

SOME SKEPTICISM ABOUT NORMATIVE CONSTITUTIONAL  
ADVICE

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It has been frequently remarked, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.<sup>1</sup>

*-The Federalist No. 1*

The spate of constitutional advice giving over the past decade or two seems to have taken only part of Alexander Hamilton's observation to heart. Advice givers appear to believe that they can help others establish good government by reflection and choice. They appear to ignore Hamilton's suggestion that the ability to establish good government in that manner was reserved to the people of the United States. True, the U.S. experience came early in the constitution-writing enterprise, and accumulated wisdom is—one might think—more widely available today than it was in 1787. And yet one might reflect as well on the fact that Hamilton's characterization of the proposed U.S. Constitution was inaccurate even when it was offered: The Constitution's drafters embedded a large number of essentially unprincipled compromises in the document they forwarded to the people for ratification, occasionally but not always dressing them up in the garments of "reflection and choice" as a tactic aimed at inducing support for the proposal.

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1. THE FEDERALIST NO.1, at 1 (Alexander Hamilton) (Terence Ball ed., Cambridge Univ. Press 2003).

My aim in this short Essay is to revive Hamilton's qualification, shorn of course of its ethnocentricity. I suggest that what primarily determines the content of constitutions are the intensely local political considerations "on the ground" when the constitution is drafted,<sup>2</sup> and therefore that normative recommendations about what "should" be included in a constitution or constitution-making process are largely pointless.<sup>3</sup> Scholars can accumulate information about constitutions and their drafting and try to draw inferences about what will work. Yet, predicating normative advice on such studies is hazardous at best.<sup>4</sup> The number of observations—examples used to generate broader propositions—in the studies are inevitably small.<sup>5</sup> Perhaps they can support conclusions that are statistically significant, but, as serious scholars understand, statistical significance is not the same as social significance.

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2. This Essay is limited to the subject of this Symposium—constitution drafting in post-conflict situations where conflict between contending parties—typically, supporters of the prior regime and insurgents who achieved enough success to force negotiations—persists in the constitution-drafting process even if it has diminished substantially in other venues. *See infra* text accompanying notes 68-70.

3. For a similar expression of skepticism, see Heinz Klug, *Constitution-making, Democracy and the "Civilizing" of Irreconcilable Conflict: What Might We Learn from the South African Miracle?*, 25 WIS. INT'L L.J. 269 (2007). *See also id.* at 270-71:

[M]y methodological claim [is] that learning from deeply textured examples is more useful than the rigid application of models that may exacerbate existing conflicts.... [T]he advisor or informed participant must be constantly aware of the danger that they or other participants in any particular transitional process will transform a context-laden example into a model they wish to advance in order to achieve a specific advantage or strategic goal in the inevitably difficult process of negotiating a new dispensation.

4. I regard this Essay as in the tradition of David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, although based on less personal involvement in the advice-giving project.

5. Donald Lutz, whose empirical studies use around eighty observations, cautions against using such studies "to provide a master plan or a set of blueprints":

There are too many variables, most of which are not susceptible to human control; ... the connections between independent and dependent variables are often so imperceptible and far removed that they cannot be effectively utilized; ... and the human ability to create and learn new responses can make formerly important variables irrelevant, and attempts at control counterproductive.

DONALD S. LUTZ, *PRINCIPLES OF CONSTITUTIONAL DESIGN* 19 (2006); *see also id.* at 183 ("Constitutionalism and constitutional design are not defined by some set of principles that can be ... mechanically applied.").

In addition, normative advice will often have something like what Adrian Vermeule calls a “self-defeating” character.<sup>6</sup> Effective advice must be compatible with the political incentives that the advice receivers have. Yet those same incentives operate to induce the advice receivers to search for solutions to their political problems; for example, for institutional designs on which they and their opponents can agree. One has to wonder whether external advisors or expert participants can bring to the attention of politically significant figures information that was not already available to them,<sup>7</sup> or that, if previously unavailable, will be fed into the local political context as the basis for rational deliberation rather than strategic maneuvering.<sup>8</sup> I proceed anecdotally, with a series of informal examples designed as provocations, although each is based on evidence.<sup>9</sup>

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6. Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 *FORDHAM L. REV.* 631, 631 (2006).

7. In a comment made at the Symposium at which this Essay was presented in draft form, Vicki Jackson observed that there have been innovations in constitutional design in recent years, and that some participants in a particular constitution-making process may be unaware of these new possibilities. One example is weak-form judicial review; another is the use of nondomestic judges on domestic constitutional courts in the aftermath of conflicts leaving each side suspicious of anyone associated with the other. I regard this as suggesting some information-provision possibilities for external advice givers. In addition, in some polities, expertise might be quite thin. Professional elites may not exist in substantial numbers, or may remain in exile during the constitution-making process, or may be available disproportionately to one side in the discussions. Local elites may not have a sufficiently wide knowledge base about institutional solutions to the political problems they face. Eventually, though, and I think in most real-world settings, there is a great deal of common knowledge available to the domestic participants without prodding from outside advisors.

8. One can offer normative design advice on quite a high level of abstraction. Something like this—“Make sure that the institutions you create give those who lose particular political contests incentives to continue to engage in political contention over other issues”—is going to be good advice generally, although even here I would wonder about its force if the particular contest at issue is one that the losing side believes to be essential to its continued existence. But this advice is unlikely to provide much guidance on questions about the specific structure of the legislative and executive branches.

9. I should emphasize that my position is one of skepticism, not of opposition. I do not rule out the possibility that normative advice giving might sometimes be helpful. Perhaps my skepticism could be taken as a suggestion for a different research project: not an inquiry into what works well and what works badly, but into the conditions under which advice is profitably taken, under which it is taken and transformed, and under which it is simply ignored.

## I. AN INTRODUCTORY EXAMPLE AND SOME COMMENTS ON WHY ADVICE IS SOUGHT AND GIVEN

A useful starting point is the argument made by Cass Sunstein in the early 1990s, with reference to the ongoing processes of constitutional drafting and development in Central and Eastern Europe.<sup>10</sup> Sunstein argued that the new constitutions in those nations should not include protections for social and economic rights.<sup>11</sup> Sunstein began with the assumption that new democracies had to enforce the first- and second-generation rights included in their constitutions through the courts, and he worried that citizens would not be able to distinguish between those rights and the third-generation social and economic rights.<sup>12</sup> It followed, Sunstein believed, that constitutional courts would have to enforce constitutionally protected social and economic rights.<sup>13</sup>

Sunstein's argument continued with the point that constitutional courts would either take those protections seriously or they would not, and whichever course the nation followed posed a danger to the successful transition to a market-oriented democracy.<sup>14</sup> If constitutional courts took the protections seriously, there would be two adverse consequences. First, enforcement of social and economic rights—for example, rights to a decent wage or to decent hous-

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10. See Cass R. Sunstein, *Against Positive Rights*, in WESTERN RIGHTS? POST-COMMUNIST APPLICATION 225, 225-32 (András Sajó ed., 1996) [hereinafter Sunstein, *Against Positive Rights*]. An earlier version of the argument appeared in Cass Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35 (1993); see also Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 275 (Sanford Levinson ed., 1995) (discussing the effects of amendment processes on the citizenry's sense of political efficacy).

11. See Sunstein, *Against Positive Rights*, *supra* note 10, at 225.

12. *Id.* at 229-30. Terminology here is sometimes a problem. By "first- and second-generation rights," I mean the rights to civil and political participation, protected in classical liberal political theory, bolstered by guarantees of equality that were often lacking when the basic rights were first protected. By "third-generation rights," I mean social and economic rights, but I do not exclude cultural rights from that category because, at least for present purposes, nothing turns on whether cultural rights are included or excluded from the category.

13. See *id.* at 229 (stating that it is "unrealistic to expect courts to enforce many positive rights").

14. See *id.* at 228 (noting that courts would have to oversee labor markets to enforce right-to-work laws).

ing—would interfere with the transition to a market economy, in which some would inevitably find themselves with unattractive jobs and bad housing, because of the interaction among their human-capital endowments, their choices, and the market demand for labor.<sup>15</sup> Second, such enforcement would interfere with the development of a sense of democratic efficacy within a populace that had, for several generations, been denied the power to affect economic outcomes through political action. Enforcing social and economic rights would shift power from the people's representatives to the courts.<sup>16</sup>

Suppose, though, that constitutional courts did not take social and economic rights seriously. Again, there might be two adverse consequences. Within the court system as a whole, judges might observe that the constitutionally guaranteed social and economic rights had no substantial legal effects, and might conclude that, as a matter of law, the constitutionally guaranteed first- and second-generation rights should have exactly the same legal status—that is, should also have no substantial legal effect.<sup>17</sup> And within the populace the nonenforcement of textually guaranteed social and economic rights would perpetuate the cynical view, built up over prior generations, that constitutions were merely paper, having nothing to do with the lives people actually led.<sup>18</sup>

Constitution drafters in Central and Eastern Europe did not take Sunstein's advice. Guarantees of social and economic rights were included in essentially all the constitutions adopted in the 1990s.<sup>19</sup> With what effects? None whatever—or at least no systematic effects. Some nations in Central and Eastern Europe made the dual transition to markets and democracy relatively easily, others with more difficulty, and on a few the jury is still out. The one thing we know, though, is that the inclusion of social and economic rights in a nation's constitution had none of the systematic effects that Sunstein predicted.

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15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.* at 229.

19. *See, e.g.*, BULG. CONST. art. 48 (guaranteeing a right to work, safe working conditions, and a minimum wage); HUNG. CONST. art. 70/B (guaranteeing a right to work and paid holidays); SLOVK. CONST. art. 35(3) (guaranteeing all citizens the right to work).

What can we conclude from this example? I offer one normative and one positive observation. Sunstein was mistaken in part because of a failure of imagination. Writing in the early 1990s, he assumed that constitutional courts would have to engage in what I have called strong-form judicial review, in which judicial orders with respect to social and economic rights are strongly prescriptive and detailed.<sup>20</sup> Constitutional designers and implementers, including constitutional courts, developed alternative forms of judicial review and implemented them in the context of social and economic rights.<sup>21</sup> It turned out that constitutional courts *could* take social and economic rights seriously without inevitably interfering with either the transition to a market economy or the development of a sense of political efficacy among the citizenry. The more general point here is that normative advice is inevitably predicated on how constitutional designs have worked, and it may turn out that constitutional designers and implementers are more ingenious than one might have thought.

The positive point is that Sunstein's advice was basically irrelevant to his seemingly intended audience. Any constitution adopted in the 1990s would have guarantees of social and economic rights no matter what a normative advice giver said. Throughout Europe—and including Central and Eastern Europe—social democratic ideas had penetrated deeply into constitutional consciousness. Social democratic, Christian democratic, and Communist parties had made the language of social and economic rights common currency in the political arena. Proposing to omit guarantees of social and economic rights would have been understood as proposing to return to the late nineteenth century, not as proposing to join the twentieth. International instruments, which were generally

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20. For my most complete discussion of this assumption and related issues, see MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

21. For an important discussion dealing with Hungary, see Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921, 1941-49 (2004). The case of South Africa is more widely discussed. See, e.g., Mark Tushnet, *Welfare Rights and Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1903-08 (2004) (explaining that the celebrated case of *Government of the Republic of South Africa v. Brootboom* provides a good example of the constitutional court rejecting one version of strong substantive rights). Sunstein acknowledged that the development of weak-form review cast some doubt on his earlier argument in CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 236-37 (2001).

characterized as part of the new law of human rights, protected social and economic rights.<sup>22</sup> Perhaps only someone from the United States, with its weak social democratic tradition,<sup>23</sup> could think that new constitutions could actually omit protections for social and economic rights. The precise contours of politics varied from nation to nation, of course, but everywhere the political context was such that new constitutions would include such protections.

Taking this anecdote as a starting point, I now speculate about why advice of this sort is sought and given. We should think about both supply and demand. The supply side is, I think, rather uninteresting. Participating in constitution-drafting projects is intrinsically interesting to scholars of constitutional law, and opportunities to do so arise infrequently. And there is always the psychic charge that comes with the possibility of being regarded as a James Madison for our times. The institutions that finance scholars' advice giving may do so for purely academic reasons, to gain credibility within the scholars' own nations, or—more interestingly—to gain influence in the nation receiving the advice. This last interest may be in influencing the shape of the new constitution or in gaining some credit for assisting in creating the constitution, to be cashed in later.

On the demand side, we should distinguish between *external* demand, that is, demand from non-domestic participants that the domestic constitution makers consult external experts, and *internal* demand. I include within the category of “external” demand, demand nominally from domestic participants induced by non-domestic forces.<sup>24</sup> In many situations, external forces—nations such as the United States, which are important sources of external capital, and organizations such as the United Nations—think it

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22. According to the United Nations High Commissioner on Human Rights, “[t]here are nine core international human rights treaties,” one of which is the International Covenant on Economic, Social and Cultural Rights. See Office of the United Nations High Commissioner for Human Rights, Human Rights Bodies, <http://www.ohchr.org/EN/HRBodies?Pages?HumanRightsBodies.aspx> (last visited Feb. 15, 2008).

23. TUSHNET, *supra* note 20, at 228.

24. For a more elaborate typology, developed largely though not exclusively to assist in assessing the normative validity of constitutions drafted under external influence, see Philipp Dann & Zaid Al-Ali, *The Internationalized Pouvoir Constituant—Constitution-Making Under External Influence in Iraq, Sudan and East Timor*, in 10 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 423 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2006).

important that a new domestic constitution have input from external advice givers.<sup>25</sup> Why they do so is irrelevant. Satisfying their desires can have real payoffs. Some may be literal payoffs, if the external forces are willing to provide material support to the new government only if its constitution is drafted with external advice. Others may be less tangible, such as enhanced credibility for the new government on the international scene.

An interest in credibility may create some internal demand as well. Political elites who agree to deals embedded in a proposed constitution may be able to pacify some domestic opposition by pointing to the fact that the deals had the endorsement of, or perhaps even were suggested by, external advisors—and were not, in particular, the result of self-dealing by the constitution drafters alone. At the same time, though, provisions developed under the eye of or attributed to external advisors might have *less* credibility than purely domestic provisions.<sup>26</sup> Suspicious citizens, and political leaders who believe that they will do worse under the proposed constitution than under other possible designs (or if the status quo persists), may see the external advisors as sources of external influence.<sup>27</sup> These groups may believe that the advisors work for some foreign entity, and that the provisions they propose or endorse serve the interests of their masters.<sup>28</sup> And this belief may be well-founded, given the possibility that the advice is being supplied precisely in order to gain influence.

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25. At the extreme, external “advice” can take the form of imposition by external forces, such as an occupying power. For a discussion of the distinction between “heteronomous” (that is, imposed) and “autonomous” constitutions, see Jean L. Cohen, *The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for “Interim Occupations,”* 51 N.Y.L. SCH. L. REV. 496 (2006-2007). Cohen treats these as dichotomous categories, *see id.* at 498 n.2, but it is not incompatible with her analysis to treat them as lying at the ends of a continuum.

26. For some examples, see Dann & Al-Ali, *supra* note 24, at 457-60.

27. *Id.*

28. My personal anecdotal support for this proposition comes from a consultation in which I participated on the development of the first post-Ceausescu constitution for Romania. The group of consultants was sponsored by the American Bar Association’s Central and Eastern Law Initiative. At a press briefing, the group was asked, among other things, questions whose clear subtexts were, “Are you shills for the United States government?” and “Are you shills for the Romanian Communist Party?” *See also id.* (discussing impact of external advisors).



## II. PROBLEMS WITH ADVICE ABOUT SUBSTANCE AND STRUCTURE

The failure of imagination about constitutional design possibilities has a cousin—the recommendation that constitution designers include specific institutional and substantive provisions, identified at such a high level of generality that the recommendation can be accepted without consequence—by which I mean, without adverse consequences to any politically significant element in the constitution-making process. Here the advice will be followed, but only because doing so is free.<sup>29</sup>

Consider two topics for constitutional design, one substantive and one institutional. As with social and economic rights, modern constitutions will include protections for first- and second-generation rights, such as those included in the International Covenant on Civil and Political Rights.<sup>30</sup> Yet including such rights in a constitution tells one essentially nothing about whether a society will actually have a robust culture of free speech or equality. The reason is, in part, that some constitutions are simply shams.<sup>31</sup> Whether a constitutional provision has life on the ground depends not on what the constitution's text guarantees but rather on whether the political forces in the society are arrayed in a way that gives politically significant figures an interest in assuring that the rights are respected. Even where constitutions are not shams, though, the range of permissible interpretations of first- and second-generation rights is wide enough to encompass quite large variations in actual behavior.<sup>32</sup>

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29. If I knew enough economics, I would describe the advice to which I am referring as “cheap talk.”

30. *See, e.g.*, International Covenant on Civil and Political Rights (ICCPR) art. 19(2), Dec. 19, 1966, 999 U.N.T.S. 171, 178 (guaranteeing to all the right to freedom of expression).

31. *See* Charles M. Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa*, 55 AM. J. COMP. L. 1, 20 (2007) (noting how the lack of independent review of laws leads to sham constitutions).

32. Consider, for example, that the general limitations clause of the Canadian Charter of Rights guarantees rights subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Canadian Charter of Rights and Freedoms, § 1, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.). The Canadian Supreme Court has interpreted this clause in a manner that reduces the number of situations in which rights restrictions are constitutionally permissible,

Perhaps structural provisions are different. With respect to judicial review, however, I am skeptical. In the modern world constitutions will almost inevitably include some form of constitutional review.<sup>33</sup> We know, though, that the design possibilities are quite large. Since the early years of the twentieth century some of the design issues have been apparent: Should the constitutional court be specialized in constitutional law, or a generalist court with jurisdiction over constitutional questions as well as other matters? Should constitutional review be centralized in a constitutional court, or diffused throughout the judicial system? Should constitutional review be case-specific only, or should there be some sort of advisory jurisdiction? If there is an advisory jurisdiction, should it be the exclusive mode of constitutional review? How many judges should sit on the constitutional court, and how long should their tenure be? And, since the late twentieth century, a new question has been added: Should constitutional review be strong-form, on the model of the United States and Germany, or weak-form, on the model of Canada and Great Britain?

I am similarly skeptical with respect to the separation of powers structure. An advisor can certainly note that contemporary constitutions ought to be committed to some form of separation of powers.<sup>34</sup> But the separation of powers comes in various large-scale forms. In

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but other, less protective interpretations are clearly possible. *See* R. v. Oakes, [1986] S.C.R. 103 (Can.); *see also* ICCPR art. 19 (3), *supra* note 30, at 178, which qualifies the right to free expression in these terms:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

33. Systems of pure parliamentary supremacy are clearly in retreat, with New Zealand, Great Britain, and Israel all having instituted some form of judicial review since 1990. *See* Gordon Silverstein, *Sequencing the DNA of Comparative Constitutionalism: A Thought Experiment*, 65 MD. L. REV. 49, 49 & n.2 (2006). Only Australia holds out. *See* Miguel Schor, *Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty*, 16 MINN. J. INT'L L. 61, 101 n.249 (2007). I put aside constitutional revision processes in authoritarian regimes such as China.

34. Even reasonably pure parliamentary systems can incorporate important separation of powers elements. For a discussion, see Bruce A. Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000); *see also* LUTZ, *supra* note 5, at 109-10 (describing common methods of modifying parliamentarism to incorporate some separation of powers).

addition, nearly all advisors would agree that modest departures from pure separation of powers principles—the allocation of a concededly legislative power to the executive, for example—are sometimes acceptable and even desirable.<sup>35</sup> Even more, sometimes people will disagree over the basic characterization of a power, and so over its proper allocation.<sup>36</sup>

Proponents of specific choices will offer reasons for their preferred choice. Those reasons will have two characteristics. First, they will almost certainly be connected, I suspect fairly strongly, to the nation's legal tradition. In the civilian tradition, legal interpretation is conceptualized as far more formal and deductive than it is in the common law tradition.<sup>37</sup> That conceptualization has generated a sense in those who design constitutions in nations with civilian traditions that constitutional review should be concentrated in a constitutional court whose judges will be chosen in a way to make them at least somewhat more purposive and less deductive than the judges in the ordinary courts.<sup>38</sup> Reflection and choice play a smaller role than tradition, and advice that is in tension with tradition may have little purchase.

Second, the reasons offered to explain design choices will generally be cast in terms of the consequences of one or the other choice. Yet, once consequences are in the picture, so is politics. Among the things on which constitution makers will reflect are possible outcomes of the controversies they have in mind. True, they are designing a constitution that they hope will have some staying power and will allow the nation's institutions to address problems of which the designers are at present unaware. But they also know

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35. For example, the U.S. separation of powers system departs from purity in the President's power to veto legislation, which is the allocation of a legislative power to the executive, and in the Senate's role in the appointment of executive officials. *See* U.S. CONST. art. I, § 7; U.S. CONST. art. II, § 2.

36. For example, the majority in *INS v. Chadha*, 462 U.S. 919, 924, 953 n.16 (1983), characterized the power to waive a statutory requirement in a specific case where "extreme hardship" was determined as an executive power, while Justice Powell characterized it as a judicial one. *Id.* at 960 (Powell, J., concurring).

37. I emphasize that my concern here is with conceptualization, not reality.

38. This is only a sense, or what literary theorists might call an "elective affinity." The Venezuelan constitutional scholar Allan R. Brewer-Carías has argued in great detail that essentially every design choice can fit into both the common law and the civilian traditions. *See* ALLAN R. BREWER-CARÍAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* 128, 186 (1989).

that the government they establish will have to face a number of specific questions (varying, of course, from nation to nation). And constitution makers will have different views on what the right resolution of those questions should be. They will therefore speculate about whether one or another constitutional design choice will make it more or less likely that their position on those contentious, immediate questions will prevail.<sup>39</sup>

These speculations will shape the design choices they make—or on which they compromise. Perhaps this is a point at which advice givers might profitably intervene with some suggestions. Suppose one politically significant group prefers design choice A over design choice B, which an opposing group supports. Because the groups have settled on design choices with an eye toward the consequences—the first group thinks that it is going to win more under choice A than B, while the other makes exactly the reverse prediction—they might get stuck. An advice giver might offer them design choice C, observing that each has a “good enough” chance to prevail on a range of important issues under C,<sup>40</sup> that overcoming the current impasse between A and B is really important *to them*, and that—perhaps after the constitution is adopted—each side can try to manipulate structure C to gain a more permanent advantage.<sup>41</sup> Here, the advice giver acts as a problem solver, offering possible solutions to people who might not be able to devise their own solutions because they are blinded by their prior commitments.<sup>42</sup>

I would not rule out this role for normative advice giving, but I would emphasize several of its characteristics. First, the claim that

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39. Again, I emphasize that long-term considerations drop out of the calculation because the constitution makers do not know what issues the nation will face in the future, or what their positions would be on those unknown issues, or how particular design choices will affect the outcomes of those issues. See LUTZ, *supra* note 5, at 94-95 (noting the imperfect information faced by constitution makers and the conflict between short-term and long-term interests).

40. I draw the term from BRUNO BETTELHEIM, *A GOOD ENOUGH PARENT: A BOOK ON CHILD-REARING* (1987), without intending to endorse anything other than the idea that doing well enough is often better than trying to do the best that one hopes for.

41. See LUTZ, *supra* note 5, at 225; see also Alicia L. Bannon, Note, *Designing a Constitution-Drafting Process: Lessons from Kenya*, 116 YALE L.J. 1824, 1849 (2007) (discussing ex post changes to Kenya's constitutional review process).

42. Innovations in constitutional design, such as those mentioned in note 7, *supra*, are candidates for this form of advice giving.

each side has a good enough chance to prevail has to be credible to both sides.<sup>43</sup> In some settings, one side might be quite skeptical,<sup>44</sup> particularly when it sees its adversary buying into the proposal.<sup>45</sup> Second, overcoming the impasse has to be more important than maintaining the status quo. This will not always be so. Third, and probably most important for present purposes, choice C has to be something that the contending parties would not come up with on their own. It must be something outside their initial vision of possible design choices. And here, I think, there may be two difficulties. I wonder whether there are any such choices in today's world. Political actors involved in the constitution-making process already have, I believe, quite a wide vision. It is unclear to me what an outsider can offer.<sup>46</sup> In addition, the very fact that a choice is offered by an outsider might have either good effects—because the idea comes from a neutral as between the contending forces—or bad ones. The bad effects would arise when outsiders are viewed as partisan (notwithstanding the subjective views of the outsiders).<sup>47</sup>

An example is provided by the question, which all contemporary constitutional designers must confront, of the legislature's size.<sup>48</sup> From early on it has been clear that a legislature should be neither too large nor too small, because in either case the legislative process is likely to be dominated by a small group—in the latter case by the entire small legislature, and in the former by the leadership group that will inevitably emerge to manage the massive legislature's

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43. See Andrew Arato, *Post-Sovereign Constitution-Making and Its Pathology in Iraq*, 51 N.Y.L. SCH. L. REV. 534, 542 (2006-2007) (“[T]he paradigm of constitution-making depends on the coordination and the compliance of many instances, and of course mutual trust ....”).

44. See *id.* at 548 (noting the mistrust among groups while drafting the Iraqi constitution).

45. The thought would be something like this: If my adversaries think they have a good enough chance to prevail, perhaps they know something I don't about how this institution will operate. I *think* I have a good enough chance to prevail, but maybe they are right in thinking that they have a better chance—in which case I ought to withhold my consent.

46. There will often be domestic legal experts that constitution drafters call upon, who may share much of the knowledge that external advisors possess.

47. I believe that some participants involved in contemporary post-conflict constitution-making projects are unlikely to consider any advice from an American as neutral—even when the advice is from a scholar formally unaffiliated with the government of the United States. See, e.g., Arato, *supra* note 43, at 457-58 (discussing the “pathology of illegitimacy” resulting from the American influence during the construction of Iraq's interim constitution).

48. See LUTZ, *supra* note 5, at 221 (noting that empirical evidence suggests legislature size has some “underlying logic”).

operations.<sup>49</sup> It also seems to be an empirically verifiable fact that legislative size tends to be a close approximation of the cube root of a nation's population.<sup>50</sup> I suspect that an external advisor who recommended that the legislature's size be set at that figure would be regarded as a lunatic.<sup>51</sup> Still, sometimes an advisor observing the course of discussions of legislative size might observe that those discussions seemed to be converging on a figure far removed from the cube root of the nation's population. The advisor might point out that other constitution designers seemed to think the proposed size was too small or too large. Note as well that the cube-root "guideline" is not something that is likely to jump out during deliberations, nor is it likely to be common knowledge.<sup>52</sup> Thus, the external advisor's comment might push the constitution makers to modify their positions.

Still, it seems worth noting that the drafters almost certainly would be converging on a "mis-sized" legislature for local political reasons, and that bringing the cube-root guideline into the discussion would probably give some participants a new argument for the positions they had already been asserting.<sup>53</sup> Further, as Professor Lutz notes, the cube-root guideline appears to be a natural outgrowth of deliberations over legislative size, not a rationally prescribed rule.<sup>54</sup> He explains that "those who design constitutions *unconsciously* struggle toward a similar sense of what is fair and workable in a constitutional republic."<sup>55</sup> Bringing this knowledge into consciousness might impair its utility in the design process.<sup>56</sup>

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49. *Id.* at 101-02.

50. *See id.* (describing the evidence).

51. *See id.* at 233 ("There is no inherent rationality to following the cube root rule.").

52. *See id.* at 102.

53. *See id.* at 233-34.

54. *See id.* at 233.

55. *Id.* at 102 (emphasis added); *see also id.* at 234 (describing the outcome as "an impressively consistent logic-in-use").

56. Lutz provides similar examples, subject to similar comments. He observes that short constitutions tend to be difficult to amend because they are "simple framework document[s]," while long constitutions tend to be easier to amend because they contain detailed prescriptions that can be made obsolete by social and economic developments. *Id.* at 222-23. From this we might derive the prescription: "Make your constitution relatively easy to amend if you are moving in the direction of a long constitution." I suspect that this is a common sense prescription. Even if it is something that an advisor can bring to a designer's attention, it tells them almost nothing about exactly how easy amendment should be.

The most general of my points is this: participants in the constitution-making process have goals that partially converge and partially diverge.<sup>57</sup> With varying degrees of commitment, they want to get a constitution adopted. Then, with the constitution in place, they want their own particular policies to be adopted. With respect to each component of constitutional design, each participant will make some judgment about the degree to which a particular design will make more or less likely that its preferred policies will be adopted. What can an outside advisor contribute to the design process? Advice to one participant that a design feature that has been overlooked will increase the chance that the participant's preferred policy will be adopted actually is unhelpful because that very thing makes the feature less attractive to other participants.

Sometimes the advisor might be able to identify a design alternative that makes it *less* likely than the alternatives on the table that any participant will achieve what it wants, but nonetheless makes it possible for each participant to anticipate winning what it wants with some probability. This kind of advice might be helpful when achieving an agreement is more desirable than ensuring substantive outcomes after the constitution is adopted. It is not that the feature is a component of good government in some general sense but rather that its adoption will solve an immediate political problem without guaranteeing future political defeats.<sup>58</sup>

Yet, to the extent that politics is what matters, present and future, I am quite skeptical about the proposition that outsiders will be able to improve on the calculations internal participants already make. Perhaps they can bring into the discussion facts about how design features are likely to work, which will assist the participants in their political calculations. Also, perhaps those facts will not be common knowledge, and the participants will actually take the outsider's factual presentation seriously. The conditions for success seem to me rather restrictive, though.

A final perspective on the problems discussed here comes from thinking about the implications of a quite minimalist view of constitutionalism's requirements. Under this minimalist view, constitutionalism requires only "(a) regular, open, and competitive

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57. *See id.* at 225.

58. *See* Arato, *supra* note 43, at 538.

elections; (b) freedoms of speech and press; and (c) well-functioning, relatively independent courts.”<sup>59</sup> It seems clear that these requirements can be met by a huge number of institutional designs, that a large number of those institutional designs are common knowledge among all constitution designers, and that these requirements can be met only when there is political support for constitutionalism itself. In other words, if the political system is ready to accept constitutionalism, the particulars of constitutional design do not matter, and so neither will normative constitutional advice giving. Similarly, if the political system is *not* ready to accept constitutionalism, the particulars of constitutional design do not matter, and neither will normative constitutional advice giving.

As Learned Hand said, “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.”<sup>60</sup> In the United States, Hand’s comment is typically offered as a caution against relying too heavily on judicial review as a mechanism for avoiding the implementation of unconstitutional legislation. Hand, however, was addressing constitutionalism itself, and perhaps all I have done is flesh out some reasons for thinking that he was right.

### III. PROBLEMS WITH ADVICE ABOUT PROCESS

I turn now from choices with respect to the institutions of an ongoing political system to choices with respect to the constitution-making process itself. At a fairly high level of abstraction, the advice is straightforward: Design the process of constitution making and adoption to ensure that all elites representing political forces with significant amounts of power—mostly power to disrupt arrangements of which they disapprove—end up committed to expending a reasonable amount of effort to make the arrangements work after they go into effect.<sup>61</sup> I will call this ensuring buy-in by political

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59. VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 459-60 (2d ed. 2006).

60. LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 190 (Irving Dilliard ed., 3d ed. 1960).

61. See BREWER-CARÍAS, *supra* note 38, at 63 (noting that the U.S. Constitution rose from a series of compromises between the ruling classes and the interests of democracy).



elites. Secondly, the advice is: Do what you can to get similar buy-in from the population generally.<sup>62</sup>

Of course, the difficulty lies in giving more content to these prescriptions. The mechanisms of gaining elite buy-in are quite varied. Discussion in parliament, extra-parliamentary round table negotiations, and development of constitutional drafts by experts for discussion in a constituent assembly, which itself can be selected in a wide variety of ways, are just a few of the available mechanisms.<sup>63</sup> Under some arrays of political power, almost anything will do. Under others, perhaps only one or two mechanisms will produce sufficient buy-in. The particular institutional mechanism for eliciting elite buy-in will depend quite heavily on the array of political forces on the ground.<sup>64</sup>

Consider, for example, two common situations. In the first situation—call it revolutionary transformation—the political elites, who previously controlled the nation, have been decisively defeated and have lost all political power. The most obvious example occurred in the United States, where the loyalist supporters of the prior regime fled the new nation in droves.<sup>65</sup> In such a situation, revolutionary leaders will bargain among themselves,<sup>66</sup> and will be unlikely to welcome, or even need, anything other than expert advice on technical details.<sup>67</sup>

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62. Buy-in by both elites and the population is likely to be increasingly difficult as the degree of heteronomy increases. See LUTZ, *supra* note 5, at 14 (noting the importance of popular consent).

63. Under what I suspect are unusual circumstances, elite buy-in might occur by means of ratification of an expert-drafted constitution in a popular referendum. See Arato, *supra* note 43, at 540.

64. For an argument that recent developments in constitution making have created a better model for eliciting the necessary buy-in, see *id.* at 539-40. Arato acknowledges that the model rests on a relatively small number of cases, and I would add that the apparent failure of the constitution-making process in Iraq seems to have multiple parents.

65. GORDON S. WOOD, *THE AMERICAN REVOLUTION: A HISTORY* 113 (Modern Library ed. 2002).

66. See BREWER-CARÍAS, *supra* note 38, at 63 (noting that the U.S. Constitution resulted from compromises among the former colonies).

67. By “technical details,” I mean such things as ensuring that the terms used in one provision are compatible with the terms used in another (whether compatibility lies in using the same terms or deliberately using different ones), that electoral timetables are coordinated in the way the drafters truly desire, and the like.

In the other common situation, elements of the prior regime retain significant power and must be accommodated. Here the negotiations will have to include these elements, as in South Africa and the roundtable negotiations in Central and Eastern Europe in the early 1990s.<sup>68</sup> This is also the case with many nominally imposed constitutions, such as the one used to absorb the German Democratic Republic (GDR) into the Federal Republic of Germany (FRG).<sup>69</sup> The FRG had to accommodate some matters of concern to the population in the former GDR, even though the GDR's political collapse was complete. In Japan, elite buy-in appears to have occurred through the process of getting the Japanese parliament to endorse—as truly Japanese—the translation of an American-drafted constitution.<sup>70</sup>

The examples of Germany and Japan suggest the difficulty of moving more than a step or two away from the most general prescriptions. I doubt that anyone would have thought, before the event, that it would matter as much as it seems to have mattered that the Japanese parliament had to translate the draft constitution from English.<sup>71</sup> Imagine a conversation within the U.S. occupying forces: “We’ve drafted a constitution in English. Let’s translate it into Japanese and then secure buy-in by having the Japanese themselves ratify the constitution.” Would anyone have thought to say, “Wait a minute. We can get better buy-in by having them translate it themselves.”? Translation, which certainly looks like a mainly technical enterprise, turned out to be politically significant in ways that a normative advice giver probably would not have anticipated.<sup>72</sup>

Getting popular buy-in is, as I have suggested, secondary. Its absence will matter only if some political leader sees an opportunity for political gain in appealing to members of the public who would

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68. See Arato, *supra* note 43, at 538.

69. On the integration of the German Democratic Republic (GDR) and the Federal Republic of Germany (FRG), see Inga Markovits, *Constitution Making After National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1307 (2008).

70. That is how I interpret the narrative offered in RAY A. MOORE & DONALD L. ROBINSON, *PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR* 116-18 (2002).

71. See *id.*

72. See *id.*

have not bought in. In the short run, if political elites have bought in, the chance that such a leader will emerge is small, though not zero. The opportunist leader may have been biding his or her time, or may have explicitly refused to buy in to the new constitution precisely to preserve the possibility of mobilizing the public against it. That the possibility is not zero counsels in favor of gaining public buy-in; that the possibility is likely to be small counsels in favor of not expending enormous energy on doing so.<sup>73</sup>

Indeed, that seems to be the pattern. Modern constitution making appears to require some form of popular ratification of a proposed constitution.<sup>74</sup> The ratification may take the form of an up-or-down referendum. An alternative, recent practice in several nations, including South Africa, has been widely admired by commentators.<sup>75</sup> A constitution is drafted by experts and debated and modified by a mechanism that aims at ensuring elite buy-in. The proposed constitution is then widely circulated throughout the nation, with significant efforts made to educate the public about its content.<sup>76</sup> There are public discussions and some means by which members of the public can submit comments and suggestions for modification.<sup>77</sup> These suggestions are considered by some elite-dominated body, and then the constitution, put in final form, is submitted to the public for ratification.<sup>78</sup>

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73. See Bannon, *supra* note 41, at 1842, 1848 (summarizing the lessons learned from the drafting process in Kenya).

74. See JACKSON & TUSHNET, *supra* note 59, at 288-89. I note here the mixed pattern with respect to the proposed Treaty for a Constitution for Europe. Some nations regarded the proposal as a treaty, which it was in form, and used their regular methods of treaty ratification, that is, endorsement by the national legislature. Others regarded it as a proposed constitution, and sought popular ratification in referenda, even in nations where referenda are not a normal mode of law making. *EU Constitution: Where Member States Stand*, BBC NEWS, Mar. 25, 2007, available at <http://news.bbc.co.uk/2/hi/europe/3954327.stm>; *The Constitution Ratification*, [http://www.unizar.es/euroconstitucion/Treaties/Treaty\\_Const\\_Rat.htm](http://www.unizar.es/euroconstitucion/Treaties/Treaty_Const_Rat.htm) (last visited Feb. 21, 2008). I have qualified my assertion with the word "modern" to take into account the U.S. experience of ratification by special popularly elected assemblies in the states. Even there, the special elections generated some degree of popular buy-in.

75. For some sources, see JACKSON & TUSHNET, *supra* note 59, at 287-89.

76. See *id.* at 283, 287-88 (discussing the process in South Africa).

77. See *id.* at 287-88.

78. See *id.* at 277 (noting that constitutional referenda appear to be gaining in popularity).

These mechanisms do obtain some degree of public buy-in at relatively low cost.<sup>79</sup> The consultative processes have, I believe, generally resulted in no more than cosmetic changes to the proposed constitution. And the up-or-down referenda have been, I believe, basically rubber stamps.<sup>80</sup> These outcomes are entirely expectable. The initial constitutions, whether submitted to the consultative process or placed on the ballot directly, result from negotiations among political elites. If they have truly bought into their own proposals, they will be willing to make only cosmetic changes to their work.<sup>81</sup> Indeed, they are likely to campaign for the ratification of their work.<sup>82</sup> What makes them political elites is that, as a general matter, they can get their way in politics. “As a general matter” is not the same as “always,” though, and there is an ever-present possibility of slippage between the political elites who negotiated the proposed constitution and the public that is asked to ratify it. Here too, it is doubtful that an external advice giver will be in an especially good position—compared to a domestic analyst—both to observe slippage occurring and to caution, effectively, the political elites against the course they are pursuing.<sup>83</sup>

Before concluding, I think it useful to bring to the fore one theme in the preceding argument that deserves specific mention. Perhaps

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79. Public buy-in can come gradually, as the nation’s political experience generates confidence among the public that the original institutional design works reasonably well. Of course, governmental failures early on may lead the public to conclude that the constitution was badly designed from the outset. *See id.* at 290.

80. *See id.* at 288. *But see* Bannon, *supra* note 41, at 1845, 1869-70 (describing the rejection by referendum of a proposed constitutional revision in Kenya). My interpretation of the events Bannon describes is that the constitutional revision did not have sufficiently broad elite buy-in, and became a vehicle for the entrenchment of one of the opposing forces participating in the revision process.

81. Making some changes is probably a good idea. This shows the public that the consultation actually had some effect, albeit a modest one. The changes, however, are likely to be cosmetic because the elites will have already bought in to resolutions of their major differences and will be unlikely to want to reopen the discussions of important and contentious matters.

82. *See* Bannon, *supra* note 41, at 1845 (discussing a government campaign for ratification in Kenya).

83. Here my formulation is designed to deal with situations in which external advice givers see a train wreck about to occur (that is, observe the slippage as it occurs), and to express skepticism about the efficacy of pointing out to the elites that the train wreck is about to occur unless they change their course. *See* Arato, *supra* note 43, at 547; Bannon, *supra* note 41, at 1864-65.

an outsider can give advice, not on constitutional substance or processes for constitutional adoption, but on the processes for reaching agreement. Advisors who know something about negotiation, bargaining, and the like might be able to move negotiations forward, acting essentially as mediators do in nonjudicial dispute resolution processes. To the extent that the demand for advice is based on an interest in gaining legitimacy from consulting experts in constitutional law, the advisors must have that expertise as well.<sup>84</sup> Whether specialists in constitutional law as such have expertise as mediators is a separate question.<sup>85</sup>

#### CONCLUSION

I have sketched some reasons for skepticism about the proposition that external observers can offer normative advice to guide the “reason and choice” of contemporary constitution makers. Perhaps some negative recommendations are possible. I wonder whether the recommendations deal with matters of common knowledge among constitutional drafters and whether the advice will be taken in circumstances where bad ideas are on the table.

Consider two such recommendations. The first is that it is a dramatically bad idea to have a parliamentary system in which the prime minister is elected independently of the parliamentary majority.<sup>86</sup> The second is that it is a pretty bad idea to combine a

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84. See Bannon, *supra* note 41, at 1865-66.

85. Bannon's note deserves special mention here. *See id.* The author provides a careful analysis of the politics associated with the failed constitution-drafting process in Kenya. She identifies the political interests that were accommodated in the drafting process and explains how the accommodations that were reached contributed to the process's failures. She concludes with a series of recommendations that, if followed, might have led to a successful outcome. Her argument is carefully qualified but would be strengthened had she recognized the self-defeating character of her recommendations. For example, she recommends that national politicians be excluded from the drafting process. *Id.* at 1866-67. Sometimes that might be possible, but in the circumstances she describes, there were political reasons for their inclusion in the process. And, if a renewed process does exclude politicians, it will be because the contours of politics have changed, not because “reason and choice” dictate their exclusion.

86. Israel tried this for one election cycle and then abandoned the experiment. *Compare* Basic Law: The Government § 3(b), 1992, S.H. 1396, at 214, *available at* <http://www.mfa.gov.il/MFA/MFAArchive/1990-1995/Basic%20Law-%20The%20Government%20-1992-> (“The Prime Minister serves by virtue of his being elected in the national general elections,

strong president with an independently elected parliament chosen through proportional representation with a relatively low threshold for participation in parliament.<sup>87</sup> The difficulties with these designs are either obvious from the start, as with the separate election of a prime minister, which gives perverse incentives to voters concerned about the aggregation of power in one person's or party's hands, or from widely known experience.

Beyond the question of common knowledge, though, one has to wonder what the political circumstances are that produce an interest among political elites in advancing these bad ideas. Take the presidentialism scenario for example. The proposal might be on the table because there is one faction with a substantial plurality and a strong leader, and many other factions. The plurality faction may push for a strong presidency, anticipating that its leader, who genuinely does tower above other politicians, will be chosen as president. The other factions may want proportional representation in the legislature. Will the constitution drafters heed the advice that they are moving toward a bad design? Perhaps. But the political situation I have described, for example, will not change, and the drafters will search for close substitutes: a strong president with one or more independently elected vice-presidents who must approve major actions, for example. Yet, I am reasonably confident that, in the posited political circumstances, institutional variants that might be politically acceptable substitutes for the strong presidency are going to pose some of the same dangers and perhaps even to almost exactly the same degree.

Negative recommendations have their own peril. The intuition behind such recommendations is that the drafters of one constitution can learn from other people's mistakes. Indeed, this is true, in the sense that they do not make the same mistakes other people

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to be conducted on a direct, equal, and secret basis ..."), *with* Basic Law: The Government, 2001, S.H. 1780, at 158, *available at* [http://www.knesset.gov.il/laws/special/eng/basic14\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic14_eng.htm) (omitting that provision).

87. This is the lesson taught by Juan Linz's studies of presidentialism in Latin America. *See generally* JUAN J. LINZ & ARTURO VALENZUELA, *THE FAILURE OF PRESIDENTIAL DEMOCRACY: COMPARATIVE PERSPECTIVES* (1994). Sometimes the lesson is stated more broadly, as a proposition about presidentialism as such, or about combining presidentialism with a parliamentary system. The U.S. experience shows that the former version is overstated; the French experience shows that the latter is overstated.

have made. Instead, they make their own new mistakes. For example, they might forgo an institutional design on the ground that it worked badly elsewhere, when it might work reasonably well in one's own political circumstances. Accepting negative recommendations, that is, might be as bad as accepting positive ones.

To restate my overall theme: institutional design results far more from on-the-ground political circumstances than from reason and choice.<sup>88</sup> Normative advice giving might occasionally have some beneficial effects, but in general the advice will be dominated by politics. In our capacity as scholars, we are better off observing what happens as constitutions are designed and implemented and trying to figure out why what happens happens, rather than offering normative advice on good constitutional design.<sup>89</sup>

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88. See LUTZ, *supra* note 5, at 3.

89. Some scholars are participants in processes of constitutional design and should participate as political actors in those processes. At this point, of course, the argument becomes entirely reflexive: scholars offering normative design advice are intervening in a political process *as political actors*. Perhaps, then, all that I am asking is that such scholars be aware that their interventions are political and not merely technical.