

CONCILIATORY INSTITUTIONS AND CONSTITUTIONAL PROCESSES IN POST-CONFLICT STATES

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There are two important questions in post-conflict constitution making, and at present neither of them has a definitive or uniformly accepted answer.¹ The first relates to the best configuration of institutions to adopt in order to ameliorate the problem of intergroup conflict. The second concerns the process most apt to produce the best configuration of institutions, whatever it might be. The first question is unanswered because there is a dispute among scholars and practitioners between two opposing views of appropriate institutions to mitigate conflict.² Constitutional processes have not generally been geared to yield coherent exemplars of either configuration in a sufficient number of conflict-prone countries³ to provide a convincing demonstration of the superiority of one approach or the other. The second question is unanswered because in many cases constitutional processes are chosen in a haphazard

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1. Constitution making is by no means the only significant method of peace building after conflict. For two incisive broader treatments, see ANTHONY OBERSCHALL, CONFLICT AND PEACE BUILDING IN DIVIDED SOCIETIES (2007); JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS (2006).

2. For the essentials of the debate, see AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES (1977) (presenting the consociational view); DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 566-76 (2000) [hereinafter ETHNIC GROUPS IN CONFLICT] (criticizing the consociational view); Donald L. Horowitz, *Making Moderation Pay: The Comparative Politics of Ethnic Conflict Management*, in CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES 451 (Joseph V. Montville ed., 1991) [hereinafter *Making Moderation Pay*] (articulating the incentives view).

3. Some partial exceptions are certain regimes formed after warfare. See *infra* text accompanying notes 27-29, 35-49, 102-05.

fashion, without regard to the aptness of the process for the problems to be addressed. Meanwhile, advocates have been arguing for a single, highly structured, uniform process that may be apt for some classes of problems but is not necessarily appropriate for the full range of problems constitution makers confront in coping with divided societies.⁴ Hence the questions of *what* and *how* are both subject to debate.

This Article takes up both questions. It surveys the main contending prescriptions for constitutional designs to cope with serious ethnic conflict, and it enumerates some of the main objections to each. It then reviews some of the available evidence on the efficacy of the contending prescriptions before turning to the question of adoptability. The Article notes that there are many obstacles to the adoption of a coherent set of political institutions to mitigate conflict, which derive mainly from processes of constitution making. For this reason, the Article evaluates some of the main suggestions in the recent literature on constitutional process and thereafter devotes considerable attention to the difficult question of designing a process for constitution making that is geared to the specific problems faced by constitutional designers.

I. INSTITUTIONS: THE DEBATE

Suppose a society contains two ascriptive (birth-derived) groups: the *As*, with 60 percent of the population, and the *Bs*, with 40 percent. The groups have the same age structures and rates of natural increase; their proportions are not vulnerable to change through immigration; they vote at the same rates; and they vote exclusively for ascriptively defined political parties, the *A* party and the *B* party. Under virtually every form of fair majoritarian political arrangement and every electoral system, the *As* will dominate government and the *Bs* will be in opposition in perpetuity. Of course, no society approximates all of these conditions, but many resemble this situation, with ascriptive cleavages (hereafter called ethnic cleavages) based on race, color and appearance, language, religion, regional origin, or some other criterion of group difference.

4. See *infra* text accompanying note 78.

In many societies, there are ethnically based parties, ethnic voting at very high rates, and electoral outcomes that foster a sense of group inclusion and exclusion that exacerbates whatever preexisting conflicts are present between the groups. Not surprisingly, a great many violent conflicts follow electoral exclusion of this kind, whether anticipated or accomplished.⁵

In some cases, conflicts are not bipolar, as the *A-B* conflict is, but tripolar or multipolar. Even where the conflict is bipolar, as it is for the most part in, for example, Northern Ireland, Fiji, Cyprus, Rwanda, and Burundi, there are subgroup differences—that is, within the *A* and *B* groups—that mitigate the overall polarization. Whatever the complexity of intergroup and intragroup relations in such societies, however, polarization and exclusion can follow from ascriptive differences, compounded by the history, advantages and disadvantages, and divergent views of the identity of the state that are all associated with these differences.

There are three principal ways to think about avoiding exclusion and polarization in such a society. One way, which comes naturally to Anglo-American democrats, is to think of majority rule with strong minority rights. But it is instantly obvious that for the 60-40 *A-B* problem—and, in considerable measure, for all of its more complex and more common variants—the prospect of perennial exclusion from governmental power makes this an unsatisfying course, both practically and theoretically. It is practically unsatisfying because without a minority share of power, or at least the threat of a share of power, minority rights are likely to wither. It is theoretically unsatisfying because democratic theory sees electoral politics as a matter of choice, rather than birth, and does not conceive ascriptive majority rule to be what is meant by majority rule at all.⁶ When elections are wholly governed by birth, the term *election* is scarcely appropriate. That leaves two other possibilities contemplated by the literature on divided societies.

The first, which goes by the name *consociational democracy*, seeks to elide the problem of majority rule altogether by requiring

5. See generally ETHNIC GROUPS IN CONFLICT, *supra* note 2.

6. See, e.g., ROBERT A. DAHL, POLYARCHY 114-21 (1971); Barry Holden, *Liberal Democracy and the Social Determination of Ideas*, in NOMOS XXV: LIBERAL DEMOCRACY 289, 307-09 (J. Roland Pennock & John W. Chapman eds., 1983).

the inclusion of all groups in government.⁷ The consociational approach is essentially a regime of guarantees. It postulates that all major groups will be represented in governing grand coalitions in proportion to their numbers, as determined by election results; that, to facilitate proportional inclusion in cabinets, elections will be conducted by a proportional electoral system; that major decisions will be made in cabinet by consensus; that financial allocations and civil service representation will be proportional to group membership; and that matters of concern to only one group will be left to that group to deal with autonomously.⁸ So, the underlying principles are proportional inclusion, mutual group vetoes on major issues, and group cultural autonomy.

The grand coalition implies that the model of government and opposition is rejected. Consensual democracy replaces majoritarian democracy, and opposition is necessarily located inside government. Group vetoes on ethnically divisive issues mean that much government action is precluded or accomplished only when veto players can be compensated. The policy process becomes complex. Moreover, the inclusive assumptions of the model prefer, if they do not foreclose, certain constitutional design decisions; for example, cabinet government is necessarily parliamentary rather than presidential.⁹ Inclusion also means that cabinets are not formed on the basis of ideological affinity. The assumption, almost always correct, is that parties in severely divided societies are based on ethnic identification, and ethnic extremists are to be represented proportionately along with moderates.

It is precisely on this last point that a competing model diverges. This model suggests that, in a severely divided society, it is paramount to encourage compromise and accommodation, which moderates are more likely to achieve than are those with completely opposite programs.¹⁰ The alternative approach aims, therefore, to

7. See LIJPHART, *supra* note 2; Hans Daalder, *The Consociational Democracy Theme*, 26 WORLD POL. 604 (1974).

8. LIJPHART, *supra* note 2, at 25-47.

9. Consociationalists prefer parliamentary to presidential regimes but do not automatically rule out presidentialism if other consociational requirements are met. See, e.g., *id.* at 33.

10. See Donald L. Horowitz, *Constitutional Design: Proposals Versus Processes*, in THE ARCHITECTURE OF DEMOCRACY 15, 23-25 (Andrew Reynolds ed., 2002) [hereinafter

support moderates against extremists. This approach does not abandon majoritarian democracy, but it aims at majorities that are cross-ethnic and at governments formed by moderate interethnic coalitions.

Because it seeks to support the moderate middle, this perspective is frequently referred to as the centripetal approach; its principal tool is not a regime of ethnic guarantees but the provision of incentives, usually electoral incentives, that accord an advantage to ethnically based parties that are willing to appeal, at the margin and usually through coalition partners of other ethnic groups, to voters other than their own.¹¹ The underlying mechanism is that, to appeal to voters other than one's own and to form interethnic coalitions in a conflict-prone society, ethnically based parties must demonstrate that they are moderate and willing to compromise on ethnic issues. The particular electoral systems employed to encourage moderation vary with the circumstances. In some cases, the alternative vote, a preferential system that facilitates the interethnic exchange of second and subsequent preferences, has been used.¹² In other cases, where territory is a proxy for ethnicity, territorial distribution of the vote, in addition to a plurality of votes, has been required for electoral victory.¹³ This is particularly helpful in presidential elections, in order to induce candidates to become pan-ethnic in their orientation. In other cases, multimember constituencies with ethnically reserved seats but common-roll elections, have facilitated the emergence of mixed tickets of ethnic moderates.¹⁴ The centripetal approach does not generally favor list-

*Constitutional Design]; see also Making Moderation Pay, *supra* note 2; Ben Reilly, *Preferential Voting and Political Engineering: A Comparative Study*, 35 J. COMMONWEALTH & COMP. POL. 1 (1997).*

11. See, e.g., TIMOTHY D. SISK, POWER SHARING AND INTERNATIONAL MEDIATION IN ETHNIC CONFLICTS 41 (1996). Sisk also refers to this approach as "integrative," a less apt description, because the approach aims at a modicum of cooperative political behavior but not at anything like the dissolution of group boundaries or the creation of bonds of friendship.

12. See BENJAMIN REILLY, DEMOCRACY IN DIVIDED SOCIETIES: ELECTORAL ENGINEERING FOR CONFLICT MANAGEMENT 18-19 (2001).

13. See ETHNIC GROUPS IN CONFLICT, *supra* note 2, at 635-38.

14. See *id.* at 633-35.

system proportional representation, which it sees as producing results that reflect, or even exacerbate, existing ethnic cleavages.¹⁵

Besides electoral incentives for moderation, the centripetal approach has a number of other tools it employs. Like consociationalists, centripetalists favor federalism in multiethnic countries, but for different reasons.¹⁶ Consociationalists see federalism as a device to foster group autonomy in homogeneous regions or provinces. Centripetalists prefer it as a way to blunt the effect of stark opposition among solidary ethnic groups at the center by allowing subethnic differences, which might otherwise be latent, to emerge within homogeneous units of a federation, where federalism encourages subgroup competition for power in those units.¹⁷ In heterogeneous provinces, on the other hand, federalism can foster intergroup cooperation between politicians as a form of political socialization to norms of cooperation before they arrive at the center.¹⁸ Federalism can also serve as a form of electoral reform, as proliferation of federal units changes electoral boundaries and has an impact on the number of political parties and their relative strength nationwide.¹⁹ So, for example, in the Nigerian First Republic (1960-66), the Hausa-Fulani, representing about 30 percent of the total population but a majority in the undivided Northern Region, were able to control that region sufficiently to use it as a springboard to gain electoral power at the center.²⁰ Later, when regions were carved into much larger numbers of states, the power of the Hausa-Fulani was confined to six of the ten states into which the Northern Region was divided.²¹ The result was a decline in their effective electoral power and the creation of great incentives for them to cooperate with other ethnic groups in order to gain a share of power at the center.²² In these ways, federalism can have a profound effect on ethnic conflict at the national level.

15. See SISK, *supra* note 11, at 38-39.

16. *Id.* at 37, 42.

17. See Donald L. Horowitz, *The Many Uses of Federalism*, 55 DRAKE L. REV. 953, 960-61 (2007).

18. *Id.* at 960.

19. *Id.* at 961-62.

20. ETHNIC GROUPS IN CONFLICT, *supra* note 2, at 603.

21. *Id.* at 604.

22. See *id.* at 602-13.

The aims of centripetalists are always directed at moderation, but the means they advocate are not always the same. For instance, on the well-supported assumption that multipolar ethnic conflict is more fluid and generally less dangerous than bipolar conflict, centripetalists try to preserve multipolar fluidity where it exists, rather than allow it to degenerate into bifurcation; they may also look favorably on the use of subgroup cleavages to foster alliances between portions of one group and portions of another.²³ For such purposes, both electoral and territorial engineering may provide incentives.

Neither the consociational nor the centripetal approach has abolition of ethnic conflict as its agenda. Both accept the existence of ethnic cleavages and attempt to manage their effects—in one case, by guaranteed representation and outcomes and in the other, by various regimes of incentives to moderation, cooperation, or fragmentation. The consociational approach has a well-specified menu of institutions, whereas the centripetal approach is at home with a variety of governmental institutions, presidential or parliamentary, provided that appropriate incentives are built in. So far as parties and elections go, consociationalists aspire to a post-electoral compromise—hence the grand coalition—whereas centripetalists aspire to a pre-electoral compromise—hence various incentives to induce parties to pool votes and form coalitions across group lines.²⁴ According to the latter, pre-election compromise is superior, because it requires that parties make commitments to moderate their ethnic claims in order to secure alliances and electoral support across group lines, whereas compulsory post-election coalitions require no such commitments.²⁵

Both approaches have been subject to considerable criticism. Consociationalism has been called motivationally challenged, because it assumes that a majority ethnic group, where one exists, will be willing to exchange the complete power it could gain through the polls for a frustrating system of power sharing, including minority vetoes.²⁶ When majorities are weak, however, or when they

23. *Id.* at 646-48.

24. SISK, *supra* note 11, at 44-45.

25. *Id.*

26. *Constitutional Design*, *supra* note 10, at 20; see also Ian S. Spears, *Understanding*

forecast future weakness, they have sometimes been willing to accept a consociational formula, as they did in Northern Ireland in 1998,²⁷ Cyprus in 1960,²⁸ and Bosnia in 1995.²⁹ Civil wars, therefore, can sometimes be brought to an end with consociational arrangements, but the desirability and durability of such agreements are often in doubt.

To the extent that the motive for this exchange of monopoly power for shared power is assumed to be statesmanship, the inarticulate presupposition is that political leaders in severely divided societies are less ethnocentric than their followers and therefore willing to forego zero-sum outcomes for cooperative schemes. On this, the evidence is mixed at best. In some countries, leaders are more tolerant than followers; in others, they are equally or less tolerant.³⁰

Furthermore, the willingness of leaders to form interethnic coalitions can produce a negative reaction among members of their own groups, which in turn can lead to the formation of new, ethnically exclusive parties on the flanks.³¹ If so, what begins as a grand coalition may end as a coalition of the middle, opposed by extremists on the flanks who are able to thwart interethnic compromise by making inroads into the support of those who join such coalitions. In short, the grand coalition may not be durable. As an empirical matter, completely inclusive coalitions are rare in democratic countries, even those utilizing some consociational devices, such as Belgium.³²

Other elements of the consociational dispensation are vulnerable as well. A longstanding literature attacks proportional represen-

Inclusive Peace Agreements in Africa: The Problems of Sharing Power, 21 THIRD WORLD Q. 105, 110 (2000).

27. See generally NORTHERN IRELAND AND THE DIVIDED WORLD (John McGarry ed., 2001).

28. See STANLEY KYRIAKIDES, CYPRUS: CONSTITUTIONALISM AND CRISIS GOVERNMENT 53-71 (1968).

29. See RICHARD HOLBROOKE, TO END A WAR (1998). In the Bosnian case, the largest group, Bosniaks, comprised a large plurality, not a majority.

30. Donald L. Horowitz, *Self-Determination: Politics, Philosophy, and Law*, in NOMOS XXXI: ETHNICITY AND GROUP RIGHTS 421, 439 & 457 n.31 (Ian Shapiro & Will Kymlicka eds., 1997) [hereinafter *Self-Determination*] (reviewing the evidence).

31. *Id.* at 439-40.

32. See ELS WITTE ET AL., POLITICAL HISTORY OF BELGIUM FROM 1830 ONWARDS (Raf Casert trans., 2000).

tation as a polarizing system that increases the distance between voting blocs in societies that already possess some degree of polarized identities.³³ Group vetoes can produce a great deal of policy immobilism. The frequent use of such vetoes by the Turkish minority on Cyprus led the Greek majority to terminate the consociational arrangement of 1960 within three years.³⁴ Cyprus lapsed into civil strife and eventually a Turkish invasion and partition.³⁵ Bosnia's consociational constitution, embodied in the Dayton Accords of 1995, has allowed ethnic leaders to prevent policy innovation for more than a decade.³⁶ In Northern Ireland, the consociational formula produced by the Good Friday Agreement has resulted in periodic breakdown of governing arrangements, a considerable decline in interethnic moderation as measured in surveys, and the growth of extremist parties at the expense of the moderate middle.³⁷ During periods in which government has been functioning in Northern Ireland, consociational norms have operated to convert the smallest distributive issues—for example, where to site a hospital or a nursery—into complex issues of ethnic policy requiring cumbersome exchanges to resolve.³⁸

In severely divided societies, the recent record of consociational constitutions is, at best, debatable. In Europe, the Belgian regime is fragile, its governing center increasingly hollowed out by efforts to devolve more autonomous powers to its ethnically differentiated regions, in which ethnic outbidding proceeds with little restraint.³⁹ Bosnia has made little serious progress in conflict amelioration or

33. See Guy Lardeyret, *The Problem with PR*, in THE GLOBAL RESURGENCE OF DEMOCRACY 175 (Larry Diamond & Marc F. Plattner eds., 2d ed. 1996); Giovanni Sartori, *European Political Parties: The Case of Polarized Pluralism*, in POLITICAL PARTIES AND POLITICAL DEVELOPMENT 137 (Joseph LaPalombara & Myron Weiner eds., 1966).

34. KYRIACOS C. MARKIDES, THE RISE AND FALL OF THE CYPRUS REPUBLIC 27-28 (1977).

35. *Id.* at 28-30, 155-57.

36. See Florian Bieber, *After Dayton, Dayton? The Evolution of an Unpopular Peace*, 5 ETHNOPOL. 15 (2006).

37. See Joanne Hughes & Caitlin Donnelly, *Community Relations in Northern Ireland: A Shift in Attitudes?*, 29 J. ETHNIC & MIGRATION STUD. 643 (2003).

38. *See id.*

39. See Kris Deschouwer, *The Unintended Consequences of Consociational Federalism: The Case of Belgium*, in POWER SHARING: NEW CHALLENGES FOR DIVIDED SOCIETIES 92 (Ian O'Flynn & David Russell eds., 2005); Liesbet Hooghe, *Belgium: Hollowing the Center*, in FEDERALISM AND TERRITORIAL CLEAVAGES 55 (Ugo M. Amoretti & Nancy Bermeo eds., 2004).

in reduction in the influence of extremists,⁴⁰ and in Northern Ireland, as mentioned, moderates have lost support and extremist parties have flourished.⁴¹ The most that can be said is that, with a few exceptions, violence has been contained. Even here, however, a serious issue arises. A careful study discloses that the presence of consociational features in India's governing arrangements at various times tends to coincide with higher levels of ethnic violence than prevail in other periods when consociational features are absent.⁴² Africa has experimented with peace agreements containing such consociational features.⁴³ South Africa's transition was facilitated by a few temporary guarantees.⁴⁴ Burundi has twice made serious attempts at consociational regimes.⁴⁵ The first attempt in 1992 was quickly aborted by a coup, and the 2000 arrangement foundered on a wave of indiscriminate arrests in late 2006.⁴⁶ It could be said that Burundi's agreements omitted some consociational elements,⁴⁷ but Sudan's Comprehensive Peace Agreement of 2005 did not: it contained a grand coalition, a limited minority veto, proportionality in the cabinet, and extensive autonomy for the South.⁴⁸ It has not collapsed; it simply has not begun to operate, and there are serious doubts that it will.⁴⁹

In some cases, as indicated, there has not been a fair test, because a few consociational features were imported into the agreement, while others were missing. In other cases, however, the

40. See Carrie Manning, *Elections and Political Change in Post-war Bosnia and Herzegovina*, 11 DEMOCRATIZATION 60, 82 (2004).

41. See Hughes & Donnelly, *supra* note 37; see also *supra* text accompanying notes 37-38.

42. Steven Ian Wilkinson, *India, Consociational Theory, and Ethnic Violence*, 40 ASIAN SURV. 767 (2000).

43. See René Lemarchand, *Consociationalism and Power Sharing in Africa: Rwanda, Burundi, and the Democratic Republic of the Congo*, 106 AFR. AFF. 1 (2007).

44. See generally HEATHER DEEGAN, *SOUTH AFRICA REBORN: BUILDING A NEW DEMOCRACY* (1999).

45. See *id.* at 7 & n.13.

46. *Id.* at 9, 12 n.27.

47. See Daniel P. Sullivan, *The Missing Pillars: A Look at the Failure of Peace in Burundi Through the Lens of Arend Lijphart's Theory of Consociational Democracy*, 43 J. MOD. AFR. STUD. 75 (2005).

48. See Comprehensive Peace Agreement, The Implementation Modalities of the Protocol on Power Sharing, dated 26th May, 2004 (Dec. 31, 2004), available at http://www.usip.org/library/pa/sudan/cpa01092005/implementation_agreement.pdf.

49. Glenn Kessler, *Sudan's Peace Deal, Seen as a Bush Success, Is Endangered*, WASH. POST, Jan. 28, 2007, at A18.

agreements were made with the overriding purpose of producing peace between governments and armed rebels or among a variety of armed factions. Consociationalism then amounts to a “warlords’ peace,”⁵⁰ which is volatile because the various armed forces cannot be integrated into a single force, or because the arrangement is merely tactical, or because the presence of arms makes leaders willing to act quickly at the first signs of breach. The irony is that warfare may be hard to end except on at least some consociational terms, but without the presence of strong external forces, as in Bosnia, the durability of such agreements is in doubt. Reviewing the failure of Angola’s power-sharing agreement in 1998, when the two sides returned to warfare, each thinking it could win total power, Ian S. Spears remarked: “[T]here are few incentives to forming inclusive governments when risk-acceptant groups have the option of complete political power and believe the attainment of that option is very likely.”⁵¹

The centripetal approach has also given rise to lively debates.⁵² Some of its electoral mechanisms might allow majorities to gain power, in part on the marginal votes of minorities, but without the necessary participation of those minorities in government.⁵³ In cases where those electoral systems have been used, the benign or malign results have been subject to contest.⁵⁴ As with the consociational cases, there has sometimes been deterioration of interethnic harmony, or the durability of accommodative institutions, or the quality of democracy. Such consequences have been produced in some countries that utilize electoral systems designed to encourage interethnic vote pooling and in others that had vote

50. Denis M. Tull & Andreas Mehler, *The Hidden Costs of Power-sharing: Reproducing Insurgent Violence in Africa*, 104 AFR. AFF. 375, 395 (2005).

51. Spears, *supra* note 26, at 109.

52. Compare Jon Fraenkel & Bernard Grofman, *Does the Alternative Vote Foster Moderation in Ethnically Divided Societies?*, 39 COMP. POL. STUD. 623 (2006), with Donald L. Horowitz, *Strategy Takes a Holiday: Fraenkel and Grofman on the Alternative Vote*, 39 COMP. POL. STUD. 652 (2006) [hereinafter *Strategy Takes a Holiday*].

53. See Arend Lijphart, *Constitutional Design for Divided Societies*, J. DEMOCRACY, Apr. 2004, at 96, 98.

54. Compare Fraenkel & Grofman, *supra* note 52, with *Strategy Takes a Holiday*, *supra* note 52.

pooling and interethnic coalitions without deliberate electoral engineering.⁵⁵

In spite of such difficulties, there is an increasing tendency to think of moderating conflict behavior as entailing a search for institutions that will produce incentives to interethnic conciliation and, specifically, institutions that utilize the mechanism of inducing or requiring marginal dependence for electoral success on the support of voters other than one's own.⁵⁶ Such measures can produce accommodative tendencies. Consider a few illustrations.

In 1978, Nigeria adopted an electoral system that required that the winning candidate secure not only a plurality of votes cast in presidential elections, but also at least 25 percent of the votes cast in no fewer than two-thirds of the states.⁵⁷ In tandem with changes in Nigeria's federal arrangements discussed earlier, the result was to produce presidents with panethnic outlooks and to change the party system by making it difficult for purely ethnically based parties to compete.⁵⁸ Seeking similar effects, Indonesia adopted a presidential vote-distribution formula in 2002.⁵⁹

In Papua New Guinea, the alternative vote, with its majority threshold for victory, effectively required candidates to secure support from multiple groups in their constituencies.⁶⁰ AV, an electoral system utilized for nearly a century in Australia, has a long record of producing centripetal outcomes.⁶¹ When AV was

55. In Malaysia, for example, interethnic vote pooling regularly supported the moderate, interethnic Alliance Party coalition. After ethnic violence in 1969, some restrictions were placed on political freedom concerning sensitive ethnic issues, and Malaysia lapsed into what is generally called a "semi-democracy." See generally HAROLD CROUCH, GOVERNMENT AND SOCIETY IN MALAYSIA (1996).

56. For illustrations, see REILLY, *supra* note 12; Matthijs Bogaards, *Electoral Choices for Divided Societies: Multi-Ethnic Parties and Constituency Pooling in Africa*, 41 J. COMMONWEALTH & COMP. POL. 59 (2003); Int'l Crisis Group, *Changing the Logic of Bosnian Politics* (ICG Discussion Paper on Electoral Reform, Mar. 10, 1998).

57. CONSTITUTION, Art. 126 (1979) (Nigeria), *superseded by* CONSTITUTION, Art. 134 (1999) (Nigeria); *see also* B.O. NWABUEZE, THE PRESIDENTIAL CONSTITUTION OF NIGERIA 192-93 (1982).

58. ROTIMI T. SUBERU, FEDERALISM AND ETHNIC CONFLICT IN NIGERIA 117 (2001).

59. UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA [Constitution] art. 6A(3).

60. REILLY, *supra* note 12, at 69.

61. See Clive Bean, *Australia's Experience with the Alternative Vote*, 34 REPRESENTATION 103 (1997); B.D. Graham, *The Choice of Voting Methods in Federal Politics*, 8 AUSTL. J. POL. & HIST. 164 (1962).

dropped in Papua New Guinea in favor of first-past-the-post elections, candidates won on small pluralities, consisting of their kinsmen alone, and violent intergroup conflict increased greatly.⁶² Responding to this conflict, Papua New Guinea has recently returned to AV.⁶³

Finally, a careful quantitative study of India has shown that anti-Muslim violence is significantly less frequent and severe in those Indian states in which the ruling party is at least partly dependent on Muslim electoral support than it is in states in which the support of Muslim voters is unnecessary.⁶⁴ Fearful of losing that support, ruling parties dependent on Muslim votes control their Hindu supporters and repress violence if it occurs. Not surprisingly, parties respond, at least on matters of life and death, to those who vote for them.

Electoral innovations, however, are not always easy to arrange. AV, for example, requires ethnically heterogeneous constituencies, which may not exist or may later be gerrymandered out of existence. Although Nigeria's territorial distribution system is used in presidential elections, many countries prefer parliamentary systems. Most important, perhaps, is a failing that can be illustrated by an example from Nigeria. When the Nigerians adopted their presidential electoral formula in 1978, they did not adopt a comparable conciliatory electoral formula to encourage interethnic vote pooling in their legislative constituencies, which in any case were mainly homogeneous.⁶⁵ Legislators, largely elected on votes of members of their own groups, do not have incentives comparable to those of presidential candidates to behave in ways conducive to interethnic moderation. Consequently, Nigeria is a case in which conciliatory electoral engineering was limited to a single office.

Constitution makers often fail to adopt coherent designs of either the consociational or the centripetal type—that is, regimes

62. See REILLY, *supra* note 12, at 81-82.

63. Ben Reilly, *Political Engineering and Party Politics in Papua New Guinea*, 8 PARTY POL. 701, 711-13 (2002).

64. See STEVEN I. WILKINSON, VOTES AND VIOLENCE: ELECTORAL COMPETITION AND ETHNIC RIOTS IN INDIA (2004).

65. Rotimi T. Suberu & Larry Diamond, *Institutional Design, Ethnic Conflict Management, and Democracy in Nigeria*, in THE ARCHITECTURE OF DEMOCRACY, *supra* note 10, at 418.

of consistent, interlocking, mutually reinforcing institutions that adhere to a single approach to reducing conflict. Because ethnic conflict can be a powerful force, it often requires a full suite of political institutions to counter it. The mixed results that are observable when states adopt one or two consociational features, or one or two incentives to interethnic moderation, may be attributed to the existence of other institutions that do nothing to reduce ethnic conflict and sometimes actively counteract the benign effects of conciliatory devices. Yet partial adoptions are the rule, and coherent packages are the exception.

Suppose, for example, that proportional representation is adopted, and parties of various ethnic groups are represented proportionately in the legislature and in the cabinet, as consociational theory specifies, but the minority group veto is not adopted, so the regime is majoritarian. There would then be the prospect of ethnic-minority exclusion abetted by an electoral system that perfected that exclusion and made the results even more predictable. On the other side, how should a regime be judged if it adopts an electoral system that provides incentives for interethnic accommodation but also provides some consociational guarantees that mitigate the rule of interethnic moderates by guaranteeing extremists a place in the cabinet?⁶⁶ Such partial innovations and hybrid outcomes may well be at the root of the inability to form conclusive judgments about contending prescriptions for interethnic accommodation. If so, constitutional processes and their impact on the adoptability of contending designs are the neglected elements in debates about measures to promote interethnic accommodation.

II. ADOPTABILITY: THE QUESTION OF PROCESS

It is more common to find one or two consociational practices than the full ensemble of consociational institutions. The same is true of incentives to moderation, which may be adopted only partially. The process of designing institutions—specifically, the process of making constitutions—is much more conducive to partial

66. For an illustration, see the discussion of Fiji's experience *infra* in text accompanying notes 94-101.

or even conflicting innovations than it is to the adoption of coherent designs whose elements reinforce each other. There are many reasons for this shortfall.

Constitutions are made in times of crisis, when existing arrangements have been shown to be illegitimate or ineffective, or both. Many are made after periods of warfare, during fragile ceasefires, when time is of the essence. Very commonly, there are explicit deadlines for producing the constitutional document.⁶⁷ Deliberation may then take a back seat to reaching an agreement, any agreement. Pressure is likely to grow to get the drafting done, even if imperfectly.

Moreover, constitution making is a loosely structured task. The nature of the job can seem vague and unspecified. Constitutions are made by people who have not made a constitution before and will not be likely to make a constitution again. There is, therefore, a great deal of lost knowledge from one constitution-making process to another and a good deal of fumbling along the way. Although many constitutions appear to be the result of deliberations, most are actually the product of a variety of accidents, biases, constraints, fears, and inhibitions, not to mention (yet) the role of negotiations between actors with conflicting preferences.

To begin with, there is the part played by limited comparative vision, or what may be called *model bias*.⁶⁸ The most pertinent constitutional examples are usually from countries that have faced similar problems and displayed some success in dealing with them, but those countries may be on the other side of the world and outside the field of vision of current constitution makers. Instead, constitution drafters may seek to emulate the constitution of one or more of the most democratic and successful countries or of the ex-

67. In Iraq, for example, the timetable allowed six months for the drafting of a permanent constitution, with the possibility of a single six-month extension. In fact, the drafting committee got down to business quite late and had fewer than three months until the first deadline to do its work. See LARRY DIAMOND, SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ 154-55 (2005). As the first deadline was approaching, the United States put pressure on the Iraqis not to request an extension, with the result that some provisions were incomplete when the draft was submitted. *Id.* at 173-77.

68. In this and the next paragraph, I am borrowing from my essay *Constitutional Design*, *supra* note 10, at 31-35.

colonial power (if there is one), or of other countries in their region or cultural zone, or of the most influential foreign advisor on the scene, who may be a captive of home-country bias, a preference for the institutions already familiar to himself or herself.

There are also problems of *historical bias*. In some countries, the objective is to design a constitution that avoids problems that the state experienced in the past. Alternatively, constitutional designers may constrict their vision, because they misperceive what designs have been attempted in their country in the past, and with what effects. In either case, history operates as a considerable constraint. It is not amiss to say that many constitutions are documents made for the future by people focused on the past, documents made for a long time horizon by people with short time horizons.

So, too, does preexisting institutional capacity constrain constitutional decisions. When Germany and Italy unified in the nineteenth century, both had very strong regional traditions that might have led to federal constitutions.⁶⁹ Yet only Germany became a federation. Unlike Germany, Italy had no preexisting regional legislatures or administrations to which to devolve power.⁷⁰ Low institutional capacity can be a major constraint on creating a federal system, even where a federal system might otherwise be expected to emerge.

Then there are constraints that derive from the process of constitution making itself. The actors at the table may possess asymmetric preferences. Whereas majorities typically want unimpeded majority rule, minorities are very likely to want guarantees and, therefore, may be attracted by consociational plans. In addition, particular political parties are likely to have a sense of the institutions which, if adopted, will favor them and disfavor their opponents. They have what might be called *visibility* with respect to their interests. They may, of course, prove to be wrong about what decisions will benefit them, but, right or wrong, the positions they take are strongly affected by what they see as being in their interest. Generally, drafters do not have the luxury of making a

69. See DANIEL ZIBLATT, STRUCTURING THE STATE: THE FORMATION OF ITALY AND GERMANY AND THE PUZZLE OF FEDERALISM 6-16 (2006).

70. See *id.* at 80-88.

constitution behind the Rawlsian veil of ignorance⁷¹ that the American framers had. By 1787, a party system had not yet crystallized, allowing the framers to go about their business without close regard for partisan interest.⁷² In most contemporary states, visibility of group interests and party interests is a major impediment to constitutional planning.

In ethnically divided societies, there is a special, and especially pernicious, version of this problem. Politicians who benefit from hostile sentiment toward other groups and its concrete results in the political system are unlikely to transform the conflict-prone environment that supports their political careers. As a result, severely divided societies, which may be most in need of institutions to reduce conflict, may be least likely to adopt them.

Even those participants who are not aiming to nurture particular interests may think that institutional choices should not necessarily depend on the propensity of specific institutions to reduce the incidence of ethnic conflict. The participants may have other goals, such as adopting an electoral system that promotes proportionality of seats to votes as a desirable end in itself, or a system that fosters accountability of representatives to constituents, or one that reduces the number of parties.⁷³ All of these are legitimate goals of electoral-system choice, but none is identical to—and some are in conflict with—choosing a system intended to promote interethnic conciliation. The same goes for other institutional choices, which may be made on grounds completely apart from their propensity to mitigate or exacerbate intergroup conflict. The multiplicity of participants gives rise to multiple goals in constitution making, often at the expense of engineering structures to foster interethnic accommodation.

Third parties on the scene may have yet a different agenda. Especially if the conflict might turn back to violence, many third parties will put reaching a quick constitutional settlement above all other goals. Third parties often secure rewards from pressing the

71. See JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1971).

72. Other interests, however, were in evidence at the Philadelphia Convention. See generally MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* (1913).

73. For the multiplicity of electoral-system goals, see Donald L. Horowitz, *Electoral Systems: A Primer for Decision Makers*, J. DEMOCRACY, Oct. 2003, at 115.

parties to a conflict to reach agreement—any agreement, so long as it does not fall apart. Third parties do not need to live with the settlement, and so they do not necessarily seek an optimal set of institutions to control the conflict.

All of these forces favor a heavily negotiated outcome, often involving an exchange of incommensurables rather than a coherent plan for conflict reduction. The conditions that inhere in a great many constitutional processes, therefore, are conducive to the exchange of a little of this for a little of that—possibly a few group guarantees, a great deal of majority rule, and relatively few, if any, institutional incentives for interethnic moderation. Constitution making is not typically as much a deliberative process as it is a negotiating process. Many constitutions in severely divided societies are not the product of single-minded attention to the goal of reducing conflict. Many, in fact, do not contain any of the institutions recommended by either of the contending consociational or centripetal schools of thought.

The Iraq Constitution of 2005 is a case in point. It was made by a process that excluded Sunni representatives and that produced a carve-up between Shia and Kurdish negotiators.⁷⁴ Apart from enshrining values of federalism—and even then a Nigerian First Republic-type federalism, with the prospect of a few large regions leveraging their power to control the state⁷⁵—and a few ethnically reserved political offices, it is difficult to identify in that document any institutions designed to reduce ethnic or sectarian conflict.⁷⁶ In this, the Iraq Constitution is not particularly atypical.

The first choice to be made by constitution makers is itself the choice to choose—that is, the choice to consider constitutional models specifically designed to reduce conflict. Unfortunately, many constitutional processes do not reach this first step, but skip over it, because participants may not be aware of the full range of available institutions or the connections between institutional choice and prospects for interethnic conciliation, or, as mentioned

74. See JONATHAN MORROW, U.S. INST. OF PEACE, SPECIAL REP. NO. 155, IRAQ'S CONSTITUTIONAL PROCESS II: AN OPPORTUNITY LOST (2005).

75. See DIAMOND, *supra* note 67, at 168 (drawing an analogy between Iraq's and Nigeria's regions).

76. See generally IRAQ CONST. art. 50.

earlier, because they may be focused on other goals or interests.⁷⁷ The precise configuration of the inchoate constitutional ideas that constitution makers bring to their task is unmapped. It is quite clear, however, despite the considerable internationalization of constitutional design processes since 1989, that in most countries there are great obstacles to constitutional engineering for inter-ethnic conciliation at the threshold of the process. And if that is so, it follows, *a fortiori*, that inducing constitution makers to produce coherent ensembles of conflict-reducing institutions, either of the consociational or the incentive-based sort, is a formidable task. Many constitutions have been constructed, but few have been designed.

III. PRESCRIPTIONS FOR PROCESS AND LIKELY OUTCOMES

The matter is made more difficult by the emergence of a new literature on constitution drafting, which elevates process over the substantive content of a constitution and aims to prescribe a uniform series of norms for constitution making.⁷⁸ Some of these norms can prove to be dysfunctional for constitution making in severely divided societies. In any case, the uniform character of the prescription fails to take account of the variety of processes that may be appropriate for specific problems faced by constitution makers.

The admonitions about the right process are easy to recite. They emphasize the virtues of public participation and transparency in constitution making. A democratic constitutional process is said to be necessary to the legitimacy of the final product, and a democratic process means considerable public involvement at various stages of the process. Civic education and efforts to engage the citizenry in the constitutional process are considered to be preconditions for citizen participation and dialogue. Hence there is a need for extensive publicity and conversation with the public. New constitu-

77. See *supra* notes 71-74 and accompanying text.

78. See, e.g., VIVIEN HART, U.S. INST. OF PEACE, SPECIAL REP. NO. 107, DEMOCRATIC CONSTITUTION MAKING (2003); Nathan Brown, Iraq and the New Constitutionalism (2005) (unpublished manuscript, on file with author).

tions should be “deeply participatory at all stages of the process.”⁷⁹ Broad ownership of the document is seen as a transcendent value.

It goes without saying that constitution makers who are indifferent to public opinion or who operate with little or no disclosure of their ongoing work jeopardize the legitimacy of what they produce. But to make participation and transparency the touchstones of the legitimacy of a constitution is to exaggerate the benefits and underestimate the costs of such a course. A single process model is unlikely to be apt for all situations, and over the long run the content of the institutions embodied in a constitution is likely to be more important for the democratic future of a state than is the presence of the highest levels of public participation and openness in the way in which the constitution is created.

There is no special reason why constitution making should be exempt from the embrace of representative government, and there are many reasons why representation, rather than direct democracy, should have a privileged place in constitution making. Constitutions are a complex matter. Most people have little or no incentive to acquire the requisite information to deal with the details of constitutional design. On the contrary, constitutional design is one of those matters on which most rational people will have good reason not to acquire information, as the literature on rational ignorance would suggest.⁸⁰

There is also a significant tradeoff between participation and transparency, on the one hand, and expertise, on the other. As the first Part of this Article suggested, some constitutional goals are much more likely to be achieved if experts are deployed to think clearly, bring pertinent comparative experience to bear, and draft carefully. These are tasks with which constitution makers often have difficulty—recall the array of constraints and biases enumerated earlier⁸¹—and they are not tasks best performed in the light of day, with very large numbers of participants. Public consultation at several points in the process is certainly necessary, but large parts of the process need to be entrusted to representatives and experts.

79. Brown, *supra* note 78 (manuscript at 2).

80. See generally GUIDO PINCIONE & FERNANDO R. TESÓN, RATIONAL CHOICE AND DEMOCRATIC DELIBERATION: A THEORY OF DISCLOSURE FAILURE (2006).

81. See *supra* notes 68-77 and accompanying text.

To these propositions there is a major exception. Transparency is especially important and public consultations need to be more frequent when there is pronounced distrust of the regime that is involved in the constitutional process. When the old regime has departed, however, or when it has been subdued or made accountable through democratic elections and distrust has subsided, the need to be conspicuously open at every step is much reduced.

A different prescription for constitutional process has been advanced less systematically and explicitly than has the participation-transparency prescription, but it is embodied in conventional wisdom about constitution making. It is often said offhandedly that a constitution should be a negotiated document.⁸² It should be noted that, as most negotiations take place in private, there is some tension between transparency and negotiation as modalities of constitutional choice. Negotiation is an inevitable part of constitutional design, but the extent of negotiation is and ought to be variable.

In post-conflict constitution making, and particularly in post-violence constitution making, a heavy role will be reserved for negotiation by virtue of the force possessed by both sides. If a “mutually hurting stalemate”⁸³ forms the background to the constitutional process, then the ability of each side to inflict damage on the other implies that a bargain between the two sides—or, occasionally, more than two sides—will be necessary.

There are other circumstances in which a heavily negotiated outcome is required. Where violent conflict has not taken place, but where constitution making is necessary, there may be great polarization in the polity. In these circumstances, if the formal requirements for constitutional change—either the requirements for amendments or for referenda—are stringent, as they may well be, then negotiation will be the only way a constitutional process can move forward. Taiwan is an example of this. There has been no appreciable violent conflict on Taiwan since 1947, but politics on the island is strongly polarized between the Pan-Blue and Pan-Green camps, and the Taiwan amendment and referendum processes are

82. See, e.g., DEEGAN, *supra* note 44, at 28.

83. I. William Zartman, *Preventive Diplomacy: Setting the Stage*, in PREVENTIVE NEGOTIATION: AVOIDING CONFLICT ESCALATION 1, 4 (I. William Zartman ed., 2001).

unusually arduous.⁸⁴ Every amendment has required a bargain between camps,⁸⁵ a point this Article will return to later.⁸⁶

All constitutional processes involve negotiation, especially those in which the parties involved in the process have great visibility—or think they do—concerning their future interests. Nevertheless, it should not be thought that every constitutional process involves *only* negotiation. The American process of 1787, for instance, involved negotiation, exemplified best by the Great Compromise that, by according each state equal representation in the Senate, saved the Constitutional Convention from collapse.⁸⁷ The presidency, however, was created by a different process.

The Convention was divided between, on one side, those who feared that a single executive might recreate a monarchy and who believed the elected legislature would be the guardian of liberty and, on the other side, those who feared the popular branch or, for other reasons, saw the need for a strong executive.⁸⁸ Under the Articles of Confederation, most states had weak governors who had succeeded the colonial governors, and so most plans proposed an executive chosen by and accountable to the legislature—in some cases, a plural executive rather than a single executive, but in any case a weak and dependent one.⁸⁹ In the end, the matter was resolved in two committees influenced heavily by a few delegates experienced in two states with directly elected governors, one of which—New York’s—had broad powers.⁹⁰ James Wilson and Gouverneur Morris worked in two committees to shape a presidency modeled, except with respect to direct election, on the powers of the governor of New York.⁹¹

And so the American separation of powers was manifestly not a product of bargaining, but of planning based on comparison of

84. See Jih-wen Lin, *Transition Through Transaction: Taiwan’s Constitutional Reforms in the Lee Teng-Hui Era*, 20 AM. ASIAN REV. 123 (2002).

85. See *id.* at 144-52.

86. See *infra* notes 117-26 and accompanying text.

87. FARRAND, *supra* note 72, at 93-112.

88. See generally CHARLES C. THACH, JR., *CREATION OF THE PRESIDENCY 1775-1789* (1969).

89. See *id.* at 25-54.

90. See *id.* at 42-43, 105-39.

91. *Id.* at 110-11, 133-37.

various models of executives and their relation to the legislature. That is not to say that this particular act of planning was entirely legitimate, for many delegates were either skeptical of or opposed to the type of presidency created by Morris and Wilson late in the proceedings and presented almost as a *fait accompli*.⁹² Nevertheless, it was an act that drew on expertise and comparative knowledge in the pursuit of a goal made manifest by the failure of the previous regime to produce a vigorous executive.⁹³ Say what one will about the separation of powers, there is no doubt that the equilibrium point of a negotiated outcome would have been quite different from the outcome that emerged.

In constitution making, there may be a tradeoff between negotiation and coherence. Bargained outcomes have much to commend them—everyone gets something—but the various parts of bargained outcomes may not fit together. In constitutions that aim at conflict reduction, the fit of the parts can be a major problem. After all, some societies need strong, coherent, even redundant institutions to deal with their problems. Severely divided societies are in this category: they need a strong ensemble of conflict-reducing mechanisms. A wholly negotiated process, however, is unlikely to produce these mechanisms. It is more likely to produce some of this and some of that, as the constitutional process in Fiji in 1996-97 did.

Fiji is a society severely divided between indigenous Fiji and Indians, the descendants of migrants from India to the islands more than a century ago.⁹⁴ Heavily influenced by the incentives view of conflict reduction, the Fiji Constitution Review Commission produced a report recommending adoption of the alternative vote as a way to produce vote pooling and interethnic coalitions.⁹⁵ Fiji has a history of ethnically reserved seats, in which both candidates and voters are limited to members of particular ethnic groups, rather than the whole electorate.⁹⁶ Not all of these seats could be abol-

92. See *id.* at 105-39.

93. See *id.* at 55-75.

94. See generally ADRIAN C. MAYER, INDIANS IN FIJI (1963).

95. PAUL REEVES ET AL., THE FIJI ISLANDS, TOWARDS A UNITED FUTURE: REPORT OF THE FIJI CONSTITUTION REVIEW COMMISSION 304-30 (1996). I was a consultant to the commission.

96. See *id.* at 291, 313.

ished, so the Commission retained twenty-five of them in a house of seventy, leaving forty-five open seats for interethnic vote pooling that would benefit whatever parties engaged in it.⁹⁷ From the outset, therefore, there were limits on the likely impact of the electoral system, recommended because of its tendency to promote interethnic accommodation.

When the recommendations were reviewed by a parliamentary committee, these proportions were more than reversed: forty-six reserved seats and only twenty-five open seats were provided.⁹⁸ Beyond that, legislators from the Indian minority demanded guaranteed representation in the cabinet—a consociational feature—and secured a provision whereby any party gaining at least 10 percent of parliamentary seats would be entitled to a proportionate share of cabinet offices.⁹⁹ No ethnic veto, however, was accorded to Indians, and the British convention of majority confidence was explicitly retained.¹⁰⁰ This was a hybrid constitution, drawing inspiration from the incentives approach, the consociational approach, and the majoritarian approach. The parliamentary committee diluted the more consistent approach of the Constitution Review Commission. In addition to reducing the number of seats available for interethnic vote pooling, it opened the possibility of planting extremists, with only 10 percent of legislative seats, in a cabinet intended to be the product of interethnic vote pooling and dedicated to moderation and compromise on ethnic issues.¹⁰¹ Rather than redundant, consistent institutions, the Fijian parliament produced a mix of institutions that was not completely coherent.

If there is often a tradeoff between negotiation and coherence, there appears to be one class of partial exceptions. It was said earlier that a major obstacle to adoption of consociational institutions would be the reluctance of majorities that have 100 percent of power within their reach to apportion a significant fraction of that power—in the case of group vetoes, an equal share of it—to

97. *Id.* at 290-96.

98. Yash Ghai, *The Implementation of the Fiji Islands Constitution*, in CONFRONTING FIJI FUTURES 21, 33-34 (A. Haroun Akram-Lodhi ed., 2000).

99. *Id.* at 34.

100. *Id.* at 37-39.

101. *Id.* at 36.

minorities.¹⁰² If the majority is unusually weak or vulnerable, however, as it was in different ways in Northern Ireland (1998), Bosnia (1995), and Cyprus (1960),¹⁰³ it becomes possible for a minority or minorities to negotiate successfully for a coherent consociational regime, albeit in the face of great reluctance or resistance on the part of majorities. This is what was negotiated in all three of those countries, but when a consociational regime was proposed again for Cyprus in the Annan Plan of 2004, the Greek-Cypriot majority was no longer in a weak position, and the proposal was rejected in a referendum.¹⁰⁴

One of the circumstances that can produce sufficient weakness to induce acceptance of a consociational constitution is the existence of protracted civil war. When the time comes to settle such conflicts, minority groups that have been engaged in secessionist warfare or other forms of resistance to the central government will be inclined to demand guarantees in exchange for laying down arms. If the warfare had secessionist aims, the likely formula will include extensive territorial autonomy in the areas secessionists already control or in the areas they claim as the traditional lands inhabited by members of their group.¹⁰⁵ These claims often have a large element of historical fiction about them—for groups are far more mobile than territorial claimants usually admit—and the territory

102. See *supra* text accompanying note 26.

103. See *supra* notes 27-29 and accompanying text. In Northern Ireland, the Protestant majority is a declining fraction of the total population and could act in anticipation of the day when it was no longer the majority. See Donald L. Horowitz, *Explaining the Northern Ireland Agreement: The Sources of an Unlikely Constitutional Consensus*, 32 BRIT. J. POL. SCI. 193 (2002). In Bosnia, Bosniaks were not a majority but a strong plurality, and they had been hurt considerably by war with Bosnian Serbs. See SUMANTRA BOSE, CONTESTED LANDS 107, 126-31 (2007). At the time of the Dayton Accords, they were dependent on the United States for military assistance and therefore vulnerable to demands to accede to a consociational dispensation. See *id.* at 130, 134-35. In Cyprus, the large Greek majority was threatened by Turkey, which had suggested a partition of the island—a claim that had been received with some sympathy by the British colonial power, whose foreign policy at the time tilted toward Turkey rather than Greece. See MARKIDES, *supra* note 34, at 21-26. In each case, therefore, special circumstances overrode the usual majority inclinations.

104. Zenon Stavrinides, *A Long Journey to Peace: The Dispute in the Republic of Cyprus*, 27 HARV. INT'L REV. 84, 84-85 (2005).

105. A good example is the 2005 Comprehensive Peace Agreement for the Sudan, which purported to end decades of civil war. See Comprehensive Peace Agreement, *supra* note 48. In addition to power sharing in the central government, the agreement provided extensive autonomy in the southern Sudan. See *id.*

claimed is not generally ethnically homogeneous, containing as it usually does various regional minorities that are vulnerable to at least as much repression at the regional level as the national minority is at the central government level.¹⁰⁶ These facts ought to induce caution as settlements are structured; often they have stymied settlement altogether, as in Sri Lanka, where Tamils claim land partially inhabited by Sinhalese and Muslims in addition to Tamils.¹⁰⁷ Despite these facts, there is no doubt that a key claim in settlement negotiations to end secessionist warfare will be that the rebels or regional politicians who succeed them control the putative secessionist region and be allowed to rule it autonomously.

At the same time, secessionists who are to be induced to abandon their claims for independence will demand, or will be offered, a guaranteed role in the central government, typically with guaranteed political offices, guaranteed participation in the armed forces, guaranteed cabinet offices, and a fixed proportion of budgetary allocations. In this respect, the terms secessionists demand do not differ much from terms demanded by those who have participated in or been victims of civil violence of a non-secessionist sort.

These terms resemble the outlines of a consociational solution, although there are assuredly some deviations. The electoral system may not be proportional, the governmental system may be presidential, the positions in cabinet may be fixed in advance by party or by group representation rather than deriving from election results, and minority-group vetoes are unlikely to be conceded.

After protracted warfare, there will almost surely be international involvement in the negotiation process, whether the external actors represent states that have offered good offices, international regional organizations such as the African Union, or broader

106. Secessionist Biafra contained Efik and Ijaw minorities, in addition to an Ibo majority; Croatia contained a Serb minority; Bosnia, Serb, and Croat minorities; Macedonia, an Albanian minority; Kosovo, Serb, and Roma minorities; Kazakhstan and Estonia, Russian minorities; Kyrgyzstan, an Uzbek minority; and so on. For the unfortunate consequences of secession or partition in such circumstances, see Donald L. Horowitz, *The Cracked Foundations of the Right To Secede*, J. DEMOCRACY, Apr. 2003, at 5.

107. Chandra R. de Silva, *Sri Lanka in 2006: Unresolved Political and Ethnic Conflicts and Economic Growth*, 47 ASIAN SURV. 99, 99-100 (2007). On the intractable problem of the Eastern Province, see NEIL DEVOTTA, BLOWBACK: LINGUISTIC NATIONALISM, INSTITUTIONAL DECAY, AND ETHNIC CONFLICT IN SRI LANKA 178-79 (2004).

international bodies. These third parties will encourage negotiations and may mediate or facilitate discussions.¹⁰⁸ Whatever their precise role, however, it is virtually certain that such external actors will push the negotiating parties—and usually push them hard—to achieve a bargained settlement. If the negotiations reach a successful conclusion, they are likely to entail some package of the kind described above, with significant consociational features, albeit falling short of the full prescription favored by consociationalists. Here, then, is a category of case in which a wholly negotiated settlement moves significantly toward the consociational end of the spectrum.

It is true that such settlements are frequently breached—which is further testimony to their long-term unattractiveness to majorities whose momentary situation induces them to accede to those settlements—and that warfare frequently returns or, if it does not, a political stalemate or breakdown frequently results. Some of these consequences have been observed in African and European cases in previous sections of this Article.¹⁰⁹ Those unfortunate results may be relevant to the wisdom of particular terms of agreement or to the advisability of pushing hard against majority preferences when majorities are momentarily vulnerable. The pertinent point for now is different: although a bargaining process and coherence of outcome are usually at odds, the negotiations to end internal wars may produce a settlement that, because of the nature of minority demands, tends toward group guarantees that resemble aspects of the consociational formula. Apart from these cases, negotiation usually involves an exchange of incommensurables because of divergent preferences, and hence typically a less than fully coherent outcome.

108. See, e.g., BOSE, *supra* note 103, at 131-33 (detailing the U.S. role in the Dayton Accords ending the war in Bosnia).

109. See *supra* text accompanying notes 34-51; see also Alexander B. Downes, *The Problem with Negotiated Settlements to Ethnic Civil Wars*, 13 SECURITY STUD. 230 (2004).

IV. THREE PROBLEMS, THREE CONSTITUTIONAL PROCESSES

There are undoubtedly many processes by which a constitution can be made.¹¹⁰ Close inspection of constitutional processes would reveal a wide variety of specific combinations and sequences of practices that could have significant effects on outcomes. Yet it is worth highlighting, if only in a crude way that approximates a first cut, three general methods of proceeding that bear on the attainment of particular goals. The key is to fit the process to the problem.

As mentioned previously, the literature on public participation and transparency has particular relevance to states in which distrust of the sitting regime is prevalent.¹¹¹ Suppose the problem is simply the public acceptability of the deal that moves an authoritarian state to a democratic regime. There may be indifference among the particular institutions to be chosen. After all, many countries can live with some standard version of parliamentary or presidential institutions. In that case, either sitting politicians and opposition politicians or a separately elected assembly can consummate a deal more or less in the open, with a considerable level of public input. The draft can, if necessary, be ratified by the public in a referendum. Under these conditions, criteria of openness, publicity, and transparency can easily be met. This might be labeled process model number one, which responds to problem number one, the problem of distrust of the outgoing regime.

Not all states will meet this description. If the problem is the difficult one of crafting a set of arrangements that will enable conflicted ethnic groups to share power in a country that needs not only democratic government but a heavy dose of institutions for conflict reduction, something different may be required. For reasons already discussed, ordinary majoritarianism can lead to ethnic exclusion,¹¹² and resort to expert advice is called for. This is a problem faced by many states.

110. See Jennifer Widner, *Constitution Writing and Conflict Resolution*, 94 ROUND TABLE 503 (2005) (describing a range of processes).

111. See *supra* Part III.

112. See *supra* text accompanying note 6.

In this case, an expert body, or expertly informed body, needs to be commissioned and given time to study and work quietly to devise a consistent plan that has a fighting chance of producing an arrangement that will not yield zero-sum results among the ethnic groups in conflict. Although there needs to be periodic public consultation, experts also need to be consulted behind closed doors. There are precedents for organizing such consultations. In some cases, commissions of inquiry have been appointed to study and deliberate, with the aid of commission staff and outside consultants.¹¹³ In others, specially elected constitutional assemblies have been accorded extended periods of time to consult widely and produce recommendations.¹¹⁴ No doubt there are several other ways of accomplishing the same thing.

However the task is organized, the goal is to produce a coherent, consistent plan of mutually reinforcing institutions that will work to reduce conflict. The development of that plan will entail consultation with political leaders, who, in the end, will need to confer their assent. Yet—at least in the absence of violent conflict that requires resolution urgently, usually on a heavily negotiated basis—it is remarkable how a carefully conceived structure can provide the time and space for an appropriate degree of comparative learning and deliberation. If this is achieved, an expert or expert-influenced draft will not be, and should not be, the last word, but it can be accorded a starting advantage in structuring public consideration of constitutional options. A side benefit is that such a process is also likely to yield an end product that is far more carefully drafted than many contemporary constitutions have been.

Leaders in severely divided states often lack basic information about, and nearly always lack sophisticated analysis of, the full range of available options for constitutional engineering to reduce conflict. It is often possible to suggest ways in which their basic interests and those of their groups can be protected without

113. The Fiji Constitution Review Commission is one such example. See *supra* notes 95-97 and accompanying text.

114. The Nigerian Constituent Assembly, which sat in 1978, is one such example. See generally L. Adele Jinadu, *The Constitutional Situation of the Nigerian States*, PUBLIUS, Winter 1982, at 155; see also Martin Dent, *Nigeria: Federalism and Ethnic Rivalry*, 53 PARLIAMENTARY AFF. 157, 166-67 (2000).

requiring them to pursue extreme strategies that produce or exacerbate intergroup conflict. There are times when leaders are open to such ideas, especially when the process has been engineered in such a way that quiets the crisis atmosphere that so frequently characterizes the first phase of democratic constitution making after conflict and creates deliberative space.

It should be obvious that the exigencies of such a process are at odds with the highest levels of openness and public participation, especially during some portions of the early stages, but certainly not with all public participation and transparency, and that the process needs to be conceived carefully. This might be labeled process model number two, responding to problem number two, the problem of intergroup conflict.

There is, however, a subcategory of severely divided societies that requires a third model. The assumption thus far has been that a new constitution is required and all parties are open to the idea. The only question relates to the process by which the new document should be crafted. But suppose this assumption does not prevail. Suppose there is a constitution that is inefficient and perhaps also undemocratic, but that nonetheless has considerable claims to legitimacy for some significant, defined segment of the population. If either of the first two processes is followed, there is a risk of exacerbating the conflict by the very process of constitutional renovation. There is also a risk of creating a serious challenge to the legitimacy of any constitution that emerges from the process. If politicians try to do a deal in the open, they will fail, and fail conspicuously, while simultaneously proving and reinforcing the intractability of their differences. Those who represent the segment attached to the old constitution will not agree to scrap it. If the second process is followed, either the experts will not agree or, if they do, the draft will fail when it is sent forward for consideration by political leaders, because there is no way around the conflict between the old constitution, with its loyal adherents, and whatever is to replace it.

Taiwan has this problem,¹¹⁵ and Indonesia has had it.¹¹⁶ In each case, a differentiated segment of the population is or was attached to the old constitution, which, by any objective standard, is or was ineffective and in need of thorough renovation. Taiwan has not solved this problem, but Indonesia has.

Taiwan has a dysfunctional version of a five-branch Confucian Constitution, drafted for the Republic of China, with the various branches intruding into matters that might have been reserved to other branches.¹¹⁷ Superimposed on this structure is a French-style semi-presidential arrangement, but with the prime minister perched anomalously between the president and the Legislative Yuan and with the directly elected president exercising much less effective power than might be expected in a semi-presidential system.¹¹⁸ Responsibility is diffused in undesirable ways. The combined Confucian and French features have clearly created difficulties that demand fundamental restructuring.¹¹⁹

Taiwanese nationalists would like to draft a wholly new constitution that might be designed explicitly for Taiwan, rather than for all of China, which the Republic of China regime previously sought to represent and wished to reclaim.¹²⁰ Some Taiwanese and most Mainlanders—those who fled China to Taiwan when the communists took over the mainland in 1949—oppose independence for Taiwan and so oppose a constitution that is not designated for the Republic of China.¹²¹ Some aim ultimately at reunification with the mainland and therefore wish to retain an explicitly Chinese constitution rather than adopt a Taiwanese constitution.¹²² Many others on Taiwan do not believe that either reunification with China or independence for Taiwan is feasible and so also oppose

115. See generally Lin, *supra* note 84.

116. See generally Adi Andujo Soetjipto, *Legal Reform and Challenges in Indonesia, in INDONESIA IN TRANSITION* (Chris Manning & Peter van Dierman eds., 2000).

117. REPUBLIC OF CHINA CONST. Arts. 25-28 (1947) (Taiwan).

118. See John Fuh-Sheng Hsieh, *Whither the Kuomintang?*, 168 CHINA Q. 930, 930 n.2 (2001).

119. See Yu-Shan Wu, *The ROC's Semi-Presidentialism at Work: Unstable Compromise, Not Cohabitation*, ISSUES & STUD., Sept.-Oct. 2000, at 1.

120. See Emerson M. S. Niou, *Understanding Taiwan Independence and Its Policy Implications*, 44 ASIAN SURV. 555, 555-56 (2004).

121. *Id.* at 556-58.

122. *Id.*

radical changes in the status quo that would be symbolized by a new constitution for Taiwan alone.¹²³ This middle group forms a plurality on the island.¹²⁴

Overlapping some of these divisions are divisions over the structure of the existing constitution, attachment to which is greater the closer on the spectrum one moves to the pro-unification and Mainlander camps.¹²⁵ The Pan-Blue camp, consisting of the Kuomintang and its allies, resists fundamental constitutional change, while the Pan-Green camp, the Democratic People's Party and its allies, champions exactly that kind of change.¹²⁶ The issue threatens to polarize the island further by eliminating the moderate middle, a course that would be quite dangerous.

Indonesia confronted an analogous problem after Suharto fell in 1998. The 1945 constitution had been drafted in haste and was intended to be temporary.¹²⁷ It embodied a view of state power that left little room for human rights or the rule of law.¹²⁸ It seemed to impart lawmaking power to the president and yet referred to a supralegal body, the People's Consultative Assembly (MPR), as possessing "sovereignty."¹²⁹ On one reading, the president could do as he wished, for the text provided that he "hold[s] the power of government."¹³⁰ For decades, Sukarno and Suharto both read it that way.¹³¹ On another reading, the MPR was truly supreme; and, with Suharto gone, the MPR began autonomously to assert its powers, including the power to choose and remove the president despite his fixed term.¹³²

123. See Keith Bradsher, *In Taiwan Ballot, Ties with Beijing Seem To Be a Winner*, N.Y. TIMES, Dec. 12, 2004, at 20.

124. See Niou, *supra* note 120, at 558-60.

125. See *id.* at 560-61. It is important to note, however, that the two camps are not identical.

126. *Id.*

127. Andrew Ellis, *The Indonesian Constitution Transition: Conservation or Fundamental Change?*, 6 SING. J. INT'L & COMP. L. 116, 116 (2002).

128. See Nursyahbani Katya Sungkana, *Exchanging Power or Changing Power? The Problem of Creating Democratic Institutions*, in INDONESIA IN TRANSITION, *supra* note 116, at 259, 261-62.

129. UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA [Constitution] art. 1, § 2, amended by amend. III.

130. *Id.* art. 4, § 1.

131. See Ellis, *supra* note 127, at 123-24.

132. See *id.* at 126-27.

For all its faults, the 1945 constitution had a considerable base of support even after democratic reform began in 1998. Indonesian society is divided into several *aliran*, meaning currents or streams.¹³³ A major line of division concerns religion. Secular nationalists associated with Megawati Sukarnoputri—who won one-third of the vote and one-third of the legislative seats in 1999, but had more support when secular nationalists in other parties and in the army were added—were deeply attached to the old constitution.¹³⁴ That constitution was associated with the anti-colonial struggle;¹³⁵ it was a product of a time when secular nationalists were ascendant; it had been reaffirmed by Megawati's father, Sukarno, in 1959;¹³⁶ and it embodied concepts of *Pancasila*, the five fundamental truths nationalists wanted the state to live by.¹³⁷ Like the ROC constitution in Taiwan, the 1945 Indonesian Constitution was a bulwark against an emerging threat to the identity of its proponents—in this case, the threat from Islam, of which secular nationalists are as wary as Mainlanders and their allies are of radical Taiwanese nationalism.¹³⁸ Consequently, many in the secular-nationalist camp wanted no change in the constitution or, in any case, as little as possible.

Indonesians in the MPR were afraid of splitting the society, so they did not adhere to a deadline in changing the constitution. Instead, Indonesian leaders awaited a consensus on every issue of constitutional change and took more than four years to produce a new constitution.¹³⁹ Or, rather, a new-old constitution, because they merely amended the 1945 constitution in a way that preserved the *Pancasila* preamble and the overall form of the constitution but changed its substance to: (1) create, for the first time, a directly

133. For Indonesia's religious cleavages, see Robert W. Hefner, *Public Islam and the Problem of Democratization*, 62 SOC. RELIGION 491 (2001). See also CLIFFORD GEERTZ, THE RELIGION OF JAVA (1960). For ethnic divisions, see LEO SURYADINATA ET AL., INDONESIA'S POPULATION: ETHNICITY AND RELIGION IN A CHANGING POLITICAL LANDSCAPE (2003).

134. See Muhammad Qodari, *Indonesia's Quest for Accountable Governance*, J. DEMOCRACY, Apr. 2005, at 73, 79.

135. Ellis, *supra* note 127, at 116-17.

136. *Id.* at 123.

137. See Soetjipto, *supra* note 116, at 271-72.

138. See Azyumardi Azra, *The Islamic Factor in Post-Soeharto Indonesia*, in INDONESIA IN TRANSITION, *supra* note 116, at 309, 310-11.

139. See generally Ellis, *supra* note 127.

elected president, a separation of powers, and checks and balances; (2) virtually eliminate the MPR as a supralegislature except for a few emergency functions; (3) add a constitutional court as an earnest of the rule of law; and (4) produce de facto federalism in a nominally unitary state.¹⁴⁰ In crafting the directly elected presidency, the Indonesians borrowed a version of the Nigerian system of election by plurality plus territorial distribution in order to create an incentive for the president to have a pan-ethnic outlook.¹⁴¹

The politics of this process of constitutional renovation is much too complex to rehearse here, but what is most interesting is that the process was led, in significant part, by some modernist Muslims who did not share most of the apprehensions of secular nationalists but were eager to avoid dangerous polarization.¹⁴² The result was to eliminate dysfunctional institutions, all the while preserving consensus and keeping secular nationalists attached to the process and to the emerging constitution. All of this occurred because the Indonesians proceeded by systematic and extensive amendment, rather than by scrapping the 1945 constitution, which richly deserved scrapping. A side benefit of this gradual process was that the Indonesians had repeated opportunities to revisit previous decisions in order to correct what they saw as errors before interests crystallized around new institutions.

Can Taiwan accomplish a similar renovation by amendment that will avoid the polarization that a one-shot redrafting would entail? Taiwan's amendment process has very high hurdles. In addition to a supermajority to pass amendments, there is a referendum provision with steep thresholds for passage.¹⁴³ This is a major barrier to proceeding by amendment in the Indonesian way.

For states that have a type-three problem, the stakes are very high. The constitution is likely to be bound up inextricably with core

140. For a variety of perspectives on the Indonesian process, see ARIS ANANTA ET AL., *EMERGING DEMOCRACY IN INDONESIA* (2005); *INDONESIA IN TRANSITION*, *supra* note 116; Ellis, *supra* note 127; Qodari, *supra* note 134.

141. See *UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA* [Constitution] amend. III (adding article 6A).

142. See Azra, *supra* note 138, at 313-14.

143. Referendum Act (enacted by Legislative Yuan, Nov. 27, 2003, promulgated by Presidential Order, Dec. 31, 2003), art. 30, *translated in DIRECT DEMOCRACY PRACTICES IN TAIWAN* 79, 88 (Taiwan Found. for Democracy ed., 2005).

ethnic and other identity issues. Inapt resolution of constitutional issues can shrink the moderate middle and increase the distance between the polar extremes. The Indonesian process is worthy of close study in such cases, because preventing polarization is always a major, but sometimes neglected, goal of constitutional processes.

V. MATCHING PROCESSES WITH PROBLEMS

Just as there are some times that are more open to constitutional innovation than others, there are times when choices of process are more open. Yet there is no escaping the fact that process choices, like the choice of institutions to be incorporated in a constitution, are heavily colored by constraint. An example of these constraints has already been reviewed. After civil or secessionist war, an end to the fighting or the prevention of its resumption is likely to be produced by bilateral negotiation that, by its nature, is conducive to guarantees of a generally consociational sort.¹⁴⁴ Similarly, a sitting authoritarian regime and an opposition that has shaken but not displaced it generally engage in an exchange of commitments. In such cases, constitutional planning, with full scrutiny of available options, is unusual. The structure of each situation provides the constraint that narrows the options.

It is generally after the violence has definitively ended or the authoritarians have departed that constitutional planning can proceed. If interim arrangements have been put in place, political actors who benefit from them are unlikely to wish to start a wholly new constitutional process. Interests crystallize quickly in such settings. Of course, if the initial post-conflict settlement breaks down, as many do, there will not be a chance to reach the stage of constitutional planning then either.

Even if the settlement does not break down, however, and there is receptivity to creating new institutions, there is no equivalent of a traffic police officer to direct particular problems to the process most appropriate for them. It is possible to enumerate processes that might prove best for dealing with an instance of one or another type of problem, but the determinants of the choice of one or

144. See *supra* Part II.

another process are, at this stage, truly uncertain. The parties in conflict may be exhorted to proceed in public, or to deploy expertise in a highly deliberative process, or to proceed by gradual amendment and consensus to prevent alienation and polarization, but these are, in the end, just exhortations. The parties may proceed by whatever method seems expedient and consistent with their interests.

There is, therefore, the prior question of who sets the procedural agenda and what can motivate an agenda-setting process that sorts problems reliably. As of now, this issue of the metaprocess—the process that leads to the process—has no convincing answers. This is yet another reason why, since 1989, there has been much constitution making but much less conflict reduction or prevention of its recurrence.