces, "Our next guest is Rhex von Whaide, Singer Professor of Ethics and Public Policy at the Devlin School of Government of the Australian National University. He will tell us about the perfectionist state. Professor Whaide."

A young man of thirty-five with long black hair that trails below his shoulders, Whaide strides rapidly to the podium.

As did Ms Strega, I begin by commenting on the title of my talk. The term *perfectionist* is often one of derision, tossed about as if its proponents were Leibnizian optimists who believe the state can perfect human beings. But if neither religion nor mothers have yet been able to do so, surely the state cannot. Perfection, Muslims say, belongs only to Allah. Certainly, the state cannot impose on its people the sort of Judeo-Christian-Islamic morality most of us have in mind. Law, standing alone, a Jesuit scholar tells us, is a feeble moral instrument.¹⁰⁹ But we

109. See Robert F. Drinan, "Will Religious Teachings and International Law End Capital Punishment?" 29 *St. Mary's L. J.* 957 (1998).

should not give up. As a Jewish jurist pointed out, "Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example."¹¹⁰ In short, a perfectionist state does not refer to a utopian form of government but to one in which government tries to help, because it should help, its citizens to improve the moral character of their lives, realizing that the process of human moral improvement is asymptotic.

Had I participated in your debate, I would have sided with those who argued for the existence of objective moral truths and the capacity of human beings to discover many of those truths. I do not, however, contend that we can know all truths or that some of us can know much truth at all. Certainly many human beings are intellectually retarded or mentally ill. Hobbes also recognized the futility of using reason with "glory seekers" and religious fanatics. Russell Hardin would also exclude "skin heads."¹¹¹ I assume that means political fanatics. But what is left is the vast majority of adults.

I do not claim that any of us can know truth perfectly. We can argue, should argue, with one another; we can learn, should learn, from each other; and we can improve, should improve, imperfect reasoning. And we need not, should not, avoid critical questions of morality, public or private, simply by saying either "We have fair procedures, so what they produce must be good" or "I have my opinion; you have yours; and we cannot judge between them." Very often, we *can* judge. At its best that decisional process is Socratic, but it should always be alembic, moving us toward keener understanding. I admit that there may be occasions when reason runs out, or when it is unclear which (or even whether) reasons supporting one position are superior to those supporting a contrary position. When this condition obtains, it is usually because there are many human goods as well as many morally permissible ways of achieving those goods. But to conclude that two opposing arguments are each morally worthy of choice, we must first acknowledge the primacy of reason—of judgment based on reason, not on self-interest, cultural biases, or class, familial, or partisan allegiance. We must fully utilize our capacity to reason and rigorously test our conclusions against available evidence, always realizing that our reason is human, not divine. Equally important, we must realize that the variety of human goods and the diversity of moral means to achieve those goods are themselves good: a society without some forms of diversity would be dull indeed.

What distinguishes people like me—the "like me" includes Aristotle,

110. Justice Louis D. Brandeis dissenting in *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

111. *Liberalism, Constitutionalism, and Democracy* (New York: New York University Press, 1999), p. 151.

Aquinas, and Maimonides, as well as many moderns¹¹²—from our critics is that we reject the notion that the state should act as if all values and forms of moral reasoning are either equally acceptable or equally unprovable. Justice does not require law to be neutral between claims of what contributes to or detracts from a morally worthy life. Indeed, it is impossible for the state always to be neutral. Even the claim that all values are equally acceptable is itself a powerful and consequential value judgment.

Ronald Dworkin has claimed that the notion of basic human equality, with its foundation of equal human dignity, commands governments “not [to] constrain liberty on the ground that one citizen’s conception of the good life of one group is nobler or superior to another’s.”¹¹³ That assertion is flatly wrong for at least two reasons. First, it leads to anarchy. Are we to say that a pedophile’s notion of the good life is as noble as that of a parent who would defend his or her child against rape? True, we can insert the notion of harm to children. But how can a neutral state give no weight to the harm to the pedophile who asserts—and deeply feels—a right to full development of his personality denied by laws against adults’ having sex with children? The North American Man-Boy Lovers Association, among other groups, makes a claim to exactly that right. Government must make a moral judgment here, a judgment between the nobility of the competing conceptions of a good life entertained by practicing pedophiles, targeted children, and their parents.¹¹⁴ A public official’s assertion that enacting a statute or refusing to enact a statute merely reflects the will of the people does not remove moral judgment; it only shifts the locus of decision making—and typically does so in a cowardly way.

Second, criminalizing pedophilic acts does not deny the equal dignity of pedophiles. Indeed, a carefully crafted law should accomplish precisely the opposite result. The criminal law is one way, perhaps

112. See, for example, John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 1980), and “Legal Enforcement of ‘Duties to Oneself’: Kant v. Neo-Kantians,” 87 *Colum. L. Rev.* 433 (1987); Hadley Arkes, *First Things: An Inquiry into the First Principles of Morals and Justice* (Princeton, NJ: Princeton University Press, 1986); George Sher, *Beyond Neutrality: Perfectionism and Politics* (New York: Cambridge University Press, 1997); and Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986). T. M. Scanlon’s argument in *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1999) implies a universality of reason that, by definition, transcends time and culture. See also Thomas Nagel, *The Last Word* (New York: Oxford University Press, 1997). [The gentle reader will note that, in many respects, Whaide’s arguments parallel those of Robert P. George: *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon, 1993); *In Defense of Natural Law* (Oxford: Clarendon, 1999); and *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis* (Wilmington, DE: ISI Books, 2001). For George, Whaide, and Mufti Ajami, “men” is a synecdoche, standing for human beings.]

113. *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), p. 273.

114. Prof. Whaide adds: I do not discuss the interest of the targeted child, though I believe it is stronger than that of a loving parent, because it is quite possible that a small child has not yet developed a coherent conception of a good life.

not the most effective way but certainly a permissible way, of instructing those with pedophilic proclivities that acting on such desires is wrong.¹¹⁵ Public policy should recognize that criminals possess intelligence as well as dignity and deserve respect as human beings who can learn that certain actions are morally as well as legally wrong. A criminal law that punishes pedophiles (or sociopaths or alcoholics or drug addicts) merely for their mental states, over which they may have little or no control, would violate equality and human dignity. A statute that punished only deeds would not.

More positively put, a perfectionist believes that democratic or constitutionalist principles of autonomy, dignity, and equality allow government to act upon a view, arrived at through careful reasoning, of what constitutes morally acceptable ways of life. I insert an important caveat here: precisely because government need not, should not, surrender to nihilism when facing moral problems, so it need not, should not, deduce moral judgments merely from a country’s past or current opinions. And, I again stress, because of the diversity both of human goods and morally acceptable ways to attain those goods, the state should not try to impose a single culture or lifestyle upon its people. Not only were the mullahs in Iran, the Taliban in Afghanistan, and the Puritan divines in colonial New England fanatics, they were ignorant, narrow-minded fanatics. There is a wide range of morally good ways of life, but that width is not infinite: some people deliberately choose bad ways of life.

Perfectionists do advocate government’s enforcing morality, but a morality arrived at through reasoned judgment, not through fiat, divine or otherwise. I also remind you that most liberals proclaim a fundamental moral precept that *they* want the state to enforce: it is wrong to harm another human being except in self-defense or in defense of an innocent third person. I agree with that claim, as far as it goes, though I cannot forbear using against my opponents their own argument: that principle has not been accepted by all societies nor by all members of all societies that have officially accepted it. Thus, to defend this precept adherents must either seek universalistic arguments for its validity or by saying something like “Some people and some societies believe murder is morally permissible, others do not. Most people in our society believe that murder is wrong, and so we will punish it. But we recognize that it is morally permissible for those who disagree with us to murder, though only within those jurisdictions that share their disagreement.” This assertion leads to the conclusion that if Nazis thought it was moral to exterminate Jews and Serbs deemed it moral to murder Muslims, then

115. See the argument of John Finnis: “Legal Enforcement of ‘Duties to Oneself’: Kant v. Neo-Kantians.”

the Holocaust and the "ethnic cleansing" in Kosovo were not immoral, however much we might find them personally revolting.¹¹⁶ Richard A. Posner is one of the few jurists with the courage to make such an argument in public.¹¹⁷

Many people who call themselves liberals also endorse a corollary precept, that the "good, either physical or moral [of an actor], is not a sufficient warrant" for government to restrict his actions. "In the part [of his conduct] which merely concerns himself, his independence is, of right, absolute."¹¹⁸ Together these two precepts form John Stuart Mill's famous "harm principle." And he made an equally famous exception to it: The state may prevent a man from selling himself into slavery because, "by selling himself for a slave, he abdicates his liberty. . . . The principle of freedom cannot require that he should be free not to be free."¹¹⁹ But the logic that justifies the exception savages the principle, which must also allow the state to prevent a person from inflicting other harms to himself that destroy his freedom, addiction to drugs or alcohol being the most obvious. Although Mill himself thought of this reasoning and rejected it, the logic of his argument makes his rejection illogical. Slavery to chemicals is no less slavery than to another human being. At very least, the exception and its justification throw open debate about what other self-harms the state might legitimately prevent.

Even without Mill's intellectual self-mutilation,¹²⁰ his analysis would not exhaust the moral reasons on which a state dedicated to the common welfare may legitimately act. All of us here value freedoms such as those

116. For discussions of the extent to which the Holocaust was congruent with or aberrant from German culture, see Daniel Jonah Goldhagen, *Hitler's Willing Executioners* (New York: Alfred A. Knopf, 1996); Norman G. Finkelstein and Ruth Bettina Birn, *A Nation on Trial: The Goldhagen Thesis and Historical Truth* (New York: Holt, 1998); Peter Gay, *My German Question* (New Haven, CT: Yale University Press, 1998); and Richard Breitman, *Official Secrets: What the Nazis Planned, What the British and Americans Knew* (New York: Hill and Wang, 1999). Less innocently than Colonel Martin, many legal theorists would like to have it both ways: they proclaim the inevitable relativity of most legal standards, but the absoluteness of principles they hold most dear. I do not object to the proposition that many if not most legal rules, and perhaps even legal principles as well, can serve as moral imperatives only within particular cultures. What I do object to is the assertion that legal principles are intrinsically so restricted.

117. "The Problematics of Moral and Legal Theory," 111 *Harv. L. Rev.* 1637 (1998). He repeated his conclusion in an exchange with Ronald Dworkin in *N.Y. Rev. of Bks.*, Apr. 27, 2000, p. 60. Linking his position to that of Richard Rorty, Posner writes, "[W]e simply believe that there is no reliable external perspective from which to evaluate conflicting moralities." I believe one can make a strong case that, at root, Dworkin does not disagree with Posner on this issue.

118. John Stuart Mill, *On Liberty*, ed. R. B. McCallum (original 1859; Oxford: Blackwell, 1948), p. 8 and chs. 4-5.

119. *Ibid.*, p. 92.

120. Prof. Whaide also says: I put aside his heavy reliance on consequentialist reasoning. Although any person who wishes to act ethically must consider the consequences of his or her acts, consequentialism offers a very shaky foundation for any ethical system.

of expression and religion; we also value the right to enjoy our own lifestyles. But these are all instrumental rights, not ends in themselves. Properly used, they enable us to enjoy more basic goods such as a fully human life, which, in the modern world, can be lived only in a political community. Improperly used, of course, these putative rights can become instruments of destruction. As Aristotle said, "[A]ny polis which is truly so called, and is not merely one in name, must devote itself to the end of encouraging goodness. . . . What constitutes a polis is an association of households and clans in a good life, for the sake of attaining a perfect and self-sufficing existence. . . . The end and the purpose of a polis is the good life, and the institutions of social life are means to that end."¹²¹ But a nation cannot nurture a good life for its citizens if its jurisprudence takes the line "Some people freely choose to destroy their minds and bodies with drugs or rent their bodies for others' sexual gratification, while others don't. Society cannot judge who is morally right here. Therefore, as long as such transactions are voluntary, they are legal; their morality is not a matter of public concern."

I do not say government must always or even should ever criminalize such behavior. Many prudential considerations come into play, such as the extent to which criminal penalties might discourage rehabilitation or lead to official corruption. But a society that wants a good life for its citizens cannot treat activities like prostitution or abuse of narcotics merely as "alternative lifestyles."

I agree that a group of people cannot long live together without a common sense of morality, but I do not ground my arguments on this assertion. Of itself, social cohesion cannot be a compelling reason for moral legislation. As we saw in Germany and Japan before and during World War II, social cohesion is not good in itself. (That there was much less cohesion in those societies than the rest of the world then thought doesn't change the argument.) Social cohesion is an instrument that may further goals that are beneficent or horrendous. Rather, I argue that if society's shared sense of morality is indifferent toward such matters as drug abuse, pedophilia, and prostitution or offers only a feebly reasoned moral defense of its opposition, it will destroy what you—and I—call a civic culture. On the other hand, a civic culture that facilitates virtue not only helps individual citizens form good moral character but also helps society pursue values such as justice, mutual respect, and a sense of obligation not only toward members of this community but toward all humanity.¹²²

121. *The Politics*, trans. Ernest Barker (London: Oxford University Press, 1946), bk. 3, ch. 9, §9, 1280b. He added: "It is therefore for the sake of good actions, and not for the sake of social life, that political associations must be considered to exist."

122. See George, *Making Men Moral*, esp. pp. 71-82.

Now, what specific institutional arrangements do I argue for? Perhaps a constitutional democracy, or a representative democracy, or some hybrid cross-bred with consociationism. I concede, though I am nervous about it, that what I urge might even be compatible with guided capitalism. But whatever the institutional arrangements, they would have to enforce broad freedoms to speak and write as well as an obligation of all public officials to listen to and engage in such discussions. Arguments, in a context of mutual respect for persons holding positions with which we disagree, are essential to making moral judgments in which we can reasonably have confidence.¹²³

Once again, note that I did not say respect for the "positions," only for the persons. My argument for free discussion goes beyond, though it certainly includes, reasons of prudence. For instance, I accept social scientists' finding that people are more apt to be content with decisions in whose making they played a role than with those, equally beneficial, imposed from above. What I also contend is that communication in general and speech in particular are essential to cooperation, and cooperation with other men and women for morally worthy ends is itself a good, one that a just state must promote.¹²⁴

I urge that you not create a political system that is morally constricted. I am not arguing for a constitutional order that protects freedom in general or specific freedoms as if they were ends in themselves and thus absolute or nearly so. They are merely instrumental goods. Neither do I argue for these freedoms because they are functional for a particular regime. I do not object to that reason; indeed, I might often support it. But there is a better and deeper reason to protect freedom: to help fulfill the basic purpose of the state, to enable citizens to live truly human lives.

The political system I advocate looks on civil liberties as instruments that, directed toward morally worthy goals, are necessary for a people's living moral, fully human lives. And those ends allow restrictions on "rights" under some circumstances and under others forbid restrictions on them. Conclusions of the U.S. Supreme Court holding that legislatures cannot look at the content of speech in deciding whether to regulate it may be congruent with American constitutional law and reflect American notions of individualism as including all persons' right to be, do, and

123. To this extent, Prof. Whaide agrees with Gutmann and Thompson's claims for "deliberative democracy" in *Democracy and Disagreement*. I wish, however, that they had displayed greater understanding of and respect for some of the reasoning with which they disagree, such as that offered by those who oppose abortion. See Robert P. George, "Book Review: Law, Democracy, and Moral Disagreement," 110 *Harv. L. Rev.* 1388 (1997).

124. See Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964); and George, *Making Men Moral*, ch. 7.

say almost anything that pleases them.¹²⁵ As an Australian, I do not have an informed judgment on that issue. But such rulings are intellectually vapid, morally empty, and at war with the notion of establishing justice—which, in my ignorance, I had thought the Preamble to the American constitutional text listed as one of the system's basic goals.

Citizens are moral beings. Both in protecting and in regulating what we deem to be civil liberties, the lodestar must be aiding citizens to live fully human—that is, moral—lives, to enable them to live in justice and peace with themselves, their neighbors, and their community. No matter how much we might wish it otherwise, soulcraft is a necessary part of statecraft.

As Whaide leaves the podium, Colonel Martin speaks in a firm voice: "It is now 2300 hours. We are in recess until tomorrow at 1000."

125. See, for example, *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

Alternative Political Systems

The Debate

The most perfect machinery of government will not keep us as a nation from destruction if there is not within us a soul. No abounding of material prosperity shall avail us if our spiritual senses atrophy

GEORGE GRANT

Just before ten, as the members of the caucus are milling about the meeting room, Colonel Martin walks to the podium and raps his gavel three times. "We convene in exactly one minute and eighteen seconds. I suggest members take their seats."

As the minute hand of the clock touches 12, Martin raps his gavel again. "So that our debate may have some semblance of order, questions should be first directed to Professor Deukalion and Mr. Pyknites. We should focus on their talks, then move to the other speakers. To facilitate discussion, let us make two exceptions: first, any of the speakers may respond to any question to or answer by any other speaker; second, any member of the caucus may ask the views of any speaker on any relevant issue. I will give notice when I think we should move from one speaker to another. Any questions about procedure? Hearing none, we move to substance. Mr. Zingaro?"

"I'm a poet and know little about politics, but I don't see any basic difference between constitutional and representative democracy. Can anyone name a representative democracy? Aren't we really talking about one system that offers a range of institutional arrangements, stretching from the simple Westminster model to the tangled webs of the United States?"

Pyknites responds: "New Zealand is the paradigm case; and if we exclude the limited constitutionalist checks of the European Union and the Convention on Human Rights, we would include Britain, the Netherlands and, de facto, Sweden, Denmark, and Finland."

"Luxembourg, Andorra, Liechtenstein, Monaco, San Marino, and the Vatican City State," Deukalion adds, "don't have judicial review either, but you might not classify them as democracies."

Pyknites continues. "We shouldn't seek representative democracy for the purpose of imitating anyone but because by relying on political culture to protect substantive rights, representative democracy forces us to realize that civic education is the most important function of free government. There

citizens learn by doing, by participating in governing themselves under democratic principles."

"My question," Zingaro repeats, "was whether the two are not versions of one basic regime."

"We could see constitutional and representative democracy," Pyknites replies, "as falling along a single spectrum. But there is a point where the differences become critically important. We reach that divide when we allow an institution not directly responsible to the people to invalidate substantive policies the popularly elected legislature has enacted, when, that is, we have judicial review or a functional equivalent that goes beyond protecting open political processes."

"Functional equivalent?"

Pyknites smiles. "I apologize for the jargon. Let me offer a few examples. For a time in 1976, the Portuguese Council of the Revolution, controlled by the military, exercised constitutional review over the new legislature. De facto, so have the military in Turkey and some Latin American countries. Currently, Iran has the Council of Guardians, which protects the Islamic constitutional order. More consonant with theories of constitutionalism, the French Conseil Constitutionnel, though not formally a court, can declare proposed legislation unconstitutional."

"I agree with Mr. Pyknites about the differences between the two regimes," Deukalion adds, "but I wouldn't count as constitutionalist a regime that allowed the military or the clergy to exercise constitutional review over elected officials. I also disagree with his ranking of constitutional and representative democracy. If you had a democratic culture and a history of ethnic harmony, the choice between the two might be a matter of taste. But Nusquam lacks a democratic culture; you do not have a history of popular rule or limited government or ethnic harmony. Thus, constitutional democracy offers you a much better chance. It augments cultural checks with institutional limitations. In Madison's terms, it gives officials vested interests in restricting each other, pitting power against power, ambition against ambition."

"But," Zingaro persists, "why then aren't there more representative democracies?"

"I could simply rest my case on that observation, but I won't," Deukalion answers. "One reason may be imitation of political success. Latin American nations have often followed the United States; Argentina's constitutional document of 1853 even instructed interpreters to follow the U.S. Supreme Court's constructions of its own text. The Australians, Canadians, Irish, and Norwegians also opted—the Japanese had no choice, though the Germans had some latitude—to modify their parliamentary systems with entrenched bills of rights and American-style judicial review. Like Spain and Portugal, Eastern Europe followed the German model, which, as did the Italian, used Hans Kelsen's design of the Austrian Constitutional Court. Founders or re-

formers in other nations, such as Belgium, Greece, and even Russia, chose to modify representative democracy with constitutionalist checks. They lacked a political culture that could limit power, just as you do, or, as in Belgium, Canada, and South Africa, feared that ethnic minorities would believe that the ethnic majority was abusing its power. I might also add the example of the European Community's using the American model of a Supreme Court to mute nationalism and supervise a quasi-federal system."

Before Pyknites can comment, Federika Strega cuts in. "Please! Political culture is a vast vat of viscous verbiage. Besides, neither constitutional nor representative democracy can *now* provide us with a viable political system. Neither can create sufficient prosperity to build allegiance to the regime, at least not in our lifetimes. Furthermore, we need ethnic peace unless we want to become like Yugoslavia after Tito. Unlike the Serbs, Croats, Bosnians, and whomever, we don't have a history of mutual murder; but neither do we have a history of mutual love. We need a political system that can impose peace until our various peoples can learn to live together as citizens of one nation. And note I said 'impose,' not negotiate."

Colonel Martin taps his gavel. "Minister Pilsudski."

"Professor Deukalion, Mr. Pyknites made a much stronger case for representative democracy than you did for constitutional democracy. You buttressed your argument for limiting the state, as well as the power of a majority to control the state, with the example of South Africa. But as sorry as our ethnic problems are, they are substantially different from those of South Africa. The junta—and, to our shame, probably society as a whole—discriminated against Gypsies, Muslims, Hispanic immigrants, blacks, and Sephardic Jews. My point is that these ethnic groups, taken together, are a minority. On the other hand, in South Africa, blacks are a large majority. The white minority, who also controlled most of the nation's material wealth, had good reason to fear revenge from a black majority. This fear was exacerbated by the links that had existed before 1990 between the African National Congress, the old Soviet Union, and various other communist movements. The violent ways in which many ANC leaders, such as Winnie Mandela, dealt with foes within their own organization certainly did not inspire confidence about peaceful coexistence. Here in Nusquam we whites don't need to fear open elections, even though we also control most of the country's wealth. It is the ethnic minorities who need to fear *our* bigotry."

Deukalion pauses for a few moments before responding. "Your question is complex. Let me try, as economists would say, to disaggregate it. First, the two presentations: Mr. Pyknites's was neater than mine because he painted an idealized picture of representative democracy, while I described constitutional democracy warts and all. Next South Africa: Your situation is obviously different, but it is similar. You put your finger on that difference when you said your ethnic minorities had to fear the bigotry of the whites while it

was whites' fear of black revenge that was one of the biggest issues in South Africa.¹ But here as there, sizable ethnic groups do not trust one another. That's why I stressed that if you're going to build up confidence in the political system, you will have to limit the stakes of conflict. Each of your ethnic groups, except white Protestants, has some memory of being oppressed by one or more of the other groups either here or in the old country. Mr. Pyknites speaks, and properly so, of the importance of a civic culture to any system of free government."

"What about a civic culture?" Pilsudski asks.

"Constitutional democracy fosters a civic culture by allowing people to come together knowing that they will often lose in political processes but that their basic rights to life, liberty, and property will be respected. Government won't oppress the losers, and majorities will have wide, though not full, room to rule."

"But," Pilsudski asks, "what about Mr. Pyknites's point about constitutionalist checks' undermining the norm of equal human dignity?"

"To say you need checks on popular government no more implies unequal dignity than a parliament's ability to make laws that bind citizens implies that legislators have greater dignity than ordinary citizens. Complex societies need complex governmental institutions staffed by people with special skills in formulating and securing agreement about public policies. Inevitably, those men and women will sometimes see things differently from ordinary citizens. Government by public opinion poll, electronic or otherwise, is government without deliberation; and government without deliberation is government by momentary passion. I won't rehearse the usual arguments for representative rather than direct democracy. Madison made the strongest case in *The Federalist*.² I believe Mr. Pyknites agrees on this point."

Pyknites nods his head.

"But there is much more," Deukalion goes on. "To repeat my mantra, constitutional democracy lowers the stakes of conflict and thus of politics. Conflicts among ethnic groups may be the most obvious, but you also have social and economic divisions. Although not as cleanly as in South Africa, these tend to follow ethnic fault lines and so reinforce distrust among groups. All those groups whom Minister Pilsudski mentioned as victims of discrimination also tend to be the least well off. They will press for more generous welfare programs, for redistributions of wealth. All sides need to be reassured that the new political system will respect basic rights, whatever specific policies take shape.

1. For a snapshot and analysis of public opinion shortly after the birth of constitutional democracy there, see James L. Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* (New York: Russell Sage, 2004); and James L. Gibson and Amanda Gouws, *Overcoming Intolerance in South Africa: Experiments in Democratic Persuasion* (New York: Cambridge University Press, 2003).

2. Esp. Nos. 10 and 57.

"More specific is the danger that representatives will sometimes blindly follow popular passion. 'Wherever there is an interest and a power to do wrong,' Madison claimed, 'wrong will generally be done, and not less readily by a powerful and interested party than by a powerful and interested prince.' In the American system, he added, 'the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which Government is the mere instrument of the major number of its constituents.'³ Mr. Pyknites says judges at times also succumb to popular passions, and he's right. But the example he cited of the Japanese-American cases from World War II involved the Supreme Court's sustaining legislation enacted by a popularly elected Congress and signed into law by a popularly elected president. I agree that constitutional courts cannot always remain above partisan struggles. Nevertheless, constitutionalism tries to insulate judges from such conflicts. It has not always been successful, but it has been more successful than representative democracy has been in insulating elected officials from popular prejudices.

"There is also a quite different danger," Deukalion continues. "Most citizens have limited political knowledge and few serious political interests. This situation allows representatives, out of the sight of most of their constituents, to form coalitions and bargain among themselves about public policy, processes that should ignite the democratic criticism of consociationism: voters don't have much voice in or even knowledge of what their representatives are doing. Douglass C. North, the Nobel laureate, argues, 'Not only could the voter never acquire the information to be vaguely informed about the myriad bills that affect his or her welfare, but there's no way the constituent (or even the legislator) could ever possess accurate models to weigh the consequences.'⁴ Adam Przeworski makes a complementary point: representative democracy 'generates outcomes that are predominantly a product of negotiations among leaders of political forces rather than of a universal deliberative process.' The function of the electorate, he says, 'is to ratify these outcomes or to confirm in office those who brought them about.'

"Moreover," Deukalion adds, "coalitions do not always quickly dissolve, and they may impose heavy costs on smaller groups. I cite only the American example of the conservative Republican-southern Democratic alliance that

3. To Jefferson, Oct. 17, 1788, italics Madison's; reprinted in Marvin Meyers, ed., *The Mind of the Framers* (Indianapolis: Bobbs-Merrill, 1973), pp. 206-7. In *The Federalist* No. 51, Madison asked: "But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary."

4. *Institutions, Institutional Change, and Economic Performance* (New York: Cambridge University Press, 1990), p. 109.

5. *Democracy and the Market: Political Consequences of Economic Reforms in Eastern Europe and Latin America* (New York: Cambridge University Press, 1991), p. 13.

for three-quarters of a century strangled efforts to enact federal civil rights legislation that blacks desperately needed for protection against combined state and private action denying them equal citizenship."

"Let me follow up," Pilsudski says. "I agree that few people are attentive to politics. 'Given their obstinate lack of interest in the subject,' an American newspaper editor wrote, 'asking a group of average Americans about politics is like asking a group of stevedores to solve a problem in astrophysics.'⁶ Representative democracy often operates undemocratically."

"Wait," Pyknites interrupts. "It's not fair to generalize from the United States. Their constitutionalist checks have brought about precisely what Professor Deukalion says is constitutional democracy's main benefit. They have lowered the stakes of politics to the point where it often seems to be a trivial game. In a true representative democracy, people could see how Parliament was affecting their interests and how they could hold representatives responsible."

"I wasn't trying to get into that discussion," Pilsudski continues. "I wanted to ask Professor Deukalion: How could constitutionalism have helped American blacks? I thought constitutionalist checks check, not spur, governmental action."

"In part, you're right," Deukalion answers, "but constitutionalism is not merely negative. Insofar as it recognizes that every human being possesses great and equal dignity, it implies that government must do more than passively watch injustice and so has a positive dimension. Even negative constitutionalists believe that government is obliged to keep order, protect human life, safeguard private property, and enforce contracts.⁷ And in both incarnations constitutionalism helped American blacks. By invalidating some of the most flagrantly discriminatory state statutes, the Supreme Court played an educational role. By reminding Americans of their basic values, most critically that of equality before the law, the Court also educated citizens. It seared the consciences of whites. A few weeks after *Brown v. Board of Education*, hundreds of clergy of all denominations, in the South as well as in the North, suddenly began preaching the gospel according to Earl Warren: God Almighty had forbidden segregation through all eternity. The Court also increased awareness among Afro-Americans. Leaders as diverse as Eldridge Cleaver and Martin Luther King Jr. exploited this new consciousness. Racial discrimination, Cleaver said *Brown* taught him, was not merely immoral, it was also unconstitutional.⁸ 'Any law that uplifts human personality is just,' the Reverend King wrote in his 'Letter from a Bir-

6. Andrew Ferguson of the *Weekly Standard*, quoted in Joan Didion, "Uncovered Washington," *N.Y. Rev. of Bks.*, June 24, 1999, p. 78.

7. See esp. Sotirios A. Barber, *Welfare and the Constitution* (Princeton, NJ: Princeton University Press, 2003).

8. *Soul on Ice* (New York: McGraw-Hill, 1968), pp. 3-4.

mingham Jail.' 'Thus it is that I can urge men to obey the 1954 decision of the Supreme Court, for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.' That realization spurred African-Americans to help themselves through the political as well as legal processes. Constitutionalism and democracy operated synergistically, generating the civil rights movement. Congress, which had not enacted any civil rights legislation since 1877, birthed a spate of statutes protecting ethnic minorities, women, and the handicapped."⁹

"An interesting interpretation," Pilsudski remarks. "You have more?"

"Yes," Deukalion says. "Most defenses of representative democracy assume that when the people are informed about political issues, their views 'will aggregate into a common view.'¹⁰ This assumption, however, seldom holds in the real world. When they're well informed about most kinds of issues, 'the people' divide as often as they coalesce. On the other hand, most of the time most of the people are not well informed. On many issues of public policy there is no 'voice of the people,' only multiple voices from a few minorities. The policy choices that result are typically products of bargains among leaders, and very often 'the people' do not know what is being swapped for what. And the goods being swapped are often financial.

"Bargaining may often be functional, but its result can be a far cry from Mr. Pykrites's ideal of the people's governing themselves through representatives who reflect their preferences. This system of government meets democratic criteria only if we define democracy as Joseph Schumpeter did: the people choose their rulers in a free election, then retire until the next election."

"I disagree," Pykrites says. "In a representative democracy, representatives are chosen by the people after full and free debate and remain responsible to the people through periodic reelections. The key word here is *responsible*. Representatives offer themselves up to the people's judgment. Should we *force* people to be more politically attentive and knowledgeable than they wish to be? Isn't it enough that they can be as knowledgeable as they wish to be and that the political system encourages them to be politically attentive and knowledgeable? By raising the stakes of politics, representative democracy encourages the people to acquire and use political knowledge."

"How can the voice of the people be intelligible," Deukalion responds, "if the people have neither knowledge of nor concern for what's happening? As North would later, Schumpeter contended that the people simply do not,

9. Gerald N. Rosenberg, *The Hollow Hope* (Chicago: University of Chicago Press, 1991), misses the whole point of the massive moral and psychological change the Supreme Court initiated.

10. Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (New York: Oxford University Press, 1999), p. 154, attacks this assumption.

perhaps cannot, act as Mr. Pykrites postulates.¹¹ He makes several contrary-to-fact presumptions: the people usually have specific policy wishes, representatives will reflect those wishes, and, most significant, the will of a majority, either of the voters or of elected officials, is the will of the people. As Schumpeter pointed out, the people form 'a mosaic that [the majority] completely fails to represent.' Mr. Pykrites uses definitions, not data, to translate his assumptions into reality. What those definitions yield—at very best—is government by popular acquiescence, a thin form of consent, not government by the people's active will expressed through their representatives' actions."

Pykrites replies: "I reject that argument."

"Of course," Strega cuts in, "all most people ever do is acquiesce—or revolt. If government gives the people peace, order, and prosperity, most of them will happily forgo voting and the other frills you two are debating. They have families to clothe and feed and medical bills to pay. For them, politics is a silly game that takes their money in taxes. Besides, when they do take politics seriously, voters consider only their short-term interests, as James M. Buchanan has shown.¹² They want low (or no) taxes along with massive spending for services they think they need."

"You exaggerate Buchanan's arguments," Deukalion replies, "and even if you didn't, Mr. Pykrites's response is still valid. As much as I respect Buchanan, he makes an abstract rather than an empirical argument. Besides, you're absolutely wrong to call due process of law a frill."

The chair raps his gavel against the dais. "We've moved afield. Mr. Pykrites has the floor and was trying to respond to Professor Deukalion. Please continue, sir."

"Thank you. I started to say that when people vote, they vote for a person and/or a platform. Americans may look on candidates as solo performers and platforms as gimmicks. So be it. Still, they choose a candidate whose discretion all voters with two digits in their IQ know will be wide, and they can hold that person responsible at the next election. In Europe, Australia, Canada, India, and Japan, parties are much more disciplined and programmatic; they tend to take clear positions that their candidates will support. Knowledgeable voters experience some, but rather few, surprises, usually because unforeseen problems arise. Nor does the concept 'representation' mean that legislators are merely their constituents' mouthpieces. The proper

11. Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy*, 3rd ed. (New York: Harper and Brothers, 1950), ch. 21, esp. p. 272. For an excellent study that claims Schumpeter's early theory of democracy was also elitist, see John Medearis, *Schumpeter's Two Theories of Democracy* (Cambridge, MA: Harvard University Press, 2001).

12. It is often difficult to judge exactly what Minister Strega has in mind, but here she is probably referring to James M. Buchanan's *Democracy in Deficit: The Political Legacy of Lord Keynes* (New York: Academic Press, 1977), and *The Economics of Politics* (Lancing, UK: Institute of Economic Affairs, 1978).

relationships between representative and represented are contested, but no one in his or her right mind expects members of a parliament to be ciphers.”

“I’m familiar,” Deukalion responds, “with some of the literature about the proper role—or roles, as I prefer—of representatives.¹³ I would not want legislators to habitually act as closely instructed agents. Indeed, I come close to Edmund Burke on this issue, though not in his view of the people as a ‘swinish multitude.’ My concern is not discretion per se but misuse and abuse of discretion while cloaking actions with hypocritical claims to be speaking with the voice of the people.”

“My concern lies there as well,” Pyknites says. “That’s why I favor representative democracy’s requiring legislators to stand for periodic reelection. If they have misused or abused their discretion, the voters can turn them out. What you overlook is that voting is an iterative process. When issues are important to voters, they can and will remember what their representatives have done and hold them responsible at the next election. Retrospective voting is documented by scholars¹⁴ and feared by politicians. They have to keep looking over their shoulders.”

“Some voters do factor officials’ earlier behavior into choices,” Deukalion admits, “but many do not; and most of those who do, do so only on a few issues. Public attention span is notoriously short, and the lapse between parliamentary votes and elections is usually years, not weeks. Furthermore, a voter’s cost of obtaining accurate information about candidates is large, and the impact of a single vote is tiny. I repeat: the interests of legislators sometimes have little to do with those of their constituents, and sometimes the two conflict. But it is from being popularly designated agents that legislators get their legitimacy. As that linkage weakens, the justification for representative over constitutional democracy weakens. It is inevitable that that linkage will fray.”

“Of course no two human beings can have identical interests in all things,” Pyknites asserts. “But elected representatives’ interests will be closer to their constituents’ than those of appointed officials, because elected officials must stand for reelection. They individually and their parties collec-

13. For empirical studies, see, *inter alia*, Warren E. Miller and Donald E. Stokes, “Constituency Influence in Congress,” 57 *Am. Pol. Sci. Rev.* 45 (1963); John C. Wahlke, Heinz Eulau, William Buchanan, and LeRoy C. Ferguson, *The Legislative System: Explorations in Legislative Behavior* (New York: Wiley, 1962). See also Roger H. Davidson and Walter J. Oleszek, *Congress and Its Members* (Washington, DC: Congressional Quarterly Press, 1981); Clem Miller, *Member of the House*, ed. John Baker (New York: Scribner’s, 1962); Charles L. Clapp, *The Congressman: His Work as He Sees It* (Washington, DC: Brookings Institution, 1963); Richard Fenno, *Home Style: House Members in Their Districts* (Boston: Little, Brown, 1978); and John W. Kingdon, *Congressmen’s Voting Decisions*, 3rd ed. (Ann Arbor: University of Michigan Press, 1989), esp. ch. 2. For discussions of the concept of “role,” see Wahlke et al., *Legislative System*, and Walter F. Murphy and Joseph Tanenhaus, *The Study of Public Law* (New York: Random House, 1972), pp. 140–44.

14. See, for example, Morris Fiorina, *Retrospective Voting in American National Elections* (New Haven, CT: Yale University Press, 1981).

tively want to retain their posts. Thus, they will do their best to serve voters’ interests. Moreover, a lot of information is free. That’s what political campaigns are all about.”

“My counter,” Deukalion says, “is that parties and legislators are concerned about constituents’ interests only to the extent they deem it necessary for reelection.¹⁵ Your argument about responsibility and the iterative nature of elections concedes that point. Furthermore, political campaigns are all about puffing up one’s own image and tearing down opponents’. Truth is only tangentially related to what’s broadcast. And except on election day, a constituency is a fiction. On all other days, every representative has several, perhaps several dozen, constituencies; these vary in awareness and resources and thus in importance to political parties and individual representatives, My principal point holds: the interests of legislators and their parties often diverge from those of most of their constituents and much more often from those of sizable minorities among voters. Robert R. Palmer, one of the great modern political historians, spoke of ‘the folly of identifying the deputies with the deputizers.’¹⁶ Of necessity, politics is a profession. Pros run the game. And they have interests as professionals. Remember Roberto Michels’s comment that in Britain a Labour MP had more in common with a Conservative MP than with members of the unions who elected him. In the 1960s, Americans gained much less from reapportionment than expected because, rather than risk massive changes, leaders of the two parties often acted like risk-avoiding oligopolists: they carve up markets to manage competitiveness. Professionals know how to manipulate rules—and news—to advance their own interests and conceal bargains from the mass of voters.”

“You underestimate journalists and overestimate politicians. But more basically, are you arguing for more democracy?” Pyknites asks.

“I have a double argument,” Deukalion responds. “First, not only do most citizens typically care very little about politics, but just as typically, legislators act first and foremost to advance their own careers, which often include jobs with large corporations or labor unions after they leave electoral politics. These interests, where such matters as campaign finance are concerned, may sharply conflict with their constituents’ interests.”

“We disagree,” Pyknites puts in, “on how frequently those conflicts occur and on how often journalists sniff them out and the electorate votes representatives out.”

“Yes, but, as George W. Bush’s staff did, politicians can pay supposedly independent journalists to plug pet policies. My second argument is that when legislators do faithfully respond to public opinion, it is frequently to discriminate. A majority is not ‘the people.’ Representative democracy al-

15. See David R. Mayhew, *Congress: The Electoral Connection* (New Haven, CT: Yale University Press, 1974).

16. *The Age of Democratic Revolution* (Princeton, NJ: Princeton University Press, 1959), I, 221.

lows a party or coalition that controls Parliament to enact whatever policies it wants, providing it does not interfere with free political processes. (I leave aside the question of what will happen if those who dominate Parliament decide to continue their domination by gerrymandering, selective disfranchisement, or some other means of tilting the electoral scales because you, like Robert Dahl and Michael Walzer, would allow judicial intervention under such circumstances.¹⁷) A. V. Dicey may have exaggerated when he wrote that the British Parliament had authority 'to make or unmake any law whatsoever,'¹⁸ but he was in good company: Benjamin Franklin noted that the British Parliament claimed 'omnipotence without omniscience.'¹⁹ Both Dicey and Franklin came close to the truth for a pure representative democracy. And here I return to my earlier point: such a system entrusts civil liberty to political culture as perceived by a parliamentary majority, responsible only to active, informed voters—in sum, to a minority, a minority whose interests will often be deeply antagonistic to those of other minorities. Such a faith is risky in many political systems; in yours it would be perilous. For its part, constitutionalism, when alloyed with democracy, reinforces a civic culture by building up trust; it does not rely on culture alone or even on culture fortified by campaigns and elections. It uses these, but as parts of a larger network of institutions and processes that increase the chances that other political actors—who, incidentally, also read newspapers and watch television—will have interests in perceiving and curbing each other's abuses."

"Yes," Pykrites says, "legislative abuses should be curbed, indeed prevented. But I would let an informed public perform that function and the threat of that reaction—ignited by ambitious journalists and self-interested members of the parliamentary opposition—stop abuses before they occur. This sort of system will reinforce, and in the beginning help create, a democratic culture in which politicians operate at their peril. There is another aspect to this problem. The professor has alluded to the possibility of the tyranny of the majority open under representative democracy; but under constitutional democracy tyranny of the minority is an equal possibility. Ran Hirschl makes a convincing argument that much of the support for constitutionalist checks comes from elites who fear democracy.²⁰ Constitutionalism allows them to prevent the people from governing by preventing government's taking positive action to protect both the people as a whole and

17. Robert A. Dahl, *Democracy and Its Critics* (New Haven, CT: Yale University Press, 1989), p. 191; Michael Walzer, "Philosophy and Democracy," 9 *Pol. Th.* 379, 397 (1981).

18. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 6th ed. (London: Macmillan, 1903), p. 38.

19. Franklin's letter of Apr. 11, 1767, to Lord Kames; reprinted in Alpheus Thomas Mason, *Free Government in the Making*, 3rd ed. (New York: Oxford University Press, 1965), pp. 90–93; the quotation is at p. 91.

20. *Towards Juritocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004).

specific minorities not included in the blocking alliance.²¹ Inaction, as Mr. Zingaro has reminded us, can be as damaging to civil liberties as action. As Father Gregorian would instruct us, the prayer that opens every Mass asks forgiveness for 'what we have done and what we have failed to do.'"

"Every representative system," Deukalion replies, "interferes with a majority's ability to rule, as do proportional representation, bargaining among parliamentary leaders, a bill of rights, and a host of other institutional arrangements. Constitutional democracy differs only in making it clear that certain actions fall beyond the pale of proper governance and in setting up institutional structures to enforce those boundaries."

The chair taps his gavel against the dais. "Both gentlemen have stated their arguments fully. Let us move on to Professor Smitskamp. The chair recognizes Ms Baca."

"Before we move on, I must, like, share with you my deep disappointment at what both Mr. Pykrites and Professor Deukalion have said. They accept the conventional view of how best to choose representatives, right? And the Professor has contemptuously dismissed such modern devices as electronic voting. Lenin would have thought this debate was cool. He wrote that representative government is only a means to 'decide every few years which member of the ruling class is to repress and oppress the people.'²² But Bernard Manin has shown that other methods than election are very possible and very possibly more democratic.²³ We should, you know, remember that Aristotle thought elections produce not democracy but oligarchy.²⁴ Montesquieu and Rousseau agreed that selection 'by lot is natural to democracy; as that by choice is to aristocracy.'²⁵ Elections are a substitute for democracy. At best they, like, produce an aristocracy of orators, at worst an oligopoly of rich, politically ambitious people."

"Are you suggesting," Pykrites asks, "we choose representatives by lot?"

"That would be fairer, and it's actually practical. Let me show you how. The Athenians, Romans, and Italian city-states chose some of their officials that way.²⁶ Today, machines randomly choose winners of national lotteries. We could allow anyone who wanted to be a representative to pick up a ticket and have a drawing every few years. What you two call representa-

21. See Robert A. Dahl's *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956), pp. 131–32, and *Democracy and Its Critics*, chs. 4, 5, 11, 23.

22. *State and Revolution* (New York: International, 1932), p. 40.

23. *The Principles of Representative Government* (New York: Cambridge University Press, 1997).

24. *Politics*, bk. 4, chs. 8–9, 1294a–b.

25. Montesquieu, *The Spirit of the Laws*, trans. Thomas Nugent (New York: Hafner, 1949), 2.2; Jean-Jacques Rousseau, *The Social Contract*, trans. Frederick Watkins (London: Nelson, 1953), 4.3, quotes Montesquieu and says, "I agree."

26. For an excellent study of Athenian political structures, see Mogens Herman Hansen, *The Athenian Democracy in the Age of Demosthenes: Structure, Principles, and Ideology* (Norman: University of Oklahoma Press, 1999).

tive and constitutional democracies are not democracies at all, but oligarchies. The oligarchs rotate in office, but they're still oligarchs. Lenin wasn't far wrong."

"The concept of representation," Pyknites says, "has changed since Aristotle and even since Montesquieu. We now also have the equally powerful concept of consent of the governed."

"Consent? Then why can't the people consent to choose representatives by lot rather than election? 'Government by consent' doesn't mean government by election. It doesn't even necessarily mean democratic government. The people can consent to all sorts of arrangements, right?²⁷ In many countries, the military depend on enlistments, not a draft. In neither case do young men enter an organization that has a hint of democracy about it and very little constitutionalism."

"Two responses," Pyknites counters. "First, your idea of consent is too limited. You rely on Manin, so let me quote him:

However lot is interpreted . . . it cannot possibly be perceived as an expression of consent. . . . Under such an arrangement, the power of those selected for office at a particular time would be ultimately founded on the consent of the governed. But in this case, legitimacy by consent would only be indirect: the legitimacy of any particular outcome would derive exclusively from the consent to the procedure of selection. . . . Under an elective system, by contrast, the consent of the people is constantly reiterated.²⁸

Second, consent is now also tied to the notion of official responsibility to the people. Choosing representatives by lot means those so selected don't have to face the people again.

"No, Manin is, you know, wrong on this particular point. In almost all truly democratic elections, the number of people who vote against a candidate or party is huge. And you commit the fallacy that Schumpeter identified: you conflate a majority with the people as a whole. What happens when a candidate or a party wins only a plurality? In the United States, Abraham Lincoln in 1860 and Woodrow Wilson in 1912 won only a plurality of the popular vote, as did Bill Clinton in 1992 and 1996. The Republicans denied the legitimacy of Clinton's claim to office, but they were very quiet about George W. Bush's actually losing the popular vote in 2000. Moreover, you and Manin are assuming that all citizens vote. They don't, even where the

27. Some scholars would doubt that human beings can in any morally meaningful way "consent" to be subjects of a totalitarian system. See Walter F. Murphy, "Consent and Constitutional Change," in James O'Reilly, ed., *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Dublin: Round Hall, 1992); and below, Chapter Fifteen. Scholarly as well as partisan literature on consent is somewhat confused. Russell Hardin summed it up best: "Perhaps there is no part of the political vocabulary that is more subject to the distortions of hortatory and self-boasting rhetoric than the vocabulary of consent." *Liberalism, Constitutionalism, and Democracy*, p. 142.

28. P. 85.

law requires them to, as in Australia. Worse, less than half of eligible voters turn out for American off-year congressional elections, and only a bit more do so in most presidential elections. What makes that sort of choice democratic? As for responsibility, if we used lottery, officials could be prosecuted for malfeasance in office as they often were in Athens, and after leaving office they would have to live under the laws they had made, right?²⁹ But your question totally misses the whole point: representatives selected by lot would be the people in microcosm. Elected representatives really aren't."

"Four hundred people," Deukalion intervenes, "can't accurately mirror forty million."

"Maybe in a statistical sense, but lot offers a better chance of real representation. In America, both the Federalists and the Anti-Federalists understood that election would mean that 'notables' would form the bulk of candidates. Few people who work for wages, professionals such as schoolteachers and doctors, or stay-at-home mothers who aren't wealthy can take the time off to campaign or even to raise the money needed. Madison and the other Federalists thought that having an elite govern would be a good thing. *The Federalist* Nos. 10 and 57 reek of elitism, of the superiority of the elected over the electors. The elected will supposedly be the 'men who possess most wisdom to discern, and most virtue to pursue' the common good.³⁰ Many others, perhaps Madison himself, saw that the rich, the leisured, and, of course, the professional politicians would run government for themselves but in the people's name. One Anti-Federalist protested that '[i]t is deceiving the people to tell them they are electors, and can chuse legislators, if they cannot in the nature of things, chuse men among themselves, and genuinely like themselves.'³¹ And that's, like, the crux of the matter: representatives chosen by lot are 'genuinely like' their people. If we have elections, representatives will soon become professionals. If our system develops as it has in the United States, they'll be mostly toadies—*ward heelers* is the term, I believe—who suck around the edges of power until their turn to run comes around, or they'll be rich lawyers who can take time off from their practice and even

29. Madison listed this requirement as a check on elected legislators (*The Federalist*, No. 57). In reply to his own question of what would keep the legislature—in context, the House of Representatives—from discriminating in favor of the interests it represents, he wrote: "the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and manly spirit which actuates the American people—a spirit which nourishes freedom and in return is nourished by it."

30. *The Federalist*, No. 57. As would be expected, Hamilton foresaw (and approved of) even greater differences between electors and elected than did Madison. See *The Federalist*, No. 35. And Madison's own elitism was an integral part of his political outlook. See the analysis in Richard K. Matthews, *If Men Were Angels: James Madison and the Heartless Empire of Reason* (Lawrence: University Press of Kansas, 1995).

31. Letters from *The Federal Farmer*, No. 7, reprinted in Herbert Storing, ed., *The Complete Anti-Federalist* (Chicago: University of Chicago Press, 1981), 2:266. (The identity of the author is still disputed, though at one time most scholars believed him to be Richard Henry Lee. See *ibid.*, 2:215–16.)

gain clients through the publicity they get. If our system develops in the European way, we'll get mostly the first sort. In either case, we'll get professionals who are not like us."

"I'm not a proponent of representative democracy," Deukalion says, "but you paint too bleak a picture. Furthermore, representation is a multiflavored word. You're using that word to mean 'chosen from.' That connotation is legitimate and is reflected in consociationalism. But today representation more often means 'chosen by.'³² That's how Mr. Pykrites and I were using the term."

"You can't escape through semantics," Baca continues. "Each of you two, like, wants an oligarchy; you only disagree about what kind of oligarchy. Constitutionalists, at least, are honest about wanting a judicial oligarchy to curb the people's power. Mr. Pykrites's oligarchic representation denies an important aspect of the democratic equality it purports to promote by setting up a barrier to free entry into politics. The paper we read in our first week said that, in a democracy, not only was voting a right but so was running for office. But for most of us, representative democracy makes a mockery of that second right. To have a fighting chance of electoral success, a candidate must be rich, have access to lots of money, or have patrons in power—or possibly all three. This way your system denies most citizens a fair opportunity for political office. That sort of equality was dear to Athenians, and it should be dear to us if aspire to be democratic. If we endorse what Peter Singer, hardly a religious sectarian, calls 'the principle of equal consideration of interests,'³³ we would give equal weight to the interest of each person affected by a decision. And we all have an interest in governing as well as in being governed, right? Your system of representation privileges the interest in governing held by those who are, like, rich and/or have rich and powerful friends."

"This is sophistic," Strega says. "Elites govern. Period! The only question is which elite. Look around. We're not average men and women. We're all talented, educated people who have made something of our advantages. As a graduate student, Ms Baca, you are a member of an intellectual elite. As a leader of the students' revolt, you're a member of a political elite. And you weren't chosen for either role by lot but because of your talent. Still, you want us to choose representatives by lot as if we were a pack of Greeks living twenty-three hundred plus years ago?"

"This isn't about me or even all of us here. It's about our country. Mr. Pykrites wants to change the classic notion of citizenship. Aristotle described a citizen as one who alternately governs and is governed. Election fixes it so only a few can govern. And this is no accident. Manin describes

32. See Murphy and Tanenhaus, *Study of Public Law*, pp. 37–38 and ch. 3.

33. *Practical Ethics*, 2nd ed. (New York: Cambridge University Press, 1997), p. 21. This principle makes, as Singer admits, a minimal claim. "What the principle really amounts to is this: an interest is an interest, whoever's interest it may be."

how the British and the French tried to rig their electoral systems so that only members of elites could compete for office. And only a few years ago, a noted scholar described electoral politics as 'the most protected industry in the United States.'³⁴

"What I want to know," Pykrites puts in, "is exactly what Ms Baca is proposing. Is she suggesting direct democracy or a different scheme of representation?"

"I want to share with you a different representational system, one that, while not perfect, is better than yours.³⁵ We could establish a system of representation by lot augmented by electronic referenda. We could divide the country into legislative districts, each entitled to multiple members to allow proportional representation. Each representative after the first parliament would serve for six years; members of the first parliament would, as did the first American senators, divide into groups—again chosen by lot—to serve, two, four and six years so that a new selection would take place every two years, so we would have, you know, both experience and new ideas."

"Fascinating," Gregorian says, with only a trace of irony.

"Actually, it's cool. Each citizen over twenty-five who wished to take part in the lottery could obtain a free ticket. Winners would be chosen as in national lotteries now. There would be no campaigns, no need for candidates to mortgage their integrity to pay for television and travel."

"May the chair inquire how electronic referenda enter in?"

"When issues come up in Parliament," Baca explains, "they would be posted on the Internet for one week, along with summaries of the arguments for and against. At the end of that time, every citizen in each district could, you know, instruct his or her representatives how to vote. The delegates from each district would then vote according to the proportion of their constituents' wishes: If there were five delegates from a district and the constituency divided 60–40, three delegates would vote for the proposal and two against."

"What would be the point of choosing representatives, by lot or otherwise?"

"There will be much work to do within Parliament, such as formulating issues, agreeing on exact language for legislation, and drawing up arguments for and against—full-time work. But what we would ensure is that representatives closely represent their constituents. To the extent that Professor

34. Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (New York: Cambridge University Press, 1991), p. 91.

35. Before gentle readers dismiss Baca's suggestion as silly, they might note that Akhil Reed Amar has concluded: "Enormous logistical, political, and psychological questions surrounding lottery voting remain to be explored. . . . But like the microeconomist's model of an economy without transaction costs, or the philosopher's model of the perfectly just republic, the lottery model can also serve as a potent heuristic device." "Note: Choosing Representatives by Lottery Voting," 93 *Yale L. J.* 1283, 1308 (1984).

Deukalion and Mr. Pyknites are right, their arguments, like, prove that we should abolish the traditional system of representation.”

“If I may steal from another poet,” Zingaro chimes in: “Though this be madness, yet there is a method in ‘t.’ I was an insider as far as prison was concerned, but otherwise I have been an outsider in this society. As I see it, elections pose a conflict between freedom and equality. The costs of campaigning give great advantages to the rich and famous. And then there’s prejudice.³⁶ If people can vote for whomever they wish, a majority of voters may oppose candidates whose race, ethnicity, gender, physiognomy, or geographical origin they don’t like. So it’s probable that successful candidates will not include any of those who run afoul of the majority’s prejudices, even though those excluded may be the best qualified by all the objectively relevant criteria such as intelligence, integrity, and energy. Thus, as a member of a despised minority, I can’t dismiss choice by lot as foolish, though I concede it would be difficult to persuade our citizens to accept.”

“Interesting,” the chair says. “Ms Baca has given us an intellectual banquet.”

“A Barmecidal feast, you mean,” Strega injects.

The chair ignores the minister. “Ms Baca has offered an interesting idea. We shall need time to digest it. Perhaps we can take up her suggestion when we talk in a few days about electoral systems. Let us turn, for the time being to Professor Smitskamp. The Mufti has the floor.”

“I agree with the Chair, peace be upon him, and also, as member of another despised minority, share some of Mr. Zingaro’s concern, peace be upon him as well. But I need to think about what Ms Baca, for whose welfare we all pray, has proposed. Now, let me ask Professor Smitskamp, may Allah give him peace: if all democratic systems have heavy elements of consociationism, how does it help to talk about it as a separate genre?”

“Speaking separately of consociationism reminds us of the many peaceful ways of coping with ethnic divisions.”

“All right. Then which democratic system does consociationism better fit?” Ajami asks.

“Both equally well.”

“I’m less sure,” Pyknites injects. “Professor Smitskamp has mentioned the problem that cartels of elites pose for democratic values.”

“But,” Deukalion counters, “Mr. Pyknites admits that representative democracies have such cartels; he just doesn’t call them cartels.”

The chair interrupts. “We’ve crossed that terrain. Something new, Father Gregorian?”

“You spoke, Professor, about consociationism’s record on civil liberties

36. Zingaro is following Bernard Manin, *The Principles of Representative Government* (New York: Cambridge University Press, 1997), ch. 4, esp. pp. 136–38.

as quite good. But you mentioned the riots in India, not only against Sikhs but also against Christians. The government did a poor job of protecting both. And in 1999 Chief Minister Keshunhai Patel of the Hindu nationalists, the Bharatiya Janata Party, who then controlled the government, made accusations against missionaries that increased the probability of such riots.”³⁷

“Yes,” Smitskamp says. “Consociationism gives strongest protection to groups in the ruling coalition, and Indian Christians are too small a minority to have their own party. I should add that the Bharatiya Janata Party’s assertion that India is a Hindu state reverses the historic secular policies of Mohandas Gandhi, Jawaharlal Nehru, and the Congress Party and threatens not only to unravel the whole fabric of India’s consociationism but ultimately to encourage interethnic violence.”³⁸

“Professor Jessica Jacobsohn?”

“I share Father Gregorian’s concern. I’m also worried about minorities among minorities where those groups have some autonomy. Specifically, I’m thinking of women among indigenous peoples in Canada and of Muslim women everywhere. The most terrible offense is mutilating women. To call that process ‘female circumcision’ is like saying Lorena Bobbitt performed a *bris* on her husband.³⁹ How can consociationism ensure that minorities among minorities have basic rights and still give groups a real measure of control over public policies that directly touch on their traditions?”

“Again,” Smitskamp answers, “I mentioned both in my presentation.”⁴⁰

The mufti interrupts: “I must have said it before, but the Qur’an speaks of men and women as equal, and genital mutilation of women is not among Islam’s precepts. It’s tribal, not religious, a cruel, crude custom of many groups within and outside of the Muslim world, especially in Africa. Even in India, some Borahs—certainly not Muslims—mutilate women.”⁴¹

37. See Celia W. Dugger’s articles in the *N.Y. Times*, Feb. 19 and Mar. 19 and 23, 1999.

38. For general analyses of the policies of the BJP Party, see Thomas Blom Hansen and Christophe Jaffrelot, *The BJP and the Compulsion of Politics in India* (New York: Oxford University Press, 2000).

39. Without realizing it, Jacobsohn is quoting a remark by Steven Pinker, *How the Mind Works* (New York: W. W. Norton, 1997), p. 447.

40. For more complete critiques of consociationism, see Hans Daalder, “The Consociational Democracy Theme,” 26 *World Pol.* 604 (1974), and Donald L. Horowitz’s two articles “Constitutional Design: An Oxymoron?” and “Provisional Pessimism: A Reply to Van Parijs,” both in Ian Shapiro and Stephen Macedo, eds., *Designing Democratic Institutions*, Nomos 42 (New York: New York University Press, 2000). For analyses of the more specific problem of the group rights of minorities and individual rights in constitutional and representative democracies, see D. L. Sheth and Gurpreet Mahajan, eds., *Minority Identities and the Nation-State* (New York: Oxford University Press, 2000).

41. The mufti’s unacknowledged source is Chiranjivi J. Nirmal’s concluding essay, “Setting an Agenda,” in a book he edited: *Human Rights in India: Historical, Social, and Political Perspectives* (New York: Oxford University Press, 2000).

"If you were in our shoes, how would you handle that problem?" Jacobsohn asks.

Smitskamp hesitates. "Were the choice mine, I would try to persuade Parliament to mandate fair employment opportunities and equal treatment in matters like ownership of group property, divorce settlements, and custody of children. Within that framework, I would give groups a veto over most policies directly affecting their customs, but not including genital mutilation."

"But," Jacobsohn persists, "are we likely to get such civil rights legislation from a legislature that has consociational checks built into it?"

"It would be difficult," Smitskamp admits.

"The problem that granting semiautonomy to some groups raises for women's equality has been duly noted," the chair says. "I don't know what more we can say. Let us move on. Mr. Pyknites?"

"I'll have more to say when we discuss specifics like electoral systems, but I must note a general point here: consociationism tends to institutionalize ethnic divisions—unhealthy for representative democracy and, I would assume, for constitutional democracy as well.⁴² We need political arrangements that dull, not sharpen, ethnic divisions."

"I don't hear," the chair says, "any great move toward adopting a full-scale consociationist system." The colonel looks around the room. "No one else asks to be recognized, so I assume that Professor Smitskamp's presentation is clear. I would add that it has also been very helpful to me. As an ignorant soldier, I had never thought about such matters. I seem to recall from my youth a biblical saying to the effect that he who adds to knowledge adds to sorrow. Let us take a fifteen-minute break for coffee and then question Deputy Minister Strega."

As the members take their seats, the chair begins: "Ms Minister, how does your system of guided capitalism differ from fascism, which we agreed to exclude?"

"There are several obvious differences. First, guided capitalism neither needs nor wants a charismatic *führer*, *duce*, or *caudillo* in command. No more nor less than any other political system, it may require a charismatic leader to initiate it, but operating it requires quiet, efficient economic experts, not demagogues. There, in Chalmers Johnson's famous phrase, politicians reign, but bureaucrats rule.⁴³ Second, the only ideology guided capitalism proclaims is that it is better to be rich than to be poor. Third, guided capitalism does not imply ethnic or racial superiority, focus on territory *irredenta*, or

42. For a fuller critique of consociationism, see Horowitz, "Constitutional Design."

43. Quoted in Steve Chan, "Democratic Inauguration and Transition in East Asia," in James E. Hollifield and Calvin Jillson, eds., *Pathways to Democracy: The Political Economy of Democratic Transitions* (New York: Routledge, 2000), p. 185.

hark back to a *volk's* lost empire.⁴⁴ Its spirit is pragmatic, not euphoric. Its stance is pacific, not belligerent. It tries to build society on a rational, commercial model rather than a military one. As such, it respects the rule of law; terror in any form is taboo. Is that response adequate?"

"Yes, thank you," the chair replies. "Mufti?"

"A questions still gnaws at my ignorant mind: How does the system she advocates differ from the one from which we were so recently rescued?"

Strega sighs. "That answer is also obvious. First, the members of our junta were corrupt; whatever their early ideals, those men quickly yearned only for more power and more money. Guided capitalism is less likely than most regimes to be corrupt, because public servants must meet clear standards. It is, of course, possible that we could see venal arrangements between officials and firms such as those that developed under Soharto in Indonesia. If, however, we are careful, we can establish a regime like Singapore's, where corruption is about as low as it gets in any governmental system. Second, the purpose of public policies will be to improve the economic status of the country as a whole, with benefits spread as widely across the citizenry as is compatible with economic efficiency. Third, although the new regime will not immediately institute full democratic and constitutionalist arrangements, its leaders will pledge to move in those directions as soon as the economy is functioning smoothly. Indeed, as gestures of good faith, they might well initiate some of those arrangements rather promptly. They might, for instance, dissolve the secret police and Special Forces and end governmental control of private associations. On the other hand, they might continue the ban on strikes and even draft workers for particular segments of the economy, and negotiations between labor and management would be supervised by public officials who have the twin objectives of economic efficiency and wide distribution of wealth. I look forward to immediate publication of regulations to which all citizens would be subject, fairly administered by public officials, with cases to be tried before impartial judges."

Colonel Martin nods toward the center of the hall. "Father Gregorian, the floor is yours."

"Minister, I sensed that your system would place economic growth above all else."

"If you would add peace to prosperity, you would be correct. Without domestic peace, we cannot have prosperity; without prosperity, we cannot have either political stability or freedom. Our people will not accept a governmental system that leaves them mired in poverty. Without prosperity, constitutionalism and democracy are doomed, while prosperity often begets liberty."

44. See Aristotle Kallis, *Fascist Ideology: Expansionism in Italy and Germany, 1922–1945* (New York: Routledge, 2000).

"Many political scientists disagree," Gregorian goes on, "and do so with hard data."

"Then let me also cite a political scientist, Russell Hardin," Strega interrupts. "He attributes much of the American political system's success to the fact that when that constitutional order began in 1788, the country was already so 'firmly coordinated on most of what matters . . . that politics [could] mainly deal with the chaff at the margins.'⁴⁵ And 'what matters' has been the economic arrangements that have fostered prosperity."

"Thank you. As I was saying, Juan Linz and Alfred Stepan say that putting prosperity before stable democracy—they seem to mean constitutional democracy—turns upside down 'the legitimacy pyramid,'⁴⁶ if you'll forgive the literary barbarism. They cite public opinion polls from Spain after 1975, Argentina after 1983, and Eastern and Central Europe after 1989 to show that people do differentiate governmental from economic systems. Although respondents tended to be dissatisfied with their economic lot, they also tended to support their hyphenated democratic regimes. If you want a concrete example of the problems of putting economic before political reform, look at the Russians. Those people teeter on the brink of economic and political disaster."

"I've read Linz and Stepan. Once they get off their pet hobbyhorse of the superiority of parliamentary over presidential systems, they make plausible arguments. But their data cover a short time span, and later surveys reported by the *Economist* show unhappiness with democracy in much of Latin America.⁴⁷ Support for any political system that replaces a harshly oppressive regime is likely to have a certain stickiness, thickened by the uncertainties of another shift in regime. But we can't count on that support's enduring for many years. 'Giving up wealth and income for other values is one thing in the face of a common and hated oppressor,' Douglass North says, 'but the value of the trade-off changes as the oppressor disappears.'⁴⁸ Let's see what happens in Eastern Europe during the next few decades. As for Russia, a quarter-century of Stalinist terror, followed by an even longer period of corrupt authoritarianism, doomed that country to economic, political, and social disasters. Besides, the Russians went about reform in a predictably backward fashion. First they tried political liberalization; then, with discipline shattered, they attempted economic reform. Mikhail Gorbachev's advisers conceded they had made 'a horrible mistake.'⁴⁹ They produced a

45. *Liberalism, Constitutionalism, and Democracy*, p. 30.

46. Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation* (Baltimore: Johns Hopkins University Press, 1996), pp. 129, 195, 222–23, 225–30, and ch. 21.

47. "Democracy's Low-Level Equilibrium," Aug. 4, 2004, pp. 35–36.

48. North, *Institutions, Institutional Change, and Economic Performance*, p. 90.

49. Samuel P. Huntington, "What Cost Freedom: Democracy and/or Economic Reform?" *Harv. Int'l Rev.* 8, 12 (1992–93), reports his conversations in 1989 with Gorbachev's aides.

state that couldn't govern and an economy run by gangsters. You must remember that, under Moses, the ancient Israelites' transition from slavery to independence required a generation to die off. The Russians will have to suffer the same fate, but probably for two generations. But we don't need to endure such chaos. We can enjoy decent, efficient government if we opt for guided capitalism."

"But if Linz and Stepan are right . . ." Gregorian begins.

"The issue is not which group of closet scholars is right. We have a weak society. We need a strong state to compensate."

"I would like," the mufti says, "to inquire into what seems to me to be implicit in the Minister's presentation: a high level of economic development will tow a democratic and/or constitutionalist regime in its wake. I first encountered this reasoning as justifying America's giving China 'most favored nation' status in trade despite that country's systematic violations of human rights. That argument was not persuasive in the Sino-American context; it is less so in ours."

"My dear sir," Strega interrupts, "you are not an economist but a theologian. Had you studied economics, you would know that long ago Frederick Hayek, Milton Friedman, and Joseph Schumpeter⁵⁰ linked individual liberty to the development of capitalism."

"But I am still troubled," Ajami replies. "My research assistant has provided me with an article by Thomas Carothers, who says that of the hundred or so supposedly transitional regimes, only about twenty have moved toward a truly open society.⁵¹ That pattern does not encourage me to link economic development with free government. And the history of Weimar Germany frightens me. Although it had endured grievous economic problems from 1920 to 1930, it was the most technologically and culturally advanced European society. Yet when the Nazis came to power, the overwhelming majority of those Germans accepted brutish racist rule not only as fully legitimate for themselves but as one that should murderously conquer the rest of Europe. Given this history, why should we believe guided capitalism will follow a 'virtuous cycle' and produce civil government?"⁵²

"You misunderstand me. I am not promising utopia. I repeat: neither politics nor economics offers guarantees. I do not claim that some sort of democratic regime will follow as night the day from economic development,

50. Hayek, *The Constitution of Liberty* (London: Routledge and Kegan Paul, 1960); Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962); and Schumpeter, *Capitalism, Socialism, and Democracy*.

51. "The End of the Transition Paradigm," *13 J. of Democ.* 5 (2002).

52. Lucian Pye recites some of these arguments: "Democracy and Its Enemies," in James F. Hollifield and Calvin Jillson, eds., *Pathways to Democracy: The Political Economy of Democratic Transitions* (New York: Routledge, 2000); see also, in the same volume, the chapters by Cal Clark, "Modernization, Democracy, and the Developmental State in Asia: A Virtuous Cycle or Unraveling Strands?" and Steve Chan, "Democratic Inauguration and Transition in East Asia."

only that without economic development we are apt soon to revert to another junta-ish system. If we must bet—and we do—I'd put my money on Hayek and Friedman rather than on a few ignorant political scientists. Guided capitalism offers our best chance, because it offers the discipline that other more or less democratic regimes cannot. Democratic government always panders to what voters believe are their immediate interests; long-term interests demand too much sacrifice for such political arrangements."

"I agree," Pyknites puts in, "that we need a strong government, and, if not absolutely essential, prosperity increases the odds for stability. I disagree with the Minister's solution. Representative democracy can produce a government as strong as we need and do so without damaging the people's freedoms and their right to change their political system."

"Plato," Strega replies, "said that democracy was a 'charming form' of government. I want a political system that will not charm us but bring us prosperity so some day we can be truly free."

"Let's go back to Linz and Stepan," Minxin Wei, the banker, cuts in. "Since their book came out in 1995, of Eastern and Central European countries outside the old Soviet Union only Romania has seriously flirted with authoritarianism. Equally important for us, although most of these countries have made economic progress, only the Czech Republic and Hungary have made dramatic strides."

"I repeat," Strega says, "we have only data from the short run; and second, even if those countries can remain poor and not revert to oppressive government does not mean *we* can."

"Yes," Wei concedes, "but Linz and Stepan offer a more general argument: democracy can cope with economic adversity better than authoritarian systems, because the latter's legitimacy depends on economic success. When bad times come, those regimes have only shallow reservoirs of legitimacy. On the other hand, democratic governments of either form carry their own legitimacy. Moreover, the fact that elections are regularly imminent opens the possibility that a new government can peacefully correct current failures."

"Plausible," Strega concedes, "but our revolution was more about economics than politics. The junta stirred up people's hopes that their lives would get better, that they could live, if not like Germans or Swedes, at least like Spaniards. When those hopes collapsed, the people began to resist. We can't let that frustration continue to fester."

"The causes of our revolt are more complex than you assert," Wei says. "Economic deprivation made people restless, but political oppression—and knowledge that others had thrown off similar oppression—made them ready to rise up. We had almost had our own Tiananmen Square, but our armed forces had the courage and decency that Chinese officers lacked."

Colonel Martin seems to blush. "Let us move ahead," he says. "Minister Pilsudski?"

"You quote, among others, Douglass North. But wasn't the whole thesis of his book that the political system determines the institutional framework within which economics operate?"⁵³ If he is correct—and it is worth noting that Josef Stalin made a similar argument in 1950⁵⁴—you are focusing on the wrong problem. Doesn't political reform have to come first?"

"What do you think I've been talking about?" Strega exclaims. "I want us, a political body established to create political institutions, to set up a political system that will allow guided capitalism to function so it can bring our people material happiness. After we do our political work, economists can do their work of bringing prosperity; then the next round of politicians can, if they want, change the political and economic systems."

"Yes, Dr. Kanuri?"

"I would ask the Deputy Minister if she has read the book by Bruno S. Frey and Alois Stutzer on happiness, economic advancement, and rights of political participation."⁵⁵

"I have not."

53. *Institutions, Institutional Change, and Economic Performance*.

54. "Concerning Marxism in Linguistics" (1950), in Josef Stalin, *Marxism and Linguistics* (New York: International, 1950), esp. p. 50, where he wrote that although the "superstructure" of a society is the product of the economic base—orthodox Marxism—"this does not mean that it merely reflects the base, that it is passive, neutral, indifferent to the fate of its base, to the fate of the classes, to the character of the system. On the contrary, no sooner does it arise than it becomes an exceedingly active force, actively assisting its base to take shape, to consolidate itself, and doing everything it can to help the new system." For analysis of this essay, which turned Marxism on its head, see Vernon V. Aspaturian, "The Contemporary Doctrine of the Soviet State and Its Philosophical Foundation," *48 Am Pol. Sci. Rev.* 1031 (1954).

55. *Happiness and Economics* (Princeton, NJ: Princeton University Press, 2002). There is a growing body of literature on possible connections between money and what people call happiness. See, for example, Richard A. Easterlin, "The Economics of Happiness," *Daedalus*, Spring 2004, who says at p. 31: "To judge from survey responses, most people certainly think [there is a connection], although there is a limit." When asked how much more money is needed to make them happy, most say about 20 percent. But health seems more important than income. Although income tends to increase with age, happiness does not, perhaps because problems with health also increase. Divorce and death of spouse also decrease happiness markedly. Easterlin concludes: "Most people could increase their happiness by devoting less time to making money and more time to nonpecuniary goals such as family life and health" (p. 33). See also Easterlin, "Does Economic Growth Improve the Human Lot?" in Paul David and Melvin Reder, eds., *Nations and Economic Growth: Essays in Honor of Moses Abramovitz* (New York: Academic Press, 1974), and "Will Raising the Incomes of All Increase the Happiness of All?" *27 J. of Econ. Behav. and Org.* 35 (1995). In these articles, Easterlin argues that a change in relative income is more important than the size of income. Some decades earlier, W. G. Runciman arrived at a rather similar conclusion: *Relative Deprivation and Social Justice: A Study of Attitudes to Social Inequality in Twentieth-century England* (Berkeley: University of California Press, 1966). Using some of the same data as Easterlin, Robert H. Frank, "How Not to Buy Happiness," *Daedalus*, Spring 2004, pp. 69ff., suggests that happiness does not increase with absolute gains in income but with how people spend their money.

"Allow me to give a quick summary that does not do justice to the book's richness. These two economists use data from interviews of six thousand respondents in all twenty-six Swiss cantons, ranked according to the degree of direct democracy they allow. Frey and Stutzer found that even with such factors as age, sex, and income controlled, small increases in political rights generally produced much greater increases in what respondents said was their level of happiness than did comparable amounts of money. In contrast, more income did not produce statistically significant increases in subjective evaluations of happiness except among respondents at the upper levels of income."

"So?"

"So these data support Linz and Stepan and indicate that people highly value political freedom and are willing to sacrifice some economic advantage for political rights."

"To some extent your information is relevant," Strega admits, "but how relevant for how long? I wouldn't extrapolate from the views of middle-class Swiss, who're rich by our standards, to those of our poor citizens."

Minxin Wei speaks: "I have another question. Both you and Professor Deukalion talk about the serious problems money presents for representative democracy, whether through campaign contributions or through less subtle bribery. How would your system cope with these problems? Surely bureaucrats would be targets for special interests, including bankers like me."

"Of course, but that danger lurks in any political system. It is less likely under guided capitalism. First, civil servants needn't run for election and so don't need big campaign chests. Second, because the salaries of civil servants are matters of public knowledge, conspicuous consumption would be obvious. Third, once the bureaucracy is established, an esprit de corps builds up and officials will want their colleagues' respect, just as soldiers do. Napoleon, after all, claimed he could keep an army together with a few pieces of ribbon. Last, I remind you that Singapore's government is among the cleanest in the world."

"Anything further?" Colonel Martin asks. "Very well, then, we turn to Professor Whaide."

Pykrites speaks first: "Professor, what you preach is essentially Catholic moral philosophy, modernized Thomism. Won't your 'perfectionist state' quickly become a confessional state and exacerbate existing distrust among our Protestants, Jews, Muslims, agnostics, and atheists?"

"Why should it?" Pastor Glückmann interrupts. "Without rehashing our earlier debate, there is a core of morality that all people of goodwill accept. Professor Whaide urges us to construct a political system whose public policies frankly confront moral considerations. As a Lutheran, I did not find his approach sectarian, though our answers to particular questions might differ. He advocates our confronting the fact that important public

policies raise moral problems. Minister Strega has made negative remarks about our interest in morality, but her efforts to reform our medical system were not solely aimed at quieting public unrest. I believe she recognized that it was morally wrong that infants were dying from lack of medical care, that sick children and adults were going without treatment, and she tried to right those moral wrongs. Ms Strega is a better person than she would like us to believe."

"Possibly, Pastor," Strega says. "But you and I are the only two who believe it."

"I doubt that, Ms Minister, but regarding Professor Whaide's larger message: we are all moved by moral considerations to advocate or oppose certain public policies. We deceive others when we conceal that motivation. Worse, we deceive ourselves. Our new political system should encourage open discussion of moral judgments, try to convince us to convince others we are right, and encourage others to try to persuade us of our being wrong."

"How," Strega asks, "would the Pastor handle a situation in which, for example, after full and fair debate the legislature forbade medical treatment to infants with spina bifida, beyond coping with any pain they might have?"

"I don't know, I honestly don't."

"Fair enough. Then let me ask the question of our Jesuit. How would he react?"

"I would fight such legislation. If we were facing a crisis in which disease were rampant and medical facilities overwhelmed, I might merely weep. Triage is sometimes a harsh fact of life. During battle, it is certainly moral for doctors to give priority to the wounded who have the best chances of survival. But as poor as we are, we are not at that stage."

"We most certainly are at that point," Strega says tartly, "and so is every other nation in the world. Even the United States can't support research to the extent needed to develop cures for AIDS, coronary disease, cancer, multiple sclerosis, and strokes, to mention only the most obvious illnesses. Instead, the American Congress throws enough money at each to placate powerful lobbies but not enough to find a cure for any one of these diseases. And you still haven't answered my question."

"I didn't because, like the Pastor, I don't know what I would do. I hope I would try to persuade medical personnel to disobey the law."

"Even though treating ten infants with spina bifida might mean that a hundred children with other diseases would die because scarce resources went to the first group?" Strega asks.

"Again, if we were facing a crisis . . ." Gregorian begins.

"But every nation faces a continuous medical crisis," Strega cuts in. "Thousands of infants and adults die daily from diseases for which adequately funded research could soon discover cures. As long as resources are scarce, every allocative choice we make has negative as well as positive

consequences. To weigh each option on a moral scale invites paralysis, a result that has only negative consequences. We should weigh our options on a utilitarian scale: which choice yields the greatest good for the greatest number of people? That scale is not as finely calibrated as we'd like; but by using as our prime criterion for politics the arrangements that are likely to produce the greatest prosperity, we allow citizens to make the choices they want. To me, that's freedom, that's respecting what you clerics call human dignity."

"We had been straying off target," the chair intervenes, "but the Minister has brought us back: the extent to which our new political system should push government to confront moral problems, debate moral alternatives, and make morally justifiable choices."

"If prosperity and good health would necessarily follow from sacrificing immediate freedom and risking that freedom over the long haul," Professor Jacobsohn says, "I'd join Ms Strega, but that just isn't so. For the moment, I'd like to question Professor Whaide. Sir, I both sympathize with and worry about your suggestions. Let's take abortion. I infer you're opposed."

"That inference would not be unjustified."

"Yes. And I assume you have strong arguments to support your strong feelings?"

"That's a fair assumption."

"I believe it," Jacobsohn says. "But I, too, have strong moral arguments that a woman should have control over her own body."

"Even to the point of killing the human life she bears?" Whaide asks.

"Yes," Jacobsohn admits. "And I know the response: If a woman has control over her body, why doesn't a man have control over his? If a woman can kill her fetus, why can't she kill other people, too? I answer that until viable outside the womb, a fetus is only potentially human—which means, incidentally, that I think late-term abortion is tantamount to homicide."

"That concession aside," Gregorian interrupts, "why doesn't the father have an equal right to order an abortion before the fetus is viable?"

"Because the father's connection to the fetus is too distant. To use a nautical trope, he's present at the keel laying but not during the building. . . . Never mind; we can endlessly debate the morality of abortion without changing each other's minds. I ask Professor Whaide a more general question: how would a perfectionist state resolve the sort of conflict you and I have?"

"Mr. Chairman," Pyknites puts in, "that's an excellent way of focusing discussion. Let's compare how different regimes have coped with this difficulty. A deliberative version of representative democracy provides the best solution: After full and fair debate, we settle the issue by judging the weight not only of the conflicting interests but also of the moral arguments. A compromise, which we can revise as we gain additional information or wisdom, would become binding public policy, perhaps something along the

German pattern, in which, to be eligible for a legal abortion, a woman twelve weeks or less pregnant agrees to counseling at a special center.⁵⁶ There she is informed of differing views about when human life begins and about alternatives to terminating pregnancy; only after presentation of a certificate that she has attended such counseling may she lawfully choose to abort the fetus."

"Why," Jacobsohn asks, "is that solution peculiar to representative democracy?"

"Such solutions are not 'peculiar' to representative democracy," Pyknites admits, "but issues are more likely to be handled in this way in that system. Problems can be settled by men and women who can adjust, negotiate around legal rules, or even create new legal rules. Representative democracy, as Walter Bagehot said, is 'government by discussion.'⁵⁷ In contrast, constitutional democracies tend to announce moral principles and produce either-or decisions on such terrible issues. American and Canadian judges have come close to holding that a woman has a right to demand an abortion, and Ireland tries to block all abortions, except to save the life of the mother."⁵⁸

"It's peculiar," Jacobsohn muses out loud, "that Mr. Pyknites uses Germany as a model of the way representative democracy would handle abortion. He must have forgotten that Germany is a constitutional democracy. He must also have forgotten that the German Parliament at first passed a very permissive abortion statute, but the Constitutional Court struck it down as not respecting human life and dignity and kept in force the old antiabortion law until Parliament enacted the statute that Mr. Pyknites admires, a statute incidentally whose validity the Constitutional Court has sustained.⁵⁹ What Mr. Pyknites has actually provided is an instance of con-

56. Prior to 2000, the German Catholic bishops operated about 270 such counseling centers. They hoped to dissuade women considering abortions. Consonant with the law, however, these, like all counseling centers, issued certificates to all women who attended, stating that they had fulfilled that part of the statute's requirement. In September 1999, the pope sent the German bishops a sharply worded letter demanding that they stop such activities. Reluctantly, the bishops ordered their centers to stop issuing certificates "in the course of the year 2000." See Alessandra Stanley, "Pope Lectures German Bishops on Abortion," *N.Y. Times*, Nov. 21, 1999; Roger Cohen, "German Bishops to Halt Abortion Certificates," *N.Y. Times*, Nov. 24, 1999.

57. Walter Bagehot, *The English Constitution*, 2nd ed. (original 1872; Garden City, NY: Doubleday, n.d.), p. 59. Actually, Bagehot said all first-rate states must have government "by discussion," but he was also claiming that the only serious choice was between presidential and parliamentary regimes.

58. The basic U.S. case, of course, is *Roe v. Wade*, 410 U.S. 113 (1973). For Canada, compare *Morgentaler v. the Queen*, [1975] 20 C.C.C. (2nd) 449, decided before the adoption of the Canadian Charter of Rights and Freedoms and its entrenchment of judicial review, which sustained provisions of the federal criminal code that regulated but did not forbid abortions, with *Morgentaler v. the Queen*, [1988] 1 S.C.R. 30, which invalidated those same provisions after adoption of the charter. For a history of the cases, see F. L. Morton, *Morgentaler v. Borowski: Abortion, the Charter, and the Courts* (Toronto: McClelland and Stewart, 1992).

59. For the permissive law, see *Abortion Case*, 39 BVerfGE 1 (1975), trans. and reprinted in part in Walter F. Murphy and Joseph Tanenhaus, eds., *Comparative Constitutional Law* (New York: St.

stitutionalism and democracy's acting synergistically to bring about a result he considers laudatory."

"Perhaps," Pyknites concedes, "but three other constitutional democracies, Canada, Ireland, and the United States, made a mess of the problem, which could have been far better, if not perfectly, solved by a deliberative representative democracy."

"Well," Jacobsohn replies, "let's look more closely at how Ireland handled abortion—quite differently from the way you believe.⁶⁰ In 1983, the two largest parties—disciplined, as you would expect, since it was the Irish under Charles Stewart Parnell who, in the 1880s, taught the English about the power of disciplined parties⁶¹—agreed that an amendment to the constitutional text was needed to prevent an American-style solution. The Dail approved a compromise measure and, as required, submitted it to a referendum. It was subjected to vigorous discussion and won handily, becoming Article 40.3.3°:

The State acknowledges the right to life of the unborn and, with due regard to the equal right of the life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

These words are less than clear, but they recognize that the mother need not continue a pregnancy that threatens her life. The controversies since have concerned the right of organizations to refer women to places outside of the country for abortions. Although Irish courts initially ruled against such a right, in 1992 the European Court of Human Rights at Strasbourg interpreted the European Convention on Human Rights to permit such agencies to operate, a conclusion the European Court of Justice had earlier indicated was also required by the Treaties of Rome.⁶²

"During 1992 several other events took place. First, as a condition to its signing the Treaty of Maastricht, Ireland obtained a protocol exempting it from any law of the European Union that allowed abortions. Second, in the famous X Case,⁶³ a young, unmarried woman said she was suicidal because of her pregnancy and was going to England to have an abortion. The government obtained an injunction against her leaving. The Supreme Court,

Martin's, 1977), pp. 422ff., and Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (Durham, NC: Duke University Press, 1997), pp. 336ff. For the later law, see Abortion Case II, 88 BVerfGE 203 (1993), reprinted in Kommers, *Constitutional Jurisprudence*, pp. 349ff.

60. For a brief summary of these events, see *Report of the Constitution Review Group* (Dublin: Stationery Office, 1996), pp. 273–79.

61. See Connor Cruise O'Brien, *Parnell and His Party, 1880–90* (Oxford: Clarendon, 1957), esp. chs. 4, 8.

62. *Open Door and Dublin Well Woman v. Ireland*, 64/1991/316/387–388 (1992). See vol. 246 of ECHR reports (1991) ECR.

63. *Attorney General v. X*, [1992] 1 I.R. 1.

however, ruled that (1) Article 40.3.3° recognized a mother's right to travel abroad to obtain an abortion when continuing a pregnancy threatened her life, and (2) a real danger of suicide constituted a constitutionally cognizable threat to the mother's life. Thereafter, following much debate, the Dail proposed new amendments to the constitutional text. The first would have eliminated risks to the mother's health—as contrasted to her life—and threats of suicide as allowing abortions. After a bitter parliamentary and public battle, this proposal was defeated at referendum by a vote of almost two to one. Two other amendments were adopted and added to 40.3.3°. They come close to entrenching the holdings of the X Case and of the Court of Human Rights:

This subsection shall not limit freedom to travel between the State and another State.

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.

"I apologize for speaking at such length," Jacobsohn concludes. "But it is critical to understand that neither Ireland nor Germany followed a rigid moral or legal course. Rather, these constitutional democracies acted through thoughtful deliberations in which judges were helpful participants. Furthermore, those processes produced compromises far more respectful of competing moral arguments than did the British Parliament in 1967, when it was free of most constitutionalist restraints. The United Kingdom rejected arguments that a fetus should have a legally protected right to life against the combined wishes of the mother and the judgment of two physicians. As a feminist, I mostly approve of the outcome, but I can't cite it as a product of thoughtful democratic deliberation."⁶⁴

"The British solution sounds good to me," Strega comments, "much better than that wonderful Irish compromise recognizing a right to travel abroad!"

"More wonderful than you imagine. Ulster is contiguous to the Republic, and no part of the country is farther from the border than a few hours' drive—considerably less for most of the population. And, you of course

64. The Abortion Act of 1967, sec. 1 (1), provides that abortions are lawful if two physicians in good faith believe

- (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman, or any existing children of her family, greater than if the pregnancy were terminated; or
- (b) that there is a substantial risk if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Subsection 2 allows the examining physicians to consider "the pregnant woman's actual or reasonably foreseeable environment" when judging potential injury to herself and/or her other children.

remember, the Irish do not need passports to travel to the United Kingdom; the British like to pretend that Ireland never left the Commonwealth.”

“I confess that the situation is better than I thought,” Pyknites says, “but amending a constitutional text is cumbersome. In a representative democracy, you need only a shift in public sentiment and . . .”

“As on gun control in the United States?” Jacobsohn asks.

“That constitutional democracy,” Pyknites answers, “allows enthusiasts to quote only half of the relevant clause in an eighteenth-century constitutional text, adopted when muskets and pistols were single-shot weapons needed for defense against wild beasts and hostile Indians, and transfer that half-truth to automatic weapons with armor-piercing ammunition.”

“You left out several facts,” Deukalion interrupts. “First, the U.S. Supreme Court has interpreted the Second Amendment exactly as you do, only to guarantee states the authority to maintain militias, not individuals’ right to own guns.⁶⁵ Second, the gun lobby falsifies history. Most Americans in the late eighteenth century did not own guns, and states limited who could join the militia.⁶⁶ Third, you do not mention that gun manufacturers and the National Rifle Association offer tons of money to legislators to help them get reelected if they support an open market in deadly weapons. These same worthies also threaten to spend larger sums to defeat representatives who oppose allowing anyone with enough cash to buy an assault rifle. Legislators’ interests in funding their next campaign takes precedence over the safety of their constituents—and their children.”

“And you,” Pyknites responds, “omit at least one important fact: large segments of the American public love guns in a way that strikes outsiders as a dangerous worship of phallic symbols. Those people encourage legislatures to keep open their own access and their children’s access to deadly weapons. If arms manufacturers and their front, the National Rifle Association, are in effect bribing legislators, they’re wasting money. Most legislators who oppose strict gun controls are merely following their constituents’ wishes.”

“Views the NRA represents?” Deukalion replies. “If so, you’ve made my point about representative democracy. But most Americans are more intelligent than you believe, though I agree that many leaders of the NRA pimp

65. See, *inter alia*, *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); and *United States v. Miller*, 307 U.S. 174 (1939).

66. Sanford V. Levinson opened the scholarly debate with an article suggesting that the historical context of the Second Amendment raised serious constitutional problems for gun control legislation. “The Embarrassing Second Amendment,” 99 *Yale L. J.* 637 (1989). For responses that argue the contrary, see esp. Saul Cornell, “Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory,” 16 *Con'l Comm.* 221 (1999); Michael A. Bellesiles, “Suicide Pact: New Readings of the Second Amendment,” 16 *Con'l Comm.* 247 (1999); Don Higgenbotham, “The Second Amendment in Historical Context,” 16 *Con'l Comm.* 263 (1999); and Robert E. Shalhope, “To Keep and Bear Arms in the Early Republic,” 16 *Con'l Comm.* 269 (1999).

for the gun industry. Public opinion polls consistently show that a huge majority of voters favor stringent gun controls.”⁶⁷

“Our disagreement is about who governs. My basic argument for representative democracy is that a shift in public sentiment can shift parliamentary majorities, and you can easily have a new statute that better serves current moral evaluations.”

“I recall,” the chair intervenes, “that Professor Jacobsohn had put a question to Professor Whaide. Mr. Pyknites’s spirited intervention has undoubtedly given the Professor time to gather his thoughts.”

“Thank you,” Whaide says. “Mr. Pyknites adumbrates what could be a sound moral algorithm when he speaks of how deliberative democracies could handle problems like abortion.”

“With Professor Whaide’s permission,” Deukalion breaks in, “I must again point out that Mr. Pyknites spoke of how a representative democracy *should* handle problems like abortion; he did not tell us how any representative democracy *did* handle such problems. He also ignored what other constitutional democracies, such as France, Italy, and Spain, have done.⁶⁸ That’s not a good argument.”

“I think the professor knows,” Pyknites interrupts, “that I was referring to representative democracies that are also deliberative democracies.”

“Please, explain to a dumb professional soldier the distinction,” the chair asks.

“I mean a representative democracy in which decision makers look at every side of a problem and protect as best they can the moral and economic interests of all parties.”

“Of course,” Deukalion says, “all of us here want that kind of deliberation, but even long-established democratic systems seldom get it. And the problem goes beyond elected officials who’re looking over their shoulders to what a majority of their constituents want. When discussing abortion, Amy Gutmann and Dennis Thompson, two eloquent and talented proponents of deliberative democracy, do not offer the sort of deliberative example they advocate for others. They convincingly argue that decision makers should look at every side of a problem and protect as best they can the moral interests of all parties. Yet they evince small understanding of arguments for

67. According to Tom W. Smith, director of the General Social Survey of the National Opinion Research Center at the University of Chicago, three annual pollings of national samples showed that even before the tragic shootings in Littleton, Colorado, in 1999, “majorities of up to 90 percent back all [regulatory] measures except those that call for the outright outlawing of guns or restricting them only to police officers and other authorized persons.” Smith, “Gun Control Support Nearly Universal,” *Albuquerque Journal*, July 18, 1999 (reprinted from *Washington Post*). The full report of the results of the survey by the National Opinion Research Center can be found online at www.norc.uchicago.edu/online/gunrpt.pdf.

68. See Mary Ann Glendon, *Abortion and Divorce in Western Law: American Failure, European Challenges* (Cambridge, MA: Harvard University Press, 1987).

the fetus's right to life and ignore respected scholars who make such arguments—though they concede that these unexplored arguments are strong enough to deadlock the debate about abortion, at least for now.”⁶⁹

“Professor Whaide, would you continue?” the chair asks.

“Yes. I don't expect my reasoning always to triumph. Reason has limits, but David Hume was self-contradictory. If reason is a slave to the passions, why did he spill so much ink trying to reason with his readers? A public temper tantrum would have been more logically consistent with his claim. Even an appeal to self-interest is an appeal to an important form of reason, cost-benefit analysis. Reason isn't *always* a slave to passion, only sometimes. True, debate can be phlogistonian rather than intellectually persuasive. Even the brightest among us may be unable to convince others of anything beyond our own sincerity. I don't think the German and Irish solutions to abortion are ideal, but they're better than the American and Canadian.”

“Let's move on,” the chair says. “Minister Pilsudski?”

“Professor Whaide, are you familiar with Arthur Miller's play *The Crucible*?”

“The one about witch trials in Puritan New England, literary surrogates for congressional investigations during the McCarthy era? Yes, of course. I've seen it performed on the stage and in cinema. I also assign it in my graduate seminar.”

“Then you know what I'm going to ask?”

“Yes. Uniformity is not among perfectionism's goals. Citizens as well as officials should confront and decide moral issues on moral grounds. As the Pastor said, every society tries to solve moral problems. A decision for abortion on demand offers a solution. That this solution does not confront the moral issues or even competing interests does not make it any less a solution. Perfectionism encourages a sense of social and moral responsibility; it pushes citizens and public officials to confront the moral problems that public policies raise. Solutions will be less imperfect if political actors candidly admit they must make moral choices, truly listen to moral arguments on all sides, openly debate on moral terms, honestly make their decisions on what they judge are the most compelling moral principles, publicly justify their decisions on those grounds, and yet realize that agreement and self-satisfaction with that agreement do not mean they have reached the perfect solution. I do not doubt that many public officials are willing so to act. What I do doubt is that many officials will so act unless the political system rewards them for doing so.”

69. See Robert P. George, “Law, Democracy, and Moral Disagreement,” 110 *Harv. L. Rev.* 1388 (1997), who makes similar points. For an even more searing critique of the one-sidedness of Gutmann and Thompson's argument—and from a judge who boasts of his moral relativism—see Richard A. Posner, “The Problematics of Moral and Legal Theory,” 111 *Harv. L. Rev.* 1637, 1677 (1998).

“Are you advocating,” Pastor Glückmann asks, “Mr. Pyknites's deliberative democracy?”

“Partly,” Whaide admits. “What is missing in Gutmann and Thompson as well as in Mr. Pyknites's remarks is an affirmation that objective moral principles exist and that we can often approximate them, not merely compromise moral concerns through mutual sensitivity.”

“You are asking for a great deal,” Strega asserts. “What sort of institutional arrangements would reward public officials for frankly confronting moral problems?”

“As a philosopher,” Whaide replies, “I'm out of my jurisdiction when I tender advice about political processes and institutions. With that caveat, I'd recommend one institution and one process. Institutionally—I assume a successful constitutional text quickly becomes a nest of institutions—any basic constitutional document should contain normative language that unequivocally states a commitment to infusing public policy with certain values.” Sensing a reaction from Strega, Whaide bows to her and adds, “Begging the Minister's indulgence.” He continues: “As part of the process of civic education—which should include debate about and adoption of specific public policies—people can learn that these are not empty words but concepts around which civil society is organized.”

“Lots of luck,” Ion Zingaro says. “We can't persuade most citizens that Gypsies are their political and moral equals. According to the *Economist*, we're ‘at the bottom of every socio-economic indicator: the poorest, the most unemployed, the least educated, the shortest-lived, the most welfare-dependent, the most imprisoned, and yes, the most segregated.’”⁷⁰

“All the more reason to etch normative language into a constitutional text,” Whaide replies.

“I'm concerned about education, the old-fashioned three R's,” Strega says. “I fear that religion would become the fourth R in public schools. Your suggestions require the state to inject religion into curricula.”

“Morality, yes; religion, no. There's no defensible reason why children should be taught that murder, rape, and theft are matters of taste.”

“You take easy cases,” Strega notes. “And even they may not be easy, as Mr. Pyknites showed with inquisitors and Comanches. But what about divisive issues such as sex between consenting gay adults? How do we teach about that in public schools? If we do it in a nonjudgmental way, we raise moral and religious issues no less than if we teach that it is good or bad. What about a right of the terminally ill to end their suffering? These sorts of questions raise moral issues about which religious leaders bitterly disagree. What about religion itself? Is it better than atheism or agnosticism? Or

70. “Europe's Spectral Nation,” May 12, 2001, p. 29.

should we teach that some kinds of religion are better or that one is the very best?"⁷¹

"Teaching morality without teaching religion is difficult," Whaide admits, "but not impossible. At varying ages and grades, one could teach basic moral principles. As students mature, one could present the alternatives and the arguments for each. The greatest difficulty is to prevent such instruction from descending either to the lowest common denominator, to the typical liberal 'you have your preference, I have mine, and we can't judge between them' or the frequent fundamentalist response, 'The Bible (or the Qur'an) gives the right answer, so we don't have to think about the problem.' Instead, we can teach general moral principles and, while letting the children draw their own specific conclusions, expect them to be logical in their reasoning and insist that they know they are making choices that have serious consequences for themselves and others."

"Where will you find," Strega asks, "pedagogic paragons who won't use such instruction for indoctrination of their own sectarian beliefs or disbelief in religion? And when educators talk about consequences, they must include the next world. Someone earlier cited Hobbes's saying that the sovereign must be the head of the church, for the power to threaten a man with death pales beside the power to condemn him to hell for all eternity. Do you want a national church?"

"You know the answer to that."

"I know you'll deny you do and believe your denial is true; but your ideas would set us down that road. Let me shift a bit. What about religious schools?"

"What about them?" Whaide asks.

"Would you allow them no matter what they teach?"

"Of course. Only a totalitarian would not."

"Two things," Strega muses. "First, after a dozen years of religious indoctrination, would children really have a free choice about whether to choose religion over atheism? Second, aren't you logically bound to outlaw religious schools, or even religions, whose teachings contradicted your fundamental principles?"⁷²

"The family is usually in a much better position than a bureaucracy to know what's in a child's interests. Although some families are dysfunctional, they typically provide a warmer, healthier setting for children than do public institutions. Basically, I reject the idea that the state, on such an all-

71. For an effort to cope with these sorts of issues and maintain strict doctrinal purity, see Joseph Cardinal Ratzinger (later Pope Benedict XVI), *Truth and Tolerance: Christian Belief and World Religions*, trans. Henry Taylor (San Francisco: Ignatius, 2004).

72. Strega's argument parallels that of James G. Dwyer, *Religious Schools v. Children's Rights* (Ithaca, NY: Cornell University Press, 1998). See also the review by Stephen G. Giles, "Christians Leave Your Kids Alone!" 16 *Con'l Comm.* 149 (1999).

important matter as the relationship of people to their Creator, can legitimately impose a 'curriculum.' You're suggesting that the state force children to be free of God."

"Indeed! But you would coerce adults as well as children into accepting your version of morality by having the state incorporate those moral concepts into its ordinary laws. You would force citizens to be free of all practices you think enslave them, differently from but no less totally than addiction to narcotics?"

"It's not the same. First, religion isn't slavery. Second, religious commitments do not always last a lifetime. Every day, adults modify or even reject their parents' religious views. I agree that groups like the Amish pose special problems; and I share the misgivings of Justice William O. Douglas about allowing parents to deny their children further free public education after eight years.⁷³ But for the state to impose a uniform curriculum for religion—or morals—seems to me a giant step toward totalitarianism. My suggestions regarding moral education would by no means exclude a parental right to put children in other academically qualified classes or even schools to obtain alternative forms of moral education."

"The short answer," Strega snaps, "is that your ideas can work only in a confessional state."

"That's not true," Pastor Glückmann says.

"Good people," Colonel Martin intervenes, "we have explored this issue about as much as we fruitfully can. Once again, these debates have educated, and humbled, me. I had always thought of 'politics' as combining petty jobbery and gossip to help friends and punish enemies. Until now, I had not realized how thoroughly politics is enmeshed with morality. I now have a glimpse of its grander designs, which makes me recall that I once read that Aristotle referred to politics as the 'master art.'⁷⁴ Finally I understand what he meant. I also realize that, in many ways, I favor a perfectionist state. Perhaps all military men who take their profession seriously do. We live under a code of honor that sharply distinguishes between right and wrong. On the other hand, I wonder how many civilians share our clear notions. I also wonder how unclouded my own notions would be if the soldier's roles were not so narrowly defined. As did all of my brother officers, I had great difficulty in opposing the junta. The word *mutiny* stirs like fiery bile in a professional soldier's belly; obeying orders comes easily. We confronted a moral dilemma: obeying orders meant killing unarmed women; we would have behaved as despicably as did Chinese officers in Tiananmen Square. But heeding our consciences meant mutinying. Some chose to obey, others to disobey, still others to avoid choice. All of us had heavy hearts."

73. Discussed, in part, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

74. *Nicomachean Ethics*, bk. 1, ch. 2, 1094b.

"What caused you to make the choice you did?" the Jesuit asks.

"We humans are enormously complex beings, with vast talents for self-deception. None of us can ever be absolutely sure why he or she made a particular decision, at least one of serious import; but I remembered Charles De Gaulle's describing his choice in June 1940 as between honor and discipline. I believe—I hope—I chose honor, as he did."

"Is there a point to this reminiscing?" Strega asks.

"Forgive my rambling. I was trying to say that while my own preferences are clear, I am deeply concerned about dividing our people. Would the demands of a perfectionist state shred our society? Should we not confine perfectionist policies to areas in which there is widespread agreement? If not, I fear we will again find ourselves resorting to force on a large scale."

"The chair is saying," Pyknites notes, "that compromises are essential here. When morality is involved, it is usually better that government do less than more, to operate pragmatically rather than in a tightly principled fashion. That way we are likely to increase rather than decrease freedom."⁷⁵

"But," Whaide answers, "all public policy, even a policy of inaction, curtails some people's freedom. I recall a dissenting opinion by Oliver Wendell Holmes dismissing as a 'shibboleth' the notion that a citizen is free to do what he likes as long as he doesn't interfere with the similar right of others. That liberty, Holmes said, 'is interfered with by school laws, by the Post Office, by every state or municipal institution which takes [a citizen's] money for purposes thought desirable, whether he likes it or not.'⁷⁶ We enjoy a large amount of freedom because our neighbors do *not* have unlimited freedom—which is to say, everyone's freedom must be limited if we are to live together. Laws setting minimum wages and maximum hours, regulating sale of alcoholic beverages, banning slavery, and criminalizing traffic in addictive drugs as well as child pornography all directly attack moral problems by restricting some people's freedom. Pedophiles look on laws against adults' having sex with children as oppressive, and racists view laws against discrimination as crushing society's values.

"To repeat myself, every important governmental policy at least indirectly involves morality. If you merely want to increase freedom, repeal laws against parents' selling their children or factory owners' buying slaves or hiring goons to break strikers' skulls. You won't do those things, because freedom is not your principal goal. It is a means—a cherished means, but still only a means—to your government's principal goal: helping its people live good lives. Because I doubt we shall ever have unanimous agreement on what constitutes the good life, a perfectionist state should not try willy-nilly to

75. Some of what Martin and Pyknites say here reflects Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986), esp. p. 429.

76. *Lochner v. New York*, 198 U.S. 45, dis. op. (1905). *Lochner* was subsequently overruled.

outlaw practices some officials or even a majority of voters deem wrong. Unsupported by reasoned arguments, 'moral offensiveness' is not sufficient cause for governmental regulation. A perfectionist state, true to its principles, must move along the lines Mr. Pyknites claims for deliberative democracy, subject to the sorts of norms that Professor Deukalion includes in constitutional democracy. It rests on the belief that the roots, though not all manifestations, of morality are real and universal, not differentiated artifacts of various societies; it rests on the belief that we can *reason* together on all moral issues and resolve most of them. Government should not be restricted to negotiating *around* moral problems."

"If I may, Mr. Chairman," Wei puts in, "this debate is fascinating, but shouldn't these questions be addressed to whatever legislature and/or judiciary this caucus proposes? We are now discussing prudence, and, although all of us favor that virtue—and many of us are full of it—there is no way we can require others to be wise."

"Maybe not," Deukalion cuts in, "but we can establish processes that will force public officials to think and to give reasons for their decisions."

"This debate has made us all much wiser," Martin says. "Let us move ahead. Do we need further discussion? If not, let us decide on a basic governmental system. We face three choices: guided capitalism, representative democracy, or constitutional democracy. When we map institutions and processes under any one of those, we can insert such increments of consociationism and perfectionism as we wish."

"Question! Question!" several members call out.

"Very well," Colonel Martin says, "let us vote. Let us do so in reverse order of our discussions: first on guided capitalism, next representative democracy, then constitutional democracy."

"I object," Strega says. "We face three choices. In such situations, the first option voted on is very likely to lose, as Condorcet demonstrated in 1793.⁷⁷ Instead, we should use written ballots with each of us ranking our choices. If no proposal gains an absolute majority as first choice, we can then count second choices."

"I agree," Pyknites puts in. "But I offer a slightly different suggestion. Let's use the system the Estonian constitutional assembly employed: vote separately on each option, counting only positive votes. After the first ballot, we drop the proposal with the fewest votes, then vote again, this time on the remaining two."⁷⁸

"Very well, the Chair will treat it as an alternative motion. Do we have a second for either proposal?"

77. For a discussion, see Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964), pp. 85–87 and literature cited.

78. See Rein Taagepera, "Estonia's Constitutional Assembly, 1991–1992," 25 *JBS* 211, 223 (1994).

"I second Mr. Pyknites's proposal," Gregorian says.

"I second Minister Strega's proposal," Zingaro volunteers.

"Let us have a show of hands on Ms Strega's proposal," the chair asks. He looks around the room. "I count eight for. Those opposed?" He pauses. "I count twelve opposed, with four apparently not voting. The Minister's motion fails. All those in favor of Mr. Pyknites's motion? I count sixteen for, eight opposed. That motion is adopted."

Colonel Martin continues, "If there is no further procedural motion, we shall vote on each of the substantive proposals, counting only affirmative votes."

After the first balloting, the tally is constitutional democracy, 12; representative democracy, 10; guided capitalism, 2. "This count means that we proceed to choose between constitutional and representative democracy," Martin says. That count is 12-11 in favor of constitutional democracy, with one abstention. "For the record," the chair notes, "if we had been tied, I would have voted for constitutional democracy."

"Still, it was a very, very close vote," Pyknites says. "We should keep that fact in mind during further decisions."

"Mr. Chairman," Minxin Wei says, "may I make a practical proposal? In keeping with our earlier decision to look on all decisions as tentative until we have completed our work, I propose that we reaffirm that policy by agreeing that we shall reexamine this decision after we have discussed whether, in fact, constitutional democracy is a viable option for us."

"Do I hear a second?" the chair asks.

"Second," Pyknites says.

"Very well. This proposal is fully in keeping with the spirit in which we agree to proceed. All in favor? . . . I count twenty-one votes. The motion carries." Martin taps his gavel on the rostrum. "We are in recess until tomorrow morning at 0930."

The Possibility of Constitutional Democracy

We have now to consider what is the best constitution and the best way of life for the majority of states and men. In doing so we shall not employ a standard of excellence above the reach of ordinary men . . . or the standard of a constitution which attains an ideal height. We shall only be concerned with the sort of life which most men are able to share and the sort of constitution which it is possible for most states to enjoy.

ARISTOTLE

The following morning Colonel Martin gavels the caucus back into session. "Last night, we decided that we would try to create a constitutional democracy, *if* such a regime is feasible. We now address that issue. We have on board three scholars who can help us. I have asked them to focus on what they would consider 'internal' preconditions. We, of course, are free to question them about foreign affairs. Our first speaker is Professor Claude Sprachfehler of the University of Toronto."

At the podium, Sprachfehler smiles sheepishly. "I apologize, but I get very nervous before strange audiences; therefore, I want to read my paper rather than summarize it."

Minister Strega starts to speak, but the chair cuts her off. "We understand. The stewards will serve espresso around the room." The members of the caucus brace themselves.

Some Internal Preconditions for Constitutional Democracy

The most obvious constitutional democracy precondition is military and economic strength sufficient, either alone or in alliance with others, to withstand foreign aggression. However, this condition was excluded from discussion. A second obvious candidate would be a political culture receptive to constitutional democracy ideals. Later today, that issue will be focused on by Professor Francesca Vaccarino; it is not addressed directly here, though it will be touched on. A third candidate is a prosperity-producing economy. That, too, was excluded, because it will be analyzed by Professor John Maynard. In addition to these three, the following internal conditions are most likely to be constitutional democracy preconditions:

1. Absence of adamant opposition to constitutional democracy from the armed forces.
2. Presence of a sufficient number of citizens with constitutional democracy commitments to form a critical mass possessing the skills (a) to operate such a government and (b) persuade other citizens to accept constitutional democracy principles and its specific rules.
3. Open and reasonable communications efficiency within the general population and between government and the people.
4. A high literacy level.
5. Sufficient economic, ethnic, religious, and cultural homogeneity or a deep and widely felt toleration so that people can cooperate with each other.

The presence of all these candidates, as well as others such as a large, educated, and politically active middle class, would enormously increase chances of constitutional democracy's success. However, if the question refers to *preconditions*, each candidate should be looked at.

Military Neutrality

For any political system, at least passive acceptance by the armed forces is an absolute precondition. If those who virtually monopolize violence instruments are ready to turn their weapons against a regime, that regime will either conform to military demands or become a civil war victim.¹ The roll could be called of constitutional democracy fetuses aborted by military coups in Asia, Africa, and Latin America.

Although positive military support is always useful and sometimes, as in the Portugal constitutional democracy transition² as well as in your own, may be essential, that aid need not be necessary. Neutrality could be sufficient. However, one of the most important polity maintenance statecraft tasks is to persuade the armed forces to adopt the ethic of Anglo-American military professionals and abstain from further political intervention.³ Once in power, civilian leaders must lessen military hostility or continue military support.⁴

1. The shah of Iran, hardly a constitutional monarch, remained in power as long as the military and secret police remained loyal and were willing to shoot down the mullahs' rioters. Once the military's support faded away, the shah was doomed, as was the Old Communists' coup against Mikhail Gorbachev in 1991. See, generally, Said Amir Arjomand, *The Turban for the Crown: The Islamic Revolution in Iran* (New York: Oxford University Press, 1988), esp. chs. 5–8.

2. Factions within the Portuguese military played several rather complex roles in ending the dictatorship. See Nancy G. Bermeo, *The Revolution within the Revolution* (Princeton, NJ: Princeton University Press, 1986).

3. Samuel Huntington, *The Soldier and the State* (Cambridge, MA: Harvard University Press, 1957), saw the Prussian army as representing the paragon of military neutrality in politics. After World War I and during the Weimar Republic, however, the German army was a frequent player in

Civilian Leadership

Constitutional democracy will not appear by magic. As has been said by Philippe Schmitter, it must be chosen by "real live political actors."⁵ In short, leaders matter. Although they need not form an aristocracy based on family, wealth, or ethnicity, they must be an elite of considerable talent and probably education as well. A polity is doomed if that elite is so skill- and resource-deficient as not to be able to persuade others of constitutional democracy's desirability and later to move them to internalize needed system values. It is impossible in the abstract to accurately speak about the minimal size of this elite, but they must include leaders with political and economic expertise who can reach other elites as well as broad segments of the public. Below higher-echelon leaders, there must be a trained civil service as well as a judges corps either accustomed to working or ready to learn how to work within constitutional democracy.

India and Ireland were fortunate in these respects: trained civil servant cadres, experienced politicians, and seasoned attorneys were ready to run the new governments. Black Africa was unfortunate. Neither the British nor the French had trained many native civil servants or helped many locals gain experience in leadership positions—except as guerrilla band commanders.⁶ The Belgians treated the Congolese even more shabbily. "No colony had ever faced independence so ill-prepared," a UN official said. "No Congolese had ever taken part in the business of government or public administration at any important level. Only seventeen out of a population of 13.5 million had university degrees. There was not one Congolese officer in the Force Publique, which was to become the Armée Nationale Congolaise."⁷

Communications and Literacy

Interstrata political communications are preconditions. Language commonality and widespread literacy seem essential. If only Urdu is spoken by one group and only Chinese by another, the two have little hope of communicating complex ideas and cooperating politically. Nevertheless, it is shown by India and Italy that constitutional democracy can function

politics. And during the final stages of World War II, professional soldiers, not civilians, attempted to assassinate Hitler and the military negotiated surrender to the Allies.

4. See the discussion in Chapter Eleven.

5. "Interest Systems and the Consolidation of Democracies," in Gary Marks and Larry Diamond, eds., *Reexamining Democracy* (Los Angeles: Sage, 1992), 158–59. See also Nancy Bermeo, "Democracy in Europe," 123 *Daedalus* 159 (1994).

6. See H. W. O. Okoth-Ogendo, "Constitutions With Constitutionalism: Reflections on an African Political Paradox," in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley, eds., *Constitutionalism and Democracy: Transformations in the Contemporary World* (New York: Oxford University Press, 1993).

7. Brian Urquhart, "The Tragedy of Lumumba," *N.Y. Rev. of Bks.*, Oct. 4, 2001, p. 4

in a nation beset by a babel of tongues. India has about seventy different languages. And as is often true, language is linked to ethnic identity and pride,⁸ while hostility is provoked by certain "foreign" tongues. A complicated and not very happy compromise was worked out by the constitutional text framers under which Hindi became the official language, with English allowed for fifteen years (later extended). In addition, either Hindi or one of ten (later fourteen) regional languages could be established as official by state legislatures.⁹

A similar though less serious problem was suffered by Italy. In 1870, the Tuscan dialect, a modern version of Dante's language, was christened by the national government as "Italian." It was the mother tongue of those who lived around Florence and Siena and was spoken and read as a first or second language in the North as well as among the better educated throughout the peninsula. However, it was unintelligible to most people in the South and many in the North. Each region had its own language; some, like Romanesco,¹⁰ have a revered literature. Despite government efforts, "Italian" remained a foreign tongue to many millions of citizens until almost three decades after World War II. People from different areas, such as the Abruzzi, Bologna, Naples, Sicily, and Venice, were unable to understand each other, much less Alto Adige German or Val D'Aosta French. A high degree of language unification was finally, though still incompletely, brought about by television.

Yet India and Italy became constitutional democracies in spite of language diversity¹¹ and widespread illiteracy. Thus we should be careful not to overweight either factor. Even so-called developed countries fall short of "functional" universal adult literacy. About 21 percent of American adults cannot read English; in Britain, with a far smaller immigrant population, the rate is slightly higher.¹² Illiteracy can be partially compensated for by television and radio. If we can generalize from studies of

8. See, for example, Sumathi Ramaswamy, *Passions of the Tongue: Language and Devotion in Tamil India, 1891-1970* (Berkeley: University of California Press, 1997).

9. See the Indian constitutional text, Articles 343-51 and the Eighth Schedule; and the discussion in H. M. Seervai, *Constitutional Law of India*, 3rd ed. (Bombay: Tripathi, 1984), 2:23. Article 6 of South Africa's constitutional charter recognizes eleven official languages and instructs the government to "elevate the status and advance the use of" other indigenous languages as well as to "promote and ensure respect for languages," including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telugu, Urdu, Arabic, Hebrew, Sanskrit, and other languages "used for religious purposes."

10. Many northern Italians refer to the Roman dialect as Romanaccio; -accio is a suffix denoting grossness. More correctly, though not according to common usage, Romanaccio refers only to the vulgar slang used in Rome.

11. Another example is offered by Canada. Despite latter-day government efforts to respect Quebec's language and traditions, Canadians for generations maintained constitutional democracy while using English as the dominant language and letting the Québécois fend as best they could.

12. See "Does Class Size Matter?" *Economist*, July 31, 1999, p. 48.

the U.S. electorate, it is probable that citizens glean more politically relevant information from these two media than from newspapers and magazines. Even in a nation where such appliances are rare, literacy low, and communication between center and periphery poor, sufficient communications may be operative for constitutional democracy's purposes. Care must be taken here, as is warned by Robert A. Dahl,¹³ not to think exclusively in terms of Western models. It should be remembered that well into the twentieth century in the United Kingdom and the United States most political debates were carried on through public speeches. A great deal of communication can be sustained by less developed societies *within* face-to-face communities. And literate delegates can be chosen by each community as representatives to other political arenas. Thus an attenuated democracy form could immediately function even with small literacy and poor communications. Under such circumstances, constitutionalism would probably be damaged more than democracy, for basic rights would be unlikely to be understood by illiterates, and the likelihood would be that many rights violations would go undetected. Nevertheless, a form of constitutionalism, if not a robust form, might function passably well.

Peaceful Pluralism

"Nonviolent factionalism" is essential. Respect for human rights is required by constitutionalism. Negotiating and compromising—promise making and keeping—are required by democracy. Thus an essential question for constitutional democracy is how much factionalism can be tolerated. The question might be turned around: Can a free people exist without a high degree of factionalism? "Turbulence and contention," it was observed by Madison in *The Federalist* No. 10, have been the heritage of republics: "Liberty is to faction, what air is to fire." No matter how fully citizens agree about basic principles, they will inevitably divide along politically relevant lines.

Neither is the significance of economic differences denied,¹⁴ but another problem is the focus here. The world over, Samuel P. Huntington

13. *Democracy and Its Critics* (New Haven, CT: Yale University Press, 1989).

14. For studies of property as a continuing raw sore in American politics, see esp. John Brigham, *Property and the Politics of Entitlement* (Philadelphia: Temple University Press, 1990); Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985), and *Forbidden Grounds: The Case against Employment Discrimination Laws* (Cambridge, MA: Harvard University Press, 1992); Richard K. Matthews, *If Men Were Angels: James Madison and the Heartless Empire of Reason* (Lawrence: University Press of Kansas, 1995), esp. chs. 4-5; Stephen R. Munzer, *A Theory of Property* (New York: Cambridge University Press, 1990); Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (Chicago: University of Chicago Press, 1990); and Bernard Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980).

claims, the most volatile problems of domestic politics are now being generated by tribal hostility.¹⁵ A generation ago, it was thought by Karl Deutsch that as the world was shrunk by technology and social and economic mobility increased, differences between groups would decrease.¹⁶ He was only partially correct. Many of us have become more acutely aware that humanity shares a common fate, but many people have become more pugnaciously aware of membership in a particular tribe. Such membership is often a, if not *the*, principal source of identity and pride, with some neighbors perceived as both threatening and morally inferior. Tribes distinguish themselves by culture, religion, language, race, national origin, or all of these. The word *ethnic* is used here as shorthand for these markers of social and political difference.

Americans boast that their nation has been enriched by diversity. Nevertheless, discrimination against immigrants from "alien" cultures, whether Catholic, Jewish, Asian, African, or Hispanic, has not been stopped by repeated self-congratulations.¹⁷ Still, American difficulties are paled by those of many other countries. Not only have Burundi, Israel, Lebanon, Northern Ireland, Pakistan, Rwanda, South Africa, Sri Lanka, the Sudan, and the crumbs of Yugoslavia been ravaged by ethnic violence but also places as disparate in history and culture as Bulgaria, India, Iran, Iraq, Kenya, Nigeria, and Romania. Nor have these problems yet been resolved by Australia, Canada, China, Germany, Indonesia, Japan, Malaysia, the Philippines, Spain, Turkey, or the United Kingdom.

It is tautological to say that as long as groups war with each other they cannot live together in peace. It is impossible for constitutional democracy to survive among peoples whose mutual hatred boils into genocidal rage. But it is not implied that everybody must love everyone else. On the contrary, constitutional democracy might be begun where ethnic tensions are rife and even occasional marauder bands assault other group

15. See esp. Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 1996); Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985); Robert A. Goldwin, Art Kaufman, and William A. Schamba, eds., *Forging Unity Out of Diversity: The Approaches of Eight Nations* (Washington, DC: American Enterprise Institute, 1989); Milton J. Esman, *Ethnic Conflict in the Western World* (Ithaca, NY: Cornell University Press, 1977); Michael Ignatieff, *The Warrior's Honor: Ethnic War and Modern Conscience* (New York: Henry Holt, 1998); Dennis L. Thompson and Dov Ronen, eds., *Ethnicity, Politics, and Development* (Boulder: Lynne Rienner, 1986); Barry R. Chiswick, ed., *Immigration, Language, and Ethnicity: Canada and the United States* (Washington, DC: American Enterprise Institute Press, 1992); and Laura Silber and Allan Little, *Yugoslavia: Death of a Nation*, rev. ed. (New York: Penguin, 1997).

16. *Nationalism and Its Alternatives* (New York: Alfred A. Knopf, 1969).

17. See Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, CT: Yale University Press, 1998).

members.¹⁸ That conflict can be reduced by the new government's prosecuting "hate crime" perpetrators. A sense of security and limits on permissible behavior can be built.

At times, martial rule may be necessary for order preservation and rights protection. For centuries, this tactic has been used by the British for control over Ireland. Because of violence among India's ethnically fractured population, "a stunning array of legislation"¹⁹ gives the military control over large areas of unruly provinces. Between 1951 and 1970, the army was called on more than 450 times to quell domestic violence, and in the eighteen months between June 1979 and December 1980, another 64 times.²⁰ During the last several decades, I have lost count.

Consociationism can be congruent with constitutional democracy. Federalism can provide additional ethnic autonomy and can mix with consociationism and constitutionalism. Examples abound. Swiss federal arrangements were made easier by the then rather clean ethnic-group geographic distribution. Similarly, in Canada federalism was attractive because of the concentration of one of the two conflicting European cultures in a single province. India's initial choice was also driven by the country's myriad divisions. More or less along language lines,²¹ the states of Andhra, Masarashtra, Gujarat, Harvana, and Punjab were later carved out. In 1978, analogous problems were faced by Spain's constitutional text framers in confronting Basque and Catalan separatism, but the Spanish opted for "autonomous communities" rather than formal federalism.²² According to Article 2 of the constitutional text:

18. See, for instance, Saul Newman, *Ethnoregional Conflict in Democracies: Mostly Ballots, Rarely Bullets* (Westport, CT: Greenwood, 1996).

19. Stephen P. Cohen, "The Military and Indian Democracy," in Atul Kohli, gen. ed., *India's Democracy* (Princeton, NJ: Princeton University Press, 1988), p. 128.

20. *Ibid.*, p. 124.

21. Due to invasions, migrations, and shifting boundaries, no Indian state is linguistically homogenous. In Assam, for example, only about 60 percent of the population speak Assamese as their first language.

22. Articles 143–58 laid out the specific powers and duties of such communities. For analyses, see Andrea Bonime-Blanc, *Spain's Transition to Democracy* (Boulder: Westview, 1987); Michael W. Giles and Thomas D. Lancaster, "Political Transition, Social Development, and Legal Mobilization in Spain," 83 *Am. Pol. Sci. Rev.* 817 (1989); José Maria Maravall and Julián Santamaría, "Political Change in Spain and Prospects for Democracy," in Guillermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead, eds., *Transitions from Authoritarian Rule: Southern Europe* (Baltimore: Johns Hopkins University Press, 1986); and Peter McDonough, Samuel H. Barnes, and Antonio Lopez Pina, "The Growth of Democratic Legitimacy in Spain," 80 *Am. Pol. Sci. Rev.* 735 (1986).

Alec Stone Sweet believes that constitutional usage has changed Spain pretty much into a federal state: *Governing with Judges: Constitutional Politics in Europe* (New York: Oxford University Press, 2000), p. 64; here Stone Sweet follows Robert Agranoff, "Federal Evolution in Spain," 17 *Int'l Pol. Sci. Rev.* 385 (1996).

The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards, and recognizes and guarantees the right to autonomy of the nationalities and regions which make it up and the solidarity among them.

A more radical solution is offered by secession.²³ Splitting a country into several independent nations, each with its own ethnic identity, is likely to be effective where antagonistic ethnic groups live in separate areas, as in the old Czech and Slovak Republic. Ethnic divisions may not follow geographic lines, and even when they do, a majority may be willing to pay heavily in blood for national unity, as was learned by Basques, Ibo, Kurds, and Sikhs and perhaps will be learned by Québécois. In the United States, unity was eventually bought at a gory cost; the price and degree of unity for the other countries remain to be seen.

The least evil outcome might be for minorities to be pacified with guarantees of rights protection. However, if that guarantee could be trusted and kept, secession would not be needed. We see a tragic American example, though it concerned regional rather than ethnic groups. On the eve of the Civil War, Congress, by the required two-thirds vote of both houses, proposed an amendment to the constitutional text that would have formally and forever transferred all power over slavery within the states to the states themselves.²⁴ Although the Supreme Court had ruled that a presidential signature on a proposed constitutional amendment was unnecessary,²⁵ James Buchanan signed the resolution. Later, in his inaugural address Abraham Lincoln said he supported the amendment's purpose that "the federal government, shall never interfere with the domestic institutions of the states, including that of persons held to service,"²⁶ a policy he believed was already constitutional law. Nevertheless, the amendment, which ironically would have become the Thirteenth, failed to convince Southern leaders that their interests were still safe within the Union.

23. For most Americans, the word *secession* causes an involuntary reflex of revulsion, linked as it is in their history not only to harsh civil war but also to desperate efforts to maintain slavery. But as the breakup of the Soviet Union demonstrated, secession may be a move toward peace and freedom. For a dispassionate study of the problem of constitutional failure and the breakdown of the constitutional order, see esp. Mark E. Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton, NJ: Princeton University Press, 1998).

24. Section 1 of the proposed amendment read:

No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of the said State.

25. *Hollingsworth v. Virginia*, 3 Dall. 378 (1798).

26. *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler (New Brunswick, NJ: Rutgers University Press, 1953), 4:262. The best discussion of the Corwin amendment and, in the American context, the general problems of cohesion versus secession is Brandon, *Free in the World*.

Where ethnic groups are mingled together and not apt to respect each other's rights, population exchanges might be possible. Attendant hardships might make this policy unattractive, though far less so than the Christian-Muslim slaughter in Yugoslavia. And if exchanges were negotiated so that no one became stateless, some harm could be averted. Other solutions include persuading smaller groups to accept a large degree of culture assimilation. However, because persuasion often involves coercion, it may pose serious normative problems. Forced culture homogenization, such as English attempts to eradicate Catholicism from Ireland or more recent Bulgarian efforts to Slavicize ethnic Turks and make them renounce Islam,²⁷ violate constitutional democracy principles.

More tangled normative problems are posed by less intrusive assimilation methods, such as the "melting pot": immigrant groups are pushed to adopt dominant values, customs, and language—to become ingredients in a cultural stew. Leaving aside the question of the extent to which this model fits U.S. experience,²⁸ the degree to which this strategy would result in minority coercion is problematic, for informal government pressures are often powerful. In the nineteenth century, for example, it was perceived by American Catholic bishops that "neutral" public schools were educating students not merely to become good citizens but good *Protestant* citizens.²⁹ To protect against this religion indoctrination, parochial schools were established by the bishops. A century later, similar charges of imperialism were voiced by blacks, women, and gays. In response, many universities adopted Afro-American, Women's, and Queer studies programs to explain and advance values different from those of the dominant culture.

The adjective *tangled* was carefully chosen for the problems culture poses for constitutional democracy. Three vectors intersect: First, eth-

27. Article 11 (4) of the Bulgarian constitutional text that came into force after the revolution bans political parties founded on ethnic or religious lines, and Article 44 (2) prohibits organizations that call into question the nation's territorial integrity or foment ethnic or religious hatred. In April 1992, six judges of the Constitutional Court held that these provisions outlawed the Movement for Rights and Freedom, a party with 99 percent Turkish membership—and incidentally had the third largest number of deputies in Parliament. The constitutional text, however, requires that seven of the twelve judges must agree on such a decision. Five of the twelve disagreed with the majority; the twelfth judge was ill and did not participate. For details, see "Turkish Party in Bulgaria Allowed to Continue," *1 East. Eur'n Con'l Rev.* 11 (Summer 1992).

28. See the challenge by Nathan Glazer and Daniel Patrick Moynihan, *Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians, and Irish of New York City* (Cambridge: MIT Press, 1963), discussed below.

29. For a fascinating study showing that the bishops' perception was essentially accurate, though incomplete, see Richard D. Mosier, *Making the American Mind: Social and Moral Ideas in McGuffey Readers* (New York: Columbia University Press, 1947); and John T. McGreevy *Catholicism and American Freedom: A History* (New York: W. W. Norton, 2003), esp. introduction and ch. 1. See, more generally, Jay P. Dolan, *The American Catholic Experience: A History from Colonial Times to the Present* (New York: Doubleday, 1985), ch. 10.

nic groups are apt to view their own heritage as the best and therefore to proselytize, perhaps without being aware of it. Second, a dominant group is likely to exert strong, if informal, conformity pressures on other citizens. This interference may be subconscious through insistence on specific customs and linguistic forms as "correct" or more directly through job control and university admission. Third—and here's the rub: denying dominant group members the right to proselytize or influence public policy is no less a violation of constitutional democracy than denying those rights to smaller ethnic groups.

Where ethnic loathing is present, solutions are likely to be found, if at all, only in government-brokered armistices, and political institution design would be of great significance in securing peace. Consociationalism could help. The objective would be political pluralism organized along the lines of what Nathan Glazer and Daniel Patrick Moynihan call a "smorgasbord,"³⁰ which, rather than trying to blend citizens into a single culture stew, recognizes a variety of culture options, all sharing a commitment to constitutional democracy.

Further, mutual consent to secede, federalize, regionalize, assimilate, or coexist might come *after* rather than *before* establishment of constitutional democracy. Securing such a settlement—and then creating conditions it would benefit most factions to continue—would be the primary statecraft task.³¹ In that process, simultaneously missionary and pastoral, allowing citizen participation would promote interest clarification to each other and, hopefully, peaceful negotiations.

It is directly argued by many pluralism theorists that chances for stability greatly increase when economic and ethnic lines crosscut rather than parallel.³² If ethnic group members are scattered across all economic classes, economic policies are less likely to impact different ethnic groups unequally. Moreover, mutual trust might be helped by goal clarification and interest bargaining, as well as by promise making and keeping. If so, education of current and future generations in constitutional democracy principles would be easier. If, however, hostility remained high and trust low, secession might be the only peaceful alternative.

A summary: It is argued that successful constitutional democracy establishment is dependent on only three of the five candidates examined: military neutrality; an energetic, determined, and skilled pro-constitutional democracy leadership cadre; and a peaceful pluralism

30. *Beyond the Melting Pot*.

31. Giuseppe Di Palma, *To Craft Democracies* (Berkeley: University of California Press, 1990), wrote about the importance of transitional political agreements between authoritarian leaders and dissident groups. His reasoning applies equally well to disputes among ethnic groups.

32. David B. Truman offered the classic argument: *The Governmental Process* (New York: Alfred A. Knopf, 1951).

commitment or peaceful separation acceptance among the population. It is not contended that constitutional democracy success chances would not be enhanced by the presence of many other candidates.

Demos Pyknites gains recognition. "I ask the Chair's indulgence, but Professor Sprachfehler's first 'condition' or 'precondition' identifies the eight-hundred-pound gorilla that has been sitting among us: the intentions of the Chair and the Chair's military colleagues."

"I thought," the chair interrupts, "that we had been clear about our intention to step aside as soon as this body and the people can constitute and operationalize a new political system."

"We have heard that, yes. But—no disrespect intended—we can't help wondering what, if any, strings are attached. Will you, for instance, insist on an amnesty or issue such a proclamation yourselves? Will you demand guarantees of the military's autonomy from regular political processes, say, in control over your budget and promotion of officers?"

"I can speak for myself and I hope for my brother officers as well. Emphatically no to all of your questions. I understand your concern, but remember that the atrocities that sickened us all were committed by the so-called Special Guards and the secret police—euphemisms for thugs with licenses from the government. All of us who rebelled against the junta are colonels. None of us was ever in a policy-making position within the government, and thus none of us needs amnesty. As I've said, the decision to disobey the junta was difficult for all of us, because we were and still are professional soldiers. But that decision was basically a moral one; we could no longer stomach a regime that had become so perverted and corrupt. The past few weeks are as close as any of us have ever come to exercising political power; and as reasonably intelligent and devoutly patriotic men, we want our country to be governed under a fair and efficient political system, not to govern. I cannot promise that if this new government becomes oppressive and corrupt like the old regime, we shall only sit in our barracks and drink; but I can promise that we are not seeking special benefits for ourselves or our profession.

"Let me speak more generally about the officer corps as a whole. We colonels will soon die or retire, and others will take our places. Therefore, this caucus must think hard about how to address the military as a whole. It is essential that you or the new government establish relationships between the regime and the military like those existing in Britain and the United States. You must devise institutions that make military officers believe that constitutional democracy or whatever other regime you bring into being respects them and is worthy of their respect."

"I hope you understand," Pyknites says, "that it was necessary to get this matter out in the open. I thank you, as I believe we all do, for your response." At that point, the caucus gives a standing ovation.

The chair taps his gavel. "Thank you. Now, Ion Zingaro has a question."

"It is for Professor Sprachfehler. Are you familiar with our ethnic diversity?"

"In general, yes."

"Then you know we are a conglomeration of Protestants, Jews, Catholics, Muslims, each uneasy in the company of the others as well as of the approximately one-sixth of us who say they are agnostic or atheist. In addition, we have a black community, about sixty thousand Gypsies, almost twice as many people of Chinese origin, and a large number of Catholic immigrants from Asia and Latin America. There is long-standing friction between Catholics and Protestants as well as among Protestant sects. Catholics whose families have been here for generations don't trust their immigrant coreligionists. Many Jews are Sephardic refugees from Iran, Iraq, and North Africa. Their culture does not sit well with Jews who come from families that have been here for a couple of centuries. And hostility exists between all Jews and Muslims. And, of course, everybody hates Gypsies."

"What's your question?"

"That's background for my question. You speak of democratic processes as generating trust among hostile groups, but I'm certain that most of our people, Christians, Jews, or Muslims, would vote out of office any party whose leaders sat down and negotiated with Gypsies. And I suspect that Christians and Jews would be very leery of parties that contained large numbers of Muslims, as Muslims would be of parties that advanced the interest of Jews."

"Perhaps you're right," Sprachfehler says. "Majority hostility can create smaller group unity; if mixed with ethnic hatred, civil war may be produced. If that's the case, either country division or a regional autonomy form should be seriously considered. One of your first leadership tasks is public policy creation that discourages violence. Your people need not love one another, only be willing to live together in peace. You must convince group leaders of their long-term interest in living together in harmony, then help them convince their own people. Separation is the only peaceful alternative."

"Radically decentralized federalism and secession," Jessica Jacobsohn breaks in, "create problems for minorities within minorities, as I've mentioned. Muslims are not apt to treat Christians, Jews, or Gypsies any better than those groups have treated Muslims.³³ And if Muslims install Shari'a rules, I, for one, won't tolerate 'local autonomy.'"

"I agree. If local autonomy is adopted, it must have a universal rights floor under it."

33. For an account of the mutual hatreds existing on the cusp of World War II among the various peoples of Yugoslavia, including those generated by Muslims' rule over Christians and Jews in Bosnia, see Rebecca West, *Black Lamb and Grey Falcon: A Journey through Yugoslavia* (New York: Penguin, 1940), esp. pp. 293-413.

Anita Baca intervenes: "Professor, I must share my horror at forcibly moving populations. It, like, totally shocks me. I've read about what the Bulgarians did to Turks after World War I and again in the 1980s and what the Czechs did to the Sudeten Germans after World War II.³⁴ And the Serbs' ethnic cleansing in Bosnia and Kosovo sickened all civilized people. So did the Kosovars' revenge. Human beings aren't trees that can be transplanted, right?"

"Right; but, please, forced population transfer was called a 'lesser evil'—lesser than leaving people to be murdered in a Bosnia- or Kosovo- or Rwanda-style civil war. My message is simple: if national unity is to be kept, a minimum of mutual trust must be felt. If that trust isn't felt at the beginning, it must be created, the nation dismembered, dissidents jailed, or a civil war fought."

Pastor Glückman speaks up: "To hold a country together, martial law may sometimes be necessary, and that raises additional difficulties. You cite British policy in Ireland, which brought terror and civil war. India's experience doesn't encourage me. Martial law undercuts respect for constitutional democracy and also encourages military officers both to ignore equality before the law and to think they can govern more wisely than civilians."

"Agreed," Sprachfehler responds. "Martial law is at best a short-term palliative. Other less radical means exist. In the American South after the School Segregation Cases, martial law was not invoked by Dwight Eisenhower and John F. Kennedy, but troops were sent into Alabama, Arkansas, and Mississippi to protect blacks' rights. Eventually, racial equality was accepted by most white Southerners, though it is still bitterly resented by some of them. Constitutional democracy was helped by military force. It's prudent to be worried. There is no short-run cure for ethnic hostility. Life hasn't been easy in any multiethnic society; it will be especially difficult for you, because almost none of your people have lived together as *citizens* with members of other groups. But the situation is not hopeless."

Václav Pilsudski, the minister of justice, speaks: "I'd like to shift the topic. What's your assessment of our chances of our having a critical mass of civil servants, including judges, to make constitutional democracy work?"

"Well," Professor Sprachfehler says, "you face an Eastern Europe situation more than an Africa situation. You have a trained administrative cadre and educated judges, though it is not clear how many of them have a constitutional democracy commitment. However, most administrators and judges have experiential learning capabilities as well as future anticipation abilities. Self-interest may tell them their careers are dependent on becoming good constitutional democrats. Moreover, though the special knowledge required

34. See Alfred-Maurice de Zayas, *A Terrible Revenge: The Ethnic Cleansing of the East European Germans, 1944-1950* (New York: St. Martin's, 1986).

for governing was vastly underestimated by Lenin in *State and Revolution*, it is possible to carry on many government operations with noncareer officials. Eamon DeValera was a high school teacher, Václav Havel a playwright, and Ronald Reagan an actor in B-movies before becoming effective government leaders. The U.K. and U.S. practice of choosing amateurs as judges, legislators, and administrator chiefs may not be ideal for a modern political system, but government efficiency and citizen freedom are often in tension. In sum, your road will be rocky, but your chances seem good to me.”

As Professor Sprachfehler finishes, Professor John Milton Maynard, an economist from the Harvard Business School, enters the room. He is wearing tennis clothes and carrying a Durbin racket. Without waiting for an introduction, he places his racket on the podium and begins.

Economic Preconditions

I had the pleasure of sitting in on your debates the last few days. That made my assignment easier. You’ve covered much of the ground I had planned to go over, so my message can be short, though not simple.

A change in political systems does not depend on the efficiency of the existing economy; indeed, the relationship may be inverse. It is the economically dissatisfied who are apt to demand political change; the prosperous seldom do. Thus, one cannot say that a certain level of income is a precondition, in a strict sense of that term, at the beginning of any kind of political regime. But one can say that a marked—I like that word; it seems definite but in fact is vague—improvement in general economic conditions is critical to a regime’s survival. I also like the word *critical*. Many patients in critical condition die, while many others live. Thus the word conveys a sobering message while leaving open a handy exit if things improve.

“Cute, but what’s the point?” Strega asks.

Thank you. My point is that some new regimes have survived over the long haul despite failing to make dramatic economic improvements. Yesterday, someone cited two constitutional democracies, India³⁵ and Ireland. Ireland has made sizable economic strides only in the past fifteen years, and India, though it still suffers from widespread poverty, has made great progress only in the past decade. If you want to include other kinds of regimes, you might look at Spain during most of Franco’s reign,

35. For studies of India’s political economy, see esp. Lloyd I. Rudolph and Susanne Hoebler Rudolph, *In Pursuit of Lakshmi: The Political Economy of the Indian State* (Chicago: University of Chicago Press, 1987), and Pranab Bardhan, *The Political Economy of Development of India* (New York: Oxford University Press, 1999).

China under Mao, or Kenya under Daniel Arap Moi. All endured decades of poverty. A constitutional democracy could remain consistent with its own ethic, fail to create more prosperity, and still be viable when economic causes were not among the basic forces behind the change or the level of income was such that people were willing to endure some financial privation for the sake of political goods.

Since World War II, it is clear that the chances of some form of democratic regime’s surviving are heavily reinforced by that government’s producing a real measure of prosperity. Although others have reached similar conclusions,³⁶ Adam Przeworski and Fernando Limongi have given the most succinct statement of the complex relations here: “The emergence of democracy is not a by-product of economic development. Democracy is or is not established by political actors pursuing their goals, and it can be initiated at any level of development. Only once it is established do economic restraints play a role: the chances for the survival of democracy are greater when the country is richer.”³⁷ They go on to say that current wealth is far less important than whether income is rising or falling. Thus democracy has a better chance of surviving in poorer countries where economic conditions are improving than in richer countries where income is falling.

Yesterday, you debated whether economic conditions were at the root of the junta’s overthrow. If the majority is correct, you can have a wide degree of constitutional freedom and democratic control over public policy. But that correctness would not mean that improving the economic status of your citizens will not affect the lifespan of your new polity.

My message, I said, is not simple, but it should be clear: although economic change is not a precondition for the birth of a constitutional democracy, it is very likely to be a *postquisite* for its long-term survival. Some authoritarian regimes have been quite adept at promoting economic development—Lee’s Singapore and Pinochet’s Chile come quickly to mind—but most others have not. And, most decidedly, the argument that economic development yields political freedom is false. Still, if I disagree with Minister Strega on the necessity of economic reform’s preceding political reform, I agree with her that you will need

36. See, for example, the essays by William Glade, “On Markets and Democracy”; Cal Clark, “Modernization, Democracy, and the Developmental State in East Asia: A Virtuous Cycle or Unraveling Strands?” Steve Chan, “Democratic Inauguration and Transition in East Asia”; Joseph S. Berliner, “The Longest Transition”; Jeffrey Herbst, “Understanding Ambiguity during Democratization in Africa”; and Peter M. Lewis, “A Virtuous Circle? Democratization and Economic Reform in Africa”—all in James F. Hollifield and Calvin Jillson, eds., *Pathways to Democracy: The Political Economy of Democratic Transitions* (New York: Routledge, 2000).

37. Adam Przeworski and Fernando Limongi, “Modernization: Theories and Facts,” 49 *World Pol.* 155, 177 (1997).

much—and intelligent—governmental regulation of the economy both to advance and protect your economy.

I stress the last point. Foreign investors will be swarming around you like buzzards, ready to pick your bones. Bankers, yours and foreign, will be anxious to make speculative loans, hoping the World Bank or the International Monetary Fund will bail them out if projects fail. Many of my colleagues have preached the virtues of classical economic theory and its public-policy child, laissez-faire. They disregard the generations of suffering that combination has caused. Entrepreneurs are out to make money; it's what they do. If in the process they wreck lives, they soothe their consciences by claiming they have also created wealth for yet other people. Foreign entrepreneurs have no reason to care what carnage they leave behind in somebody else's country. If you let robber barons roam freely about your house, they will pillage.

I've said enough. When I advised governments in Russia and Eastern Europe, I always stressed the necessity of privatization—a painful process, but like taking adhesive tape off a hairy part of the body, it is least painfully done when done swiftly. Because your economy was and remains mostly private, you do not face such problems. Let's move to discussion.

"Professor," Minister Strega asks, "if, in fact, economic anger had brought about the junta's downfall, how would your conclusion change?"

"Then I would think that some economic reform, though still not a condition for the beginning of constitutional democracy, would be more urgently needed. Because most economic reforms cause a great deal of short-term suffering, constitutional democracy, like representative democracy, has huge difficulty carrying out radical reform. Policies whose pain is sharp can bring harsh punishment at the polls. According to Jon Elster's theory, for democracy, (1) basic economic reform—he was concerned mainly with privatization but his reasoning applies more generally—presupposes reform of prices, for labor as well as goods; (2) reform of prices must reflect the market, again for labor as well as goods; (3) democratically responsive government cannot survive price reforms that either keep the worst-off poor or the best-off rich; but (4) a basic economic reform to a true market economy will produce enormous disparities in wealth and cause high unemployment or inflation or both.³⁸ Hence this sort of economic reform cannot occur simul-

38. Jon Elster, "The Necessity and Impossibility of Simultaneous Economic and Political Reform," in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley, eds., *Constitutionalism and Democracy: Transformations in the Contemporary World* (New York: Oxford University Press, 1993); see also J. C. Sharman and Roger E. Kanet, "International Influences on Democratization in Postcommunist Europe," in James F. Hollifield and Calvin Jillson, eds., *Pathways to Democracy: The Political Economy of Democratic Transitions* (New York: Routledge, 2000).

aneously with or soon after establishment of democracy. Constitutionalism erects additional barriers by morphing property rights into constitutional rights, thus preventing, as in India, some important phases of reform."

"Pardon me," Jacobsohn interrupts, "but didn't Elster qualify his claims? Was he as dogmatic as you make him out to be?"

"Of course. That's why I can cite him and still argue as I do. Authoritarian regimes may seem to have an easier time generating economic development than hybrid democracies, but their record is poor, and they carry a risk of high—and permanent—damage to this caucus's goals."

The chair turns to Maynard. "Professor, we thank you for your time and comments. We shall certainly give them due weight . . . Let us take a fifteen-minute recess, fifteen minutes not sixteen, and take up the issue of political culture."

The next speaker, Professor Francesca Vaccarino of the University of Rome, appears fourteen minutes late, meticulously dressed in a dove gray silk suit. She ignores Colonel Martin's displeased glare, puts on a pair of black horn-rimmed glasses, picks up a sheaf of handwritten notes, and begins.

Political Culture

I constructed my paper without the opportunity to read the words of my colleagues, so there is—how does one say?—overlap. I shall attempt not to repeat them. I must also apologize that my English is awkward. Alas, my message is also complex. Political culture is very important to any regime. In fact, there must be what Harry H. Eckstein referred to as "congruence" between a political culture and any viable political system.³⁹ *Dunque*, we can say that a political culture congruent with constitutional democracy is a *condition* for the survival of such a regime.

But the problem is not simple. I stress you two causes. First, no particular political culture is uniquely necessary. Every constitutional democracy that has endured across several decades is multicultural. Even the United Kingdom has historically included Scots, Welsh, and Irish alongside Anglo-Saxons; more recently, of course, Pakistani, Indians, Arabs, and West Indian blacks form sizable minorities. Nevertheless, some political cultures are incompatible with constitutional democracy. There may be, as in Israel among Jewish groups, "resentment, and even loathing and lasting hatreds,"⁴⁰ but those people must be willing to live

39. Harry H. Eckstein, "A Theory of Stable Democracy," in his *Regarding Politics* (Berkeley: University of California Press, 1992); "Russia and the Conditions of Democracy," in Harry H. Eckstein, Frederic J. Fleron Jr., Erik P. Hoffmann, and William M. Reisinger, *Can Democracy Take Root in Post-Soviet Russia?* (Lanham, MD: Rowman and Littlefield, 1998); and Harry H. Eckstein and Ted Robert Gurr, *Patterns of Authority* (New York: Wiley, 1975).

40. Avishai Margalit, "Israel: Why Barak Won," *N.Y. Rev. of Bks.*, Aug. 12, 1999, p. 47; and

together in peace. There must be *fiducia*—you say “trust”?—not trust that others will want wise or just policies but that they will behave as decent citizens. Democracy, Taylor Branch has told, requires “having faith in strangers.”⁴¹

My ultimate words predict the second cause: it is possible that government and parts of civic society can, if not create such a culture, at least plant and nourish seeds. Professor Maynard’s word *postquisite* is pleasing to me. At the initiation, there need not be a plenum of trust, only a willingness to see if other groups can keep their word and, meanwhile, a commitment that one’s own group will behave honorably toward others. If that plant takes root, then the needed culture can grow.

Allora, I step back and explain you what I mean by political culture. Like a nation’s physical setting and resources, customs and ideals influence its political character and operations. Social scientists have invented the expression *political culture* to encompass these politically relevant ideas and habits. That term announces that norms of conduct, patterns of action, symbols of good and evil, and even fundamental notions about the nature of human beings and God help shape people’s *vista* of politics, what sorts of political systems they judge legitimate, what sorts of institutions and policies they accept as valid, and how they treat and want government to treat fellow citizens. Three sets of beliefs are especially important: about a deity, about authority, and about humanity. If most modern nations and all constitutional democracies are multicultural, it must follow, I say of new, that every constitutional democracy, perhaps every nation, possesses several political cultures.

Religion, the state, and citizenship interact at the abstract and concrete levels. Indeed, each is merely an ingredient; their interactions create the cultures themselves, and those different cultures interact—sometimes they clash—with each other. Today I speak you mostly about interactions.

People who believe in capricious deities are apt to view life and politics differently from people who believe in a just deity who loves humanity.⁴² Those who deny a deity may also differ from these others about political fundamentals. Faith or disbelief in divinely ordained principles can have gross impacts on how people view political legitimacy. Religions usually codify principles and stabilize organizations to teach them, make them more specific, and enforce them. When a people have piety,

Charles S. Liebman, “Jewish Fundamentalism and the Israeli Polity,” in Martin E. Marty and R. Scott Appleby, eds., *Fundamentalism and the State: Remaking Politics, Economics, and Militance* (Chicago: University of Chicago Press, 1993).

41. Quoted in Stanley N. Katz, “Does Constitutionalism Require a Civil Society?” Jefferson Lecture, University of California, 1999.

42. See Lucian W. Pye, *Politics, Personality, and Nation Building: Burma’s Search for Identity* (New Haven, CT: Yale University Press, 1962).

the political system must either conform, at least overtly, to dominant theological principles or battle with religious leaders.

According to me, Professor Sprachfehler is correct to speak against determinism. Politics may gain the people’s loyalty even against clerical resistance. But, I pray, note well I say *may*. Ireland provides an example. During the nineteenth century, when the British tried to use the Vatican to repress Irish nationalism, Irish leaders made an answer: “We get our religion from Rome but our politics from home.” And many of the parish priests, ardent nationalists, agreed with the politicians and disagreed with their bishops and the Vatican. *Ecco*, the conflict was not clergy versus popular leaders, but some clergy and popular leaders versus other clergy. The story repeats itself during the civil war in the 1920s, when Irish bishops excommunicated members of the Irish Republican Army. Of new, the village priests were often nationalists. Thus, the IRA could be both vehemently anticlerical and devoutly Catholic.

When religious beliefs are widely and deeply held and political leaders oppose those beliefs, it is likely to take a cataclysmic event for political leaders to win a quick and telling victory. It is improbable, for example, that any Japanese leader in the 1940s could have vanquished Shintoism without a disastrous defeat like that nation suffered in World War II.⁴³ Even Lenin and Stalin were unable to erase Christianity in Russia or Islam in the Central Asian republics.⁴⁴ The Soviets were, as Americans say, ahead in the game, but the Orthodox Church and Islam, all and two, survived Marxism. You are in a situation different from either Douglas MacArthur or Lenin. You have neither conquered a people nor are you willing to use terror to create a new political system. *Dunque*, you cannot impose a constitutional order that violates prevailing religious tenets.

Ecco, the thought races: *Italia* had only three religions—Catholicism, atheism, and indifference. Because the third predominated, founders of Fascism and constitutional democracy had an easy time. Perhaps. But Mussolini told that his goal was social justice as Pope Leo XIII had preached in *Rerum Novarum* (1891). Later, the founders of the Repub-

43. As a counterexample, one might cite the French Revolution’s execution of Roman Catholicism. Let me, I pray, say two things. First, in the minds of the revolutionary leaders, the Church had become closely identified with the corruption and oppression of the *ancien regime*, and irreligion had become “an all-prevailing passion, fierce, intolerant, and predatory.” I must add that Alexis de Tocqueville thought it had been an error to link the Church so closely with the corruption of the *ancien regime*: *The Old Regime and the French Revolution*, trans. Stuart Gilbert (New York: Doubleday, 1955), p. 149. Second, the Catholic Church survived the French Revolution in much better condition than the Russian Orthodox Church survived Marxism.

44. For ultimately unsuccessful Soviet efforts to “modernize” Russia’s Islamic southern rim by easing traditional restrictions on women, see Gregory Massell, *The Surrogate Proletariat: Moslem Women and Revolutionary Strategies in Soviet Central Asia, 1919–1929* (Princeton, NJ: Princeton University Press, 1974).

lic, mostly Christian Democrats, more plausibly told the same, as they and their American sponsors frightened the Vatican with the specter of communism.

Your country possesses these three religions and Protestants, Muslims, Jews, and Gypsies as well. *Dunque*, you must—how does one say?—keep many balls in the air. You must have concern about what is acceptable to each of these groups, while always fastidious not to offend the majority, if, in fact, a majority exists on religiously tinted issues. Constitutional democracy, emphasizing human dignity, does not of itself conflict with the basic theology of any of those religions. *Ecco*, the principal problem I vision is constitutional democracy's stress on rights and freedom as the goal of the state. According to me, that will not always ride well with strict adherents to any of these religions. They are apt to view freedom as a means, usually desirable but one that can lead to sin. Fortunately, such problems are likely to complicate governing a constitutional democracy rather than veto its establishment.

Now I speak about authority. But we cannot yet depart religion. Ideas about deities influence our *vista* of authority in general. For a political system to be stable, it must enjoy a great deal of "harmonic convergence"⁴⁵ between official concepts of authority and citizens' experiences in their families, schools, posts of labor, and churches. If those institutions are dictatorial, it will be difficult for the values of constitutional democracy to thrive in the public square, as Weimar Germany illustrates. A democratic constitutional order sat on top of an authoritarian social order.⁴⁶ As Thomas Mann allegedly said, Weimar was a republic without republicans.

Ecco, most people in Western societies find themselves in the middle, where the sources, nature, and scope of political authority are more complex. Americans and Europeans tend to think of popular election as the sole source of legitimate authority, but that *vista* is limited. We can recall ourselves Ms Baca's word about the historic use of the *lotteria*. And also, for some groups, benediction by religious personages donates legitimacy. For centuries, the central argument of political theory in Europe centered on the "two swords," with the Church insisting on its discretion to bestow the secular sword. And clergy dominated coronation ceremonies of monarchs for even more centuries. In Islam, Allah is the ultimate sovereign, not the people. During much of Muslim history, the khalif was His representative and supposedly ruled with the approbation of the *ulama*,⁴⁷ the wise holy men. In fact, the khalif often ruled solo but still claimed delegation from Allah.

45. The phrase is Maureen Dowd's: "Liberties: Truth or Dare," *N.Y. Times*, Aug. 12, 1998.

46. See esp. Eckstein, "Theory of Stable Democracy."

47. The *professoressa* had probably read Muhammad Qasim Zaman, *The Ulama in Contemporary Islam* (Princeton, NJ: Princeton University Press, 2002).

For other peoples, tradition may be critical. An American Central Intelligence Agency official who fought in the Vietnamese highlands arrived at a Montagnard village soon after the Vietcong had made a visitation. They had raped many women and stolen food, then had taken the *capo* into the piazza and, at a blow, expelled his brains into the dirt to encourage the people to provide the VC with food and information. Thus the CIA official had no difficulty to persuade the villagers to accept American weapons to defend themselves against another visitation. Then he made a grand mistake: he told they needed a new *capo* and should make an election. Angry villagers explained that the American had insulted the village's customs. Their *capo* was always the oldest male from a certain family. The American lost the villagers' support.

History may become tradition and together produce conditions that make constitutional democracy more or less possible. I cite you the *Mezzogiorno*, the south of Italia. For centuries, the people there knew only oppressive rule by foreigners; government became, and to much extent remains, the enemy. Other relationships there paralleled those with government. People of similar economic status did not cooperate for mutual advantage; rather, a *padrone*—you say godfather?—donated favors and exacted obedience in return. Relationships between rulers and ruled in political and private life were hierarchical, often enforced by violence outside the control of the state. For the *mezzogiorni*, constitutional democracy, with its cooperation, bargaining, shared trust, and mutual recognition of inalienable rights, does not resonate with real life. Historically, they had not known the myriad private institutions that in much of the Western world had mediated between state and citizen—or in this case state and denizen. There was only the Church, whose interests, above the level of the parish priest, were seldom those of the people; and then there were the Camora or the Mafia, whose interests were only in power through terror and extortion.

I pray you, let me make an intervention to my own presentation. I am less disturbed about the usual indicia of political culture than I am about the facts that you lack mediating institutions. What labor unions the junta allowed you were farces. Your churches could not have auxiliary associations like they have in free countries; manufacturers have no organizations . . . I could go on but you understand. You may certainly initiate a constitutional democracy, but I doubt if you can long continue it, without secondary associations.⁴⁸ They aggregate and present inter-

48. Vaccarino is borrowing from Robert D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, NJ: Princeton University Press, 1993), and his *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon and Schuster, 2000). Even though she is Italian, she has not read Filippo Sabetti, *The Search for Good Government: Understanding the Paradox of Italian Democracy* (Montreal: McGill: Queen's University Press, 2000), who takes issue

ests to government and give people a sense of belonging, of cooperation with and trust in one another; they also provide training for democratic leadership.

Limits on power are also important. The West reveres limited government, but it was not always so, nor is it now universally so. Of new, religious norms enter as limits and demands on political authority, all and two. Sometimes natural law, revelation, or ecclesiastical dogmas restrain civil authority; sometimes they require governmental action—for example, to punish sinners. More positively, religion may require divinely ordained social policies. According to me, it is no accident that many Orthodox Jews in Israel are angry at their Supreme Court for ruling that the country has the—you say “rudiments”—of a secular constitutional text.⁴⁹ For the ultra-Orthodox, the Halakhah is *the* constitutional text. And for many Muslims the Qur’an offers the only true constitutional document.

Dunque, it is probable that your people, inexperienced with either constitutionalism or democracy and devoted to their religious precepts, will have difficulties with the regime you propose. Still, I vision this only as an obstacle, not an insurmountable absolute barrier. This complexity underlines—that word is proper?—the necessity of skilled leadership.

My paper also speaks about attitudes regarding humanity. You have already discussed the essence of my message: to the extent people lack a *vista* of humanity as one family, all entitled to equal respect, they will not make perfect citizens of a constitutional democracy. According to me, however, constitutional democracy does not require perfect citizens. It can survive if its people have a certain amount—one cannot say exactly how much—of mutual respect and trust. If groups cannot live together in peace, constitutional democracy is doomed. I am also in accord with Professor Sprachfehler that the political system you stabilize can do much to augment, even create, peace among your citizens. Like Professor Maynard, I accept your judgment that your people can, at the

with Putnam's analysis regarding Italy. Ariel C. Armony, *The Dubious Link: Civic Engagement and Democratization* (Stanford, CA: Stanford University Press, 2004), disagrees more fundamentally with Putnam. He points out that citizens' participation in many “civic” organizations, such as the White Citizens Council in the United States and pro-Nazi and procommunist groups in Weimar Germany, can undermine both constitutionalism and democracy.

49. Bergman v. Minister of Finance, 23 (I) P.D. 693, trans. in 4 Israel L. Rev. 559 (1969); United Mizrahi Bank v. Migdal Cooperative Village, [1995] 49 (iv) P.D. 221, trans. and excerpted in 31 Israel L. Rev. 764 (1997). For analyses, see esp. Martin Edelman, “The New Israeli Constitution,” 36 *Middle Eastern Studies* 1 (2000); Aharon Barak, “The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law,” 31 *Israel L. Rev.* 3 (1997); Gad Barzilai et al., “Supreme Courts and Public Opinion: General Paradigms and the Israeli Case,” *Law and Courts*, Winter 1994, p. 3; and Menachem Hofnung, *Democracy, Law, and National Security in Israel* (Dartmouth, UK: Aldershot, 1996).

initiation, live together without violence. Officials will possess an opportunity to persuade them that long-lived *fiducia* is in their interests.

Ecco, I am also in accord with Professor Maynard that the economic system does not determine the political system. The fact that your economy is performing poorly can function to your advantage, *if* you can add even small amounts of prosperity to your people. For the long run, the regime's chances of survival increase as prosperity increases.

In sum, my paper tells that although some forms of culture might make constitutional democracy impossible, your culture does not present such impediments. Let me risk offending by reiterating that you still must be carefully attentive to your people's differing cultures. That overused word *multicultural* translates for you as “much difficult labor.”

“Professoressa,” Ajami comments, “although I have serious reservations about some aspects of constitutional democracy, I care about a civic culture. More than a century ago, Herbert Spencer and William Graham Sumner said that stateways can't change folkways. Were they not correct? The real base of society is its culture; it shapes both politics and economics: ‘culture makes all the difference.’⁵⁰ Politics reflects, it does not create, a social order. It pains me, but no Islamic country is a democracy of any species. Nor have all peoples of other beliefs made democracy work. The littered trails of failed efforts in Latin America and Africa so attest. In the first, mixtures of authoritarian forms of Roman Catholicism and Spanish heritage stress obedience and honor while denigrating liberty and compromise, thus dooming constitutional democracy. And nothing in the lives of most Sub-Saharan Africans makes constitutional democracy intelligible, much less desirable.”

“If an intervention to an intervention is permitted,” Vaccarino interrupts, “politics is sometimes the dependent variable, sometimes the independent variable; sometime it acts, sometimes it is acted upon, sometimes it reacts. Regard the mode in which constitutional democracy influenced the Catholic Church during Vatican II.”

“I do not understand,” Colonel Martin interrupts.

“Perhaps I can explain,” Atilla Gregorian offers. “Until after World War II, papal attitudes toward democratic and constitutionalist theories were negative, despite the affinity between positive constitutionalism and the teachings of encyclicals such as *Rerum Novarum* and *Quadragesimo Anno*. During that period, Rome went so far as to command that the Jesuits silence John Courtney Murray because he was preaching the constitutionalist doctrine of separation of church and state. Moreover, despite Thomistic emphasis on ‘subsidiarity,’ that is, allowing insofar as possible decisions to be made

50. David S. Landes, *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor* (New York: W. W. Norton, 1998), p. 516.

at the lowest level so as to accommodate local differences, the Vatican was (and is) still trying to run the Church as a monarchy operating through a centralized bureaucracy. Some change came at the Second Vatican Council. There, pastoral bishops who had been living in constitutional democracies and wanted a voice in running the Church phrased their arguments in language parallel to those of theorists of their secular regimes. At home, priests, who knew bishops were often as deaf to them as the Vatican was to bishops, used similar arguments for participating in governing their dioceses. The laity, who found their pastors deaf to their concerns, wanted parish councils so they, too, could share governance. Professional theologians around the world also deployed the language of constitutionalism in their quest for due process when brought up before Rome or local bishops on charges of doctrinal error. Much of the turmoil within the Church during the 1960s pitted arguments for constitutional democracy against those for absolute monarchy.

"Although changes were not as full or as lasting as the majority of bishops, priests, and laity wanted, changes were real. Since 1966, every few years synods of bishops from around the world meet in Rome to advise the pope; most pastoral bishops call diocesan synods in order to consult with their priests; and most parishes have councils of laity to advise pastors. Moreover, ecclesiastical courts as well as the Holy Office itself have refined procedures to bring their practices somewhat more in line with constitutional democracy's norms of due process. And constitutional democracy triumphed when in 1979 Pope John Paul II in New York City publicly preached the doctrine of John Courtney Murray.

"Spillovers from democracy and constitutionalism were not the only causes of these changes, but those forces have significantly increased internal institutional tensions in at least two important respects: (1) by buttressing the reformers' cause with successful secular arguments and (2) by providing a widely understood and respected vocabulary to express normative concepts. To combat most reforms, opponents were forced to rely on ideas and practices that human experience had discredited. In moving toward constitutional democracy, my church has been late rather than unique. Nathan O. Hatch attributes much of the democratization of American Protestantism to the political ideals of the Declaration of Independence."⁵¹

"Many social theorists," Vaccarino says, "say groups like the church are primary organizations and government is secondary. *Allora*, the story the Padre has told shows that a supposedly secondary association, the state, has changed a primary association."

51. *The Democratization of American Christianity* (New Haven, CT: Yale University Press, 1989), pp. 9–11. I am indebted to Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge, MA: Harvard University Press, 2000), p. 55, for pointing out this similarity.

Ajami persists: "Your examples are Japan and Germany and to a lesser extent the Catholic Church. But we are not the Allies after World War II; neither are we a collection of bishops. Nor are we thugs who would ram the 'best' political system down the throats of an unwilling—and unprepared—people. It took centuries for constitutional democracy to germinate in Britain and the United States, and it hasn't fully blossomed there yet. And recent popes are undoing the reforms of Vatican II because the Church was not prepared for many of those changes. For our part, we must begin slowly . . . a little democracy . . . a little constitutionalism . . . a little authoritarianism . . . then a little more of the first two and less of the third. For decades we will have to lead, sometimes push, our people, to help build a culture that will enable them to accept constitutional democracy. We must force our people to be free, but force them very slowly and very gently."

"*Va bene*, you make a large thesis. We are in accord about the prudence of gradual change. Even sainted geniuses cannot stabilize constitutional democracy at a blow. The United States has not done so after more than two centuries. You confront long and difficult labor."

"It is good that you retreat."

"Do not mistake clarification for retreat. Your thesis possesses three parts; the first is correct, but the second is wrong and wars with the third. The first is that a specific culture is necessary. I spoke of a range of cultures and a certain level of awareness of the world existing outside of oneself, family, and vicinage, and also a willingness, as Professor Sprachfehler said, to live in peace with people outside one's own tribe. *Allora*, I have no *vista* of a constitutional democracy's stabilizing soon in villages whose people possess no understanding of the outside world, or constitutional democracy's having been possible in societies like those of the nineteenth-century Comanches, where outsiders were things to loot, rape, torture, and kill. Because you do not find yourselves in either kind of situation, this part of your argument has truth but not relevance.

"*Dunque*, the second part of your thesis," Vaccarino continues, "is that stateways cannot change folkways. I grant you the changes in the Catholic Church have only been partial, but do not the conversions of Germany and Japan refute Sumner?"

Pyknites cuts in: "I'm not sure. In the 1920s, each had experienced a period of democracy if not constitutionalism. And some of those leaders were still alive in the later 1940s to help fashion new constitutional orders."

"Of new, I say Sumner was wrong, though not completely so. According to me, Montesquieu was correct when he said that the state 'cannot change its religion, manners, and customs in an instant.' Those ultimate three words are critical. *Allora*, you told about Germany and Japan. A few leaders, even great ones like Konrad Adenauer, do not of themselves alone constitute a culture, though they may redirect one. By definition, culture's norms must be

widespread among a population. So I give to you another example: India. Its traditions included little about either democracy or constitutionalism. Hinduism never possessed a tendency toward equality. Women were little better than property, to be burned after their owners' deaths, and the caste system denied equal dignity. When the concept 'constitutional' made its face in political discourse, it was in the narrow sense of existing colonial processes and institutions—what Professor Deukalion termed *constitutionism*, not *constitutionalism*. I quote you Professor Tapan Raychaudhuri, who has told that it is an error to believe either the broader or truncated concept of constitutionalism 'was *the* or even *a* central theme in the nationalist discourse.'⁵² And Mohandas Gandhi's mass politics, with his fervor for village autonomy and fear of industrialization and the state, possessed a political *vista* 'out of tune with constitutional democracy.'⁵³ Most important, did the hundreds of millions of poor peasants who heard Gandhi's orations hear them as promises to finish their economic misery or to confer the blessings of constitutional democracy? In India, Sunil Khilnani says, 'democracy was constructed against the grain, both of a society founded on the inequality of the caste order, and of an imperial and authoritarian state. If the initial conditions were unlikely, democracy has had to exist in circumstances that conventional political theories identify as being equally unpropitious: amidst poor, illiterate and staggeringly diverse citizenry. Not only has it survived, it has succeeded in energizing Indian society in unprecedented ways.'⁵⁴

"*Senta*, India possessed countervailing assets, including a small but politically active, Westernized middle class, a corps of trained civil servants, and eloquent, determined prophets, Gandhi and Nehru, maestros of the political arts. Not least important, in 1949, the leaders of the Congress Party had the *vista*, patience, and skill to utilize these assets to vanquish opposition, doubt, and indifference.'⁵⁵ You should take much comfort from that example."

"Perhaps."

"More exists. There was no fit at all between constitutional democracy's notions of individualism and historic Indian ideals. According to Professor T. G. Vaidyanathan, 'India's dominant principle celebrates the abrogation if not the very extinction of personality, whereas the Western concept of romantic love joyfully celebrates the extension of personality and often person-

52. "Constitutionalism: The Indian Experience," in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley, eds., *Constitutionalism and Democracy: Transformations in the Contemporary World* (New York: Oxford University Press, 1993). Throughout this provocative essay, Raychaudhuri uses *constitutionism* in the narrow sense of "constitutionism."

53. *Ibid.*, p. 208.

54. *The Idea of India* (New York: Farrar, Straus, and Giroux, 1998), pp. 9–10.

55. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Oxford University Press, 1966), remains among the very best works on the modern Indian founding.

ality itself.'⁵⁶ He continues: 'The [traditional] Indian self, by definition, lacks reflexive awareness of itself. . . . The self as a homogenous, independent entity capable of moral choice, discrimination and reflexivity is a Judeo-Christian conception wholly inapplicable to the Indian psychological reality.' According to me, this 'reality' offered rocky ground in which to plant a theory based on individual dignity and autonomy.

"Yet constitutional democracy has survived for more than fifty years. And increasing numbers of Indians have become more individualistic, even materialistic. Exact allocation of credit is impossible among factors such as constitutional democracy, economic development, moral progress, or moral corruption. But according to me, the political system must take some responsibility. India's leaders have used democracy to build the state, very different from the European model of using the state to build democracy.'⁵⁷ Constitutional democracy thus preceded two of its supposed *preconditions*: a receptive culture and a state."

"I need to think about it before trying to rebut you."

"*Mô*, I have fear that I appear ungracious in adjoining that the second part of your thesis not only is wrong but also contradicts the third part. The third tells you have need to proceed slowly, as the government changes the culture—exactly what you previously said stateways could not do."

"If a visitor may be permitted," Professor Deukalion interrupts, "we might think in more general terms about state and society. Neither is monolithic. Every society has many divisions. Sex, age, and health push people to value different distributions of goods differently. Madison claimed that property was the greatest cause of faction, but religion certainly ranks at or near the top. Even if everyone is nominally of the same group, the existence of orthodoxies and heresies—and thus of sects, 'little enders' and 'big enders'—is practically universal. We can say much the same about the state. No state is monolithic. Even would-be totalitarian states such as Stalin's Soviet Union, Mao's China, and Hitler's Germany were run by people whose ideas and ambitions conflicted with each other. At times the ability of dictators to dictate was complete, but those periods were short lived. The cracks that soon appeared may have been small, but they were real. And, of course, founders of constitutional democracies try to divide power, to pit ambition against ambition and interest against interest. In a struggle to influence public policy and popular behavior, different portions of the state—really different public officials—try to induce different social groups to sup-

56. "Authority and Identity in India," 118 *Daedalus* 147–48 (1989). See also Ashis Nandy, "The Political Culture of the Indian State," 118 *Daedalus* 1 (1989).

57. Maya Chadda, *Building Democracy in South Asia: India, Nepal, Pakistan* (Boulder: Lynne Rienner, 2000), p. 143. See also Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Constitutional Context* (Princeton, NJ: Princeton University Press, 2003).

port their policies. Joel Migdal has said that modern societies are always 'becoming' and states 'continually morph.' The relationship between the two is typically symbiotic.⁵⁸ The state may be the most important collection of instruments of social change, but neither is it the only such collection nor is it, itself, impermeable to changing forces from within society.

"Competitions for power among public officials often change the institutional competencies, if not the basic structure, of the state's institutions; and as they struggle, those officials try to enlist various social groups by giving them at least some of what they want, thereby perhaps frustrating other groups. And as social groups compete against each other, they, in turn, try to enlist state institutions on their side. Insofar as they are successful, they may change both the state and the society. In sum, Professor Vaccarino is right: the question is not whether the state can change society or society can change the state; rather it is how much and under what circumstances one can change the other."

"My dear professors," Federika Strega cuts in, "your ideas of political culture are slippery."

"*Forse*," Vaccarino says. "But you attended the law faculty of the University of Chicago. And according to me, no lawyer should criticize others for slippery concepts."

The members chuckle as Strega says, "Touché, touché. But tell me something about society and political culture that directly bears on our work. You say political culture is not 'determining' but still important; that government can change society but not too fast or too much. What aspects of political culture are preconditions for constitutional democracy? Do we have them?"

"*Giusto*, equitable questions. First, no particular culture can be a precondition, because no constitutional democracy has a single culture. *Pero*, as I have told, some cultural elements are essential: most people must have some sophistication, accept the necessity of government, believe they possess rights that neither government nor other citizens can violate, recognize that fellow citizens possess the same rights, and be willing to utilize only peaceful means to settle disputations. These are important conditions, and the state can cultivate them among its citizens."

"Then we face a great difficulty," Professor Jacobsohn intervenes. "Oppression has made *government* a dirty word. Our people believe *they* have rights, but I doubt they believe that those who disagree with them do. As for peaceful means, they suffered much violence from government and have had their lives saved by violence against government."

"You do face great difficulty, but you are not without hope. Your people

58. *State in Society: Studying How States and Societies Transform and Constitute One Another* (New York: Cambridge University Press, 2001), pp. 23, 50, 59.

abandoned the old regime. Therefore, a large portion of them probably possess what Catholic moral theology calls 'a right disposition' toward constitutional democracy. They have learned much from other nations; they can learn more, and you can instruct them. According to me, a people do not require profound quantities of these cultural 'traits' at the initiation, but they must quickly make roots if constitutional democracy is to survive."

"We must instruct them? We *know* those traits, but do we *internalize* them?" Strega asks.

"*Ecco*, the answer lies in your hearts. I mention a related difficulty, a 'dissident culture'—that is, an orientation toward politics that often develops while fighting against an oppressive regime. Paul Wilson has said the *capi* of the Czech and Slovak Republic suffered such a malady. I quote you him: 'These leaders believed in political solidarity; a community could be created in which people of vastly differing political views and backgrounds could bury their differences and work together on a project that had a higher meaning and deep principles than "mere" politics.' But maintaining a constitutional democracy involves much 'mere politics,' because people who are in accord on fundamentals may yet disagree about who should obtain what from the political system.

"A 'belief that compromise means surrender' may exist as a natural reaction against the sordid moral compromises that existence under the old regime required. Wilson told that the Czechs' experience had deprived them of the skills—and desire—to practice the give-and-take necessary to building consensus.⁵⁹ *Ecco*, times do occur when one cannot compromise; but in constitutional democracy, it is usually obligatory to try negotiation and compromise."

"Do you think a good Muslim can be a good citizen of a constitutional democracy?" Ajami asks.

Vaccarino smiles. "You nicely rephrase Aristotle's famous question. I am not a specialist about things Islamic. Do you still want my opinion?"

"Yes," Strega cuts in. "And it's interesting that the first professor who confesses to not being the world's greatest expert on everything is a woman. Refreshing."

"*Allora*, first, Carl J. Friedrich, the great explainer of constitutionalism, thought that constitutionalism's values were rooted in Christian beliefs,⁶⁰ implying that it could flourish only in a society that adhered to the Christian, perhaps Judeo-Christian, tradition. On this point he was wrong—according to me and according to the evidence. I cite you India and Japan: both are constitutional democracies, neither is in the Christian or Jewish tradition.

"Then for Islam: my paper makes bibliographic citations the Mufti will

59. "The End of the Velvet Revolution," *N.Y. Rev. of Bks*, Aug. 13, 1992, pp. 57ff.

60. *Transcendent Justice: The Religious Dimension of Constitutionalism* (Durham, NC: Duke University Press, 1964), esp. p. 17.

not need but his colleagues might find utile.⁶¹ We have need of two distinctions: between the words of the Qur'an and historic practice and among differing interpretations of that text. According to many writers, the Qur'an itself does not preclude constitutional democracy. In fact, L. Carl Brown points out, Islam has been much freer than Christianity in religiously ori-

61. For general discussions, mostly of Arab versions of Islam, see Fouad Ajami, *The Dream Palace of the Arabs: A Generation's Odyssey* (New York: Pantheon, 1998); Raymond William Baker, *Islam without Fear: Egypt and the New Islamists* (Cambridge, MA: Harvard University Press, 2003); James A. Bill and Robert Springborn, *Politics of the Middle East*, 3rd ed. (New York: HarperCollins, 1990); L. Carl Brown, *Religion and the State: The Muslim Approach to Politics* (New York: Columbia University Press, 2000); Dale F. Eickelman and James Piscatori, *Muslim Politics* (Princeton, NJ: Princeton University Press, 1996); Noah Feldman, *After Jihad: America and the Struggle for Islamic Democracy* (New York: Farrar, Straus and Giroux, 2003); Gilles Kepel, *Muslim Extremism in Egypt: The Prophet and the Pharaoh* (Berkeley: University of California Press, 1995), and *The War for Muslim Minds: Islam and the West* (Cambridge, MA: Harvard University Press, 2004); Bruce B. Lawrence, *Shattering the Myth: Islam beyond Violence* (Princeton, NJ: Princeton University Press, 1998); Robert W. Hefner, ed., *Remaking Muslim Politics: Pluralism, Contestation, and Democratization* (Princeton, NJ: Princeton University Press, 2005); Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Boulder: Westview, 1991), esp. chs. 9–10; Daniel E. Price, *Islamic Political Culture, and Democracy, and Human Rights* (Westport, CT: Praeger, 1999); Olivier Roy, *The Failure of Political Islam* (Cambridge, MA: Harvard University Press, 1994), and *Globalized Islam: The Search for a New Ummah* (New York: Columbia University Press, 2004); Edward Said's now classic *Orientalism* (London: Routledge and Kegan Paul, 1978); and Anthony Shadid, *The Legacy of the Prophet: Despots, Democrats, and the New Politics of Islam* (Boulder: Westview, 2002). For essays on legal problems internal to Muslim communities, see Robert Gleave, ed., *Islamic Law: Theory and Practice* (New York: Tausis, 1997); and for essays on Islam and war, especially holy war, see Harfiyah Abdel Haleem et al., eds., *The Crescent and the Cross: Muslim Approaches to War and Peace* (New York: St. Martin's, 1998); and Gilles Kepel, *Jihad: The Trail of Political Islam* (Cambridge, MA: Harvard University Press, 2002). For studies of the condition of women in Islamic nations, see Miriam Cooke, *Women Claim Islam: Creating Islamic Feminism through Literature* (New York: Routledge, 2000); Haled Esfandiari, *Reconstructed Lives: Women and Iran's Islamic Revolution* (Baltimore: Johns Hopkins University Press, 1997); Elizabeth Warnock Fernea, *In Search of Islamic Feminism* (New York: Doubleday, 1998); Deniz Kandiyoti, ed., *Women, Islam, and the State* (Philadelphia: Temple University Press, 1991); Fauziya Kassindja and Layli Miller Bashir, *Do They Hear You When You Cry?* (New York: Delacorte, 1998); Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton, NJ: Princeton University Press, 2004); and Khalida Messaoudi with Elisabeth Schlema, *Unbowed: An Algerian Woman Confronts Islamic Fundamentalism*, trans. Anne C. Vilna (Philadelphia: University of Pennsylvania Press, 1998).

Abdullahi Ahmed An-Naim, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and Islamic Law* (Syracuse, NY: Syracuse University Press, 1990), argues that the Shari'a utilizes the Prophet's more specific commands, designed to allow the then small sect to survive in a hostile environment, at the expense of the Qur'an's more general principles, which support human rights. Thus, according to him, it is the Shari'a's misinterpretation of Islam that makes it conflict with constitutional democracy, not the Prophet's message itself. Farid Esack, *Qur'an Liberation and Pluralism* (Chichester, UK: Oneworld, 1997), a member of South Africa's Truth Commission and founder of the political-religious movement Call to Islam, attacks much traditional interpretation of the Qur'an as a rationalization for oppressive governments. John L. Esposito and John O. Voll, *Islam and Democracy* (New York: Oxford University Press, 1996), are rather optimistic about the possibility of an Islamic democracy. Quite appropriately, they point out that democracy is a contested concept and analysts should therefore not believe that Western models have exclusive claims to democratic legitimacy. On the other hand, their case studies fail to unearth a single Islamic democ-

ented political theorizing.⁶² Nevertheless, as the Mufti has told, no Islamic democracy exists. Moreover, few Muslim countries have made serious efforts to stabilize constitutional democracy, and none has long retained it. *Ecco*, Turkey, a militantly secular state, has made some brave attempts, but its history is pitted by episodes of martial law and frequent violations of human rights under civilian or military rule. Pakistan calls itself an 'Islamic republic' and has proclaimed the perhaps incompatible ideals of constitutional democracy and an Islamic state. It, too, has endured much life under military rule; even under civilian government its connections to democracy or constitutionalism have been tenuous. Malaysia has made feeble democratic efforts and has stabilized a form of authoritarian consociationalism, which manifests some democratic trappings that might cede future fruit. Other Islamic nations range from Jordan and Egypt, which offer some democratic processes, to Syria, which remains a brutal dictatorship. Ergo, practice donates small encouragement."

"You are preaching my message," Ajami says. "Please continue."

"Giusto, traditional interpretations of the Qur'an, most importantly in Islamic law, the Shari'a, donate no more. According to me, Abdullah Ahmed An-Naim is correct: the Shari'a, as now comprehended, is incompatible with constitutional democracy. Women cannot be equal to men; nonbelievers cannot be equal to believers; it is a capital offense to persuade a Muslim to convert to another religion, for the converter as well as the converted; and the Shari'a's harsh criminal processes run contrary to Western notions of legal protections. But, I stress you, the Shari'a is an encrustation on Islam, vulnerable to surgery."

"I agree," Ajami notes, "and I apologize for enticing you to say it. But my

rary. Moreover, they focus on what many scholars call representative democracy rather than constitutional democracy. For more general analyses of these problems, see Khaled Abou Fadl, *Islam and the Challenge of Democracy*, ed. Joshua Cohen and Deborah Chasman (Princeton, NJ: Princeton University Press, 2004). Shadid, *Legacy of the Prophet*, analyzes efforts to transform Islamic politics into a more "mature" incarnation that would further both a civil society and less authoritarian governance.

To the contrary, Elie Kedourie, *Democracy and Arab Political Culture* (Washington, DC: Washington Institute for Near East Policy, 1992), contends that "there is nothing in the political traditions of the Arab world—which are the political traditions of Islam—which might make familiar, or indeed intelligible, the organizing ideas of constitutional and representative government" (p. 5; see also ch. 6). Bernard Lewis, *The Political Language of Islam* (Chicago: University of Chicago Press, 1988), is almost equally pessimistic about the chances of constitutionalism or democracy in an Islamic country. Speaking of Islam in South and Southeast Asia, Lucian W. Pye, *Asian Power and Politics: The Cultural Dimensions of Authority* (Cambridge, MA: Harvard University Press, 1985), p. 278, says, "In a peculiar way Muslim ideals of power and authority find martial law and military rule very attractive." See also ch. 10. For a useful analysis of the literature on Islam and democracy, see Masoud Kazemzadeh, "Teaching the Politics of Islamic Fundamentalism," 31 *PS* 52 (1998). Jane I. Smith, *Islam in America* (New York: Columbia University Press, 1999), examines the growth and peculiarities of Islam in the United States.

62. *Religion and State*.

colleagues, peace be upon them, are more likely to believe you than me. The Shari'a's voices are not the voice of the Prophet, peace be upon him, but mere interpretations of his words. Many people dispute the traditional interpretations of Qur'an and the Shari'a, as your paper's bibliographic footnote demonstrates. These people—'liberals'—argue that 'fundamentalists'—a term as ambiguous as 'liberals'—misread the Prophet's message. Islam itself is compatible with many forms of democracy. You have mentioned An-Na'im, a Sudanese; he is among the more prominent. So also are Farid Esack, a theologian from South Africa, and Reza Aslan,⁶³ born in Iran but now teaching about Islam in the United States. In Iran itself, prominent writers such former president Seyyed Khatami and Abdol-Karim Soroush⁶⁴ contend that Islam, properly understood, encourages democracy and defends human rights. In the United States there is a movement of young Muslim men and women who practice the new interpretations and try to convert others in the Islamic world."⁶⁵

"Aren't you being overly optimistic, Mufti?" Pynites asks.

"Perhaps, but Islam is in turmoil. Osama bin Laden and his hate-filled followers make the headlines, while heavy-handed American operations like the invasion of Iraq and torture of prisoners and brutal Israeli treatment of Palestinians turn suicidal terrorists into Muslim heroes. But these fanatical thugs do not represent the mainstream of Islam. Most of my people are seeking new ways, peaceful ways, and democracy is far more appealing to them than bombs. It is not the West's version of democracy, but our version. Our religion urges us to seek consensus and community, *ummah*. Islamic democracy offers such a possibility not only in a fight against despotic regimes but also as a political structure for a just society. This form of democracy has a good chance of becoming a reality, not today, next year, or in the next five years, but in the foreseeable future. I am less sure about what you call constitutionalism. Human dignity has always been central to Islam, but for the West removal of tyranny means liberty. For devout Muslims the absence of tyranny is not liberty but justice.⁶⁶ They equate Western liberty with materialism and sexual promiscuity. And, I say with sorrow, too many of my brothers, peace be upon them, equate justice with revenge. Thus, I am less optimistic about constitutionalism's taking firm roots. I know that Nathan Brown⁶⁷ has shown that constitutionalist institutions have begun to grow in the Middle East, but I doubt if they will become more than dwarf

63. *No God but God: The Origins, Evolution, and Future of Islam* (New York: Random House, 2005).

64. Soroush is the pen name of Hossein Dabbagh. For summaries of his and Khatami's political writings, see Shadid, *Legacy of the Prophet*, chs. 6-7.

65. "The New Islamists," *Newsweek*, Mar. 16, 1998, pp. 34ff., and Smith, *Islam in America*.

66. Shadid stresses this point: *Legacy of the Prophet*, p. 67.

67. *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany: State University of New York Press, 2002).

plants until Islamists thoroughly revise the Shari'a. And that revision is one I wholeheartedly support."

Anita Baca interrupts. "I totally admire your views; they're awesome. But aren't you liberals a tiny minority? Isn't it critical that, in Islam, Allah is sovereign, not the people? In Islam, there can be no separation of church and state. There can be no equality among people, no religious freedom if we define it to include the right to criticize or renounce Islam or to convert others to another religion. And the Shari'a makes women chattel, right?"

"You have reason but not in a plenary mode," Vaccarino speaks before Ajami can reply. "I respond you by point. First, in these days, liberal Muslims are a minority in the Islamic world, but so were constitutional democrats in the West a century and a half ago. Slavery existed in the United States until 1865, and severe racial discrimination was approbated by law until only a few decades ago. Second, yes, for Muslims there can be no separation of church and state. But you must comprehend that for Sunni Muslims, more than 90 percent of Muslims in the world, there is no such thing as a church on the Cattolic model. Thus the idea of separation has no relevance for them.

"Of truth, according to traditional teaching, Allah is sovereign for Muslims," Vaccarino continues. "But Islam is here in accord with Judaism, early Liberalism, Cattolicism, and much of Protestantism. For the Israelites, the earth belonged to Yahweh; the chosen people only held it in trust for Him. The great *padron* of liberalism, John Locke, wrote as if God were the ultimate sovereign.⁶⁸ For many believing Christians, God alone is sovereign. For them, a law, to be moral, must conform to His law, the which Cattolic moral theologians define as 'right reason.' Historically, that requirement donated much power to clerics. What changed to permit good Cattolics to become good constitutional democrats is interpretation, influenced, according to me, by constitutionalism and democracy. Vatican II acknowledged officially what Cattolic theologians and laity had long believed was the proper interpretation of natural and divine law: government exists to protect human rights, including religious freedom. Some conservative Cattolics, like some conservative Protestants and ultra-Orthodox Jews do not accept that change, and nether do many conservative Muslims. This struggle is not finished and may never be.

"*Allora*, your other point is the most difficult. The Shari'a rejects equality of women; but, I say of new, the Shari'a is not the word of Allah. Like the Torah, the Qur'an ordains genital surgery only on males. Second, we should

68. Richard Aschcraft, "The Politics of Locke's Two Treatises of Government," in Edward J. Harpham, ed., *John Locke's Two Treatises of Government: New Interpretations* (Lawrence: University Press of Kansas, 1992). Leo Strauss said in seminars that he believed Locke was an atheist, the real reason that he attacked Filmer rather than Hobbes. I am not aware that this conclusion appears in Strauss's writings.

remember that women were not allowed to vote in much of Europe and America until the twentieth century, and the United States allowed many forms of legal discrimination against women into the second half of that century. Israel has also lagged on women's rights. When Golda Meier was prime minister, she could not give sworn testimony in court because a woman could not be expected to tell the truth. Furthermore, until 2000 women were not allowed to hold religious ceremonies at the Western Wall ceremonies at the Western Wall; they were allowed then because of a decision by the Supreme Court, not based on a statute enacted by the popularly elected Knesset. Third, there are some favorable omens in the Muslim world, and we Romans put much faith in omens: women have served as president of Indonesia and as prime ministers in Bangladesh, Pakistan, Turkey, and even India, which possesses a significant Muslim minority.⁶⁹

"I do not find a few token women as prime ministers encouraging in the context of mutilation and oppression," Strega says.

"I am of accord that women lack their rightful power in either East or West.⁷⁰ But if you are asking if any Islamic country will soon adopt constitutional democracy, I agree with the Mufti and say no, though American military power is pushing Iraq in this direction. That failure will, however, not be due only to religion. Muslim leadership tends to be feudal, their tribal customs hostile to modernization. *Allora*, you do not face those problems. According to me, it would be not be prudent for you to assume that your Muslims do not wish to live within a system that protects their rights and the rights of others. Probably, most of them already believe that women are equal to men. I recall you that Professor Ann Elizabeth Mayer tells that she has never found a single Muslim woman aware of international human rights who thought that Islam prevented her claiming those rights."⁷¹

"Please allow me." Ajami says, "to add a few words. The existence of regimes throughout the Middle East that are both oppressive and Muslim only in name has encouraged reformers to claim that a return to true Islam is

69. For data on women's holding political office in the West, see Rebecca H. Davis, *Women and Power in Parliamentary Democracies: Cabinet Appointments in Western Europe, 1968-1992* (Lincoln: University of Nebraska Press, 1997), and Alan Siaroff, "Women's Representation in Legislatures and Cabinets in Industrial Democracies," *21 Int'l Pol. Sci. Rev.* 197 (2000). The *Economist* reported (Apr. 23, 2005, p. 100) that Rwanda had the highest proportion of women in Parliament, almost 50 percent, followed by Sweden, Finland, the Netherlands, and Spain. The United States ranked near the bottom, well below even Pakistan.

70. In a footnote to her paper, *la professoressa* cites "Germany: Kinder. Küche, CDU?" *Economist*, Mar. 11, 2000, p. 54, showing that although 31 percent of members of Parliament were women, no woman had yet headed a large political party, and only one of the sixteen *Länder* was led by a woman. Moreover, women hold less than 10 percent of the positions in the senior civil service, only 6 percent of higher management jobs in private industry, and 6 percent of the top university professorships. The latter figure is not likely soon to change radically because in 2000 two-thirds of doctoral candidates were male. The footnote adds that in 2005 Angela Merkel became Chancellor of Germany.

71. *Islam and Human Rights*, p. 218n16.

the answer to all of the region's political and economic problems. False! Our religion is not a political ideology; it does not have answers to all problems; rather, it outlines our relationship to Allah and thus to each other, relationships of peace, justice, and love. Where it has been co-opted as the ideology of rulers, as in Iran and the Sudan, it has been corrupted and brought a double failure, strengthening tyranny and weakening religious belief."

"I agree with the Mufti and the Professoressa," Tuncer Kirca adds.

"Thank you," Vaccarino says. "Let me demonstrate you why I am more optimistic than the Mufti about Muslims' being open to constitutional democracy. I quote you from a booklet published by an Islamic educational group in the United States. It warns that we must distinguish between what is Islamic and what is not Islamic in the treatment of women, then tells: 'In Islam women are completely equated with men in the sight of Allah in terms of spiritual rights and responsibilities. . . . Islam views men and women as equal but not identical. Thus rights and status are equal.'⁷² "According to me, these are encouraging words."

At this point, the chair intervenes: "Colleagues, we have grilled our speakers at great length. I suggest we debate these issues ourselves, with, of course, our honored guests invited to participate. But first, we should attend to matters physical. Let us adjourn for two hours for dinner."

Two hours and five minutes later, the caucus reconvenes. Jacobsohn opens the debate: "The best strategy to establish constitutional democracy is to begin with small steps."

"And what might those be?" the chair asks.

"Because we must take these steps more or less simultaneously, I do not imply a sequence of events. We must begin by educating our people, teach them about constitutional democracy by encouraging them to participate—through voting, discussing public policies among themselves, and campaigning. We should also promulgate an interim bill of rights to provide guidelines to instruct citizens, judges, administrators, and, not least, ourselves. During this process, we must also decide if we want to have a constitutional text or should proceed by developing customs—and somehow bring citizens in on those sorts of decisions. Whatever our choices, we must create governmental institutions that both fit our needs and fulfill our people's basic expectations."

"And rising expectations about standards of living are among the latter," Minxin Wei says. "I agree with Professor Maynard's first point: although we don't need prosperity to begin constitutional democracy, we'll be in trouble if we don't soon improve the economy—Indian and Irish experiences notwith-

72. Islamic Cultural Center, *Islam: A Brief Guide to the Teachings of Islam* (Tempe, AZ: Islamic Cultural Center, n.d.), p. 27.

standing. Polish discontent with economic performance brought 'reformed' communists back for a time, and economic chaos has made the chances for Russia's continuing toward constitutional democracy very dicey. Maynard's third point is wrong. Elster himself wrote that each of his propositions "might be contested. Fine tuning and incrementalism by the authorities, and willingness in the population to accept temporary hardships and inequalities, might sustain a feasible path to a stable market democracy."⁷³ It would be more efficient to impose a new economic system than to work reforms out through democratic bargaining subject to constitutional guarantees, but we'd risk a terrible political price. Change is necessary and likely to cause enormous hardships. The new regime must shoulder the burden of persuading the people to suffer in the short run so they can prosper in the long run. We've been preaching about constitutional democracy; we can't ignore its demands when we need to do something important."

"And we may fail," the chair notes.

"We may," Wei agrees. "But that's a risk we must take."

"May I make a question?" Vaccarino asks.

"Be our guest, as the Americans say," the Chair replies.

"I make the Mufti this question: What are his reservations about constitutional democracy?"

"I do not believe," Ajami replies, "that we should try to establish a constitutional democracy like that of the United States. Although economic reform is necessary, I see our principal problems not as economic but as moral. Many people think that moral relativism is the 'default setting' for all peoples and that liberty requires license."

"Now wait, Ibrahim," Pyknites says brusquely, "I don't believe that all morals are equal, but I know that we come from several different moral cultures, none of which can conclusively demonstrate its superiority. If we impose one we alienate others."

"So you, my friend, peace be upon you, would have the state represent the least common denominator?"

"No," Pyknites explains, "I would have the state enforce as much as we can agree on without badly dividing society."

"I confess that I still don't understand the Mufti's argument," Vaccarino says.

"My point," Ajami answers, "is that we will have little difficulty persuading most of my Muslim brothers and sisters in this country of the importance of democratic and limited government and of the legal and moral equality of men and women. But you will not persuade them that all morals are relative, that individual freedom means the right to do whatever makes us feel good including promiscuous sex and then abortion to kill the consequences, that

73. "Necessity and Impossibility," in Greenberg et al., *Constitutionalism and Democracy*, p. 271.

abuse of alcohol or drugs is a 'crime without a victim,' and that 'gay marriages' should be lawful. I shall not repeat arguments about the existence of moral standards that are not relative. Here I speak of the fact that a majority of our people so believe, and we cannot offend that belief and hope to persuade them to accept a political system that contradicts that belief. Just as Westerners tend to wrongly identify the horrors of Iran and the Sudan as inherent in an Islamic state, so Muslims, again wrongly, tend to see licentiousness as inherent in constitutional democracy. Our problem will be to convince them that we can construct a polity in which they can have freedom without authorizing moral license."

"I may sound like Pollyanna," Pilsudski puts in, "but though I think the ethnic-moral issue is serious, it is not insuperable. We are all here discussing these issues, and that 'we' includes men and women of every ethnic group. All of us here realize that Liberalism's moral laissez-faire is itself a moral claim. I hope we can do better. Our people deserve a chance to try."

"Yes, but not to try license, to make our nation an abomination before the face of Allah—or the Most High or God, as Jews and Christians name Him."

After three more hours of discussion, the chair interrupts: "This debate has been enlightening as well as long. With due humility, we have all assumed our country has a skilled and determined political elite, present in this chamber, to make constitutional democracy work. What most of us have been saying about other so-called preconditions, with the possible exception of interethnic harmony, presumes an affirmative answer to our question about the feasibility of constitutional democracy. Most of us are now discussing how to cope with ethnic and moral divisions. Thus the chair will entertain a motion to give an affirmative answer to the question of practicality. Do I hear such a motion?"

"So moved," Pilsudski says.

"Second," Gregorian adds.

"Question," Jacobsohn says.

"Very well," the chair continues, "all in favor, please raise your hands." He pauses, looks around the room, and counts. "The motion carries, seventeen to seven. Let us move to the next set of issues. All the things just mentioned may have to be done simultaneously, but we can only make one decision at a time. The chair proposes that we consider these aspects separately, make tentative decisions on each, and then, when we are done, debate and construct an overall scheme for a new political system. The first item, it seems to me, is whether we should have a constitutional text. If so, our work could be extraordinarily complex either in designing more or less permanent institutions ourselves or in setting up one or more institutions to do that work. We should reflect on these problems. Thus I propose that we take the

weekend off to think and discuss matters informally among ourselves. I should add that all of our learned advisers have agreed to stay at least until the end of next week—except for Professor Maynard, that is. He has a pair of tickets to Wimbledon.”

Colonel Martin again looks around the room. “Hearing no objection, it is so ordered. We are in recess until Monday at 0900 hours.” The gavel slams down, and the colonel leaves the dais.

CHAPTER FIVE

To Draft or Not to Draft a Constitutional Text

A constitution is not an act of a government, but of a people constituting a government.
THOMAS PAINE

The force of words . . . [is] too weak to hold men to the performance of their covenants.
THOMAS HOBBS

At 0858 Colonel Martin walks behind the dais, a double espresso in his left hand, the gavel in his right. Despite the fact that fewer than twenty members of the caucus are present, precisely at 0900 he slams the gavel down. “I call the caucus to order. The first item of business is whether to create a constitutional text. Professor Retlaw Deukalion will give us the benefit of his wisdom.” The elderly professor walks to the podium.

To Write or Not to Write a Constitutional Text?

Earlier, I invoked Genesis’s theological account of creation, most importantly the chaos that preceded Yahweh’s work and, in the form of human passions, continues to wreak havoc in our lives. Law is among the more obvious efforts to channel those passions. Writing constitutional charters and creating theories to justify them are also products of that project. These operations are, however, both more specific and more general: more specific because constitutional texts proclaim themselves part of the genus “law”; more general because they partake of practical politics and its never-ending search for peace, prosperity, and self-fulfillment for all citizens. Moreover, the justification for any constitutional document, indeed any constitutional order, ultimately rests on arguments from political philosophy, moral theology, or both. Every such charter depends on its acceptance as a higher law; each reflects faith in the power of words to spawn loyalties by plucking what Abraham Lincoln called “the mystic chords of memory.” Alas, eloquent language has often disappointed. We can cite dozens of failures of “parchment barriers” to stay “the lash of power.”¹ Yet we can also cite successes. A political chemistry

1. The phrase is Paul Carrington’s: “Of Law and the River,” 34 *J. of Legal Ed.* 222, 226 (1984).