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## The Cult of Constitutionalism

Richard Albert, *Boston College Law School*



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# THE CULT OF CONSTITUTIONALISM

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## ABSTRACT

*Constitutionalism compels and constrains all dimensions of our everyday lives in ways large and small that we often do not fully appreciate—perhaps because constitutions take many forms that we do not generally associate with constitutionalism. From the arts, sports, trade, entertainment, politics, and war, constitutionalism is both the point of departure and the port of call. In this Article, I explore whether and how we might distinguish among these seemingly infinite types of constitutions.*

*First, I critique conventional distinctions separating public from private constitutions, and international from national and local constitutions. Then, I build on that deconstructive exercise to propose a theory of constitutionalism that distinguishes between constitutional basics and constitutional virtues. I subsequently undertake a comparative inquiry, applying this new model of constitutionalism to ask on what basis we might distinguish between a constitution of a nation from a constitution of a private organization.*

I. INTRODUCTION.....	373
II. CONSTITUTIONALISM AND ITS FORMS.....	378
A. <i>Conceptions of Constitutionalism</i> .....	378
B. <i>Illusory Distinctions</i> .....	383
III. CONSTITUTIONAL FEATURES.....	389
A. <i>Constitutional Basics</i> .....	390
B. <i>Constitutional Virtues</i> .....	393
C. <i>Constitutional Camouflage</i> .....	397
IV. CONSTITUTIONAL COMPARISONS.....	400
A. <i>The Constitutional Text</i> .....	401
B. <i>Beyond the Constitutional Text</i> .....	406
V. CONCLUSION.....	414

## I. INTRODUCTION

Two years after America’s founding statesmen gathered in Philadelphia to write the United States Constitution, Benjamin Franklin paused to reflect on the charter that Americans had given themselves and bequeathed to their posterity: “Our new [C]onstitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes!”<sup>1</sup> Two centuries later, Franklin’s intuition about the permanence

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1. Letter from Benjamin Franklin to Jean Baptiste Le Roy (Nov. 13, 1789), in 1 MEMOIRS OF BENJAMIN FRANKLIN 619 (1834).

of the Constitution has proven right, so much so that we might now speak of death, taxes, and the United States Constitution as life's three certainties.

The United States Constitution has defied the expectations that constitutional theorists commonly ascribe to national constitutions. Whereas many constitutions perish in the early years of nationhood, the United States Constitution has stood peerless in its durability: "[a]s it ages, it seems to grow stronger, and the risk of death recedes."<sup>2</sup> Americans, beginning with the founding generation, have infused the constitutional text with an unassailable legitimacy, both moral and sociological. The document has survived turbulent periods of domestic conflict and foreign war, economic misfortune and industrial growth, demographic evolution and migratory movement, and epic social and political transformations. But the endurance of the United States Constitution is just a small part of the larger story of constitutionalism that history will tell about our time.

Constitutionalism is ubiquitous. It informs how states behave in the international order, how governments treat their constituents, how communities order themselves, how groups relate to individuals, and how citizens interact with each other. Constitutionalism compels and constrains all dimensions of our everyday lives in ways large and small that we often do not fully appreciate, perhaps because constitutions take many forms that we do not generally associate with constitutionalism. Yet whether in the arts, sports, trade, entertainment, politics, or war, constitutionalism is both the point of departure and the port of call.

Consider the multiplicity of ways constitutionalism manifests itself around us. Return to the spring of 2010. In their battle to pass a new health care law expanding coverage for Americans, the Obama Administration and congressional Democrats resorted to the controversial process of reconciliation to block a Republican filibuster that could have derailed the historic bill.<sup>3</sup> Republicans responded that the legislative tactic of reconciliation was not only undemocratic but also unconstitutional.<sup>4</sup> Democrats in turn countered that the Constitution authorizes Congress to make its own internal rules<sup>5</sup>—including rules like reconciliation, which congressional Republicans had themselves

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2. ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 65, 167 (2009).

3. See Christi Parsons & Janet Hook, *Obama Signs Reconciliation Bill with Major Student Loan Change*, L.A. TIMES (Mar. 31, 2010), <http://articles.latimes.com/2010/mar/31/nation/la-na-obama-reconciliation31-2010mar31>.

4. See Michael W. McConnell, Op-Ed, *The House Health-Care Vote and the Constitution; No Bill Can Become Law Unless the Exact Same Text is Approved by a Majority of Both Houses of Congress*, WALL ST. J. (Mar. 15, 2010), <http://online.wsj.com/article/SB10001424052748704416904575121532877077328.html>.

5. U.S. CONST. art. I, § 5.

deployed on many occasions in years past.<sup>6</sup> A similar back-and-forth on war powers had earlier enveloped the Bush Administration's choice in 2003 to enter Iraq by force: does the president's authority as Commander-in-Chief<sup>7</sup> trump the congressional power to declare war,<sup>8</sup> and how were political actors to weigh the constitutional significance of the congressional resolution authorizing military force?<sup>9</sup> Concerns about Iraqi sovereignty and American foreign policy interests arose against this larger backdrop of the constitutionality of the Iraq invasion.

Even less obvious instances of constitutionalism abound. For instance, we have witnessed constitutionalism shape the resolution of trade disagreements between nations.<sup>10</sup> In 2002, after decades of threatening to impose tariffs on Canadian lumber exports, the United States did just that, charging a 27% duty on Canadian softwood lumber for what the United States argued was an unfair Canadian governmental subsidy to its lumber industry.<sup>11</sup> The dispute was ultimately settled by an international tribunal according to the strictures of the North American Free Trade Agreement, to which Canada and the United States are signatories.<sup>12</sup>

We have also observed how constitutionalism governs relationships in the university setting. In 2006, when the University of Colorado at Boulder suspended Ward Churchill from its faculty, Churchill had within his portfolio of academic rights the power to appeal his dismissal.<sup>13</sup> The appeal process entailed tolling limitations as well as manner and form requirements, all of which were dutifully catalogued in the University's Faculty Senate Constitution and administered by the Standing Committee on Privilege and Tenure.<sup>14</sup>

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6. See ROBERT KEITH, CONG. RESEARCH SERV., RL 30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" (Mar. 20, 2008), available at [http://assets.opencrs.com/rpts/RL30862\\_20080320.pdf](http://assets.opencrs.com/rpts/RL30862_20080320.pdf).

7. U.S. CONST. art. II, § 2.

8. U.S. CONST. art. I, § 8, cl. 11.

9. See Neil A. Lewis, *Congress Lets Slip the Dogs of War*, N.Y. TIMES (Oct. 13, 2002), <http://www.nytimes.com/2002/10/13/weekinreview/the-world-congress-lets-slip-the-dogs-of-war.html>.

10. For a discussion of the constitutionalization of the global economy, see DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE (2008).

11. Ian Austen & Clifford Krauss, *U.S. Will Lift a Lumber Duty in a Trade Deal with Canada*, N.Y. TIMES, Apr. 28, 2006, at A6, available at 2006 WLNR 7141577.

12. See Tobi Cohen, *Canada's Softwood Lumber Dispute with U.S. Laid to Rest*, VANCOUVER SUN, July 23, 2010, at C2, available at 2010 WLNR 26170711; Brett Popplewell, *NAFTA the Nasty No More; Twenty Years Ago, Free Trade Was Equated with National Suicide. How Things Change*, TORONTO STAR, Feb. 7, 2009, at O2, available at 2009 WLNR 2439522.

13. See Dan Frosch, *Colorado Regents Vote to Fire a Controversial Professor*, N.Y. TIMES, July 25, 2007, at A11, available at 2007 WLNR 14191129.

14. Scott Jaschik, *The Ward Churchill Endgame*, INSIDE HIGHER EDUC. (May 29, 2007, 4:00 AM), <http://www.insidehighered.com/news/2007/05/29/churchill>; UNIV. OF COLORADO, UNIVERSITY OF COLORADO FACULTY COUNCIL: FACULTY SENATE CONSTITUTION,

Constitutionalism pervades the world of sports just as emphatically as it does elsewhere. Case in point: We have seen constitutionalism at play in the World Cup of Soccer, and we have seen constitutionalism take center stage at the Olympics. When referee Koman Coulibaly drew the ire of the globe in the summer of 2010 for disallowing an American goal in the World Cup, angered fans and players turned immediately to the FIFA rulebook to investigate whether they had any recourse to reverse the controversial decision.<sup>15</sup> Nearly a decade ago, at the Salt Lake City Winter Olympics, the judges awarded the gold medal in the figure skating pairs competition to the Russian team over the Canadian duo by a margin of five to four.<sup>16</sup> When it later came to light that a French judge had cast the deciding vote under pressure to vote in favor of the Russians,<sup>17</sup> Canada appealed the decision and demanded an independent investigation.<sup>18</sup> The International Olympic Committee quickly took corrective action, but it could not alone undo the gold medal decision. To defuse the controversy, the Committee needed to persuade the International Skating Union to find a way through the labyrinthine rules and procedures enshrined in its General Regulations.<sup>19</sup> In the end, all parties agreed to a curious compromise: to award the Canadian pair a gold medal of its own.<sup>20</sup>

What unites these examples of constitutionalism is their common lineage. The intellectual origins of the rules governing the International Skating Union are the same ones that sustain the FIFA rulebook, the University of Colorado's Faculty Senate Constitution, the NAFTA regulations, and the United States Constitution. They are also anchored in the same foundations that underpin the constitutive charters of the New York State Bar Association,<sup>21</sup> Microsoft,<sup>22</sup> Whole

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available at <https://www.cu.edu/facultycouncil/constitution/Constitution.pdf> (last visited Apr. 25, 2012).

15. See Jeffrey Marcus, *Referees Talk in the Open, but Not About that One Call*, N.Y. TIMES, June 21, 2010, at B10, available at 2010 WLNR 12601623.

16. See Jeff Chu, *Fun and Games*, TIME (Feb. 18, 2002), <http://www.time.com/time/magazine/article/0,9171,203634,00.html>.

17. See Wayne Coffey, *IOC Won't Rule Out Sharing Skate Prize*, N.Y. DAILY NEWS, Feb. 15, 2002, at 93, available at 2002 WLNR 13833972.

18. See Christine Brennan, *Scoring Scandal Knocks Skating Chief for a Loop*, USA TODAY, Feb. 13, 2002, at 03D, available at 2002 WLNR 4493620.

19. See Mark Starr, *And Justice for All*, NEWSWEEK (Feb. 14, 2002, 7:00 PM), <http://www.thedailybeast.com/newsweek/2002/02/14/and-justice-for-all.html>.

20. See Kerry Lauerman, *Make Olympic Skating Judges Accountable*, SALON (Feb. 16, 2002), [http://dir.salon.com/news/sports/2002/02/16/fix\\_skating/index.html](http://dir.salon.com/news/sports/2002/02/16/fix_skating/index.html).

21. Bylaws of the New York State Bar Association (May 2, 1877), <http://www.nysba.org/Content/NavigationMenu/AboutNYSBA/Bylaws/BylawsJanuary2012.pdf>.

22. Amended and Restated Articles of Incorporation of Microsoft Corporation (Nov. 24, 2009), <http://www.microsoft.com/investor/CorporateGovernance/PoliciesAndGuidelines/articlesincorp.aspx>.

Foods,<sup>23</sup> the Sierra Club,<sup>24</sup> Coca-Cola,<sup>25</sup> Japan,<sup>26</sup> the Organization of American States,<sup>27</sup> the League of Women Voters,<sup>28</sup> the Urban League of Philadelphia,<sup>29</sup> and the Arab League.<sup>30</sup> Their shared ancestral bond is the written constitution.

Constitutionalism can of course exist without a written constitution.<sup>31</sup> But the concept of constitutionalism has today evolved into an institution deeply rooted in its written nature. From the early legal codes of Mesopotamia to the Solonian Constitution, from the Hebrew Bible to the Qur'an, from the Magna Carta to the United States Constitution and to the recent Kenyan Constitution,<sup>32</sup> humanity has across the ages developed a profound reverence for textuality. Accessible and touchable, the written form invites the reader to take hold of the text as her own and to engage with it in ways that outflank even the grandest ethereal ideas and spoken promises. The result is salutary—both for the project of building nationhood and for the challenge of entrenching public citizenship—because it constructs a collective identity and orients citizens toward their common interest.<sup>33</sup> But writtenness has brought along with it a cavernous hazard: the advent of the written constitution has spawned a culture of constitutionalism that threatens to devolve into a cult of constitutionalism defined more by artifice than virtue.

My task in these pages is to endeavor to distill constitutionalism to its simplest essence. I am concerned primarily with a question that understandably continues to puzzle political theorists: What is a constitution, and what is it for? I readily concede that definitively defining constitutionalism is an impossibly high ambition, most assuredly

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23. Amended and Restated Articles of Incorporation of Whole Foods Market, Inc. (Mar. 24, 2006), <http://www.wholefoodsmarket.com/company/pdfs/restatedarticlesincorporation.pdf>.

24. Bylaws & Standing Rules of the Sierra Club (Apr. 11, 1981), <http://www.sierraclub.org/policy/downloads/bylaws.pdf>.

25. Restated Certificate of Incorporation of The Coca-Cola Company (Sept. 15, 1993), <http://www.thecoca-colacompany.com/investors/certification.html>.

26. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (Japan).

27. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, available at [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States.htm](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm).

28. Bylaws of the League of Women Voters of the United States, art. II, § 1 (May 3-17, 1984), <http://www.lwv.org/content/bylaws-and-certificate-incorporation>.

29. By-Laws of the Urban League of Philadelphia (Sept. 30, 2009), [www.urbanleaguephila.org/bylaws.pdf](http://www.urbanleaguephila.org/bylaws.pdf).

30. Pact of the League of Arab States, Mar. 22, 1945, 70 U.N.T.S. 237.

31. See ADAM TOMKINS, PUBLIC LAW 9 (2003). One might ask, though, what came first: written constitutions or constitutionalism? The answer is quite surely the latter.

32. CONSTITUTION (2010) (Kenya).

33. In this classic study of American government, Thomas Paine described the American Constitution as the “political bible of the state,” as the ultimate source of authority both in perception and reality, and as the glue that brought together disparate persons to form a nation of citizens who would come to be known as Americans. 2 THOMAS PAINE, *Rights of Man, Part II. Combining Principles and Practice*, in THE POLITICAL WRITINGS OF THOMAS PAINE 145, 180-81 (1856).

so within this limited context. Nonetheless, I hope to illuminate the subsidiary queries that we should raise in interrogating the larger, elusive question about what constitutes the core of a constitution.

I begin, in Part II, by examining constitutionalism and its forms. There, I posit a number of distinctions according to which we generally understand constitutions, and suggest that each of them risks collapsing under the weight of scrutiny. Part III builds on that deconstructive exercise to propose the beginnings of a positive theory of constitutionalism that may help us theorize both the basic form and function of constitutions, irrespective of their indigenous manifestations. In Part IV, I undertake a comparative inquiry, applying the model of constitutionalism constructed earlier in Part III to ask which is more constitution-like: the constitution of a nation, such as the United States Constitution, or the constitution of a private organization, for example the Constitution of the National Collegiate Athletic Association? The answer, I believe, is not as clear as we might suppose. Part V concludes with reflections on the interrelationship between constitutions and constitutionalism.

## II. CONSTITUTIONALISM AND ITS FORMS

We cannot define constitutionalism without first understanding its constitutive features. But identifying the elements that comprise constitutionalism is easier said than done because there is no shortage of conflicting theories about what constitutionalism is and what it demands. Still, if there is one incontrovertible point about constitutionalism it is that it boasts a distinctive appeal, not only along practical and political lines, but also on moral and normative grounds. And therein lies the biggest conceptual problem underlying modern theories of constitutionalism: they collapse constitutionalism's functions—for example, its insistence on predictability, fair notice, and separating powers—with constitutionalism's goods, namely its celebration of the rule of the law and its eternal pursuit of societal cohesion, unity, and fidelity to the community.

### A. *Conceptions of Constitutionalism*

There are two major conceptions of constitutionalism. The first looks to its purpose. The second looks to its promise. These two conceptions of constitutionalism are not necessarily incompatible; rather, they are cumulative. The second folds within itself some manifestation of the first, meaning that it presupposes, correctly, that constitutionalism has a purpose, but it subsequently takes the further step of orienting itself toward constitutionalism's higher promise for humanity. Let us call the first conception of constitutionalism *functional constitutionalism*, and the second *aspirational constitutionalism*.

For functional constitutionalism, constitutionalism is a simple matter of fact: Can we point to something recognizable as a constitution? It is a binary question, yes or no. Functional constitutionalism does not concern itself with the values or substantive principles that do or should appear in a constitution. On this view, a constitution is no more than a set of basic rules that define, describe, and govern the structure and operation of an entity.<sup>34</sup> That entity may be a country, a country club, a subnational territory, an organization, a private institution, a football team, or even an individual. To write a constitution for that entity, a number of questions demand answers, including some or all of the following: How is the entity structured? Are there conditions to joining the entity and to subsequently remain a member? Who may bind the entity and act in its name?<sup>35</sup> The answers to these questions form the rules that comprise the constitution and define the powers and undertakings of those who constitute that entity. They also serve as instructions for how the entity discharges its mission and how it relates to the outside world.<sup>36</sup>

What characterizes functional constitutionalism is a bold and uncompromising—and for some perhaps a disconcerting—amorality about the role of a constitution. Functional constitutionalism pays no heed to questions of right and wrong, virtue or vice, just or unjust. It is “wholly neutral in moral and political terms,” and makes no judgment as to whether a given constitution “is good or bad or about whether it is worth commending or condemning.”<sup>37</sup> We may draw a useful parallel to procedural democracy, which Frank Michelman contrasts with substantive democracy. The former concerns questions about the decisionmaking process, namely who makes the laws and who interprets them, whereas the latter is more concerned with the actual content of those laws and the social purposes they serve.<sup>38</sup> This view, however, is subject to John Hart Ely’s observation that procedural democracy cannot function properly without baseline rules about political equality and representation,<sup>39</sup> which may themselves be regarded as principles of substantive democracy. We can therefore refine the distinction in the interest of achieving greater clarity about functional constitutionalism: Procedural democracy demands an order anchored in only those substantive concepts that make possible

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34. LEONARD JASON-LLOYD, *THE LEGAL FRAMEWORK OF THE CONSTITUTION* 1 (1996).

35. CHERYL SAUNDERS, *IT’S YOUR CONSTITUTION: GOVERNING AUSTRALIA TODAY* 1 (2d ed. 2003).

36. HILAIRE BARNETT, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 6 (5th ed. 2004).

37. ANTHONY KING, *THE BRITISH CONSTITUTION* 3 (2007).

38. Frank I. Michelman, *Brennan and Democracy*, 86 CALIF. L. REV. 399, 401-02, 411 (1998).

39. This is what John Hart Ely refers to as “the representation-reinforcing approach.” See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-104 (1980).



fair procedures; in contrast, functional constitutionalism is interested only in having an order irrespective of its content. Functional constitutionalism, then, is quite simply a positivist conception of a blueprint that designs structures to preside over a group of persons and to command a course of conduct consistent with the group's purpose, whether mal-intentioned or righteous.

Functional constitutionalism therefore regards a constitution as a blank slate. Beyond its minimal elements of structure and design, a constitution is an empty cast devoid of intrinsic moral, ideological, or political meaning. No fill is poured into the shell to give it a predetermined shape; the cast of the constitution is not sculpted by an intrinsic fundamental purpose nor is it reinforced by higher theoretical principles. It is better seen as a clean canvas unmarked even by the first strokes of paint. It will display whatever portrait is affixed to it and take the shape into which it is molded by its artisans.

Malleability, impressionability, and manipulability—those are the defining characteristics of a constitution according to the functional conception of constitutionalism. It stands ready to be deployed for any purpose ascribed to it. For the constitution of the newly independent state of Kosovo,<sup>40</sup> the purpose may be to establish a representative government. For the constitution of the Rotary Club of Montebello,<sup>41</sup> the purpose may be to congregate in the service of community-building activities and personal enrichment exercises. For the Sicilian mafia's constitution,<sup>42</sup> the purpose may be to earn illicit profits for distribution along the chain of command in a prescribed order of priority. Functional constitutionalism sees these purposes as equally valid and consequently perceives no difference among the constitutions of Kosovo, the Rotary Club, and the mafia.

But aspirational constitutionalism sets a higher standard for a constitution. It looks askance at the concept of functional constitutionalism, convinced not only that amorality is the very reverse of what should structure communities, but moreover that the bare-boned approach of functional constitutionalism is an uninspiring way to understand both a constitution and its wider social purposes. Aspirational constitutionalism does not limit itself to the ways in which a community is presently arranged, constrained as it may be by the practical realities of finite resources, internal limitations, and a narrow imagination of possibilities for collective and individual growth. Aspirational constitutionalism, instead, sees a constitution as reflecting a vision of society as it could be; it decrees a collaborative undertaking for the community to pursue. Though it may be an

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40. CONSTITUTION OF THE REPUBLIC OF KOSOVO pmbL (2008).

41. Constitution of the Rotary Club of Montebello, California, art. IV, *available at* <http://www.montebellorotaryclub.org/docs/rotaryconstitution.pdf> (last visited Apr. 25, 2012).

42. See JOHN DICKIE, *COSA NOSTRA: A HISTORY OF THE SICILIAN MAFIA* (2004).

eternally unachievable objective, this vision of constitutionalism sets out to perfect the political and institutional arrangements that constitute communities. Aspirational constitutionalism therefore brandishes as its sword the Austinian philosophy that a constitution is the embodiment of positive morality.<sup>43</sup> It assigns substantive meaning to the project of constitutionalism, defines it as more than merely specifying the “rules of the game,”<sup>44</sup> and seeks to breathe into it values coherent with the larger project of liberal democracy.

More than purely a set of operating procedures, an aspirational constitution is more precisely a standard that merges principles of governance, institutional expectations, and some form of an ethical code.<sup>45</sup> What underpins this view of constitutionalism is that persons who join forces to create a constitutional community will have the capacity and willingness to suspend their personal interests in the service of the larger good. That is what liberal democracy demands: respect for the rule of law and the predictability, notice, and fairness that constitute it. Aspirational constitutionalism insists on subordinating one’s immediate, inward-looking desires to the longer-term, public-regarding interests of the whole. In this respect, aspirational constitutionalism exemplifies the struggle for righteousness, the search for completion, and the march toward an idealized version of reality. It is, as one text puts it, “an ideal that may be more or less approximated by different types of constitutions and that is built on certain *prescriptions* and certain *proscriptions*.”<sup>46</sup>

Importantly, though, those prescriptions and proscriptions can be assessed only against a normative standard. But choosing that standard is problematic. David Strauss states the problem in this way: “[I]t presupposes some form of moral objectivity. That is, it presupposes that in a wide range of cases, there are right and wrong answers to moral questions. Otherwise, it would not be possible to say that certain rights are fundamental, and that all societies should protect them.”<sup>47</sup> And therein lies the insoluble haze of aspirational constitutionalism. Giving content to that normative standard requires reaching some peaceful and plausible agreement among disparate peoples whose view of the world is informed by their own particularized lived experiences. This may be possible in homogeneous communities bound together by a shared history and a common code of communal ethics that predates constitutionalism. But, it is much

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43. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 53, 71 (2d ed. 1861).

44. Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25, 26 (Jack M. Balkin & Reva B. Siegel eds., 2009).

45. GILLIAN PEELE, *GOVERNING THE UK: BRITISH POLITICS IN THE 21ST CENTURY* 32-33 (2004).

46. NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁS SAJÓ & SUSANNE BAER, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 10 (2003).

47. David A. Strauss, *The Role of a Bill of Rights*, 59 U. CHI. L. REV. 539, 558 (1992).

harder in heterogeneous communities that do not rest on these tangible connections and rely instead on constitutionalism as a condition of membership. Nonetheless, we have seen constitutionalism create several inventive devices to facilitate agreement among dissimilar individuals. Federalism is perhaps the best illustration of a constitutional innovation that has been deployed to manage differences in a polity and to palliate the problem of moral subjectivity.<sup>48</sup>

Despite its difficulty, managing difference and negotiating compromise may be the most compelling attraction of aspirational constitutionalism. Few things can be more satisfying than joining together with others to fashion a sustainable accord about how to improve ourselves and our community. And to do so by engaging in civil debate, heated though it may become, about the course to chart toward better prospects for the union, association, or country—that is what opens the door to constitutionalism’s majestic possibilities for fulfilling the maxim that humanity can sometimes achieve unimaginable triumphs unbecoming the sum of its parts. Yet aspirational constitutionalism’s appeal may also be the greatest threat to itself.

Paradoxically, it is precisely that which makes constitutionalism so appealing that complicates the task of defining constitutionalism. True, constitutionalism is at its best when it takes root in tandem with the rule of law as its foundation. But it is inaccurate to define constitutionalism in terms of the rule of law, as if the former insists on the latter or the latter requires the former. That may be more of a wish than a reality because constitutionalism and the rule of law can, and indeed do, exist independent of each other.

Take North Korea and Iran, for example. Both are oppressive regimes whose people are deprived of the blessings of liberty and the pleasures of peace and prosperity despite being ostensibly governed by supreme constitutions which purportedly guarantee democratic rights and freedoms.<sup>49</sup> What these authoritarian states demonstrate in plain view is that constitutions are sometimes deployed as a smokescreen by nefarious persons with nefarious purposes—which is nothing new because constitutions have long existed in states that have no culture of constitutionalism.<sup>50</sup> Let us therefore not be held

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48. Michael Burgess, *Managing Diversity in Federal States: Conceptual Lenses and Comparative Perspectives*, in CONTEMPORARY CANADIAN FEDERALISM: FOUNDATIONS, TRADITIONS, INSTITUTIONS 428, 428-40 (Alain-G. Gagnon ed., 2009); see also RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY (1999) (rethinking constitutional commitments in terms of social coordination and game theory instead of the conventional narrative of mutual benefit and cooperation).

49. CONSTITUTION OF N. KOR., ch. V, art. 64 (2009); ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION], ch. I, art. 3(7), 1368 [1989] (Iran).

50. See H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN

spellbound by the illusion that the rule of law derives from constitutionalism, or that the two travel together. That is only one misconception about constitutionalism. There are others. Other false positives pepper the terrain of constitutionalism—and we must press those unsteady distinctions before proceeding to theorize constitutionalism afresh.

### B. *Illusory Distinctions*

Constitutions come in many manifestations. The World Trade Organization,<sup>51</sup> Google,<sup>52</sup> the American Association of University Professors,<sup>53</sup> the Commonwealth of Australia,<sup>54</sup> the Republic of Haiti,<sup>55</sup> the Ford Foundation,<sup>56</sup> the College Republicans of the Massachusetts Institute of Technology,<sup>57</sup> General Motors,<sup>58</sup> and Disney<sup>59</sup>—all of these entities govern their internal and external relations with reference to a constitution. Like the other associations and institutions that dot the landscape of human organization, these are groups large and small, far and near, professional and academic, profit-making and service-oriented, and everything in between. This limitless collection of constitutions calls for manageable categories to structure our understanding of the infinite possibilities of constitutionalism.

Two obvious distinctions emerge as promising prospects for sorting constitutions. The first concerns the sphere of the constitutional order and the second concerns its reach. On the former, we could posit a distinction between public and private constitutions. As to the latter, we could hypothesize that international constitutions are different from national ones, which are themselves different from sub-national ones. Using these points of dissimilarity, we could suggest the following archetypes of constitutional kind: (1) a public interna-

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THE CONTEMPORARY WORLD 65, 65-82 (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero & Steven C. Wheatley eds. 1993).

51. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

52. Third Amended and Restated Certificate of Incorporation of Google Inc. (Aug. 24, 2004), <http://investor.google.com/corporate/certificate-of-incorporation.html>.

53. Constitution of the American Association of University Professors (June 13, 2009), <http://www.aaup.org/AAUP/about/bus/constitution.htm>.

54. Commonwealth of Australia Constitution Act, 1900 (Imp), 63 & 64 Victoria, c. 12 § 9 (U.K.).

55. La Constitution de la République d'Haïti de 1987 [CONSTITUTION] Apr. 28, 1987 (Haiti).

56. Restated Articles of Incorporation of the Ford Foundation (Dec. 8, 1983), [http://www.fordfound.org/pdfs/about/Charter\\_Articles\\_of\\_Incorp.pdf](http://www.fordfound.org/pdfs/about/Charter_Articles_of_Incorp.pdf).

57. Constitution of the MIT College Republicans (May 8, 1995), <http://web.mit.edu/republicans/www/constitution.html>.

58. Amended and Restated Certificate of Incorporation of General Motors Holding Company (Aug. 11, 2009), [http://yahoo.brand.edgar-online.com/EFX\\_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=6895833-837814-851247&SessionID=UPPIHFqxm7zmKG7](http://yahoo.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=6895833-837814-851247&SessionID=UPPIHFqxm7zmKG7).

59. Restated Certificate of Incorporation of the Walt Disney Company (July 9, 1999), <http://corporate.disney.go.com/media/corporate/DisneyCertificateofIncorporation.pdf>.

tional constitution, for instance the United Nations Charter;<sup>60</sup> (2) a public national constitution, namely the Irish Constitution;<sup>61</sup> (3) a public subnational constitution, for example the Constitution of the Commonwealth of Massachusetts;<sup>62</sup> (4) a private international constitution, such as the Constitution of the International Association of Lions Clubs;<sup>63</sup> (5) a private national constitution, like the Charter of the National Rifle Association of the United Kingdom;<sup>64</sup> and (6) a private subnational constitution, perhaps the Constitution of the Texas Ornithological Society.<sup>65</sup> We *could* hypothesize that these categories bring clarity to constitutional forms. But we would find these categories unsatisfactory because there are negligible differences between public and private constitutions, and among international, national, and subnational ones.

Begin first with what may be an illusory distinction between a public and a private constitution. Consider the case of a private association governed by a private constitution. Assume that the private association has adopted the practice of holding association-wide elections at each election cycle in order to select candidates who will then run in a number of different races for the official Democratic nomination. Further assume that this private association prohibits a certain class of citizens from participating in its private elections. Those were the facts in a case before the Supreme Court of the United States, in which the Court elaborated what has come to be known as the state action doctrine.<sup>66</sup> The doctrine generally holds that the United States Constitution's protections for civil rights and liberties apply only to public, or governmental, institutions.<sup>67</sup>

But there are exceptions to the state action doctrine. The most relevant one for our purposes is the public function exception, which holds that the Constitution applies where a private entity performs a task or engages in conduct that was traditionally and exclusively performed by a public body.<sup>68</sup> Returning to our example of a private association holding association-wide elections, the Court concluded that the administration of elections is a traditional government task—a task which private associations may assist in administering but not

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60. U.N. Charter.

61. IR. CONST., 1937.

62. MASS. CONST.

63. Constitution and By-Laws of the International Association of Lions Clubs (revised July 8, 2011), <http://www.lionsclubs.org/EN/common/pdfs/la1.pdf>.

64. Charter of the National Rifle Association of the United Kingdom (Nov. 25, 1954), <http://www.nra.org.uk/common/files/currentcharter.pdf>.

65. Texas Ornithological Society Constitution (revised, 1998), [http://www.texasbirds.org/index.php?option=com\\_content&view=article&id=80:constitution&catid=61:documents&Itemid=89](http://www.texasbirds.org/index.php?option=com_content&view=article&id=80:constitution&catid=61:documents&Itemid=89).

66. *See Terry v. Adams*, 345 U.S. 461 (1953).

67. *See The Civil Rights Cases*, 109 U.S. 3, 11-19 (1883).

68. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

in a way that circumvents the strictures of the public constitution.<sup>69</sup> The same theory has compelled the Court to rule similarly in other instances. For example, where a town was fully owned by a private corporation, it was nevertheless a public town and therefore subject to the standards that govern public entities.<sup>70</sup> Another example: a private, racially restrictive covenant was denied the cover of judicial enforcement because giving public refuge to such private conduct would be to sanction discrimination.<sup>71</sup> Still another example: American corporations must conform their conduct to the standards of the United States Constitution,<sup>72</sup> but they may also claim the benefits it confers.<sup>73</sup> What these cases have in common is their underlying theory, which is that the state is implicated in all forms of conduct by even nonstate actors because “any private action acquiesced in by the state can be seen to derive its power from the state . . . .”<sup>74</sup>

At first glance, it may seem plausible to state that there exist meaningful points of contrast between the constitutions that compel and limit the actions of public bodies and private associations. Indeed, Carl Schmitt, one of history’s most influential constitutional theorists, has suggested that very point, reasoning that “[a] proper understanding requires that the meaning of the term ‘constitution’ be limited to the constitution of the *state*, that is to say, the political unity of the people.”<sup>75</sup> A constitution, to him, may only correctly refer to the organizing principles of a public body, not a private one, which must necessarily mean that public charters differ in material respects from their private counterparts. There is some truth to that. The former focuses on government institutions while the latter constrains only nongovernmental bodies. Yet as we see from our case study of elections, that cursory analysis, while descriptively accurate as a factual statement, cannot hold when pressed beyond its surface. Private associations and public bodies do not operate in separate spheres; they coexist in the same single sphere and are often held to the same standard of conduct. An artificial distinction between public and private constitutions is therefore appealing but misleading. For it fails to appreciate the multiple methods and mechanisms that have shrunk the space between the public and private spheres, so much so that it makes little sense to insist on such a contrived distinction between public and private.

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69. *Terry*, 345 U.S. at 468-69.

70. *See* *Marsh v. Alabama*, 326 U.S. 501 (1946).

71. *See* *Shelley v. Kraemer*, 334 U.S. 1 (1948).

72. *See, e.g.,* *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374 (1995).

73. *See* *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 912-13 (2010); *NAACP v. Button*, 371 U.S. 415, 419, 428-29 (1963).

74. Paul Brest, *State Action and Liberal Theory: A Casenote on* *Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1301 (1982).

75. CARL SCHMITT, *CONSTITUTIONAL THEORY* 59 (Jeffrey Seitzer ed., trans., 2008).

If there is a difference between public and private, it may be more conceptual than empirical. That is one of the enduring contributions of Duncan Kennedy's vast body of influential scholarship: it is not possible, he wrote, "to take the public/private distinction seriously as a description, as an explanation, or as a justification of anything."<sup>76</sup> Claire Culter has written similarly in the context of public and private international law, observing that "the distinction is in empirical decline as forces of globalization and privatization are blurring the separation between private and public authority."<sup>77</sup> But even the conceptual distinction raises challenging questions about how to classify something as private or public. Charter schools, business improvement districts, government contractors, homeowners' associations<sup>78</sup>—these now customary coalitions of traditional public and private institutions illustrate the difficulty of articulating with convincing clarity the bases upon which something may be said to fall within or beyond the realm of the private.

There may also be a second illusory distinction among constitutions: international versus national versus local. There is no longer such a thing as a border between states and, if there is, it no longer means what it once did. Borders have faded, though not quite vanished—our inheritance from the politics of the twentieth century. Once upon a time, ages ago it seems, what characterized membership in the international order of states was a reciprocal distrust and a jealous security of national borders. This defensive posture was obligatory if states were to preserve the twin signposts of statehood: territorial sovereignty and political independence. States consequently devised an effective instrument in the service of self-determination: the principle of nonintervention. Long established, the principle affirms that no state may intervene in the internal affairs of any other, be they cultural, economic, political, or social.

Nonintervention was then, and remains today, anchored in the theory of deterrence. Where two states enter into a nonintervention agreement, each knows that the other reserves the right to intervene in the internal affairs of the other if one of the two parties violates the agreement. The most commonly feared manifestation of intervention is any form of military intercession, though political or economic aggression may be equally devastating to the viability of a state. In the interest of preserving its own territorial sovereignty and political independence, a state will agree to a pact of nonintervention out of

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76. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1357 (1982).

77. A. Claire Cutler, *Artifice, Ideology and Paradox: The Public/Private Distinction in International Law*, 4 REV. INT'L POL. ECON. 261, 261-62 (1997).

78. Paul M. Schoenhard, *A Three-Dimensional Approach to the Public-Private Distinction*, 2008 UTAH L. REV. 635, 642.

fear of losing dominion over its land and people. This once central principle of nonintervention dates to a series of seventeenth-century agreements among royal emperors.<sup>79</sup> Mutually suspicious of the designs of monarchs on their holdings, the ruling classes negotiated this mutual deterrent of nonintervention.<sup>80</sup> Nonintervention embodied the core foreign policy that informed all international relationships through the early years of the Post Second World War Era.<sup>81</sup> The principle even became constitutionalized in several nations<sup>82</sup> and elevated as a condition for membership to international bodies, most notably the United Nations,<sup>83</sup> the Organization of American States,<sup>84</sup> and the Association of Southeast Asian Nations.<sup>85</sup>

In recent years, however, nonintervention has fallen out of style. Although the principle of nonintervention has not officially been abrogated from constitutions or international charters, it has lost the force it once enjoyed. Consider the recent military interventions in Darfur,<sup>86</sup> Liberia,<sup>87</sup> and Georgia.<sup>88</sup> What those episodes illustrate is that gone are the days of regarding states as islands, as unconnected entities whose internal affairs are of no concern to the wider world. It is difficult to consider this development a surprise given the gradual disappearance of borders that have traditionally demarcated nations and the expanding sphere of influence enjoyed by the world's economic and military powers.

The escalating pace of globalization is not the only reason why the principle of nonintervention has been cast aside as an artifact of an earlier political order. Another terribly important reason is the rise of what Bruce Ackerman calls "world constitutionalism,"<sup>89</sup> the notion that humanity is converging toward a set of shared understandings about the role of the state and the rights of citizens—a descriptive, not normative, vision of the world that is encapsulated emphatically

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79. ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., *NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS* 1-14 (1956).

80. *Id.*

81. See JUDE IBEGBU, *FUNDAMENTALS OF INTERNATIONAL LAW* 171-72 (1999).

82. See, e.g., CONSTITUTION DE LA RÉPUBLIQUE ALGÉRIENNE DÉMOCRATIQUE ET POPULAIRE [CONSTITUTION] 1996, pt. I, ch. III, art. 28 (Alg.); CONSTITUTIONAL LAW OF THE REPUBLIC OF ANGOLA Aug. 1992, pt. I, art. 15; CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH Nov. 4, 1972, pt. II, art. 25(1).

83. U.N. Charter, art. 2, para. 7.

84. Charter of the Organization of American States, *supra* note 27, at art. 19.

85. The Association of Southeast Asian Nations Declaration, Aug. 8, 1967, pmbl.

86. See Lydia Polgreen, *Peacekeeping in Darfur Hits More Obstacles*, N.Y. TIMES, Mar. 24, 2008, at A1, available at 2008 WLNR 5627702.

87. See Somini Sengupta, *Peacekeeping Unit Arrives in Liberia*, N.Y. TIMES, Aug. 5, 2003, at A1, available at 2003 WLNR 5653424.

88. See Neil MacFarquhar & Thom Shanker, *Russian Neighbors Urge U.N. to Stand Against Kremlin Aggression*, N.Y. TIMES, Sept. 24, 2008, at A10, available at 2008 WLNR 18186747.

89. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).



in such texts as the Universal Declaration of Human Rights,<sup>90</sup> the European Convention,<sup>91</sup> the Charter of the African Union,<sup>92</sup> the North Atlantic Treaty,<sup>93</sup> and elsewhere. These international constitutions have very serious implications for national constitutions. For example, international constitutions, some of which are also known as treaties, are often given a higher authority than national rules.<sup>94</sup> As a consequence, national rules fall below, and therefore are subject to, international rules, the effect of which is to fuse international constitutional standards into domestic ones.<sup>95</sup>

Perhaps the best example is the Constitution of South Africa, which compels domestic judicial bodies to interpret the South African Bill of Rights in a manner that respects international law.<sup>96</sup> The impetus for inserting this provision in the South African Constitution was to begin to right the wrongs of the past. When South Africa emerged from the darkness of institutionalized inequality to give itself a new constitution in 1996, the constitutional designers wanted to send a signal to the world: the new South Africa would be guided by international human rights norms.<sup>97</sup> The result was to reshape South Africa in the image of the wider world. Humanity's standards for rights and state conduct would become those of the government and people of South Africa; in so doing, they would challenge the conventional distinction between national and international.

In much the same way, the distinction between national and local is deceptive. Consider federal states in which there are two levels of government: national and subnational. A number of these states possess both a national and several subnational constitutions. For instance, the United States and Argentina<sup>98</sup> both have a national constitution and subnational constitutions, the former being state con-

90. G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

91. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

92. Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3.

93. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

94. See, e.g., CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA DE 1949 [CONSTITUTION] Nov. 7, 1949, tit. VIII, ch. III, arts. 99-104; tit. IX; tit. X; tit. XI; tit. XIII, ch. II, arts. 183-84 (Costa Rica); U.S. CONST. art. VI, § 2.

95. For a useful discussion of the internalization of constitutional law, see Ignacio de la Rasilla del Moral, *The Unsolved Riddle of International Constitutionalism*, 12 INT'L COMMUNITY L. REV. 81 (2010). We find an equally useful analysis in Ulen and Ginsburg's recent work, in which they argue that the fusion of the international into the national serves important political interests: "[I]t not only facilitates commitment to international audiences, but also to domestic ones. That is, politicians may in some circumstances choose to convey promises to domestic constituents in international instruments rather than in domestic ones." Tom Ginsburg & Thomas S. Ulen, *Odious Debt, Odious Credit, Economic Development, and Democratization*, 70 LAW & CONTEMP. PROBS. 115, 124 (2007).

96. S. AFR. CONST., 1996, ch. 2, § 39(1)(b).

97. JOAN CHURCH, CHRISTIAN SCHULZE & HENNIE STRYDOM, *HUMAN RIGHTS FROM A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE* 195 (2007).

98. CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

stitutions<sup>99</sup> and the latter provincial ones.<sup>100</sup> It would be incorrect to presume that these constitutions are intended by their textual provisions to constrain only the actions of their respective levels of government. Quite the contrary, the Argentinian Constitution makes the provincial governors “agents” of the federal government for a specific purpose: “the enforcement of the Constitution and the laws of the Nation.”<sup>101</sup> Moreover, although the provincial governments may create their own constitutions, they must do so “in accordance with the principles, declarations, and guarantees of the National Constitution.”<sup>102</sup> The effect is to fuse the national into the local.

The United States Constitution does something similar. The Constitution provides in the Supremacy Clause that it not only takes precedence over the subnational constitutions of the several states but that its text governs in the event of a conflict with the constitutions, laws, or actions of the subnational entities.<sup>103</sup> Likewise, the standard set by the United States Bill of Rights is also fused into the constitutional law of the states, a result of the incorporation doctrine,<sup>104</sup> which now requires states to comply with many of the political and civil rights enshrined in the national Bill of Rights.<sup>105</sup> Thus the local becomes the national, undermining the claim that meaningful differences flow from the national or subnational character of a constitutional text. That renders this distinction as insecure as the one between international and national or public and private.

### III. CONSTITUTIONAL FEATURES

Perhaps instead of categorizing constitutions according to their zone of application and territorial reach, we might alternatively classify constitutional types according to their constituent components. There are certain tasks, functions, or features that define constitutionalism as a fundamental enterprise. These are baseline criteria that must be present in order to constitute a constitution. We can call these *constitutional basics*—features that are indispensable to a constitution, without which something is unidentifiable as a constitution. Constitutional basics set the floor for the minimum attributes of constitutionalism; all constitutions must and do, as a descriptive matter, satisfy those requirements. But beyond these constitutional basics, a constitution should also possess features and perform tasks or functions that are neither necessary nor sufficient for constitutionalism

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99. See, e.g., ALASKA CONST.; S.C. CONST.; TENN. CONST.

100. See, e.g., BUENOS AIRES CONST.; SANTA FE CONST.; MENDOZA CONST.

101. Art. 128, CONST. NAC. (Arg.).

102. *Id.* at art. 5.

103. U.S. CONST. art. VI, cl. 2.

104. U.S. CONST. amend. XIV.

105. See *Duncan v. Louisiana*, 391 U.S. 145, 147-49 (1968).

but that are nevertheless worthy ambitions for a constitution. We can call this second class of normative constitutional characteristics *constitutional virtues*—features that constitutions should aspire to exhibit because they are desirable elements of constitutionalism.

### A. *Constitutional Basics*

All constitutions do three things. First, constitutions separate powers by creating an internal structure of authority that serves as a referent for disputes. Second, constitutions identify or create a class of constituents who must govern themselves according to it. Third, constitutions embrace a purpose or a mission that guides constituents and their governors in the conduct of their affairs, both internal to the group and external toward the wider world. But constitutions can do each of these three things without expressly stating so in their text.

Take the separation of powers as an example. Some national constitutions make plain by their very words that the separation of powers is a fundamental organizing principle of governance.<sup>106</sup> For example, the French Declaration of the Rights of Man and of the Citizen actually declares that a state without the separation of powers has no constitution at all.<sup>107</sup> The same cannot be said about the United States Constitution, which was nevertheless constructed on the basis of Montesquieu's separation of powers theory.<sup>108</sup> Although the American presidential system has become synonymous with separated powers,<sup>109</sup> nowhere in the text of the United States Constitution will one find a provision declaring explicitly that national powers shall operate separately. Instead, readers must infer the principle of separated powers from the structure of the text and the substance of its several provisions, which establish independent legislative, executive, and judicial branches of government.<sup>110</sup>

Constitutions do not separate powers for the sake of separation alone. They separate powers for a particular purpose: to establish a way, at least nominally, to resolve internal conflict. John Rogers discusses

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106. See, e.g., MO. CONST. art. II, § 1 (1945); AZER. CONST. art. 7(III); Article 47, Section 3, *Doustour Jomhouriat al-Iraq* [The Constitution of the Republic of Iraq] of 2005; QATAR CONST., art. 60.

107. Déclaration des droits de l'Homme et du Citoyen du 26 août 1789 [The Declaration of the Rights of Man and the Citizen of August 26, 1789], Ministère de la Justice et de Libertés [Department of Justice and Freedom], Aug. 26, 1789, art. 16.

108. See JACK P. GREENE, *THE INTELLECTUAL HERITAGE OF THE CONSTITUTIONAL ERA* 43-44 (1986).

109. See Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 54-55 (2001); Fred W. Riggs, *Globalization, Ethnic Diversity, and Nationalism: The Challenge for Democracies*, 581 ANNALS AM. ACAD. POL. & SOC. SCI. 35, 42 (2002).

110. U.S. CONST. arts. I, II, III.

this point in the particular context of a state constitution, but he frames the dispute-resolving function of a constitution quite effectively, allowing us to extrapolate its application to nonstate constitutions:

[W]e can think of a constitution as a kind of fundamental political agreement. The elements of a political society that hold power agree that decisions will be made in a certain way, by certain officials, institutions, or bodies. The terms of the agreement may be written or not. The agreement may be changed by express or implicit agreement. The agreement may be abolished or superseded by express or implicit agreement. Moreover, the agreement may be violated, even repeatedly. But as long as such an agreement serves as a fundamental referent for disputes among the elements that have power in the political society, one can speak of it as a constitution.<sup>111</sup>

Whether they structure the organization of governments or membership associations or other groups, constitutions divide authority between or among entities with a view to elevating one above the others in some or all areas of potential dispute.

This is a compound point that demands two showings: first, that constitutions separate powers; and second, that their structure of separated powers serve as a referent for disputes. Both items are demonstrable in tandem. For instance, the Alabama Constitution creates three branches of government, separates responsibilities among them, and grants each primary jurisdiction in their respective spheres of authority.<sup>112</sup> For its part, the Constitution of India creates and separates powers among four government departments and likewise authorizes each to exercise its powers to the fullest extent subject to conformity with the constitution.<sup>113</sup> Likewise, the nonprofit HoneyNet Project's Constitution confers powers upon a board of directors, a corps of officers and committees, and also describes the terms for voting membership, all of which establish the conditions for exercising authority in the name of the body and resolving disputes that may arise in the normal or exceptional course of affairs.<sup>114</sup>

Even a society that we might otherwise regard as dictatorial meets this first condition of constitutionalism. Hobbes' classic study of political theory, *Leviathan*, depicts a community whose members have in common cause voluntarily surrendered their individual rights to one person or a group of persons—the sovereign—in the larger interest of the community.<sup>115</sup> The sovereign therefore has the

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111. John M. Rogers, *Anticipating Hong Kong's Constitution from a U.S. Legal Perspective*, 30 VAND. J. TRANSNAT'L L. 449, 451 (1997).

112. ALA. CONST. art. III, § 43 (1901).

113. INDIA CONST. art. 53.

114. See Bylaws and Constitution of The HoneyNet Project, arts. 4-6 (July 10, 2007), <http://old.honeynet.org/misc/files/20070723-bylaws.pdf>.

115. THOMAS HOBBS, *LEVIATHAN* (J.C.A. GASKIN ed., reissue ed. 2009) (1651).

power to make rules, may judge the application of its own rules, and is immune to challenges to its authority by the membership.<sup>116</sup> That is a separation of powers between ruler and ruled, a binary division of authority between two parties, one of which has forfeited the entirety of its rights to the other. Normatively, we may find some discomfort in this arrangement. But as a descriptive matter, it fulfills the first of three constitutional basics: separating powers as a referent for disputes.

Constitutions are not self-executing directives. They require activity, interpretation, enforcement, and adherence by persons—which leads us to the second condition of constitutionalism: membership. A constitution creates, or by its very being embodies, the body or group of constituents who are bound to govern themselves within the confines of the arrangement of rules, orders, customs, conventions, and practices the constitution establishes and whose growth the constitution facilitates. A constitution, therefore, defines the boundaries of membership for the constitutional community, either in precise terms or implicitly in noncontroversially pliable ones.<sup>117</sup> This may seem an obvious point; of course a constitution must refer to a body of persons otherwise it would not actually constitute anything meaningful.<sup>118</sup> But the point is a critical one if we look beyond the constitution of a state and recognize that constitutionalism takes many forms around us. For example, although a publicly-traded corporation traces its permission to operate to a public charter granted by its incorporating state jurisdiction, its relevant membership is not the larger polity but rather the corporation's individual shareholders. Similarly, the constitution of the Atlantic Coast Conference, an intercollegiate sports association, serves its member institutions, not the fans that fill the bleachers when their alma mater plays a game on that conference schedule. And even a dictatorship has a membership, though it may admittedly not be a willing one.

One final feature is common to constitutions irrespective of their form, structure, length, scope, or reach: constitutions orient themselves toward a purpose or mission. The purpose or mission assuredly varies from one constitution to the next. It may be a forward-looking, positive, community-building mission, or it may be an insular, destructive, hate-filled mission, or it may be something else altogether. But the shared similarity among constitutions is that they convey, either expressly or by inference, an objective that guides the constitutional community both as an entity and as individual participants (or subjects) in the collective venture they have undertaken or to which

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116. *See id.* at 115-22.

117. Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 576 (1998).

118. *See* DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 299-302 (1996).

they have been compelled to submit. This third feature of constitutionalism is evident in the Iranian Constitution, a document whose mission—to create a society on the basis of Islamic principles and norms—is deliberately, though not necessarily sincerely, articulated in its preambular statements.<sup>119</sup>

We may also identify a constitutional purpose or mission in some of the earliest state constitutional texts, namely the Magna Carta, whose stated purpose was to protect the liberties of free persons,<sup>120</sup> and the French Declaration of the Rights of Man and of the Citizen, written to secure for humanity the happiness it merited.<sup>121</sup> We may also identify a stated purpose in the constitutions of the National Football League,<sup>122</sup> Greenpeace,<sup>123</sup> Exxon Mobil,<sup>124</sup> the John D. and Catherine T. MacArthur Foundation,<sup>125</sup> and the Delaware State Bar Association.<sup>126</sup> Insofar as constitutional missions are intended to color the entire constitutional framework, they will consequently often appear in an introductory statement that casts a broad sweep of the entity's possibilities. Sometimes constitutional missions will appear elsewhere deep in the text. Still other times, constitutional missions may not appear in print at all; we may instead need to infer the objective from the structure and substance of the constitution.

### B. *Constitutional Virtues*

Constitutions, therefore, at a minimum, govern members of a community according to a structure of separated powers marshaled in the service of some identifiable objective. That is the most basic purpose of constitutionalism, something that we can analogize to the least common denominator among constitutions no matter the form they take. But these three fundamental elements of constitutionalism make for a horribly uninspiring portrait of constitutionalism. The constitutional basics are only structures devoid of moral content. Ill-meaning rogues may therefore hijack constitutionalism for wicked

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119. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] pmbl., 1358 [1980].

120. Magna Carta, 1297, 25 Edw. 1, cl. 1 (Eng.).

121. Déclaration des droits de l'Homme et du Citoyen du 26 août 1789 [The Declaration of the Rights of Man and the Citizen of August 26, 1789], Ministère de la Justice et de Libertés [Department of Justice and Freedom], Aug. 26, 1789, pmbl.

122. Constitution and Bylaws of the National Football League, art. II (Feb. 1, 1970), [http://static.nfl.com/static/content/public/static/html/careers/pdf/co\\_.pdf](http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf).

123. Amended and Restated Bylaws of Greenpeace, Inc., art. VIII, § 8.1 (Feb. 23, 1990), <http://www.greenpeace.org/usa/Global/usa/binaries/2010/4/greenpeace-fund-inc-bylaws.pdf>.

124. Restated Certificate of Incorporation of Exxon Mobil Corporation, para. III (1-4) (June 20, 2001), [http://www.exxonmobil.com/Corporate/investor\\_governance\\_incorporation.aspx](http://www.exxonmobil.com/Corporate/investor_governance_incorporation.aspx).

125. Articles of Incorporation of the John D. and Catherine T. MacArthur Foundation, para. V (Oct. 27, 1970), <http://www.macfound.org/atf/cf/%7Bb0386ce3-8b29-4162-8098-e466fb856794%7D/ARTICLES.PDF>.

126. Amended and Restated Delaware State Bar Association Bylaws, art. I.2 (Mar. 12, 2007), [www.dsba.org/pdfs/CommercialByLaws.pdf](http://www.dsba.org/pdfs/CommercialByLaws.pdf).

and deceitful purposes, soiling the larger promise of constitutionalism—a grander, nobler, and indeed much more righteous promise than its narrow and shockingly amoral purpose. This is precisely why constitutions should strive to embody lofty constitutional virtues beyond those simple constitutional basics.

What makes constitutionalism virtuous? There are several constitutional virtues, but four in particular are noteworthy. First, a constitution should be in written form to the extent possible. Second, a constitution should grant privileges and protections to its members as well as to its non-members. Third, a constitution should make known the values that are held in the highest regard within the constitutional community. Together these features point to a fourth virtue: the primacy of members. Member primacy transforms the constitutional function from structuring the modalities of governance to bringing the constitution closer to the membership and signaling to the membership that its participation in the project of constitutionalism is necessary to the successful fruition of the community. Let us begin with the fourth virtue.

Constitutional theory correctly holds that constitutions trace their origin to an uncommon manifestation of popular sovereignty, a revolutionary expression of self-definition that marks a break from the past to proclaim the formation of a new entity.<sup>127</sup> For Emmanuel Sieyès, the famed narrator of the French Revolution, the genesis of this extraordinary act is the notion of the *pouvoir constituant*, which, in translation, literally means the constituting power.<sup>128</sup> The constituting power was then, and remains today as a matter of positive political theory, the people. That explains why, to the question “What is the constituting power?” Sieyès answered *everything*.<sup>129</sup> The people are the Alpha and Omega, the beginning and the end, the base and the nucleus.

The greatest virtue of a constitution is its window into the soul of a defined community of peoples. Whether a state, an institution, a team, a family, or otherwise, individuals as constituted bodies want more for themselves than a simple statement of standards of governance. They define their venture in terms grander than structures and rules of admission. Their constitution is a repository of thought, action, norms, practices, expectations, and outlook on themselves, the world, and their role within it. Therefore, the very first rule of consti-

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127. See, e.g., Anne Peters, *The Constitutionalisation of the European Union—Without the Constitutional Treaty*, in *THE MAKING OF A EUROPEAN CONSTITUTION* 35, 46 (Sonja Puntischer Riekmann & Wolfgang Wessels eds., 2006).

128. EMMANUEL JOSEPH SIEYÈS, *QU’EST-CE QUE LE TIERS ÉTAT?* (Éditions du Boucher) (2002).

129. *Id.* at 1.

tutionalism is that the constitution should take the form given to it by its members:

[A] constitution must accommodate the particular people it is created for, bending here and there to their habits, opinions, and circumstances; that is to say, to accident if not force. In just this manner, a constitution may embrace universal principles, but it does so for a particular people, marking its boundaries by way of the people, even while attempting to cultivate and sustain that people's attachment to the constitution.<sup>130</sup>

By granting member primacy its just import, we compel ourselves to give greater attention to what makes a constitution a constitution. What is a constitution? Aristotle was right when he wrote "the community *is* the constitution."<sup>131</sup> It is a path to freedom and growth, not only because of the liberty-granting and liberty-preserving content that should shape it, but also because of what it portends for a community's self-determined power to define and redefine itself in the very act of constituting the community. It is therefore mistaken to think of a constitution as something that freezes time at the moment of the founding design. Quite the contrary, people "should not think it slavery to live according to the rule of the constitution; for it is their salvation."<sup>132</sup> A constitution, then, is much more than just a text.

Still, constitutions should nevertheless be written. It is of course true that much, perhaps even most, of a constitution cannot be captured in a constitutional text. This is especially true in the case of the United States. The grand tradition of American constitutionalism folds within itself political practices, democratic conventions, extra-canonical statutes, presidential orders, administrative regulations, and extraconstitutional amendments whose entrenchment in the American constitutional order belies the text of the United States Constitution.<sup>133</sup> Imagine the surprise that would greet a new constitutional democracy hoping to replicate the American experience on its soil simply by the wholesale adoption of the unmodified text of the United States Constitution. It would be unlikely to succeed because the story of American constitutionalism extends well beyond the four

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130. George Thomas, *The Tensions of Constitutional Democracy*, 24 CONST. COMMENT. 793, 793-94 (2007) (reviewing GEORGE THOMAS, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER (2007)).

131. ARISTOTLE, POLITICS, Book III, ch. 4, at 71 (C.D.C. Reeve trans. 1998).

132. ARISTOTLE, POLITICS, Book V, ch. 9, at 216 (H. W. C. DAVIS ed. 1908).

133. See, e.g., Ernest Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 414 (2007).



corners of its text.<sup>134</sup> It is therefore right to ask, as John Gardner does, whether a constitution can ever be fully written.<sup>135</sup>

We must concede that a constitution may never be a completely or exclusively written constitution. But the signature piece of a community's constitution should nonetheless be written. This view derives from conceiving of a constitution as a community-based instrument whose primary purpose is to govern members of a community according to a structure of separated powers marshaled in the service of some identifiable objective, but whose promise reaches far beyond. That powerfully compelling part of the promise of a constitution is to build and sustain a community of persons who together forge and develop an identity in common cause.

To say that a constitution should be written does not, however, tell us what should appear in its text. In addition to providing for the constitutional basics, a constitution should incorporate the two final constitutional virtues in its text: first, privileges and protections for its members and nonmembers; and second, a hierarchy of values. Unlike some who argue that constitutions should necessarily contain rights and liberties for their members,<sup>136</sup> I take the view that rights and liberties are only desirable features of constitutions, not indispensable ones. This derives from my descriptive effort to define constitutionalism across all of its forms. While protection for rights and liberties may be a fundamental element of liberal democratic constitutionalism, is it a basic requirement of any constitution? I think the answer is no. But that does not mean that all constitutions should not aspire to include it in their text—which is why privileges and protections fall within the category of constitutional virtues, not of constitutional basics.

Constitutions should therefore aspire to grant privileges and protections to its membership and, preferably, to its nonmembership as well. As to members, constitutions should guard them against the powers enjoyed by the body or bodies created to govern the community. Constitutions should also guard members against the action and inaction of fellow members. In granting these rights and liberties to members, constitutions extend to members both the privilege of acting positively in specified ways and the protection from designated

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134. A. E. Dick Howard, *Toward Constitutional Democracy: An American Perspective*, 19 J.L. & POL. 285, 293-94 (2003).

135. See John Gardner, *Can There Be a Written Constitution?*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 162 (Leslie Green & Brian Leiter eds., 2011); see also Mattias Kumm, *Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called*, 54 AM. J. COMP. L. 505, 508 (2006) (discussing whether writtenness is a necessary feature of constitutionalism); Jane Pek, Note, *Things Better Left Unwritten?: Constitutional Text and the Rule of Law*, 83 N.Y.U. L. REV. 1979 (2008) (comparing the merits of written and unwritten constitutions).

136. See, e.g., JOHN RAWLS, POLITICAL LIBERALISM 227 (1993).

actions deemed objectionable. Constitutions would also do well to extend privileges and protections to nonmembers. These privileges and protections may differ in material respects from those granted to members. But constitutions should express some solicitude for nonmembers for the very reason that nonmembers are nonmembers: they are unrepresented in the community and consequently have no authority to speak to its organization, structure, and mission. It is their lack of voice that demands the constitution recognize their powerlessness by acknowledging them in some way.

It is not enough to grant privileges and protections. Constitutions should also identify within their text the most important values held by the community. All communities develop within them, either at their genesis or in the evolution of time, a hierarchy of standards or principles pursuant to which one could construct a pyramidal chart displaying the most important values at and near the summit all the way down to the least important ones. These values may change in the life of the community, such that something that was valued highly at the founding may depreciate in its value to the community over the years, or altogether new ones may take root and displace older ones. Those are momentous developments in the life of a constitutional community. Constitutions should therefore not only state their values in a descriptive hierarchy but remain updated to reflect the current landscape of values.

Three corollary points follow from distinguishing among the importance of constitutional values. First, as a practical matter, enshrining a hierarchy of values will assist in resolving disputes that develop within the community. Second, a constitutional community could of course choose not to conceive of its values along a sliding scale. Indeed, a community may reasonably resolve that all values are equally meritorious—but such a decision should be stated in the constitutional text in the interest of predictability and fair notice. And third, insofar as values may change in the life of a constitutional community, the constitutional text should state how members may amend the constitution in order to reflect the new ranking of constitutional values. This last point is exceedingly important because the power to amend the constitution is the most basic of all privileges and protections that should attach to constitutional membership.

### *C. Constitutional Camouflage*

The boundaries that typically set apart one constitution from another are less rigid than they otherwise appear to be precisely because the conventional distinctions among public, private, international, national, and local constitutions have become blurred in the age of constitutionalism. At a time when anyone and everyone adopts

a constitution to govern associations and activities, often the consequence is to diminish the great promise that constitutionalism holds for communities, be they states, unions, companies, or groups. I have posited that this promise manifests itself in four ways, each of which combines with the others to create a culture of active citizenship within the constitutional community: a written charter, privileges and protections for members and nonmembers, a hierarchy of community values, and member primacy. Those constitutional virtues, which only some constitutions exhibit, stand in contrast to the three constitutional basics that we reliably find in all constitutions.

Yet even constitutions that exhibit one or more constitutional virtues can sometimes distort the promise of constitutionalism. Consider what I call camouflage constitutionalism. Some states adopt constitutions reflecting most if not all of the constitutional virtues. But what their constitutions proclaim on their face conceals the darkness that lurks beneath. Constitutional virtues are sometimes mere pretense for disingenuous motives, for instance to appease or mislead the international community, to deceive their own citizens, or to entrench existing structures of power imbalance and inequality.<sup>137</sup> Proof positive are the most authoritarian states in the world,<sup>138</sup> all of which have written constitutions that purport to make citizens foremost in the constitutional order<sup>139</sup> and to guarantee them liberal democratic rights.<sup>140</sup> Nothing, of course, could be less truthful because the entrenched leaders in these wicked regimes deny even the most basic freedoms to everyone but themselves.<sup>141</sup>

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137. ISSA G. SHIVJI, WHERE IS UHURU? REFLECTIONS ON THE STRUGGLE FOR DEMOCRACY IN AFRICA 50-63 (Godwin R. Murunga ed., 2009).

138. I rely on the Economist's Democracy Index for this claim. See Economist Intelligence Unit, *The Economist Intelligence Unit's Index of Democracy 2008*, ECONOMIST (2008), <http://graphics.eiu.com/PDF/Democracy%20Index%202008.pdf>.

139. See, e.g., CONSTITUTION DU LA RÉPUBLIQUE DU TCHAD Mar. 31, 1996, tit. I, art. 3 (Chad) (placing sovereignty in the people themselves); CONSTITUTION OF THE REPUBLIC OF GUINEA-BISSAU May 6, 1984, tit. I, art. 2, § 1 (amended 1991) (same); CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR May 10, 2008, ch. I, art. 3 (same); Конституция Туркменистана [CONSTITUTION] Sep. 26, 2008, § I, art. 2 (Turkm.) (same); O'ZBEKISTON RESPUBLIKASI KONSTITUTSIYASI [CONSTITUTION] Dec. 8, 1992, pt. I, ch. 1, art. 2 (Uzb.) (same).

140. See, e.g., CONSTITUTION DU LA RÉPUBLIQUE DU TCHAD Mar. 31, 1996, tit. II (Chad) (protecting liberal democratic rights and liberties); CONSTITUTION OF THE REPUBLIC OF GUINEA-BISSAU May 6, 1984, tit. II (amended 1991) (same); CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR May 10, 2008, ch. VIII (same); Конституция Туркменистана [CONSTITUTION] Sept. 26, 2008, § II (Turkm.) (same); O'ZBEKISTON RESPUBLIKASI KONSTITUTSIYASI [CONSTITUTION] Dec. 8, 1992, pt. II (Uzb.) (same).

141. On this point, recent evidence suggests that authoritarian regimes that engage in torture are more likely to ratify the Convention Against Torture than others. See James R. Hollyer & B. Peter Rosendorff, Why Do Authoritarian Regimes Sign the Convention Against Torture? Signaling, Domestic Politics and Non-Compliance (Sept. 29, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1684916>.

Constitutionalism has, in those cases, become a powerfully compelling stand-in for fairness, justice, and the endless quest for good. These interlopers and their reprehensible intentions have commanded constitutionalism to achieve ends that are inconsistent with constitutionalism's virtues. They stand behind the tradition of constitutionalism to cloak themselves in the veil of legitimacy that only constitutionalism can confer. That is the power of constitutionalism: it can legitimize illegitimate institutions.<sup>142</sup> It can bless people and institutions with a presumption of righteousness that would otherwise extend beyond their reach. Constitutionalism, therefore, exerts something of a sanitizing effect. In this way, the power of constitutionalism is also its tragic failure. By its very nature, a constitution is an empty cast that can be shaped and fitted to comport with even the most evil designs. It is a malleable, impressionable, and maneuverable mold that has no encoded commands—which is why a constitution can in one place serve as a dispassionate charter for the impersonal rule of law, while at the same time serve in another place as a rigged playbook that facilitates the self-interested rule of man.<sup>143</sup>

If deployed inartfully, constitutionalism may also actually divest written political and civil rights of their force and meaning. Consider the constitutions of Poland and Belarus. The Polish Constitution protects the traditional menu of speech, assembly, expression, equality, religion, and criminal defense rights.<sup>144</sup> For its part, the Belarusian Constitution does the same, protecting the same group of rights for which the United States Bill of Rights is known.<sup>145</sup> But both the Polish and Belarusian Constitutions do something that the United States Bill of Rights does not: they enshrine social and economic rights, namely the right to a minimum wage,<sup>146</sup> to a job,<sup>147</sup> to health care,<sup>148</sup> to education,<sup>149</sup> to housing,<sup>150</sup> paid vacation,<sup>151</sup> a gradually improving standard of life,<sup>152</sup> and the right to a clean environment.<sup>153</sup>

Although social and economic rights are privileges toward which society should aspire, to identify them as justiciable rights runs the

142. GORAN HYDEN, *AFRICAN POLITICS IN COMPARATIVE PERSPECTIVE* 106 (2006).

143. For a discussion of a constitution as a “personal pact” serving the interest of rulers alone, see Augusto Zimmermann, *Constitutions Without Constitutionalism: The Failure of Constitutionalism in Brazil*, in *THE RULE OF LAW IN COMPARATIVE PERSPECTIVE* 101, 101-46 (Mortimer Sellers & Tadeusz Tomaszewski eds., 2010).

144. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, ch. II (Pol.).

145. Канстытуцыя [CONSTITUTION] May 1, 1994, § 2 (Belr.) (amended 1996).

146. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, ch. II, art. 65(4) (Pol.).

147. *Id.* at art. 65(1).

148. *Id.* at art. 68.

149. *Id.* at art. 70.

150. Канстытуцыя [CONSTITUTION] May 1, 1994, § 2 (Belr.) (amended 1996).

151. *Id.* at art. 43.

152. *Id.* at art. 21.

153. *Id.* at art. 46.

risk of evaporating from the text its force and moral authority.<sup>154</sup> It is dangerous to put social and economic rights into a constitution because those are not self-executing rights, nor do they require what rights typically require: restraint from the state and a promise not to overreach into the personal space of citizens. Quite the contrary, these positive rights require capital expenditures from the state—and the state does not have infinite resources at its disposal. Here is the problem: How can a constitution proclaim certain guarantees in its text yet fail to fulfill those promises? For instance, imagine a constitutional right to food and housing, yet citizens see around them the hungry and the homeless.

This jarring disconnect between rhetoric and reality is potentially catastrophic for constitutionalism. It turns the constitution from a grand charter that defines the community to nothing more than a piece of paper whose content no longer commands the respect of the membership because the constitution does not mean what it says. What risks happening is precisely what has befallen Russia in the aftermath of its constitutional revolution: Russians do not see a connection between their constitution and their government because the latter exists largely in name alone.<sup>155</sup> Still, despite this very substantial risk, some states with increasingly tight budgets and with absolutely no realistic capacity of financing social and economic rights nevertheless entrench these socio-economic rights in their constitution. Whether they do so with ill-intent to deceive their members or with a genuine lack of appreciation about the positive action those rights require and entail, the disheartening result is nonetheless the same: constitutionalism loses its moral standing.

#### IV. CONSTITUTIONAL COMPARISONS

The distinction between *constitutional basics* and *constitutional virtues* is therefore not watertight. Even constitutions that appear to exhibit constitutional virtues—for instance the virtues of member primacy and of enshrining privileges and protections—may still fall short of the promise of constitutionalism. But the distinction between constitutional basics and constitutional virtues may nevertheless be more helpful than distinguishing between public and private constitutions or among international, national, and local ones. It allows us to compare constitutions across meaningful dimensions beyond simply territoriality and state action. It gives us the tools to engage in a critical comparative assessment of constitutional texts. To see how,

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154. Some constitutions recognize this problem and consequently make these socio-economic rights nonjusticiable statements of policy direction rather than policy prescription. See, e.g., INDIA CONST., pt. IV, art. 37; IR. CONST., art. 45.

155. ROBERT B. AHDIEH, RUSSIA'S CONSTITUTIONAL REVOLUTION: LEGAL CONSCIOUSNESS AND THE TRANSITION TO DEMOCRACY 1985-1996, at 209 (1997).

let us compare two constitutions using the taxonomy of constitutional basics and constitutional virtues: the United States Constitution and the Constitution of the National Collegiate Athletic Association<sup>156</sup> (“NCAA”). Which constitution more closely achieves the aspiration embodied in constitutional virtues? The answer, at least initially, is not altogether obvious.

#### A. *The Constitutional Text*

Begin with the basics of the text of both the United States Constitution and the NCAA Constitution. Recall my claim: all constitutions—whether they are for states, partnerships, corporations, associations, or international organizations—do three things. First, they separate powers by creating an internal structure of authority that serves as a referent for disputes. Second, they identify or create a class of constituents who must govern themselves according to it. And third, they embrace a purpose or a mission that guides constituents and their governors in the conduct of their affairs, both internal to the group and external toward the wider world. The Constitution of the United States and the NCAA both satisfy each of those items.

First, the United States Constitution separates powers among legislative, executive, and judicial branches of government.<sup>157</sup> This separation of powers facilitates the settlement of disputes insofar as the constitutional text grants designated powers to particular branches, for instance the power to coin money<sup>158</sup> and to establish post offices to the legislature,<sup>159</sup> the power to make treaties<sup>160</sup> and to fill vacancies during Senate recesses to the executive,<sup>161</sup> and the power to hear cases<sup>162</sup> and to resolve controversies to the judiciary.<sup>163</sup> Separating powers in this way, and assigning functions to the branch best equipped to discharge that function, enhances the efficiency and accountability of government.<sup>164</sup>

The NCAA Constitution, likewise, separates powers in an elaborate manner. The entire Association is governed by an Executive Committee consisting of twenty members representing each of the

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156. Unless otherwise stated, I will refer to the Division I NCAA Constitution for purposes of this discussion. See NAT'L COLLEGIATE ATHLETIC ASS'N, *Constitution*, in 2010-11 NCAA DIVISION I MANUAL (Aug. 1, 2010) [hereinafter *Constitution of the NCAA*].

157. U.S. CONST. arts. I, II, III.

158. *Id.* at art. I, § 8, cl. 5.

159. *Id.* at art. I, § 8, cl. 7.

160. *Id.* at art. II, § 2, cl. 2.

161. *Id.* at art. II, § 2, cl. 3.

162. *Id.* at art. III, § 2, cl. 1.

163. *Id.*

164. Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 12 (1987).

three Divisions that comprise the NCAA.<sup>165</sup> The Association has overall responsibility for budgetary, hiring, dispute-resolution, and long-range planning matters.<sup>166</sup> Each of the three Divisions is managed by a board of directors or its equivalent, each of which is responsible for setting policy for its respective Division.<sup>167</sup> The Division I Board of Directors oversees a Leadership Council and a separate Legislative Council, the former being responsible for making fiscal, academic, and other recommendations to the Board of Directors,<sup>168</sup> and the latter for interpreting bylaws and serving as the primary legislative authority.<sup>169</sup> Final legislative authority rests with the Board of Directors, which has the power to accept or reject the Legislative Council's proposals or duly-adopted legislation.<sup>170</sup>

Second, the United States Constitution speaks directly to the persons who have bound themselves to govern their actions according to it. "We the People of the United States," begins the constitutional text, "do ordain and establish this Constitution for the United States of America."<sup>171</sup> There is another category of individuals who are bound by the Constitution: the states that comprise the United States. The nine states' ratification of the document brought the charter into force and, as a result, extended its application across all thirteen states.<sup>172</sup> And third, the United States Constitution embraces, in its text, a mission that defines the collective purpose Americans set for themselves: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."<sup>173</sup>

With respect to the NCAA, its constitution identifies its membership with great detail. The text makes clear that NCAA members are not student-athletes and coaches but rather the institutions to which they belong: colleges and universities. The NCAA Constitution identifies five classes of membership: active members, which are accredited two-year or four-year institutions of higher education;<sup>174</sup> provisional members, which are two-year or four-year colleges and universities that have applied for membership to the NCAA;<sup>175</sup> member conferences, which comprise a group of colleges and universities that

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165. *Constitution of the NCAA*, *supra* note 156, § 4.1.1.

166. *Id.* § 4.1.2.

167. *Id.* Figure 4-2, at 29.

168. *Id.* § 4.5.2.

169. *Id.* § 4.6.2.

170. *Id.* § 4.2.2.

171. U.S. CONST., pmb1.

172. *Id.* at art. VII.

173. *Id.* at pmb1.

174. *Constitution of the NCAA*, *supra* note 156, § 3.02.3.1.

175. *Id.* § 3.02.3.2.

compete under the auspices of the NCAA;<sup>176</sup> affiliated members, which are nonprofit groups or associations whose affairs are directly related to the NCAA;<sup>177</sup> and corresponding members, which include institutions, nonprofit organizations, or conferences that are ineligible for membership but nonetheless wish to receive NCAA publications and mailings.<sup>178</sup>

The NCAA's members and its governing institutions work toward achieving a number of purposes. The first basic purpose is amateurism, to which the Constitution refers as the effort to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."<sup>179</sup> The NCAA has also tasked itself with other purposes—namely administrative ones like facilitating the creation and continuity of intercollegiate sports,<sup>180</sup> occupying a historical role in cataloguing competition records,<sup>181</sup> and setting standards for eligibility and participation,<sup>182</sup>—and, among others, cultivating a culture of institutional accountability and control among its membership.<sup>183</sup> The NCAA has therefore given itself several responsibilities that constitute its larger mission and organizational purpose.

It is hardly a revelation that the United States Constitution and the NCAA Constitution both satisfy the constitutional basics. All constitutions meet those requirements. But whether the United States and NCAA Constitutions fulfill the demanding criteria of constitutional virtues is another matter. Before we assess how the two constitutions fare on those grounds, it bears recalling the four constitutional virtues introduced in the previous Part: writtenness, member and nonmember privileges and protections, constitutional hierarchy, and member primacy.

Turning to the United States Constitution, it appears to exhibit three of the four virtues. First, it is a written constitution. Although much of the Constitution remains either unwritten or written in a number of subsidiary texts,<sup>184</sup> it is known and understood as a written document which people can touch and identify and to which they can reliably point as evidence of a constituted state. Second, the Constitution extends privileges and protections to the constitutional

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176. *Id.* § 3.02.3.3.

177. *Id.* § 3.02.3.4.

178. *Id.* § 3.02.3.5.

179. *Id.* § 1.3.1.

180. *Id.* § 1.2(a), (d).

181. *Id.* § 1.2(e).

182. *Id.* § 1.2(c), (f), (i).

183. *Id.* § 1.2(b).

184. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1264 (2001) (describing super-statutes as quasi-constitutional).



community, including both members and nonmembers.<sup>185</sup> But the United States Constitution does not establish a hierarchy of rights that indicates which values or principles are held in the highest regard within the constitutional community. The Bill of Rights enshrines a menu of rights but does not, by its text, identify which of those rights stands above or below others.<sup>186</sup> Fourth, the Constitution honors the principle of member primacy insofar as it gives its members the ultimate power to amend its text by way of either a constitutional convention or a congressional procedure in tandem with state ratification.<sup>187</sup> It may also be possible to amend the constitution by a simple majority vote in a national referendum.<sup>188</sup> Three out of four constitutional virtues: that is a good, though not perfect, record.

In contrast, the NCAA Constitution appears to land on all four bases. First, it is a written constitution, much like the United States Constitution—only more so. It is several thousand words longer than the United States Constitution and goes into considerable specificity to detail with intricate precision its rules, requirements, and prescriptions. In many ways, the NCAA Constitution approximates what we might expect of a congressional statute. But it would be inaccurate to draw that analogy because there also exist NCAA bylaws, which are better viewed as the counterpart to United States statutes. Second, the NCAA Constitution extends privileges and protections to its members and, importantly, to its nonmembers as well. Each of the five classes of membership has some measure of rights or entitlements under the NCAA Constitution. For example, active members have the right to compete and vote on proposed legislation<sup>189</sup> and affiliated members have the right to send a nonvoting member to NCAA conventions.<sup>190</sup> But in addition to providing privileges and protections to its members, the NCAA Constitution also protects the in-

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185. By the use of the term members, I refer to those constituents of the constitutional community who have agreed to be bound by the Constitution. In the case of the United States, the relevant members are the citizens of the United States and the several states. Citizens and the states have rights under the Ninth and Tenth Amendments, respectively. See U.S. CONST. amends. IX & X. But noncitizens—and therefore nonmembers—also have privileges and protections under the Bill of Rights. For example, the Fourteenth Amendment applies to both citizens and noncitizens within the territorial jurisdiction of the United States. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 215 (1982); *Galvan v. Press*, 347 U.S. 522, 530 (1954); *Yick Wo. v. Hopkins*, 118 U.S. 356, 369 (1886).

186. But the Supreme Court has, through its decisions, fashioned a hierarchy of sorts among forms of expression: “Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protection position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring).

187. U.S. CONST. art. V.

188. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1060 (1988).

189. *Constitution of the NCAA*, *supra* note 156, § 3.02.3.1.

190. *Id.* § 3.02.3.4.

terests of its nonmembers, namely those of the student-athletes who compete in intercollegiate athletics under the rules promulgated by the NCAA. Specifically, the Constitution makes it the responsibility of member institutions to promote educational opportunities,<sup>191</sup> cultural diversity and gender equality,<sup>192</sup> health and safety;<sup>193</sup> to cultivate positive working relationships between student-athletes and their coaches;<sup>194</sup> as well as to protect student-athletes from being exploited for professional and commercial purposes.<sup>195</sup> This is a particularly laudable part of the NCAA Constitution because it gives voice to a group whose interests are not represented at the level of institutional policymaking.

The NCAA Constitution gets the other two items right, at least as a textual matter: first, it honors the principle of member primacy; and second, it establishes a hierarchy of values or principles. As to the first item, the NCAA Constitution begins and ends with its membership. The member institutions control the Executive Committee,<sup>196</sup> the Board of Directors,<sup>197</sup> the Leadership Council,<sup>198</sup> and the Legislative Council.<sup>199</sup> Second, the NCAA Constitution establishes tiers of provisions subject to varying thresholds for amendment. This is a significant departure from the United States Constitution because it signals quite clearly which values and principles demand greater solicitude and are worthy of greater watchfulness. Case in point: amending a dominant provision requires a two-thirds majority vote from the total membership of the NCAA.<sup>200</sup> Issues that fall under this category include the mission of the Association<sup>201</sup> and institutional duties of care toward student-athletes.<sup>202</sup> Alternatively, amending a common provision demands only a majority vote from each of the three divisions voting separately.<sup>203</sup> Such matters include the definition of a Senior Woman Administrator and the privileges that flow from having a female director of athletics.<sup>204</sup> Third, a division-dominant provision—for example, the revenue-sharing agreement<sup>205</sup>—requires a two-thirds majority vote from all delegates attending a

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191. *Id.* § 2.2.1.

192. *Id.* § 2.2.2.

193. *Id.* § 2.2.3.

194. *Id.* §§ 2.2.4, 2.2.5.

195. *Id.* § 2.9.

196. *Id.* § 4.1.

197. *Id.* § 4.2.

198. *Id.* § 4.5.

199. *Id.* § 4.6.

200. NAT'L COLLEGIATE ATHLETIC ASS'N, *User's Guide, in* 2010-11 NCAA DIVISION I MANUAL ix (Aug. 1, 2010) [hereinafter *NCAA User's Guide*].

201. *Constitution of the NCAA, supra* note 156, § 1.2.

202. *Id.* § 2.2.

203. *NCAA User's Guide, supra* note 200.

204. *Constitution of the NCAA, supra* note 156, § 4.02.4.1.

205. *Id.* § 4.01.2.2.

division convention.<sup>206</sup> As a result, the NCAA Constitution satisfies all four constitutional virtues whereas the United States Constitution achieves only three.

### *B. Beyond the Constitutional Text*

But perhaps we ought to look beyond the constitutional text to probe more deeply whether the United States and NCAA Constitutions do indeed live up to these constitutional virtues. That is the fear, after all, that the cult of constitutionalism has brought to life: constitutions in name alone masquerading as constitutions in substance, the former purporting to achieve the promise of the latter under the deceptive cover of its attractive exterior. For, on its face, a constitution may appear to meet both the constitutional basics and the constitutional virtues, but in reality it may do no more than satisfy the basics of constitutionalism, which is something that all constitutions do as a matter of fact.

Neither the United States Constitution nor the NCAA Constitution may be defensibly described as a constitution in name alone. Both meet the requirements of constitutional basics and both also go a significant way toward achieving the virtues of constitutionalism. Still, though both possess the necessary and aspirational elements of a constitution, they express them in different ways. On that score, two points call for our attention: first, the two constitutions differ in flexibility, which has implications for the virtue of member primacy; and second, they may also differ in public perception, which has implications for their sociological legitimacy. Let us briefly explore each of these in turn.

On a scale of constitutional malleability, the United States Constitution stands at or near the very top while the NCAA Constitution falls at or near the very bottom. The NCAA Constitution is a rigid document characterized by its overwhelming statute-like detail that belies what one might usually find in a constitutional text. In contrast, the United States Constitution is flexible, written in broad strokes, and outlines a basic structure of government, collective purpose, and citizen rights and responsibilities, with the preponderance of the details left to be added later by legislative, executive, judicial, and civic actors. This hints at a connection between constitutional flexibility and constitutional specificity that is worth pursuing. It may be best examined through the prism of constitutional change.

A constitutional text does not necessarily constrain how constitutional change can occur in a constitutional community. Constitutional change can actually occur in ways that belie the procedural rules en-

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206. *NCAA User's Guide*, *supra* note 200.

shrined in the constitutional text. That is the case in the United States, where the Constitution has been amended in nontextual ways. Those types of nontextual constitutional amendments have been possible largely because of the generalities with which the Constitution is written. Although the Constitution establishes, in its text, two general ways amendments may be proposed—by a specific sequence of congressional and state legislative supermajority action, or through a constitutional convention<sup>207</sup>—it has also been amended in ways that do not conform with those procedures.<sup>208</sup> That is because those two procedures for amending the Constitution are not exhaustive; they are merely the only ones mentioned in the text.<sup>209</sup> What is more, judicial interpretations of the Constitution may themselves give rise to the equivalent of a constitutional amendment.<sup>210</sup>

This makes the United States Constitution exceedingly malleable insofar as it may be altered in several ways, including those that are not contemplated by its text. The rise of the political parties, the creation of the administrative state, the expansion of national executive powers in the twentieth century, the civil rights revolution<sup>211</sup>—these constitute unwritten constitutional amendments that occurred beyond the constitutional amendment rules entrenched in the constitutional text. They instead developed organically in a convergence of thought and action by popular movements, judicial actors, and the political branches. On the one hand, flexibility is an asset because it allows a constitutional community to develop organically, to meet pressing needs, or even to respond to crises that the textual amendment procedures cannot accommodate either for time constraints or because of exacting supermajority thresholds.<sup>212</sup> On the other hand, this measure of flexibility risks undermining the transparency that constitutionalism should foster. If it is possible to alter the Constitution in meaning, but simultaneously not in form, that can lead to a troubling disunity between appearance and reality, which can itself entrench constitutional contradictions or, worse still, trigger fears of constitutional subversion.

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207. U.S. CONST. art V.

208. See Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 13, 25-32 (Sanford Levinson ed., 1995).

209. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

210. See ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 142 (2d ed. 2005).

211. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884 (1996); see also David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001) (chronicling and theorizing the development of unwritten amendments to the United States Constitution).

212. The United States Constitution is one of the world's most, if not *the* most, difficult constitution to amend. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 20-22, 160 (2006).

In contrast, the NCAA Constitution has a strict, exhaustive, and expressly exclusive amendment process. The amendment rules span nearly ten pages of single-spaced full-sized page text.<sup>213</sup> The NCAA Constitution sets out detailed procedures specifying how to amend it, who may do so, what subjects are susceptible to amendment, and what particular majority or supermajority voting thresholds are required. There is therefore no surprise about how the NCAA Constitution may lawfully be amended. That is one significant constitutional amendment difference between the NCAA and United States Constitutions.

There is another significant difference between the NCAA Constitution and the United States Constitution with respect to constitutional amendments. Unlike the United States Constitution—which permits, though does not expressly authorize, judicial constitutional amendments—the NCAA Constitution provides for the equivalent of judicial constitutional amendments by cataloguing in rigorous detail a series of rules for how the Board of Directors, Legislative Council, and subcommittees are to interpret its text and accompanying bylaws.<sup>214</sup> The consequence of these strict rules is to promote transparency in the constitutional life of the community. Its rigidity establishes clarity about how the constitution is to evolve, what is amenable to amendment, and who has the authority to initiate and consummate those constitutional changes.

The specificity of the NCAA Constitution is a useful entrée into the second point of comparison between it and the United States Constitution: public perception. In general, the United States Constitution commands greater deference and respect than the NCAA Constitution. This is surely not surprising given that one is a national constitution that applies directly to everyone and the latter is a specialized constitution that applies directly only to a smaller group of persons. But something more helps explain the enhanced authority of the United States Constitution over the NCAA Constitution: it is a short document written in expansive and general terms. Indeed, the particularized content of the NCAA Constitution was precisely what led the legendary former college basketball coach, Bobby Knight, to curse it: “This thing needs to be thrown out and we need to start all over again and we need to make something that’s simple, that we can understand, and something that is oriented toward what’s good for kids.”<sup>215</sup> What troubled Knight was that the NCAA’s constitutional labyrinth actually did more harm than good because the consequence of its meticulous specificity was to obscure the rules instead of illu-

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213. *Constitution of the NCAA*, *supra* note 156, §§ 5.3-5.4.

214. *Id.* § 5.4.

215. Bobby Knight, Basketball Coach, Texas Tech University, Remarks at the National Press Club Newsmaker Luncheon (Sept. 27, 2004) (transcript available in the Eric Friedham Library).

minating them. Knight recounted his frustrating experience of working in tandem with a colleague to take a forty-question, open-book examination on the NCAA's Constitution and bylaws, only to find that "[t]here were seven questions that we actually couldn't find the answer to" and "six questions that could be given at least two different answers."<sup>216</sup> It is no wonder, then, that Knight is not a fan of the NCAA Constitution.

But Knight was gesturing to a point much larger than merely whether the NCAA Constitution is so long that it breeds confusion. He was probing the edges of an incredibly important question that has puzzled constitutional theorists for ages: How do we create a culture of constitutionalism? Creating a constitutional culture is a prerequisite to entrenching in a people what the leading constitutional theorist of his time, Albert Venn Dicey, called the "spirit of legality."<sup>217</sup> This spirit is less tangible than ethereal, but it breeds a very real feeling of attachment to the constitutional community. Call it a collective moral bond that unites the membership,<sup>218</sup> or perhaps something as strong as what Durkheim referred to as "social solidarity" anchored in enduring institutional arrangements,<sup>219</sup> or even something less concrete as the psychic relation that Kelsen suggested bound the citizen to her state.<sup>220</sup> Whatever it is called, there is some discernible type of psychological component underpinning constitutionalism that is indispensable to breathing legitimacy into the constitutional text. It is a prerequisite to creating a culture of constitutionalism. To say it is a prerequisite, though, does not tell us how to achieve it.

To begin to understand how to cultivate a culture of constitutionalism, it is worth turning again to Bobby Knight. He states in brilliant clarity one of the key differences between the United States Constitution and the NCAA Constitution, with a meaningful biblical reference for added emphasis:

Here is a copy of the NCAA manual. (Laughter.) . . . This is what I'm supposed to memorize. Now listen to it hit the floor. (The manual hits the floor with a thud.) That's the NCAA manual.

. . .

Here is the Constitution of the United States. (Laughter.) I mean, it's got 15 pages, and I mean, it's served us for a long time. And this includes 22 Amendments; this includes 22 Amendments

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216. *Id.*

217. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 100 (8th ed. Liberty Fund 1982) (1885).

218. ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (1976).

219. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 63 (George Simpson trans., 1933).

220. HANS KELSEN, PURE THEORY OF LAW 288 (Max Knight trans., 1967).

to the original document. We've only changed it 22 times. They've changed NCAA rules 22 times this morning! (Laughter.)

And even beyond that, you know, I mean, Moses wrote 10 things on a rock that have lasted millenniums and were very clear and very precise, and a great majority of the world has lived on those tenets that Moses wrote.<sup>221</sup>

Return now to the early American experience. The living proof of the American Revolution is the United States Constitution that followed shortly after the Articles of Confederation. The former replaced the latter because it was thought to better capture the vision for an American union than the decentralizing and disunifying Articles.<sup>222</sup> The challenge that the constitutional drafters had given themselves—and ultimately achieved—was to triumph over the localism that made the American revolutionaries see themselves as thirteen disparate colonies rather than one new nation.<sup>223</sup> The effort to create a political culture rooted in an American identity began with the new constitutional text. This was a strategic choice to draw from the American tradition of textuality—the great reverence that early Americans had for texts, particularly religious texts.<sup>224</sup> This peculiarly American veneration for their founding charter prompted Thomas Paine to observe that the United States Constitution became, for Americans, something of a “political bible,”<sup>225</sup> a copy of which every American held close to herself, both to engage with the text and to hold accountable their agents in government.<sup>226</sup>

To be an American at the founding, and even still today, is to believe deeply in the moral force of the written word.<sup>227</sup> By enshrining in a tangible, touchable, and readable charter the principles that defined Americans and that would later come to define their purpose, the framers tapped into the common American practice to connect, through texts, personhood with something otherworldly. In the case of the Constitution, that otherworldly manifestation was nationhood. As much as the new constitution was a reference point for the rules and values that bound Americans to their state and to themselves, it also became a symbol of nationhood and American identity.

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221. Bobby Knight, Basketball Coach, Texas Tech University, Remarks at the National Press Club Newsmaker Luncheon (Sept. 27, 2004) (transcript available in the Eric Friedham Library).

222. THE FEDERALIST NO. 2, at 12 (John Jay) (Jacob E. Cooke ed., 1961).

223. CAROL BERKIN, A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION 17-18 (2002).

224. Wayne Franklin, *The US Constitution and the Textuality of American Culture*, in WRITING A NATIONAL IDENTITY: POLITICAL, ECONOMIC, AND CULTURAL PERSPECTIVES ON THE WRITTEN CONSTITUTION 9, 10 (Vivien Hart & Shannon C. Stimson eds., 1993).

225. THOMAS PAINE, *supra* note 33.

226. *Id.*

227. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 260 (1998).

The spirit of the document conveyed to Americans, communicated to the world and encapsulated for posterity the revolutionary ideals that had inspired this new American charter. Perhaps the single most important reason why the Constitution could, as a matter of both practice and theory, achieve all of these and other disparate purposes was its short length, one of the great virtues of the document. Indeed, its brevity helps us discern the very source of its force.<sup>228</sup> That undeniable force springs from the short and accessible arrangement of the constitutional text. The document was, in Rossiter's brilliant formulation, "[p]lain to the point of severity, frugal to the point of austerity, laconic to the point of aphorism."<sup>229</sup> It is "singularly brief and expressive," in Story's account.<sup>230</sup> As Amar writes in his masterful study of the American Constitution, this particularly pithy style of constitutional drafting invites Americans to discover its content.<sup>231</sup> It is something, observes one scholar, "that the individual citizen can affirm as his own,"<sup>232</sup> something that is at once readily comprehensible and worthy of reverence.

Surely this constitutional design was not accidental. The creation of constitutional culture in the new nation-state began from its revolutionary roots but moved toward consolidation with its new constitutional text, a strategic intent of the drafters who saw themselves as nation-builders faced with the daunting task of constructing a union from separate groups whose revolutionary conquest a few years earlier had set in motion the march toward nationhood. In this respect, the brevity of the document served several related purposes. First, it invited Americans to get acquainted with their new charter and to learn it, as if they were preparing to recite its text as lines to a play. Second, it palliated fears about the overwhelming dominance of a new national government. Endowed as it was with limited powers, the authority of the central state was spelled out in detail but nonetheless succinctly in a document, and Americans could rest assured of the boundaries that constrained its actions—because those margins were documented on paper. Third, as a more practical matter, the brevity of the document has actually allowed it to survive, nearly unchanged in form, for over two hundred years.<sup>233</sup>

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228. Richard D. Brown, *The Ideal of the Written Constitution: A Political Legacy of the Revolution*, in LEGACIES OF THE AMERICAN REVOLUTION 85, 87 (Larry R. Gerlach, James A. Dolph & Michael L. Nicholls eds., 1978).

229. CLINTON ROSSITER, *1787: THE GRAND CONVENTION* 258 (1987).

230. Joseph Story, *The Science of Government*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 622 (William W. Story ed., 1852).

231. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* xi (2005).

232. Douglas Litowitz, *Legal Writing: Its Nature, Limits, and Dangers*, 49 MERCER L. REV. 709, 738 (1998).

233. WALTER B. MEAD, *THE UNITED STATES CONSTITUTION: PERSONALITIES, PRINCIPLES, AND ISSUES* 166 (1987).



What Bobby Knight sees in the United States Constitution and the Ten Commandments is the merit of generality. Though there are incontrovertible facts of history that underlie each provision in each of those texts, both documents have survived as paragons of community-building because they allow people to see in them what they want to see. They are written in sweeping terms that few can describe as undesirable. Where the one speaks of justice or another speaks of fairness, or one speaks of equality and the other speaks of love, no one can disagree with its principles at the high level of abstraction at which either document is cast. It would be like disagreeing with the goodness of ice cream and puppy dogs—it is unlikely because we can all imagine in our mind's eye the type of ice cream we crave or the breed of dog we prefer.

All of which returns us to the merits of the United States Constitution's generality. That the document was written succinctly demonstrates that its drafters knew well enough to shape a document that could accommodate future interpretation by citizens and officials alike.<sup>234</sup> This may help explain why the United States Constitution commands such reverence from Americans. As James Bryce writes, “[i]t ranks above every other written Constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity, and precision of its language, its judicious mixture of definition in principle with elasticity in details.”<sup>235</sup> As much as its shortness contributes to its generality, so does its silence on many subjects that the founders could have addressed, both of which together permit the Constitution to evolve in a way that usually does not produce jarring results disconnected from the text.<sup>236</sup>

But some observers have difficulty saying the same about the NCAA Constitution. The results that flow from the Constitution sometimes defy its text, according to critics. Why, asks one commentator, does the NCAA Constitution proclaim as its signpost the principle of amateurism yet fall short, in practice, of doing what it should to ensure its integrity?<sup>237</sup> Why, asks another, does the NCAA purport to place education at the summit of importance yet nonetheless treat

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234. Michael Kammen, *The Most Wonderful Instrument Ever Drawn by the Hand of Man: Changing American Perceptions of Their Constitution*, in *THE UNITED STATES CONSTITUTION: ITS BIRTH, GROWTH, AND INFLUENCE IN ASIA* 9 (J. Barton Starr ed., 1988).

235. MARTIN J. WADE & WILLIAM F. RUSSELL, *ELEMENTARY AMERICANISM: THE SHORT CONSTITUTION* 78 (1920) (quoting JAMES BRYCE, *THE AMERICAN COMMONWEALTH* (1888)).

236. MICHAEL FOLEY & JOHN E. OWENS, *CONGRESS AND THE PRESIDENCY: INSTITUTIONAL POLITICS IN A SEPARATED SYSTEM* 13 (1996).

237. See James Hopkins, *NCAA Penalties: Corporate Accountability for Coaches and Presidents*, 1 *DEPAUL J. SPORTS L. & CONTEMP. PROBS.* 179 (2003).

its competitors as athletes first and students second?<sup>238</sup> In the commercial context, another argues that the NCAA constitutional regime is “unconscionable” because it operates as an unreasonable restraint of trade on student-athletes.<sup>239</sup> And, it has even become common to question whether the NCAA’s rules comport with the strictures of due process.<sup>240</sup>

This bodes poorly for the NCAA Constitution. What makes it worse is that informed observers do not simply raise questions about whether the NCAA is acting honorably to fulfill its mission, as if it were an honest query with no discernible answer. Quite the contrary, scholars and stakeholders speak of the NCAA as “cling[ing] to a myth of ‘amateurism,’ ”<sup>241</sup> failing to take the necessary initiative to improve the quality of life of student-athletes,<sup>242</sup> “drift[ing] away from performing a public function and towards promoting the interests of its representative member institutions,”<sup>243</sup> letting the “commercialization of intercollegiate sports . . . mar[] the NCAA’s stated educational objectives,”<sup>244</sup> and of betraying its alleged hypocrisy in “never tak[ing] seriously” its own stated principles.<sup>245</sup>

One could not imagine perspectives more damning for the NCAA. Not only is the institution seen as acting contrary to its constitutional mission, but it is viewed as utterly unconcerned with the student-athletes that compete in its intercollegiate sports. To be fair, I suspect that the way the NCAA is perceived may not accurately reflect the reality of what its institutional officers and members really are, feel, and believe. It would be surprising to discover that the NCAA and its leaders were entirely disengaged from their mission to promote amateurism and to integrate intercollegiate sports into the woven life of a student-athlete. After all, the women and men who

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238. See John R. Allison, *Rule-Making Accuracy in the NCAA and its Member Institutions: Do their Decisional Structures and Processes Promote Educational Primacy for the Student-Athlete?*, 44 U. KAN. L. REV. 1 (1995).

239. See Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673 (2003).

240. See, e.g., John Kitchin, *The NCAA and Due Process*, 5 KAN. J.L. & PUB. POL’Y 71 (1996).

241. Ray Yasser, *A Comprehensive Blueprint for the Reform of Intercollegiate Athletics*, 3 MARQ. SPORTS L.J. 123, 156 (1993).

242. Jay Jordan, *Reform from a Student-Athlete’s Perspective: A Move Towards Inclusion*, 14 U. MIAMI ENT. & SPORTS L. REV. 57, 59 (1997).

243. Jonathan Jenkins, Note, *A Need for Heightened Scrutiny: Aligning the NCAA Transfer Rule with its Rationales*, 9 VAND. J. ENT. & TECH. L. 439, 464 (2006).

244. Harold B. Hilborn, Comment, *Student-Athletes and Judicial Inconsistency: Establishing a Duty to Educate as a Means of Fostering Meaningful Reform of Intercollegiate Athletics*, 89 NW. U. L. REV. 741, 743 (1995); see also Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2633 (1996) (questioning the NCAA’s “emphasis on commercialism in Division I intercollegiate athletics at the relative expense of amateur and academic ideals”).

245. Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 STAN. L. & POL’Y REV. 213, 229 (2004).

staff the NCAA are undoubtedly well-intentioned citizens who toil to give students a lasting foundation of academic and athletic achievement that will help them go on to lead fulfilling and successful lives and to become active members of their respective communities. That, I am certain, is true. But true or not, the public perception is to the contrary.

And that, in turn, deflates the public value of the NCAA Constitution. Its principles mean less the more they are seen as mere window-dressing for public consumption. And that appears to be the case today inasmuch as the NCAA Constitution is more like a strict operations manual enumerating in excruciating detail when, how, and for what purpose its governors may act. No more stark contrast could exist between it and the United States Constitution, which is instead written as a higher-ordered blueprint and which betrays a judgment that its constituents made about their governors that it is harder to say about the NCAA's constituents: the short United States Constitution "assume[d] great trust in those who will be governing under it" and presupposed "that government officials would be true to the spirit of the document."<sup>246</sup> It appears nothing short of a stretch to use the same language to describe how the NCAA's constituents regard their own constitution. The consequence is devastating for the NCAA and its hope for creating a culture of respect for its Constitution, among its members and nonmembers alike. As long as the NCAA is not believed to be taking seriously its own stated constitutional mission, the NCAA Constitution will continue to be seen through the eyes of Bobby Knight.

## V. CONCLUSION

From the arts, sports, trade, entertainment, politics, and war, constitutionalism compels and constrains all dimensions of our everyday lives. Constitutionalism informs how states behave in the international order, how governments treat their constituents, how communities order themselves, how groups relate to individuals, and how citizens interact with each other. Is it possible to make meaningful distinctions among this multiplicity of constitutions? That was the challenge that framed our inquiry—a difficult challenge that has proven even more difficult than imagined. Nonetheless, we have covered a lot of ground across the rough terrain that lay between us and our destination: to distill constitutionalism to its essence.

Our first step was to press the conventional distinction among international, national, and local constitutions, and between public and

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246. Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1566 (1998) (reviewing DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995* (1996)).

private constitutions. Our conclusion on both counts was the same: these distinctions are unsatisfactory. Defining constitutionalism according to geography is unsatisfactory because, as we have seen, the distinction between an international and a national constitution is just as blurry as the line between a national and a local constitution. There is more continuity than divergence among international, national, and local constitutions because they are better viewed as falling along a hierarchy of constitutional authority. The local must defer to the national, which must in turn conform to the international. Defining constitutionalism according to its sphere of application is equally unsatisfactory because the distinction between public and private no longer commands the force of reason it may once have. These two spheres are only superficially distinct; at their core, they are both constitutive of a single sphere where the private can no longer be described as antimodal to the public.

Our next step was to find an alternative way of classifying constitutional types. Instead of conceptualizing constitutions according to their zone of application and territorial reach, I proposed to distinguish constitutions according to their constituent components. This led us to two categories of constitutions: constitutions that satisfy the basics of constitutionalism and those that exhibit the virtues of constitutionalism. This taxonomy of constitutional basics and constitutional virtues ultimately proved helpful to piercing our way through the veil that obscures constitutionalism and constitutional types.

But there remains further for us to travel. The taxonomy of constitutional basics and constitutional types does not resolve the problem that continues to frustrate the challenge of defining constitutionalism: the crisis of constitutional cultification. States, subnational governments, associations, unions, groups, and corporations have deployed constitutionalism for purposes both good and evil. We can sometimes cut through the smokescreen of their stated constitutional mission to discern their real constitutional purpose. But that is a terribly complicated inquiry that pushes us well beyond the text of the constitution and pulls us into questions about how the constitution actually works and how it fits within the broader culture of the constitutional community. It may be that a constitution is engaged in the steadfast pursuit of the lofty ideals that constitute civil society. Or it may be that a constitution is engaged in a dishonest project to conceal mal-intent. These enduring unknowns are part of what threaten to devolve what could otherwise be a promising culture of constitutionalism into a cult of constitutionalism defined more by artifice than virtue.

The challenge ahead is to move beyond the narrow inquiry of defining constitutionalism. What is a constitution? It matters less the closer we get to cultifying constitutionalism because once we reach

that point—let us hope we are not yet there—the community-building, democracy-enhancing, and participatory values to which constitutionalism should aspire, will be lost amid the shallow insincerities that constitutions reflect for the sake of appearances alone. We should therefore give less attention to the form of a constitution and more scrutiny to its content. It should matter little, for instance, that a constitution proclaims the separation of powers as its cornerstone if one authority-wielding institution has arrogated to itself all powers and divested the others of theirs. A constitutional text should likewise command minimal deference if it declares fidelity to a righteous mission yet discharges its institutional obligations in ways that betray contrary intentions. Our task is, therefore, to hold constitutions to account for the promises their makers pledge to their communities. Only then may we forestall our descent toward the cultification of constitutionalism and instead rise to keep our commitment to it.