

A CONSTITUTION BETWEEN PAST AND FUTURE

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Constitutions tend to be written at momentous turning points in a country's history. A war is lost;¹ an empire is vanquished;² an old

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1. The German Constitution (Basic Law) of 1949 was written while the country was still under occupation at the end of a war. *See generally* JOHN FORD GOLAY, *THE FOUNDING OF THE FEDERAL REPUBLIC OF GERMANY* (1958); PETER H. MERKL, *THE ORIGIN OF THE WEST GERMAN REPUBLIC* (1963). The same was true of the Showa Constitution, Japan's governing legal document since 1947. For a brief account of the Japanese constitutional-drafting process, see Charles L. Kades, *The American Role in Revising the Japanese Imperial Constitution*, 104 *POL. SCI. Q.* 215 (1989). For original documents that reveal the communication between the Japanese drafting committee and the American occupation forces, see *THE CONSTITUTION OF JAPAN: A DOCUMENTARY HISTORY OF ITS FRAMING AND ADOPTION, 1945-1947* (Ray A. Moore & Donald Robinson eds., Princeton University Press CD-ROM, 1998).

2. The Turkish Constitution of Ataturk followed the destruction of the Ottoman Empire. *See generally* Adrien Katherine Wing & Ozan O. Varol, *Is Secularism Possible in a Majority-Muslim Country?: The Turkish Example*, 42 *TEX. INT'L L.J.* 1, 9-13 (2006) (discussing the role of religion in the Ottoman Empire and the change from a theocratic regime to a secular government). The Austrian Constitution of 1920 grew out of the pains of imperial destruction as well, when the Austro-Hungarian Empire did not survive the First World War. *See generally* HERBERT HAUSMANINGER, *THE AUSTRIAN LEGAL SYSTEM* 3-5 (2d ed. 2000).

order is overturned;³ a dictator dies;⁴ an authoritarian government is forced to step aside;⁵ a mass public seizes the reins of power from the few who guided the state.⁶ These sorts of events typically trigger the creation of constituent assemblies to write new constitutions because such events create a political discontinuity into which a new blueprint showing how the affairs of state will be organized thereafter may be inserted. Constitutions, then, are rarely written at moments of continuous tranquility in the life of a state, but instead at moments of political crisis, or at least in moments of

3. The United States Constitution, for example, was forged after American independence from the British monarchy was gained during the Revolution, which created a new world for the ages, as the title of one famous constitutional history of the period suggests. *See* FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985). The French Constitution of 1791, which was the first of the French revolutionary constitutions, also signaled a new world order with the abolition of feudalism, the creation of a parliamentary government, and the announcement of individual rights. *See generally* MICHAEL P. FITZSIMMONS, *THE REMAKING OF FRANCE: THE NATIONAL ASSEMBLY AND THE CONSTITUTION OF 1791* (1994).

4. The current Spanish Constitution dates the start of its construction to the death of Francisco Franco. *See* ANDREA BONIME-BLANC, *SPAIN'S TRANSITION TO DEMOCRACY: THE POLITICS OF CONSTITUTION-MAKING* 17-32 (1987) (describing social and political trends toward democratization following Franco's death in 1975).

5. The "negotiated transitions" in Eastern Europe in 1988-89 resulted when self-proclaimed opposition leaders demanded that the then-communist governments negotiate a transition of power. *See, e.g.*, Jon Elster, *Introduction to THE ROUNDTABLE TALKS AND THE BREAKDOWN OF COMMUNISM* 3-4 (Jon Elster ed., 1996) [hereinafter *THE ROUNDTABLE TALKS*]. The end result of each of these processes was a constitution. *See id.* at 11-16. The Hungarian Constitution was adopted first, ratified in October 1989, *see* INTRODUCTION TO HUNGARIAN LAW 8 (Attila Harmath ed., 1998), while the last to finish was the Polish process, which produced a constitution in 1997, *see* INTRODUCTION TO POLISH LAW 4 (Stanislaw Frankowski & Adam Bodnar eds., 2005). Accounts of the early negotiations and their results can be best seen in compact form in Wiktor Osiatynski, *The Roundtable Talks in Poland*, in *THE ROUNDTABLE TALKS*, *supra*, at 21, and András Sajó, *The Roundtable Talks in Hungary*, in *THE ROUNDTABLE TALKS*, *supra*, at 69. For the Hungarian process in detail, *see generally* RUDOLF L. TÖKES, *HUNGARY'S NEGOTIATED REVOLUTION: ECONOMIC REFORM, SOCIAL CHANGE, AND POLITICAL SUCCESSION, 1957-1990* (1996), and ANDRAS BOZOKI, *THE ROUNDTABLE TALKS IN HUNGARY: THE GENESIS OF HUNGARIAN DEMOCRACY: ANALYSIS AND DOCUMENTS* (2002). For the Polish process, *see generally* MARK BRZEZINSKI, *THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND* (1998).

6. South Africa lived under the fiction that it was a democratic state through the period of apartheid; such a fiction was only true if one looked at the white population. *See generally* HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* (2000) (discussing the constitution-making process and the democratic transition). When a negotiated transition resulted in a new constitution in 1994, the inclusion of constitutional protection for the great bulk of the population represented a constitutional revolution. *See id.* at 93-118.

political dishevelment. New constitutions are often envisioned not only as devices to get a state through a crisis but also as great opportunities for progress, which generally means that these legal governing documents are portrayed as platforms for launching new futures. As Ulrich Preuss writes, “The idea of a constitution ... was greeted enthusiastically at the hour of its birth as the fulfillment of all hopes for political progress”⁷ Constitutions, when they succeed, “exert a beneficial pressure on society to rationalize and improve itself.”⁸ Because the explicit aim of constitutions generally is to improve upon an existing condition, the faces of constitution drafters are almost invariably imagined to be turned toward the future, bright with hope.

What this Essay suggests, however, is that constitution drafters invariably look even more toward a past than they do toward a future. In fact, this is impossible to avoid. Constitution drafters *know* about the past experiences of their country and its people; these drafters are usually selected for the constituent assembly or other constitution-drafting body precisely because of their roles in the immediate past crisis that provided the opportunity for a new constitution.⁹ What they do not know, and in fact *cannot know*, is the future. If they are well-prepared—and many constitution

7. ULRICH K. PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 71 (Deborah Lucas Schneider trans., 1995) (reviewing European constitutional history in the eighteenth and nineteenth centuries).

8. *Id.* at 109.

9. Here, the American case provides the most obvious example, where:

The war against Britain provided [...] [the framers] with a continental and national experience that replaced the state-centered focus of the pre-1776 generation. A remarkable number of framers either served in the Continental Army or were diplomats or administrative officials for the Confederation or members of the Continental Congress. Indeed, thirty-nine out of the fifty-five delegates to the Constitutional Convention had sat in the Continental Congress.

Isaac Kramnick, *Introduction* to, JAMES MADISON ET AL., *THE FEDERALIST PAPERS* 68 (Isaac Kramnick ed., Penguin Press 1987) (1788).

Similarly, those *absent* from the Convention failed to participate precisely because of who they were before the Constitution was drafted:

The Anti-Federalists were generally older men like Sam Adams, R.H. Lee and Patrick Henry, who had acquired fame in the events leading up to the Declaration of Independence. Their lives and careers were shaped by their colony's confrontation with Britain. They would find it difficult to defend a Constitution that for many seemed a return to the dreaded spirit of authority and power against which they had rebelled.

Id. at 67.

drafters prepare themselves for their tasks with extensive research¹⁰—all they can be informed about is what has already happened, not what is yet to come.

Constitutional theory, in my view, needs to take on board this basic observation: Constitutions in their moments of creation cannot be inspired solely by imagined futures. Perhaps even more crucially, they encode imagined pasts.¹¹ Though they may look abroad for models, constitution drafters ultimately understand and react most of all to what they take to be the crucial histories of their own countries. In this Essay, I make the case for reclaiming the pre-constitutional past as a matter of constitutional inquiry. In doing so, I will use Hannah Arendt's works—her preface from *Beyond Past and Future*¹² as well as her concurrently published book-length study of constitutions, *On Revolution*¹³—as both inspiration and foil. Keenly aware of the uses of history in constitution writing, Arendt nonetheless overstates both the certainty with which constitution drafters know this past and the confidence with which they deploy

10. The American framers, for example, were prodigious collectors of information about all constitutions of the past:

On this task, the creation of new power, the founders and men of the Revolution brought to bear the whole arsenal of what they themselves called their "political science," for political science, in their own words, consisted in trying to discover "the forms and combinations of power in republics." Highly aware of their own ignorance on the subject, they turned to history, collecting with a care amounting to pedantry all examples, ancient and modern, real and fictitious, of republican constitutions

HANNAH ARENDT, *ON REVOLUTION* 148 (1963) (footnote omitted) [hereinafter ARENDT, *ON REVOLUTION*].

11. By talking about "imagined pasts," I do not mean to say that constitution drafters can make up anything they want to about a past without constraint. Instead, I want to highlight the element of conscious human construction that goes into how a past is *narrated*. Everything that a narrative includes could well be true, and yet there would be other ways of telling an equally true story that might produce a different effect. For the canonical source on the construction of nationalities through this process, see generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM* (1983). For a particularly good example of how national narratives are constructed on the familiar territory of American history, see MICHAEL SCHUDSON, *WATERGATE IN AMERICAN MEMORY: HOW WE REMEMBER, FORGET, AND RECONSTRUCT THE PAST* 26 (1992) (tracing the alternative ways of telling the story of Watergate before the dominant narrative emerged that "[t]he System [w]orked").

12. HANNAH ARENDT, *Preface: The Gap Between Past and Future*, in *BETWEEN PAST AND FUTURE* 3, 3-15 (1961) [hereinafter ARENDT, *Preface*].

13. ARENDT, *ON REVOLUTION*, *supra* note 10.

it. Arendt, tellingly, invokes Franz Kafka to make her point,¹⁴ but, as I will show, a re-reading of Kafka permits us to imagine a more equivocal treatment of the past in imagining a future, no less important for the hesitancy and controversy with which those in the present understand that past.¹⁵ Kafka's insights can help us to correct Arendt's overreach, in which she emphasizes the immediate decisiveness of constitutional moments. Instead, as I will show, constitutional moments can only appear to be decisive after the fact. At the time of constitutional drafting, too much is uncertain for constitution drafters to feel decisive and confident.

I. ARENDT'S MEN OF THE RESISTANCE

In the preface to her collection of essays, *Between Past and Future*,¹⁶ Hannah Arendt evoked the experience of participants in the French Resistance during the Second World War. In joining the Resistance, they found an unprecedented intensity and meaning in life.¹⁷ The excitement and danger of belonging to the Resistance removed all of the trappings of status from their prior lives; they were equals fighting for their liberty.¹⁸ They felt altogether more important than they had when their country was not threatened:

[T]hey had been visited for the first time in their lives by an apparition of freedom, not, to be sure, because they acted against tyranny and things worse than tyranny ... but because they had become "challengers," had taken the initiative upon themselves and therefore, without knowing or even noticing it, had begun to create that public space between themselves where freedom could appear.¹⁹

But these "men of the European Resistance,"²⁰ as Arendt called them, eventually lost the spirit they had gained when they were

14. ARENDT, *Preface*, *supra* note 12, at 7-15.

15. *See infra* Part III.

16. ARENDT, *Preface*, *supra* note 12.

17. *Id.* at 4.

18. *Id.*

19. *Id.*

20. *Id.*

fighting something massive and real. After they won the fight, life did not feel so charged with importance.

Arendt quotes René Char, a major French poet and one of the leaders of the domestic Resistance, on the subsequent disillusionment: “[O]ur inheritance was left to us by no testament.”²¹ What was the inheritance? Arendt implies that it was the liberty of an independent France and the sense of importance that such liberty had when it was imperiled.²² And the testament? A formal account of what had happened: an official documenting of the threat, the danger, the bravery, the victory, and the promise of future liberty.²³ In Arendt’s account, the Resistance fighters retreated into mere private life without establishing a definitive account of the history in which they had participated and without linking that history to a plan for the future.²⁴ Arendt explains:

The testament, telling the heir what will rightfully be his, wills past possessions for a future. Without testament or, to resolve the metaphor, without tradition—which selects and names, which hands down and preserves, which indicates where the treasures are and what their worth is—there seems to be no willed continuity in time and hence, humanly speaking, neither

21. *Id.* at 3.

22. *Id.* at 3-5.

23. *Id.* at 5-6.

24. This is in fact an odd view to have of Char himself, whose diaries kept during the war were published as *RENÉ CHAR, LEAVES OF HYPNOS* (Cid Corman trans., 1973). In fact, Arendt’s quotation from Char comes from precisely this source, *id.* at 62, written in the middle of the war when Char could not have known what sort of testament would be left after the war, or whether any testament would be left at all. At the time he wrote, he could not even know whether the Resistance would succeed. The line that immediately follows the one cited by Arendt sheds light on what Char might have meant: “We fight well only for causes of our own moulding and are fired when identified with them.” *Id.* at 63. This juxtaposition gives credence to Grégoire Mallard’s understanding of Char—that as an artist skeptical of constraint, he would have taken the absence of a testament to be a liberation and not a failure. E-mail from Grégoire Mallard, Ph.D candidate, Sociology, Princeton University, to Kim Lane Scheppele, Director, Program in Law and Public Affairs, Princeton University (Sept. 18, 2007, 09:31 EST) (on file with author). As for his recognition for fighting in the Resistance (the actual testament in Arendt’s terms), Char himself won both a Medal of the Resistance and the Croix de Guerre for his Resistance activity. *René Char, French Poet, 80, Dies*, N.Y. TIMES, Feb. 21, 1988, at 39. He was also named to the Legion of Honor. *Id.* Throughout his life, Char maintained a sense that resistance was important, whether in art or direct action. In the 1960s, for example, he was involved in the anti-nuclear campaign, protesting nuclear silos in France. See eNotes.com, René Char 1907-1988, <http://www.enotes.com/poetry-criticism/Rene-char> (last visited Feb. 16, 2008).

past nor future, only sempiternal change of the world and the biological cycle of living creatures in it. Thus the treasure was lost not because of historical circumstances and the adversity of reality but because no tradition had foreseen its appearance or its reality, because no testament had willed it for the future.²⁵

Arendt argues that major historical events must be marked by an account that registers the precise way that the past slipped into the future and how world-historical events came to be connected to the mundane ones that preceded and succeeded them.²⁶ As a result, moments of political change need a sense of history to create durable new political formations.²⁷

As regular readers of Arendt know, she expanded on this observation²⁸ explicitly in the context of constitutionalism in *On Revolution*.²⁹ As she argued there, the major difference between the American and French Revolutions was that the American Revolution produced a durable Constitution, a testament “to ourselves and our Posterity,”³⁰ while the French Revolution did not.³¹ The American Revolution, precisely by leaving a testament, provided a precise accounting for what was valuable and who was to inherit it, calling upon an account of the past to explain the devise. The French Revolution, in Arendt’s view, mistook the seizure of power for the consolidation of law and failed to constitute a legitimate government.³²

25. ARENDT, *Preface*, *supra* note 12, at 5-6.

26. *Id.*

27. *Id.*

28. The connection between Arendt’s essay *The Gap Between Past and Future*, ARENDT, *Preface*, *supra* note 12, at 3, and her book on constitutionalism, ARENDT, *ON REVOLUTION*, *supra* note 10, is made clear when she invokes the same quotation of René Char and the conception of the “lost treasure” to begin chapter six of *On Revolution*, entitled *The Revolutionary Tradition and Its Lost Treasure*. ARENDT, *ON REVOLUTION*, *supra* note 10, at 217. The imagery and quotations from the essay and from *On Revolution* are intertwined.

29. ARENDT, *ON REVOLUTION*, *supra* note 10.

30. U.S. CONST. pmb.

31. ARENDT, *ON REVOLUTION*, *supra* note 10, at 154-56. Actually, the decade of the French Revolution produced four constitutions: the constitution establishing a limited monarchy in 1791; the republican constitution of 1793; the constitution establishing the Directorate in 1795; and the constitution of dictatorship under Napoleon in 1800. See Kim Lane Scheppele, *The Agendas of Comparative Constitutionalism*, 13 LAW & CTS. 5, 8 (2003), available at <http://www.law.nyu.edu/lawcourts/pubs/newsletter/spring03.pdf>. But none lasted, and none were ever generally followed in the spirit of constitutionalism while they were in effect. *Id.*

32. In Arendt’s opinion:

But one might argue against Arendt that the French Resistance did in fact produce a testament. By contributing to the liberation of France, the Resistance eventually gave birth upon its success to the Fourth Republic and the Fourth Republic Constitution of 1946.³³ That constitution carries a clear acknowledgment of the Resistance and its legacy:

On the morrow of the victory of the free peoples over the regimes that attempted to enslave and degrade the human person, the French people proclaim once more that every human being, without distinction of race, religion or belief, possesses inalienable and sacred rights. It solemnly reaffirms the rights and freedoms of man and of the citizen consecrated by the Declaration of Rights of 1789 and the fundamental principles recognized by the laws of the Republic.³⁴

The great and fateful misfortune of the French Revolution was that none of the constituent assemblies could command enough authority to lay down the law of the land; the reproach rightly leveled against them was always the same: they lacked the power to constitute by definition; they themselves were unconstitutional. Theoretically, the fateful blunder of the men of the French Revolution consisted in their almost automatic, uncritical belief that power and law spring from the selfsame source. Conversely, the great good fortune of the American Revolution was that the people of the colonies, prior to their conflict with England, were organized in self-governing bodies, that the revolution—to speak the language of the eighteenth century—did not throw them into a state of nature, that there never was any serious questioning of the *pouvoir constituant* of those who framed the state constitutions and, eventually, the Constitution of the United States....

The astounding fact that the Declaration of Independence was preceded, accompanied, and followed by constitution-making in all thirteen colonies revealed all of a sudden to what an extent an entirely new concept of power and authority, an entirely novel idea of what was of prime importance in the political realm had already developed in the New World

ARENDT, ON REVOLUTION, *supra* note 10, at 164-65 (footnote omitted).

33. The Fourth Republic Constitution of 1946 had an inauspicious start. The first version of the constitution was rejected by a referendum, which meant that a new constitutional drafting committee was appointed to start over. Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 YALE L.J. 1341, 1397 n.214 (2004). It was the second try that produced a working constitution.

34. 1946 CONST. pmbl. (FR.), *reprinted in* A CONSTITUTION FOR THE FOURTH REPUBLIC app. X, at 109 (1947).

The preamble to the first version of the 1946 Constitution, rejected in referendum, was even more explicit:

On the day following the victory brought about by free peoples over the regimes which tried to enslave and debase man and which have just covered the world

The Preamble not only made reference to those who fought for a free France but also indirectly to what France was freed *from*: distinction based on race, religion, and creed—a thinly veiled reference to the Nazi ideology that had dominated Europe. The Preamble also reasserted a continuity of French public law, from the Declaration of 1789 to the major laws of the Republic that gave France its distinctive character, a proud constitutional history that remained even after the horrors of the war. The 1946 Preamble then went on to list an extraordinary number of rights, particularly economic and social rights, to add to the past-facing references, and to name specifically which legacy of the war was being passed on to future generations.³⁵ Despite what Arendt says about the Resistance, it is hard to think of the result as the failure to provide a testament, to recognize the past, and to explain what was willed to future generations.

with blood, the French people, faithful to the principles of 1789—charter of its liberation—proclaims anew that each human being possesses inalienable and sacred rights, which no law may assail, and has decided, as in 1793, 1795, and 1848, to write them at the head of its Constitution.

Id. app. VIII, at 85.

Significantly, the Preamble to the adopted French Constitution of 1946 is referenced in the Preamble to the French Constitution of 1958 (the current constitution). 1958 CONST. pmbl. (FR.), *reprinted in* JOHN BELL, FRENCH CONSTITUTIONAL LAW 245 (1992). In the famous Associations Case of 1971, CC decision no. 71-44DC, July 16, 1971, Rec. 29, *reprinted in* BELL, *supra* at 272-73, the French Constitutional Council declared the 1958 Preamble and the documents to which it referred (the 1946 preamble and the 1789 Declaration of the Rights of Man and the Citizen) to be integral and legally enforceable parts of the current Constitution. *Id.* For more on the Associations Case, see generally Peter L. Lindseth, *Law, History, and Memory: "Republican Moments" and the Legitimacy of Constitutional Review in France*, 3 COLUM. J. EUR. L. 49 (1996/1997) [hereinafter Lindseth, *Republican Moments*]. The 1946 Preamble, as well as its attendant economic and social rights, and the indirect invocation of the French Resistance and its principles, is still part of the Constitution of France.

35. For the full list of rights, see 1946 CONST. pmbl. (FR.), *reprinted in* BELL, *supra* note 34, at 263. These rights were in the main text of the first (rejected) draft of the constitution put forward in a referendum. Art. I and Art. II of the Rejected 1946 Constitution, *reprinted in* A CONSTITUTION FOR THE FOURTH REPUBLIC app. VIII, *supra* note 34, at 85-89 (1947). Because the Left had shown weakness in that referendum, it did not have the power to keep those rights in the main text. *Id.* at 62-63. Consequently, one of the primary compromises between the first and second drafts of the 1946 Constitution was the movement of these rights from the text to the Preamble, where it was thought they would not be legally enforceable. A CONSTITUTION FOR THE FOURTH REPUBLIC, *supra* note 34, at 63.

The Fourth Republic Constitution, however, based as it was on dreams of parliamentary government³⁶ that required firm and stable party coalitions and a resulting political backbone in the face of challenge, failed quite spectacularly when French colonies started to agitate for independence a decade later. The 1946 Constitution lasted only twelve years before it was replaced by a new constitution that concentrated many powers in the executive.³⁷ Looking back from more than a decade out, as Arendt was doing, the men of the French Resistance might well have said that the freedom fighters won the war but lost the spirit that enabled the war effort to succeed in constituting a new participatory government. Their dreams of liberty and self-governance were eventually sacrificed to a strong president who thought he alone knew what was best for France.³⁸

There was no shortage of constitution writers eager to preserve the country's constitutional inheritance in post-war France. They

36. The Fourth Republic Constitution established a strong parliament and a weak presidency. See Title II for the strong parliament and Title V for the weak presidency. 1946 CONST. tits. II & V (FR.), reprinted in BELL, *supra* note 34, at 109-13, 114-16.

37. See generally Stanley H. Hoffmann, *The French Constitution of 1958: I. The Final Text and Its Prospects*, 53 AM. POL. SCI. REV. 332, 342 (1959) (analyzing how the drafters attempted to use constitutional provisions to create effective government authority in France, and noting that "the most important innovation [was] the grant to the President as 'high judge of the national interest' of new and vital powers which he receive[d] because of France's special political difficulties").

38. Of course, De Gaulle, the president for whom the 1958 Constitution was written, had been the self-proclaimed leader of the French Resistance; his ability to push through a constitution giving the executive extraordinary and largely discretionary powers in 1958 came precisely from the national sense at the time that only someone as strong as De Gaulle could possibly unite a fragmented country in danger of losing its key foreign territories. De Gaulle's fellow resisters, however, may well have thought otherwise. When De Gaulle famously marched down the Champs Élysées at the end of the war, he instructed the Resistance fighters who marched with him to keep "at a respectable distance in his wake." Jonathan H. King, *Emmanuel d'Astier and the Nature of the French Resistance*, 8 J. CONTEMP. HIST. 25, 26 (1973). Histories of the French Resistance tend to emphasize the perspective of the Free French (i.e., those outside France) and the Allies, De Gaulle chief among them, while minimizing the accounts of those who fought within France the whole time, a group that included Char. *Id.* at 27. By the time of the 1958 Constitution, De Gaulle was able to practically dictate the terms of his own rule through his hand-picked Minister of Justice Michel Debré, supported by a circle of believers in strong executive power: "[T]he neo-liberal 'other Resistance' ... is ultimately as much the inspiration of the 1958 Constitution as the generally socialist-oriented, anti-statist majority of the Resistance was the inspiration of the 1946 Constitution." Nicholas Wahl, *The French Constitution of 1958: II. The Initial Draft and Its Origins*, 53 AM. POL. SCI. REV. 358, 377 (1959).

repeated the exercise twice in scarcely more than a decade. But even though the first constitution failed and the second lasted only through constitutional luck,³⁹ important aspects of the continuity of French public law remained intact.⁴⁰

Arendt uses the metaphor of the “lost treasure”⁴¹ to describe what happens when a revolution fails and when it has therefore not produced a constitution that in fact constitutes a stable and lasting government. As a result, she heaps disdain on all but successful constitutions, where success is considered only as the ability of a constitution to last.⁴² But it is not clear why failed constitutions

39. Establishing this would take an essay in itself, but the outlines of such an essay would be as follows: The French Constitution of 1958 established a government with a president so strong that there were few real checks on his power. The president, once acclaimed as such, served for seven years, compared with only five for parliament. The parliament could be overridden or dissolved by the president, but the parliament was limited in the ways it could bring a no confidence motion against the cabinet. The president was entrusted with an important species of lawmaking, for which he required no consent of the parliament. The Constitutional Council's chief responsibility was to ensure that the parliament did not tread on the president's turf. Constitutional luck played a role because the structure of French executive power was weakened—at first only theoretically—by the fact that the prime minister, though appointed by the president, could be dismissed with a motion of no confidence by the parliament. See Hoffmann, *supra* note 37, at 336. During François Mitterrand's terms as president, the parliament was frequently in the hands of his opposition. And this parliamentary majority was able to use the constant threat of a no confidence motion to force “cohabitation” on the president. Cohabitation meant that the president had to take into account what the parliament wanted because they held the constant threat to disrupt his cabinet. See Jean V. Poulard, *The French Double Executive and the Experience of Cohabitation*, 105 POL. SCI. Q. 243, 254-57 (1990). Another important check on the presidency was created when the Constitutional Council used the Associations Case of 1971 to read rights into the Constitution and to enforce them against both parliament and president. See Lindseth, *Republican Moments*, *supra* note 34. For an account of the pre-1958 constitutional traditions that the 1958 Constitution was able to draw upon, see BELL, *supra* note 34, at 79-86. The end result of this opportunistic use of the constitutional loopholes in light of French constitutional tradition is that France now has a constitutional system in which the president has more actual checks on his power than he did when the constitution was first written. Poulard, *supra*, at 254-57.

40. As Peter Lindseth argues, the tradition of French public law preserves the conception of a republic through multiple specific constitutional instantiations. See Lindseth, *Republican Moments*, *supra* note 34, at 57.

41. Compare ARENDT, ON REVOLUTION, *supra* note 10, at 217 (“The Revolutionary Tradition and its Lost Treasure”); with ARENDT, *Preface*, *supra* note 12, at 4-5 (“The men of the European Resistance were neither the first nor the last to lose their treasure.”).

42. Arendt writes that,

To believe that the short-lived European postwar constitutions or even their predecessors in the nineteenth century, whose inspiring principle had been distrust of power in general and fear of the revolutionary power of the people in

should not also count in the project of keeping a “treasure” from being “lost.” After all, at any given moment, any country with an existing constitution might have a constitution that will fail in the future, and yet the country may well have a sense of a constitutional inheritance successfully passed on. If such a government hands off power through a successor constitution that maintains elements of the same legacy, then it is not clear that anything of an enduring sort has been lost. In both her Preface and *On Revolution*, Arendt seems to have it in for the French in particular, whose frequent constitutional transformations gave her the opportunity to bemoan the revolutionary tradition as the antithesis of reliable constitutional government.⁴³ In these moments of anti-French pique, Arendt seems to forget one of her own strongest points:

The loss [of a treasure], at any rate, perhaps inevitable in terms of political reality, was consummated by oblivion, by a failure of memory, which befell not only the heirs but, as it were, the actors, the witnesses, those who for a fleeting moment had held the treasure in the palms of their hands, in short, the living themselves. *For remembrance, which is only one, though one of the most important, modes of thought, is helpless outside a pre-established framework of reference, and the human mind is only on the rarest occasions capable of retaining something which is altogether unconnected.*⁴⁴

To follow Arendt’s own thinking, a new constitution *could* both constitute and carry on a tradition if it is cognizant of the past from which it emerges and from which it is also an escape. If this is right, then failed constitutions are not necessarily signs of a “lost treasure” as long as successor constitutions remember and incorporate

particular, could constitute the same form of government as the American Constitution, which had sprung from confidence in having discovered a power principle strong enough to found a perpetual union, is to be fooled by words. ARENDT, *ON REVOLUTION*, *supra* note 10, at 153.

43. See, e.g., *id.* at 181 (“The men of the French Revolution, not knowing how to distinguish between violence and power, and convinced that all power must come from the people, opened the political realm to this pre-political, natural force of the multitude and they were swept away by it”); ARENDT, *Preface*, *supra* note 12, at 5 (“The history of revolutions ... could be told in parable form as the tale of an age-old treasure which, under the most varied circumstances, appears abruptly, unexpectedly, and disappears again”).

44. ARENDT, *Preface*, *supra* note 12, at 5-6 (emphasis added).

this history. If memory is doing most of the work and the specifics of any constitutional text are contingent on this memory, then the crucial question to ask about constitutions is how they incorporate the past. It is not hard to imagine, because France is one example, a country that changes its written constitutions repeatedly while preserving a certain common baseline of principles and traditions.⁴⁵ On this model, a daisy chain of constitutions can be just as “successful” as one single constitution that appears to last forever. Perhaps Arendt is too hard on France.

II. KAFKA’S MAN-IN-THE-MIDDLE

So what would make any particular group of constitution writers the preservers of a nation’s “treasure,” to use Arendt’s metaphor? I think that effective constitution writers might learn from the man in Kafka’s text, “*He*.” Invoked by Arendt in her Preface, Kafka’s character is himself caught in a struggle between past and future:

He has two antagonists: The first pushes him from behind, from his birth. The second blocks the road in front of him. He struggles with both. Actually the first supports him in his struggle with the second, for the first wants to push him forward; and in the same way the second supports him in his struggle with the first; for the second of course is trying to force him back. But it is only theoretically so. For it is not only the two protagonists who are there, but he himself as well, and who really knows his intentions? However that may be, he has a dream that some time in an unguarded moment—it would require too, one must admit, a night darker than any night has ever been yet—he will spring out of the fighting line and be promoted, on account of his experience of such warfare, as judge over his struggling antagonists.⁴⁶

45. See *supra* text accompanying notes 33-40.

46. FRANZ KAFKA, “*He*,” in *THE GREAT WALL OF CHINA: STORIES AND REFLECTIONS* 263, 276-77 (Willa Muir & Edwin Muir trans., 1946) (1936). See also ARENDT, *Preface*, *supra* note 12, at 7. Here, I have reverted to the original translation that Arendt herself “corrects” because her correction is contentious. See Vivian Liska, *The Gap Between Hannah Arendt and Franz Kafka*, 38 *ARCADIA* 329, 332 (2003). I am grateful to Stanley Corngold both for the reference and the conversation that prompted me to think more deeply about the context of this quotation.

Kafka's character apparently aspires to fly out of this battle between past and future in order to attain a different view of the two opponents and to force them into a fight only with each other, leaving him out.

Arendt reads Kafka as introducing a human viewpoint in what is otherwise an uninterrupted linear flow of time.⁴⁷ To insert a man into the middle of time is to create the conditions for the past to be seen as a still-living force that can press upon its human observer with the strength of an adversary, *not* as something over and finished.⁴⁸ Similarly, the future comes to squeeze the man-in-the-middle, so to speak, because his dreams of an ideal future also pressure him in specific ways. In short, the experience of being caught in the push-and-shove of time comes from the projection of the human into this otherwise unbroken linearity which would flow uninterrupted were there not a person to feel the cross-pressures. And what is this man-in-the-middle to do when caught in these pressures? According to Arendt's reading of Kafka, he can fly out of the pressure and act as an "umpire."⁴⁹ He can decide which of these forces should prevail and which of these forces should lose.

But the passage of Kafka that Arendt quotes constitutes the very last section of the story; the moment of judgment that Arendt anticipates never appears in the text. Instead, the rest of Kafka's "*He*" creates a more complicated picture of who this man-in-the-middle might be and how he is pressured. "*He*" is a figure that

47. See ARENDT, *Preface*, *supra* note 12, at 11.

48. Arendt opines,

Seen from the viewpoint of man, who always lives in the interval between past and future, time is not a continuum, a flow of uninterrupted succession; it is broken in the middle, at the point where "he" stands; and "his" standpoint is not the present as we usually understand it but rather a gap in time in which "his" constant fighting, "his" making a stand against past and future, keeps in existence. Only because man is inserted into time and only to the extent that he stands his ground does the flow of indifferent time break up into tenses; it is this insertion ... which splits up the time continuum into forces which then, because they are focused on the particle or body that gives them their direction, begin fighting with each other and acting upon man in the way Kafka describes.

Id.

49. Arendt changed the original English translation from "judge" to "umpire." Compare KAFKA, *supra* note 46, at 277, with ARENDT, *Preface*, *supra* note 12, at 7. As Vivian Liska notes, an umpire is still in the game, while the judge of the original German courts might be "elevated above" the whole scene and not necessarily part of it at all. Liska, *supra* note 46, at 332.

appears in a list of aphorisms that have been arranged together in a work by this name;⁵⁰ not quite a story, but not quite *not* a story either. Kafka's "He" has no name, no fixed identity. It also appears that "He" is in fact a single character, given that throughout the text "He" remains consistently quite tortured about his own position and not at all sure of what he would choose.

50. Though the words are all Kafka's, they were originally diary entries appearing between January 6 and the end of February, 1920. They were not a sequence written to appear as such. Instead, they were assembled by Kafka's friend Max Brod, who had promised Kafka that he would burn all of Kafka's papers after his death, but evidently did not do so. Instead, Brod organized and edited them for publication, including "He," in which the words of the "story" are taken from diary entries not arranged by Kafka in a coherent way as a story. Though a few other entries are interleaved with the excerpted ones close to the start of the sequence in Kafka's diaries, the fragments otherwise follow in the order in which they were written. But as Stanley Corngold observes, this is true with an important exception:

The note beginning "He has two antagonists," which constitutes a resounding finale in Max Brod's edition of these aphorisms as a tribute to human decisiveness, in politics and ethics, was actually composed by Kafka on January 17—hence, relatively early in the sequence. If Brod had consistently matched his sequence to the sequence that appears in Kafka's journals, this aphorism would have had to appear in eighth place, following the aphorism that begins "Some deny the existence of misery" And so, in deciding to publish these aphorisms separately, and as if to tell a story through them, Kafka's editor took various liberties with Kafka's manuscripts.

E-mail from Stanley Corngold, Professor of German and Comparative Literature, Princeton University, to Kim Lane Scheppele, Director, Program in Law and Public Affairs, Princeton University (Nov. 25, 2007, 21:02 EST) (on file with author).

Moreover, in the sequence of diary entries that are arranged as "He," Kafka had already excised the crucial sentence upon which Arendt particularly relies: "However that may be, he has a dream that some time in an unguarded moment ... he will spring out of the fighting line and be promoted, on account of his experience of such warfare, as judge over his struggling antagonists." The excerpt, as Kafka left it, ends with the question "and who really knows his intentions?" instead of with the now-famous leap out of the action. As a result, in Kafka's own final version of these lines, no decisive moment occurs when "He" seizes the initiative in the "story" at all. When Brod set about creating a story from these fragments, he put Kafka's original concluding sentence back in, thereby making "He" appear to *do something* at the end. As Corngold writes: "In order to have Kafka produce the impression of a triumphant activity of the will, Brod had to reinvent the sequence and restore a sentence that Kafka had plainly crossed out." *Id.*

For the extraordinary detective work that allowed me to see how all of this went together, I want to thank profusely Stanley Corngold for teaching Kafka to me, as well as for tracking down the diaries, the omissions, and the commissions. Corngold also engaged Benno Wagner, Vivian Liska, and Hans-Gerd Koch in the hunt for origins of the mysterious last sentence, and I am grateful to all of them for their engaged erudition and shared wisdom on these passages. All of this appears in a rather remarkable email correspondence over the matter which is on file with the author.

What is the evidence both for the unity and for the agony of this figure? Here are some clues:

- He is never quite ready for any contingency All that he does seems to him, it is true, extraordinarily new, but also, because of the incredible spate of new things, extraordinarily amateurish, indeed scarcely tolerable⁵¹
- He could have resigned himself to a prison. To end as a prisoner—that could be a life's ambition. But ... he was not even a prisoner.⁵²
- He has the feeling that merely by being alive he is blocking his own way.⁵³
- [I]f he is asked what he actually wants he cannot reply, for ... he has no conception of freedom.⁵⁴
- He proves nothing but himself, his sole proof is himself, all his opponents overcome him at once, but not by refuting him (he is irrefutable), but by proving themselves.⁵⁵
- He does not live for the sake of his personal life; he does not think for the sake of his personal thoughts. It seems to him that he lives and thinks under the compulsion of a family⁵⁶
- He fights against having his limits defined by his fellow-men.⁵⁷
- The current against which he swims is so rapid that in certain absent moods he is sometimes cast into despair by the blank peace amid which he splashes, so infinitely far has he been driven back in a moment of surrender.⁵⁸

51. KAFKA, *supra* note 46, at 276-77.

52. *Id.* at 264.

53. *Id.*

54. *Id.* at 265.

55. *Id.* at 268.

56. *Id.* at 269.

57. *Id.* at 271.

58. *Id.* at 274-75.

From these scattered thoughts attributed to “He,” Kafka’s creation is not the decisive umpire of Arendt’s interpretation, who escapes a terrible bind cleverly in a moment of darkness and is poised, where Arendt finds him, to make a final judgment. Instead, Kafka’s “He” seen in context of the rest of the text is a less openly heroic figure: “He” is someone who feels completely unprepared for what the present demands, someone for whom freedom is both alluring and frightening, someone who wonders in fact whether he has any capacity to be recognized by others as a person with desires and agency of his own. “He” is someone who alternatively does not know who he is or what he wants, and someone who nonetheless struggles against the forces that buffet him. Why, then, does Kafka’s list of aphorisms about “He” end with the passage that Arendt uses?

Seen as the endpoint of a progression of observations and not as its starting point, Kafka’s “He” of the Arendtian quotation⁵⁹ seems less like someone who has reached the point of decision and rather like someone who, having been through much personal turbulence, primarily wants to escape the pressures of the moment to be somewhere else entirely. Vivian Liska, in her brilliant reading of Arendt’s (mis)reading of Kafka, suggests this: “In Arendt’s translation, the man in his dream would have gained the capacity to judge the antagonists *in* their fight, he would know about right and wrong. In the original he would rise *above* his antagonists altogether, *beyond* the boundaries of their struggles and concerns.”⁶⁰

In Liska’s reading, Kafka’s man-in-the-middle would rather be anywhere but there in the conflict between past and future. When “He” escapes, “He” is not an umpire with a role to play in the game, but a judge who stands outside the game entirely in another realm. As a result, Kafka’s “He” is not a strong and decisive character intervening in an epic struggle. “He” is an altogether more recognizable figure from daily life: someone who dreams of escaping pressures to look on them from a quiet place beyond the “fighting line,” but someone who also is inescapably caught in a fraught historical moment from which it would be practically impossible to flee.

59. ARENDT, *Preface*, *supra* note 12, at 7.

60. Liska, *supra* note 46, at 332.

One might learn even more about Kafka's "He" with the invocation of Kafka's "I." Twice in the piece titled "*He*," Kafka's list of aphorisms features not "He" but "I," similarly un-introduced by reference to a proper name, social location, or concrete past. The first time "I" appears, "I" is someone who wishes "to attain a view of life (and—this was necessarily bound up with it—to convince others of it in writing)."⁶¹ But the wish is not really proper because it is a "natural full-bodied" something and simultaneously "nothing, a dream, a dim hovering."⁶² The second time "I" appears, "I" is watching two children.⁶³ When they turn to face "I," "I" is described as nobody by one child and the devil by another.⁶⁴ The figure of "I," then, is always a split image—something and nothing, present and absent at the same time. Could not "He," then, also be split in this way? If so, it would explain his sense of impermanence combined with the contradictory observations, "He was once part of a monumental group,"⁶⁵ and "He does not die along with his dying thoughts."⁶⁶ Both the "I" and the "He" are divided characters, possessing at once a sense of their own importance and a sense of being poised on the brink of non-existence.

Arendt sees Kafka's man-in-the-middle as a decisive, participating force that will determine whether past or future will win in their monumental struggle. But reading the passage Arendt quotes against the background of Kafka's entire text, one sees a much less decisive figure. Kafka's man-in-the-middle, read through the whole text, is divided, ambivalent, uncertain.⁶⁷ At the end, he dreams of

61. KAFKA, *supra* note 46, at 267.

62. *Id.*

63. *Id.* at 270.

64. *Id.* at 271.

65. *Id.* at 269.

66. *Id.* at 274.

67. For this, I am again indebted to Stanley Corngold who suggested in one of his provocative e-mails that this sort of personal splintering may well be a key to understanding Kafka's text:

As for "He," you will find in the literature the expected observations: it represents Kafka assuming an objective standpoint on issues that do indeed concern him personally—gravely—but which he treats as exemplary for his "community." I have read that the form is derived from East European Jewish writings that he chiefly heard about from Juri Langer; one scholar (Peter Alt) says they "look like" fragments from a "tradition" of "Chassidic" writing (naming a few names—Eliasberg, Peretz, Buber) and suggests that you have here a *doubling* of the "Er" form—these tense dramas are narrated by an observer (very

fleeing the pressures that buffet him to become a judge above—perhaps above and beyond—them all. But of course, he cannot really escape, for it would take “a night darker than any night has ever been yet.”⁶⁸

Arendt, in *On Revolution*, sees her constitutional protagonists the way she sees Kafka’s man-in-the-middle. Her constitution drafters are also poised to judge past and future by standing as umpires above their epic battles to rule on what is and what is not playing by the rules of the umpire’s game. In particular, Arendt’s model drafters, the Americans, leave a testament (saying what is important to preserve about the past) to future heirs (those entitled to receive it):

Clearly, the true objective of the American Constitution was not to limit power but to create more power, actually to establish and duly constitute an entirely new power center, destined to compensate the confederate republic, whose authority was to be exerted over a large, expanding territory, for the power lost through the separation of the colonies from the English crown.... The American Constitution finally consolidated the power of the Revolution, and since the aim of revolution was freedom, it indeed came to be what Bracton had called *Constitutio Libertatis*, the foundation of freedom.⁶⁹

In Arendt’s tale of the American Constitution, the drafters recreate the power of the English crown in a new form to hand on to the “confederate republic” and its citizens. They take the treasure, account for it, and determine who shall inherit it.

But what if we were to consider Kafka’s man-in-the-middle as a more typical, more representative sort of constitution drafter than Arendt’s decisive testament maker? Now that we have exposed “He” as buffeted, divided, and ambivalent, and yet also someone who

likely a “he”) about a being who is a “he” even to *himself*. You’d have here more evidence of the cracking into irretrievable pieces of the “I”—the identity—of the Western Jewish intellectual.

E-mail from Stanley Corngold, Professor of German and Comparative Literature, Princeton University, to Kim Lane Scheppelle, Director, Program in Law and Public Affairs, Princeton University (Aug. 8, 2007, 20:40 EST) (on file with author) (emphasis in the original).

68. KAFKA, *supra* note 46, at 277.

69. ARENDT, *ON REVOLUTION*, *supra* note 10, at 152-53.

experiences himself caught in a crucial moment of history, what sort of constitution writer would “He” be?

If it were Kafka’s “He” in this pressured constitutional moment, he would have a sense of his own inadequacy. He would be “never quite ready for any contingency,”⁷⁰ and he would feel that his work was “amateurish.”⁷¹ He would have the sense of “blocking his own way.”⁷² He would feel in the moment as if he had “no conception of freedom”⁷³ and would have a sense that “all [of] his opponents overcome him at once” simply by proving themselves.⁷⁴ He would feel incapable of acting as an individual, but would feel “under the compulsion of a family,”⁷⁵ and yet of having to “fight[] against having his limits defined by his fellow-men.”⁷⁶ He would feel that the moment in which he acts is a “blank peace”⁷⁷ that represents how far he has been driven back, not how far he has come.⁷⁸ And yet, he is also “part of a monumental group.”⁷⁹

Of course, Kafka’s “He” is not represented as a constitution drafter, or even a person of consequence in Kafka’s own text. But Arendt finds inspiration in “*He*” for her argument about the importance of history and memory in the process of political recovery.⁸⁰ The inspiration she finds, however, comes from a decisive, confident, judging character, which is precisely what Kafka’s “He” is not.⁸¹

What would happen if we started with this understanding of Kafka’s “*He*,” not as decisive but as inevitably conflicted and uncertain, and then inserted this character into Arendt’s argument? Are constitution drafters more like Kafka’s ambivalent character upon whom history has imposed itself or more like Arendt’s omnipotent decision maker?

70. KAFKA, *supra* note 46, at 263.

71. *Id.*

72. *Id.* at 264.

73. *Id.* at 265.

74. *Id.* at 268.

75. *Id.*

76. *Id.* at 271.

77. *Id.* at 274.

78. *Id.* at 274-75.

79. *Id.* at 269.

80. See ARENDT, *Preface*, *supra* note 12, at 13-15.

81. See *id.* at 7-14.

III. KAFKAESQUE CONSTITUTION DRAFTERS

From what we know about constitution drafters in those moments when history cracks enough to insert a new blueprint into the middle of it,⁸² Kafka's picture of the ambivalent "He" caught in the moment, buffeted by time and in danger of being smothered by group affiliation, is a more adequate representation of what constitution drafters seem to experience. Many are quite uncertain of where they are in time.⁸³ For instance, are they at the end of a process, or at its beginning? They do not know what they are supposed to be doing.⁸⁴ Should they follow personal conscience, or vote with their bloc in the constituent assembly? They have no idea whether they are doing anything correctly. Will their ideas really calm troubled political waters, or will these ideas bring out new conflicts? The last thing most of them feels is that they are in control of events, clear-headed about what has to be done, and sure that they are right.⁸⁵ Of course, there are always a few headstrong types in the mix,⁸⁶ but because, almost by definition, a new constitution is being written at a moment of major political change, certainty is not the usual backdrop for the process. As a result,

82. István Rév, a brilliant observer of the recent Hungarian transition, described 1989 as that year in which "the past fell to pieces and became extinct. Millions, hundreds of millions of people in the former Communist world became lost; they lost their future because they lost their past." ISTVÁN RÉV, *RETROACTIVE JUSTICE: PREHISTORY OF POST-COMMUNISM* 8 (2005) (footnote omitted). Moments like these are moments in which constitutions are written.

83. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1300 (1999). Tushnet notes:

Under the pressure of time and the need for political compromise, a constitution's drafters are likely to latch on to whatever solution is near at hand to the immediate problems they face. They will not have sharp understandings that the institutions they are creating have some necessary characteristics flowing from the very nature of the institutions. With respect to details, they are, in short, bricoleurs.

Id.

84. See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 394 (1995) ("[T]he call for a new constitution usually arises in turbulent circumstances, which tend to foster passion rather than reason.").

85. *Id.*

86. Michel Debré, De Gaulle's Minister of Justice, tasked with writing the Fifth Republic Constitution of 1958, is rarely portrayed as having doubts or having to work in coalition, but is instead seen as a keen political operative with an ambition lasting more than a decade to give De Gaulle near-dictatorial powers. See Wahl, *supra* note 38, at 360.

many constitution drafters turn to history to find models to follow, ideas to plunder, and guides to steady themselves in their own troubled times.⁸⁷

Perhaps the purest evidence of the uncertainty felt by a thoughtful constitution drafter comes from Alexis de Tocqueville, the famous observer of American democracy and someone hardly possessed of uncertain views in normal times. He was caught up in the revolutionary events of 1848 in France.⁸⁸ A new constitution was demanded, and Tocqueville was elected to the Constituent Assembly tasked with its writing.⁸⁹ His memoirs, written within two years of the Assembly itself and with the immediacy of the moment, were meant to be kept completely secret.⁹⁰ These extraordinary memoirs reveal how uncertain the moment felt to those who lived through it, “when one was never sure, between ordering and eating one’s dinner, whether a revolution might not intervene.”⁹¹ In the moment of the crisis itself, in the Constituent Assembly, and as foreign

87. The German constitution drafters at the end of World War II also followed public opinion in looking to the past: “The most important single influence on German public opinion during these years was that of the traditions and tried institutions of the past.” MERKL, *supra* note 1, at 22.

88. J.P. Mayer, *Introduction* to ALEXIS DE TOCQUEVILLE, *RECOLLECTIONS: THE FRENCH REVOLUTION OF 1848*, at xxxv (J.P. Mayer & A.P. Kerr eds., George Lawrence trans., 1995) (1893) [hereinafter Mayer, TOCQUEVILLE]:

In order to understand the shock the French revolutionary development exerted on its contemporaries, one must bear in mind that until 1848 there were less than 250,000 voters in France; the elections for the Constituent Assembly, however, had given voting rights to 9,000,000 voters, “almost all of them,” as Seignobos writes, “without any political idea, without any experience of voting, and most of them even illiterate.” It was this sudden jump into universal manhood franchise that created such a confused political situation.

Id.

89. *Id.* at xxxiii-xxxiv.

90. *Id.* at 3-4. Tocqueville wrote:

These pages are to be a mirror, in which I can enjoy seeing my contemporaries and myself, not a painting for the public to view. My best friends are not to know about them, for I wish to keep my freedom to describe myself and them without flattery. I want to uncover the secret motives that made us act, them and myself as well as other men, and, when I have understood these, to state them. In a word, I want to express myself honestly in these memoirs, and it is therefore necessary that they be completely secret.

Id. (footnotes omitted). The fact that Tocqueville’s memoirs were eventually published may have discouraged later drafters from ever again writing such blunt appraisals of themselves and their fellow constitution drafters.

91. *Id.* at 30.

minister in the new government formed thereafter, Tocqueville openly admitted his constant sense of doubt:

But what preyed most on my hopes and my nerves throughout the nine years spent in public affairs, and what still remains the most frightful memory of that time, was the constant doubt in which I was forced to live about what was best to do each day. With me, I think, vacillation is due to intellectual doubts, not to a weak heart, and I never hesitate or find any trouble in taking even the thorniest path when I see clearly where it should lead me. But surrounded by all these petty dynastic parties, so little different in their aims and so much alike in the evil methods employed, what path clearly led to honesty or even to usefulness? Where was truth? Where was falsehood? Or which side were the evil ones? And on which side the well-intentioned? I never could, at that time, fully answer those questions, and indeed I could not do so properly even now.⁹²

Once elected to the Constituent Assembly, Tocqueville felt that “the nation had a sort of frenzied desire to see the work of constitution making finished and to see authority established.”⁹³ So did the Assembly itself:

But the thing that most effectively deprived the Committee of its freedom of mind was, one must admit, fear of outside events and the excitement of the moment. It is difficult to appreciate how much this pressure of revolutionary ideas affected even those minds least subject to such influence, and how it almost unconsciously drove them farther than they meant to go, and sometimes even in a different direction.⁹⁴

As the debate over the new constitution went on, a new fear was added: “the fear that, if we went to the bottom of things, we would plunge into endless violent argument, and we preferred to keep a semblance of harmony by staying on the surface.”⁹⁵

And so what predominated in the midst of the doubt and fear? A sense of French history. Tocqueville was quite pessimistic about this

92. *Id.* at 84.

93. *Id.* at 169.

94. *Id.*

95. *Id.* at 172.

influence in 1848: "In France there is only one thing that we cannot make: a free government; and only one that we cannot destroy: centralization. How could it perish? The government's enemies love it, and the rulers cherish it."⁹⁶

Tocqueville did not think much of his compatriots in the constitution-drafting committee, believing them to be unprepared: "[a]nticipatory alarm at the vast complexity of the subject made us tired before we started: most of the members had not even attempted to study it, or had picked up only some very confused ideas"⁹⁷ Still, his compatriots thought that they knew France and French history, and it was with the ideas generated by the French constitutional past that they began the search for a French constitutional future. They were less umpires refereeing a battle between past and future than they were reluctant judges with mandatory jurisdiction held within the limits of the evidence they had before the proceedings began. All they knew was their country's own past.

Despite the doubts and turmoil, the Assembly produced a constitution in 1848, one that shared power between a president and a parliament.⁹⁸ But the constitution fell quickly. By 1851, with the president and parliament in a deadlock and with the constitution nearly impossible to amend, Louis-Napoleon broke the bounds of the constitution and seized power himself.⁹⁹ When he crowned himself Napoleon III,¹⁰⁰ France's latest experiment with republicanism ended.

In the Frankfurt Parliament, an all-German assembly also meeting in the middle of the European Revolutions of 1848, the constitution drafters there also turned more to history than to any clear sense of a future.¹⁰¹ They, too, were buffeted by the present to the point where history seemed the only safe refuge. But what

96. *Id.* at 170.

97. *Id.* at 172 (footnote omitted).

98. Chapter IV of the French Constitution of 1848 outlined legislative power and Chapter V executive power. While the president was responsible for defending the nation, only the National Assembly could declare war (Art. 54). The president could not dissolve the National Assembly (Art. 51), but his ministers were permitted to sit in the Assembly (Art. 69). 1848 CONST. (Fr.), available in French at <http://mjp.univ-perp.fr/france/co1848.htm> (last visited Feb. 20, 2008).

99. PRISCILLA ROBERTSON, *REVOLUTIONS OF 1848: A SOCIAL HISTORY* 99 (1952).

100. *Id.*

101. *See generally* FRANK EYCK, *THE FRANKFURT PARLIAMENT 1848-1849* (1968).

national history could they draw from, given that their only experience of German unification had come from a weak Confederation that had barely functioned?¹⁰² Though they were the leading edge of a German nationalist movement, attempting to unify Germans throughout Europe, they had no choice but to draw from other countries' constitutional experiences:

Germans in 1848 were bound to look largely abroad for political inspiration [F]or years all but the most determined defenders of the old order had followed constitutional developments in other countries with intense interest In a curious and presumably completely unintended manner, censorship had reinforced this tendency to look abroad. It was less dangerous to write about constitutional demands in foreign countries than about what was happening at home.¹⁰³

As a result, the representatives of the Frankfurt Parliament debated other countries' histories to provide models for a new all-German state.¹⁰⁴ Some drew inspiration from the Belgian or English constitutional monarchies; others were attracted to the constitutional ambitions of revolutionary France.¹⁰⁵

The delegates in this assembly were buffeted by current events as well. The Hungarian uprising within the Habsburg Empire divided the delegates, with some believing that this meant that non-German peoples had to be excluded from the new German state and others believing that further weakening the Habsburg Empire by supporting a German-only policy was folly.¹⁰⁶ Like Tocqueville, the delegates of the Frankfurt Parliament were caught up in the revolution outside their doors as well as in struggles over how to understand history and its relevance to a possible future.¹⁰⁷ In the end, though their constitutional draft was much admired for its declaration of rights and the liberal spirit behind its creation, the Frankfurt Constitution never went into effect.¹⁰⁸

102. *Id.* at 8-9.

103. *Id.* at 118.

104. *Id.*

105. *Id.*

106. *Id.* at 158-59, 255-56.

107. *Id.* at 26-56.

108. *See, e.g.,* Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W.

Were the failures of the French Constitution and the Frankfurt Constitution, both of 1848, due to these doubts and vacillations of the drafters? Did they pick the wrong histories to lean on? Although few assemblies have had a blunt chronicler like Tocqueville recording his innermost feelings and his colleagues' foibles, constitutions that have lasted much longer have also been accompanied by serious doubts and divided views of their framers. Most constitutional records reveal the crucial importance of a sense of history among the framers, for good or for ill.¹⁰⁹

To take perhaps the most obvious example of a successful post-World War II constitution, the Bonn Constitution, or German Basic Law, was drafted in an inauspicious moment between past and future. It was written while Germany was still under occupation in 1948-49.¹¹⁰ Here, too, rapid changes in the political climate put pressures on the drafters; they were buffeted between an immediate Nazi past they uniformly wanted to reject and a future that was completely uncertain as the previously Allied powers picked sides in what became a Cold War with Germany as the dividing line.¹¹¹ Germany had ended the war parceled out among Allied powers; by the time constitutional drafting started in earnest in the Western zone in 1948, it was clear that the Eastern zone was moving in a separate direction.¹¹² A constitution was adopted in the East just as one was being constructed in the West.¹¹³

Despite the complete agreement on rejecting anything that appeared to be a continuation of the Nazi past, the drafters of the Bonn Constitution nonetheless found elements of German constitutional history to draw from in creating a new government. Suspicion lingered that perhaps the Weimar Constitution of 1919 had been at least in part responsible for the rise of fascism, and so the elements

RES. L. REV. 797, 800 n.3 ("[The Frankfurt Constitution], heavily influenced by leading academics, never came into effect." (citing BODO PIEROTH & BERNHARD SCHLINK, GRUNDRECHTE STAATSRRECHT II 9 (10th ed. 1994))).

109. See, e.g., Mayer, TOCQUEVILLE, *supra* note 88, at xxi.

110. See generally MERKL, *supra* note 1, at 55-90 (discussing the Parliamentary Council in Bonn); Inga Markovits, *Constitution-making After National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1307 (2008) (describing the creation of the Basic Law of 1949 and contrasting it with the Weimar Constitution of 1919 and the Roundtable Constitution of 1990).

111. GOLAY, *supra* note 1, at 1-6.

112. MERKL, *supra* note 1, at 7-8.

113. *Id.* at 16-17.

of that constitution that seemed most to blame were immediately rejected.¹¹⁴ In fact, the rejection of many aspects of the Weimar Constitution was so complete that at least one delegate urged a bit more fairness to the document, in the name of avoiding a replay of the immediate past:

The Weimar constitutional order was not such a bad one. It has become fashionable today ... to speak disparagingly of the Weimar constitution.... It is unquestionable that the Weimar constitution fell victim to a stupendous error: overconfidence in the “fairness” of the German people.... Thus it came about that the development of the young democracy took place in the atmosphere of nationalistic fantasies, of attempts to restore the monarchy, and of the criminal fairy tale of having been stabbed in the back. These things were far, far more decisive for the operation of the Weimar constitution than the formulation of this or that article which may not accord with present-day notions.¹¹⁵

But his comments did not stop as he described:

speaker after speaker retrac[ing] the course of Weimar history in a search for the critical weaknesses and false turns ... as though in the grip of some quite personal tragedy, restlessly exploring the past in a search for an understanding which might bring both relief and the restoration of confidence necessary to make a fresh start.¹¹⁶

Where else should the Bonn framers have looked for guidance, if not to the Weimar Constitution? The Bismarck Constitution was too remote, with monarchies of any sort simply not being an option after

114. *Id.* at 22-23. This was particularly true of the emergency powers of the president under the Weimar Constitution (the infamous Article 48) as well as the parliamentary system that allowed anti-constitutional parties to join across very different political ideologies to block constitutional action. Emergency powers were left out of the constitution altogether, GOLAY, *supra* note 1, at 131-32, and the problem of parliamentary splintering was solved by requiring parties to get at least 5 percent of the vote before being awarded seats in the Bundestag, as well as by permitting judicial outlawing of anti-constitutional parties. MERKL, *supra* note 1, at 87-88.

115. GOLAY, *supra* note 1, at 113-14 (quoting Dr. Theodor Heuss) (footnote omitted).

116. *Id.* at 114 (not quoting Heuss).

1945.¹¹⁷ The constitutional heritage adopted without objection was the never-tried Frankfurt Constitution of 1848-49, with its elaborate emphasis on rights.¹¹⁸ In the end, the survivable remnants of the Weimar Constitution, together with inspirations from the Frankfurt Constitution, were the primary frame of reference for the Bonn drafters.¹¹⁹

They were so intent on stopping the potential rise to power of another dictator like Hitler that this very preoccupation subjected them to criticism. Young people, in particular, thought that the framers were “old men making an old constitution.”¹²⁰ To them, the framers “looked too much into the past, wasting their ingenuity on gimmicks that might have saved Germany from Hitler twenty or thirty years ago—as though history was bound to repeat itself.”¹²¹

But the Bonn framers were not able to remain completely in the past, fixing Weimar’s constitutional loopholes. Dramatic current events came at them as well, events that buffeted their sense of what they should do with the new constitution. Currency reform and restoration affected the views of parties within the Parliamentary Council, bringing economic recovery to the top of the agenda.¹²² But perhaps nothing shocked like the Berlin blockade, which made West Germans realize how seriously estranged their Eastern counterparts had become and which moved West German public opinion to the right.¹²³ Just as with the French and German constitutional efforts of 1848, the Bonn constitutional process 100 years later was still affected daily by events taking place as the Constitution was written.

I could multiply the examples, having just used some of the obvious and best documented ones. But when one looks closely at actual constitutional drafting processes, one has to be struck by how common it is for constitution drafters to be caught, like Kafka’s “He,” between the past’s demand for recognition and the future’s demand to do better. But unlike Arendt’s portrayal of Kafka’s character as someone who can escape from the pressures to referee

117. MERKL, *supra* note 1, at 23-24.

118. *Id.* at 24.

119. GOLAY, *supra* note 1, at 200.

120. MERKL, *supra* note 1, at 83.

121. *Id.*

122. *Id.* at 104-06.

123. *Id.* at 107-08.

this game from a pressureless position of normative clarity, actual constitution drafters look more like the conflicted, uncertain, divided, and yet strangely wise figure that one sees when examining the rest of Kafka's text for clues.¹²⁴ Constitution drafters can never really escape the pressures of being caught between past and future, though they may dream of it. Instead, many of them struggle against their own self-evident limitations, feeling all the time that their best efforts are hardly adequate to the task.

IV. POSTSCRIPT: CONSTITUTIONAL ADVISING

In this *William and Mary Law Review* Symposium, we are all urged to focus our attention on post-conflict constitutional drafting. While framing the problem in this way tends to push most of us toward current conflicts and current crises with the aim of asking what can be done, I have tried to bring our attention back to some famous cases about which nothing can now be done to show how much less certain those situations look when seen through the eyes of their participants. After all, 1848 was certainly experienced as a crisis by those who lived through it; the same was true for the constitution drafters working in the wake of the Second World War. Nearly all efforts to write constitutions take place in post-conflict situations. The writers of some classic constitutions experienced the same indecisiveness, sense of inadequacy, and agony of uncertainty as do present constitution drafters. In this Essay, I want to make these classic drafters human again to let those who are going through these processes now feel less alone in their sense of being overwhelmed by the task.

Since the constitutions I have written about were penned, however, a new culture of expertise has arisen in the field. It is now commonplace for countries going through political transitions to call in foreign experts for consultation; many of us at the conference that gave rise to this journal issue are part of that traveling circus that tries to be helpful when constituent assemblies are formed. I myself have consulted from a far distance on the recent constitutions of Afghanistan and Iraq, and from a nearer distance in the failed constitutional drafting process of Hungary in 1995-96. I have never

124. See *supra* Part II.

felt I have made a difference in any of these settings and am alternately disappointed and relieved that such is the case. But there is now a sense in our field that we all, experts and drafters alike, should be able to do better by designing constitutions that are immediately effective and lasting.

Though it is clear that constitution drafters are often eager to learn about things that constitutional experts can teach them—both about the drafters' own national pasts and about the experiments of other countries—it is not clear to me that the newly developing science of constitutional consulting can really improve upon the overall successfulness of new constitution-writing efforts. The unfortunate fact is that most constitutions fail. Some, like the Frankfurt Constitution,¹²⁵ are stillborn but revived later when their ideas seem useful again; others, like the French Constitutions of 1848¹²⁶ and 1946,¹²⁷ are overwhelmed by events and disappear altogether. Some, like the Bonn Constitution of 1948-49, succeed,¹²⁸ though it started inauspiciously enough from the “point zero” of constitutional life in a divided country under occupation.¹²⁹

Constitutions fail because the success of a constitution is not predictable merely from its initial design. How political leaders and citizenries learn to live—or not—within a constitution's framework is determined only in part by the way that the political institutions were constructed in the first place and the specific lists of rights that a constitution contains. What may matter more is something we might call “constitutional culture,” which is very hard to grow from scratch as a conscious matter but which has clearly been observed thriving in all sorts of places where one would not have guessed it would. The most important element of “constitutional culture” is the willingness of a population battered by recent political turbulence to treat the newly designed constitutional institutions as real from the start.

This Essay is designed to make us all more humble about what we should expect of constitution writers. No one sets out to write a failed constitution, and yet that is precisely what happens in most

125. *See supra* text accompanying notes 101-08.

126. *See supra* text accompanying notes 88-100.

127. *See supra* text accompanying notes 36-38.

128. *See supra* text accompanying notes 110-23.

129. MERKL, *supra* note 1, at 3.

cases. Though constitution drafters may appear confident and knowledgeable, the fact is that no one knows the future that their new constitutions will face. Constitution drafters are in many ways like Kafka's "He," but not the "He" of the Arendtian interpretation,¹³⁰ poised to make a decisive judgment. Instead, constitution writers are caught painfully between past and future, improvising their way through the present while feeling inadequate to the challenge. Arendt takes her inspiration about constitution drafters in Kafka's "*He*" from the very end of the work, where Kafka's character seems poised to be decisive. We might find a better account of what a person asked to write a constitution in turbulent times may feel in the crucial moment by drawing from the very *beginning* of Kafka's story:

He is never quite ready for any contingency, yet he cannot even blame himself for that, for when in this life, which insists so mercilessly that we must be ready at every moment, can one ever find time in which to make oneself ready? and even if there were time how can one make ready before knowing the task; in other words, can one ever be equal to a natural task, a spontaneous task that has not merely been artificially concocted?¹³¹

Kafka suggests that the answer may be no. Yet the astonishing conclusion one has to draw from observing so many constitutional drafting processes is how hard constitution drafters try to push themselves beyond their hesitations and doubts to do the best they can.

130. ARENDT, *Preface*, *supra* note 12, at 7.

131. KAFKA, *supra* note 46, at 263.