

Constitutional Politics

**Essays on
Constitution
Making,
Maintenance,
and Change**

Edited by

Sotirios A. Barber

&

Robert P. George

CONSTITUTIONAL POLITICS

ESSAYS ON CONSTITUTION MAKING,
MAINTENANCE, AND CHANGE

Edited by Sotirios A. Barber and Robert P. George

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CONSTITUTIONAL POLITICS

THE AUTHORS AND THE EDITORS DEDICATE THIS VOLUME TO

Mary Therese (“Terry”) Murphy

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CONSTITUTIONAL POLITICS

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Introduction

IN THE LATE 1970s political scientists with a “Princeton connection” began producing works in constitutional theory and politics that departed in content and perspective from the preoccupation of other scholars in these fields. While mainstream students of public law and judicial politics pursued court-centered or litigation-minded research (doctrinal and behavioral), the Princeton group explored such questions as the nature of the American Constitution, the sources of constitutional obligation, the philosophic implications of the Constitution’s amendability, and forms of constitutional maintenance beyond institutional arrangements like “checks and balances.”

With a sense that there might be something distinctive about this developing body of work, members of the Princeton group began discussing the question in the mid-1980s. These conversations occurred under the urging and patronage of Walter F. Murphy, Princeton’s McCormick Professor of Jurisprudence until his retirement in 1995. Murphy cultivated a sense of community among his former students and faculty colleagues by inviting them back year after year for colloquia and to address his graduate seminars. This effort in community building resulted in two conferences, in the spring of 1993 and 1995. The first of these conferences asked such questions as what, if anything, the substantive theoretical concern was uniting this group of some twenty scholars; what might be the broader academic and civic value of this unifying concern; and how might it be presented to the larger communities of political science and academic law. Although the first conference was somewhat inconclusive on the question of what defined the participants as a group, the conferees tentatively planned most of the essays collected here. After a year’s delay draft essays started accumulating, talk of a “Princeton School” increased elsewhere in political science and academic law, and Murphy called the second conference to renew the question of unity and to discuss the early drafts of most of the essays published in this volume.

Each of these essays either explores or has immediate implications for what the authors have come to see as the concerns that define them as a group: (1) the normative, conceptual, and empirical study of *constitution making*, *constitution maintenance*, and deliberate *constitutional change* as aspects of a distinct form of political activity termed *constitutional politics*, and (2) judicial behavior and doctrine studied from the point of view of a concern for constitution making, maintenance, and change. This concern for constitution making, maintenance, and change is at once

civic-minded yet somewhat liberated from the normative sway of any particular civic constitution. It takes the goodness or rectitude or efficiency of no constitution for granted. It flows from commitments not to any particular constitution but to constitutionalism itself. It aspires not only to understand constitution making, maintenance, and change, but ultimately to cultivate the skills and the virtues of these categories of action as varieties of political competence. Ours is a *constitutionalist's* concern for constitution making, maintenance, and change.

Yet we must acknowledge a reservation about a “constitutionalist’s concern for constitutional politics” as an account of the public law scholarship by Princetonians over some three generations or more. Mention of Edward S. Corwin and Alpheus T. Mason is sufficient reminder of litigation-minded doctrinal commentary, court history, and judicial biography as facets of constitutional studies for which writers touched by Princeton’s tradition have provided decades of leadership. Further, with his earlier research in judicial strategy and comparative legal systems, Murphy himself helped lead a behavioral movement in political science whose ambitions pointedly excluded practical political ends. Are major works of Corwin, Mason, and Murphy suddenly to be counted out of the “Princeton tradition”?

There is no quarrel here with this objection. Reducing a long and complex tradition to its more recent preoccupations would indeed misrepresent that tradition, and in a manner too obvious to mislead. For our part, therefore, we the editors refer to the “Princeton group”—i.e., the group here collected—not *the* “Princeton School” of which others may choose to speak. As editors we will have to accept what further label, if any, the future affixes to our authors’ reflections on the elements of “constitutional politics.”

Those reflections begin with such questions, why should anyone prefer constitutional democracy to other regimes? What is a constitution? How do different answers to the What question affect our views of the nature of constitution making, maintenance, and change? If we should conclude, for example (and unlike any of our authors), that for Americans “the Constitution” is essentially a contract between sovereign states, we would ask whether a competent strategy of constitutional maintenance would seek ways to discourage a sense of national community or, alternately, to encourage local attachments and sociopolitical identifications among the general population. Could such an arrangement make sense on paper? Has something like this worked for other nations? Under what socioeconomic and international conditions has it worked or might it work? What might the organic public policies of such a “nation” be? What might its basic institutions be?

The behavioral and comparative components of such questions are at

least as obvious and pressing as the conceptual and normative. And if the former are worth asking, they're worth trying to answer in the only rational way—(social) scientifically. Scholars in the field of “public law” who accept the invitation of this collection of essays must therefore become more than mere scholars in public law. Just as they have recently acquainted themselves with fields like literary and ethical theory, they must now acquire the skills of comparative politics and public policy, or at least learn enough of these disciplines to communicate with their resident scholars. And although few if any of the authors in this volume claim to have satisfied the intellectual ambitions implicit in their view of constitutional studies, most believe that the times and the subject demand the setting of new goals, for themselves as well as others, and they submit these essays as first steps.

We reiterate that scientific though our aspirations may be when confronting scientific questions, we do not view constitution making, maintenance, and change as mere events to be studied by observers with both feet outside their subject. We see the elements of constitutional politics as categories of deliberate, deliberative, and cooperative action to be studied by individuals who link them with arts that the nation needs, now as much as ever, and as opportunities for personal intellectual and moral fulfillment. It is with this attitude that we offer these constitutionalist reflections on constitutionalism and constitutional politics.

To start things off, Walter Murphy's essay, “Alternative Political Systems,” canvasses the question of “Why constitutional democracy?” and previews questions of constitution making and maintenance. By critically examining the experiences of other nations, Murphy challenges us to justify our preference for the political system we call constitutional democracy. His essay thus manifests a belief in the need to revive and perpetuate that aspect of the constitution maker's perspective that seeks alternative ways for a community to get what it wants and needs. Like Publius at his moment of “reflection and choice,” Murphy sees the necessity of relevant information from outside the American experience.

John E. Finn follows with an essay that shows how different basic conceptions of what the American Constitution is influence a wide range of issues. Finn argues that a full understanding of the Constitution requires first a distinction between, and later a recombination of, two conceptions: the Juridic (or legal) Constitution and the Civic (or political) Constitution. He shows how the view from each of these two dimensions of the Constitution influences our beliefs on many traditional issues of constitutional theory, including “the relationship of the constitutional text to the constitutional order,” who is responsible “for protecting and maintaining that order,” whether constitutional interpretation is best con-

ceived as a form of constitutional maintenance, “who bears final institutional authority in matters of constitutional interpretation,” the nature of citizenship in a constitutional democracy, and the “vision of the community we claim citizenship in.” At the conclusion of his analysis, Finn offers further argument for recombining the Juridic and Civic Constitutions in a way that favors the latter.

Christopher Eisgruber’s essay on the revolutionary impact of the Fourteenth Amendment also implicates the question of what the American Constitution is. He suggests that writers who narrowly define a “constitution” as a particular text assume an answer to What, no less than writers who find constitutions in actual political practices and patterns of belief. Eisgruber shows that beliefs about the kind of text that analysts and political actors are dealing with influences their judgments about relationships among governmental institutions and their competing claims to legitimate power. Eisgruber’s theory of the impact of the Fourteenth Amendment serves his broader point that amendments initially thought to be alterations of a larger whole can actually change the essentials of the entire system.

James Fleming’s essay criticizes Bruce Ackerman’s view of the American Constitution and illustrates the importance of perspective in constitutional analysis. Ackerman’s treatment of the What question concludes that unlike Germany’s Basic Law, the American Constitution values democratic processes above fundamental rights. This conclusion, Fleming argues, flows from dubious assumptions about “entrenchments”—founding decisions to place specific rights or practices beyond the reach of formal constitutional amendment. Ackerman assumes that entrenchment of a specific value marks it as constitutionally fundamental and that a value not so entrenched is not fundamental. Fleming disagrees. Taking a constitution maker’s perspective, he finds other reasons for entrenchment and cites the histories of America and Germany to prove that entrenchment has in fact served purposes beyond those Ackerman identifies. By thus inviting Ackerman to rethink his contention that the American constitutional text is “democratic first, rights-protecting second,” Fleming displays the advantages of looking at written constitutions from the perspective of actors who structure constitutional architecture to achieve political, social, and economic results.

Constitution making on the American model can be conceived as a form of collective self-limitation. As such, it suffers paradoxes of the kind that Jefferson addressed in his call for “revolution” every generation. If constitutional texts are planning documents that must eventually fail due to a humanly uncontrollable environment, and if generations are as equal as the individuals who comprise them, Jefferson may well have asked why

one generation should bind another. The *Federalist* No. 49 tries to answer this question by claiming that the founding of the 1780s was a unique historical moment imbued with a special historical spirit, and that social stability is best served by living with tolerable errors rather than changing constitutional structure with each newly perceived defect. Other answers to the problem yield unexpected possibilities for constitutional change, even “revolution,” in sources ranging from ordinary judicial interpretations to critical elections. With some writers (Bruce Ackerman comes to mind), these possibilities legitimate constitution making by depicting it as something less than the future-binding activity it appears to be. The adequacy of these different answers is a question that has generated much of the literature of American constitutional theory.

Jeffrey K. Tulis complicates matters further with an observation about the American Revolution and the Constitution that leaves in doubt the very coherence of constitution making as a type of action. He argues that constitution making in America presupposes revolution and that liberal legitimacy depends on the continuing possibility of revolution. Yet, Tulis contends, the organic policy commitments of the American constitutional system have extinguished the possibility of revolutionary liberals. The system thus undermines liberal legitimacy while inviting such revolutionaries as presently populate the “militia movement.” The further difficulty for constitutional theory is whether liberal constitution making could have avoided this problem. Can a constitution be liberal without the continuing possibility of revolution by liberals? Can it be functional for a constitution of *government* to perpetuate revolutionary possibilities and attitudes? A negative answer to either question could vitiate a prescriptive theory of constitution making by indicating that constitution making, on the American model, is not a fully rational activity.

Suzette Hemberger’s analysis of the founding debate between Federalists and Antifederalists exposes two opposed models, or “logics,” of constitution making: constitution making as empowering government *versus* constitution making as limiting government. She observes that modern Americans have been able to assume that constitutions are instruments of limitation only because the post–New Deal consensus tended to make questions of power irrelevant and invisible. Now that a majority of justices of the Supreme Court appear willing to revitalize the Tenth Amendment and reopen questions of state vs. federal power, American constitutional thought may be more receptive to Hemberger’s argument that constitutionalism in America has always at bottom been a matter of who governs and for what substantive purposes.

In other works, several of our authors (Macedo, Murphy, George) have proposed that constitution making is at least implicitly normative not only for institutional arrangements but also for human character and

the ways of life that foster civic virtue. As the editors prefer to put it, an adequate constitutional plan must be linked to some theory of civic virtue and involve, however indirectly, a strategy for creating and perpetuating the “private attitudes” that support what the regime conceives as good citizenship. The point applies to liberal constitutions no less than to others. In his essay for this volume, “Notes on Constitutional Maintenance,” Sotirios Barber elaborates a version of this point.

Stephen Macedo takes matters further. In an essay taken from his book, *Liberalism, Civic Education, and Diversity*, he shows how orthodox liberal assumptions “obscure the extent to which a liberal constitutional order is a pervasively educative order” and how a liberal regime, to succeed, “must constitute the private realm in its image . . . and . . . form citizens willing to observe its limits and able to pursue its aspirations.” He goes on to defend as an unavoidable consequence of the concern for liberalism’s survival what writers like Stephen L. Carter and Sanford Levinson have criticized as liberalism’s political marginalization of conservative religious believers who would deny primacy to liberal values. Macedo would allow some accommodation of illiberal religious practices, but only to the extent justified by what advances liberal values and fosters liberal attitudes. Levinson responds to Macedo with a list of accommodations to religion that he believes secular liberals ought to make. He argues that anything less is politically unsustainable and inconsistent with liberal principles.

One can disagree with specific proposals for accommodating religion without disagreeing that constitutional maintenance involves an educative function and depends as much or more on a people’s psychology and moral and spiritual commitments as on the arrangements of its governmental institutions. But most observers believe that modern constitutionalism forbids government’s turning education into thought control. Education for citizenship in a constitutional democracy must allow not only for popular criticism of government but even for popular initiation of constitutional change. Maintaining such a system may thus mean maintaining openness to change, even radical change. Harry Hirsch’s contribution to this volume develops this suggestion by considering recent efforts to deploy civil rights laws in civil litigation against pornography and racism. Hirsch argues that restrictions on speech must be enforced in a content-neutral way, and that attempts to restrict the rights of “bad guys,” such as pornographers and neo-Nazis, are eventually likely to “ensnare good guys.” Hirsch’s essay illustrates how constitutional analysis that respects the perspective of constitution makers can influence the doctrines of those who administer constitutional provisions: constitution making favors a strong First Amendment because it actively assumes the revolutionary possibility of new constitutions.

Interpretation as maintenance and openness to fundamental change, and the role of minorities in constitutional maintenance are themes of Wayne D. Moore's article, adapted from his book, *Constitutional Rights and Powers of the People*. Exploring the attributes of constitutional citizenship, Moore draws on principles of popular sovereignty to maintain that "citizens"—as members of "the people"—may shape and vindicate constitutional norms against official practices through unofficial interpretive practices. He cites the case of Frederick Douglass. According to the Supreme Court's decision in *Dred Scott v. Sandford*, Douglass did not qualify as a "citizen." Yet Moore claims that the former slave made himself a citizen by at once shaping and vindicating foundational principles through his actions and his radical antislavery arguments. Douglass's life thus demonstrates that constitutional maintenance can involve far more than preservation of the status quo.

The volume continues with an essay by Keith E. Whittington that shows how a constitution maker's view can influence analysis of the political conditions for maintaining institutional arrangements. An interest in "how constitutions are maintained in politically fractious environments" brings Whittington to enlarge upon an observation of *The Federalist*: political actors must have political incentives for supporting institutional arrangements and prerogatives over time. Keeping formal legal arrangements in the background and focusing on the strategic political situations of American presidents vis-à-vis the Supreme Court, Whittington explores the political incentives that account for presidential domination of constitutional politics in some seasons, and presidential deference to the Supreme Court in others.

Deliberate constitutional change takes different forms and serves different purposes. Change can occur through formal amendment, formal interpretation by courts or other authoritative bodies, informal practices of public officials, the will of the voters in critical elections, or revolution. Theorists, of course, differ as to the legitimacy of all of these methods other than formal amendment as methods of constitutional change, and some may even hold that a specific emendation is constitutionally invalid. The effects of formal amendment may range from repair of verbal defects in the constitutional text to revolutionary changes in the larger political order. And it is the latter case that raises most questions of legitimacy.

The current literature of constitutional theory attends admirably to these problems, as is evident in the volume Sanford Levinson edited in 1995, *Responding to Imperfection: Theory and Practice of Constitutional Amendment*. Yet constitutional scholars have seldom addressed the abstract problem of constitutional failure, perceived instances of which precede the need for constitutional change. Neglect of this problem may

reflect a reluctance to confront an additional question: the criteria for constitutional success. In his essay for this volume, Mark E. Brandon observes that Americans “do not like to be made to feel unhappy, especially about their Constitution.” But, as he also observes, eventual constitutional failure is inevitable, and a theory of constitutional failure is a necessary part of any general theory of constitutional government. In a “preliminary exploration” of the issues, Brandon indicates the complexity of the notion of constitutional failure and some of the philosophic problems that await theorists who confront it.

Some of our authors (Levinson, Murphy, Fleming, Barber) have suggested in other works that one test of constitutional failure may be the inability of responsible bodies of citizens, like some economic, racial, and religious minorities, to reaffirm the constitutional order as a reasonably effective means to ends like justice and the general welfare. In the concluding essay of this volume, Robert George asks how citizens who believe legal abortion to be a grave injustice against the unborn can affirm a constitution which self-identified authoritative interpreters tell them includes abortion as nothing less than a fundamental right. George asks whether these citizens can treat such a state of affairs as anything less than a matter of constitutional failure. From the other side of the abortion issue, some people on the left fear that the rise of religious conservatism portends constitutional failure.

How to define constitutional failure and identify its instances are difficult questions, and Americans generally, including many in constitutional studies, may not want to think about them. We would count this as a sign, one of several, that the effort is past due.

Alternative Political Systems

WALTER F. MURPHY

To inquire into the best form of government in the abstract (as it is called) is not a chimerical, but a highly practical employment of scientific intellect; and to introduce in any country the best institutions which, in the existing state of that country, are capable of, in any tolerable degree, fulfilling the conditions, is one of the most rational objects to which practical effort can address itself.

—John Stuart Mill

THIS CHAPTER, a segment of a book on constitutional democracy, focuses on some of the choices open to political leaders guiding an imaginary nation, *Nusquam*, out of an oppressive political system.¹ Unlike John Rawls's "free and rational persons" operating behind a veil of ignorance, these founders know who they are and hope to become. They are also aware of the values they hold; and they want to establish a constitutional order that will promote those values. These leaders, styling themselves the Caucus for a New Political System, are practical men and women concerned more about the real-life consequences of their choices than the philosophical grounds for their values. Because *Nusquam* has deep religious divisions, these founders wish to avoid decisions based on theology. They realize, however, that because some of their politically relevant values rest on their own differing religious convictions, sooner or later they must face up to those divisions among themselves and the nation as a whole. Nevertheless, they now prefer to confront such difficulties later.

Members of the Caucus understand that they are operating not only under conditions of uncertainty but also under economic, military, geographic, and social constraints. Although they hope to create a new people, they know that different groups of citizens will retain different collective histories and memories. Because *Nusquam* has not one but several cultures, the Caucus must pay careful attention to varied "inclinations, riches, numbers, commerce, manners, and customs."² *Pace* William Graham Sumner, stateways can change folkways; but only with consider-