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This paper constitutes a segment of a larger work in progress that focuses on founding, maintaining, and changing a constitutional democracy.2 Any merit the final book will have will be due in no small part to Harry Eckstein's encouragement, constructive criticism, and warm friendship.

My reasoning here is simple. I start from what I take as two plain facts of political life: First, the maintenance of any constitutional order whatsoever requires some constitutional interpretation; and, second, the complex normative bases of constitutional democracy cause this necessity to operate especially often. Next comes the gist of the paper, the argument that, in a constitutional democracy, interpreters must exercise a wide range of discretion that inevitably allows, in fact frequently requires, a degree of creativity that may change the constitutional order.3 Either through a series of patches or a single dramatic restyling, the effect of constitutional interpretation will sometimes help create a new order. Finally, I briefly discuss the problems for political stability that the necessity of creative interpretation poses, leaving to the chapter that follows in the book itself a fuller discussion of this issue.

Constitutions, Constitutional Orders, and Constitutional Democracy

A conventional way of categorizing constitutional development speaks of three stages: first, creating a constitutional order; next maintaining a constitutional order; and, third, changing a constitutional order. Alas, the real world seldom fits neatly into the sections of intellectual catalogues, and one of the sub-arguments of this paper is that this tripartite distinction, however plausible, convenient, and sometimes correct, can also be misleading. These processes blur at the edges.4 At one moment, maintaining a constitutional order may require preserving the status quo, at another moment changing it and by so doing re-create that order, at least partially. Indeed, we might apply Heraclitus' claim about bathing in rivers to constitutional orders: We never live under the same constitution for more than one crisis.5

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So far I have used three terms of art, *constitution*, *constitutional order*, and *constitutional democracy*. I should define and distinguish these and at least three others, a *constitutional text*, *constitutionism*, and *constitutionalism*. Narrowly construed, a *constitution* refers to a nation's arrangement of public offices and powers as well as the rights of individuals and groups. More broadly, as Aristotle came to use the word, a constitution signifies a way of political life, what modern theorists are apt to call a "constitutional order,"[6] which can vary from that of Mao's China or Stalin's Soviet Union, at one extreme, to such rather benign systems as those of Australia, Canada, the Federal Republic of Germany, and the United States.

A *constitutional text* identifies the document or documents that supposedly spell out the nation's basic political principles, institutional arrangements, modes of selecting public officials, and the rights and duties of private citizens. The contents of these texts vary as widely as does their authority. At one end of the spectrum we would again locate Stalin's constitutional script, a fig leaf, whose pietistic function was to hide the obscene phallus of brutal terror; at the opposite end would be the constitutional documents of countries such as France, India, Ireland, Italy, Japan, and Switzerland, whose terms public officials usually try to follow.

The awkward neologism *constitutionism* (my colleague Stanley N. Katz prefers "*faux* constitutionalism") refers to adherence to the terms of an existing constitutional text and/or the norms of that constitutional order. Because the basic values of both text and order can range from those of a totalitarian regime to those of a loose libertarian political system, officials of most governments can happily pretend to practice what they prefer to call *constitutionalism*, while in fact they are only following constitutionism, that is, being true to the principles of their own constitutional order.

The concept *constitutionalism*, however, differs from constitutionism in demanding more than adherence to *any* constitutional text or order. Constitutionalism is a normative political theory that endorses a special kind of constitutional order, one whose central principle is that every exercise of governmental power, whether representing the will of a single leader, an elite, or an overwhelming majority of citizens, is subject to important *substantive* as well as procedural limitations. Some constitutionalist theorists[7] contend that constitutionalism's central value is human dignity. On either premise, it follows that there are some things that government cannot do, no matter how faithfully it observes procedures specified by a constitutional text and a larger constitutional order, or even if its actions perfectly mirror the deliberate judgment of a charismatic *Führer*, benevolent junta, scientific elite, or the majority of voters. Obviously, this normative theory is incompatible with most forms of authoritarian government and, more generally, coexists uneasily with the notion of sovereignty, even that of "the people." The union of constitutionalism and representative democracy produces the new entity *constitutional democracy*. Its fundamental principle is that the people shall govern, but only in a manner limited by substantive as well as procedural restraints. This marriage begets severe tensions, as the ideals and institutions of constitutionalism try to tame the power of the people that democratic theory sanctifies.

Who Interprets?

A final definitional matter is important, especially for Americans who often assume that judges have a monopoly on constitutional interpretation. In fact, however, even in a constitutional democracy with a constitutional text and judicial review, all public officials sometimes interpret - and properly if not always correctly so-the constitution.8 Not only judges but also legislators interpret when they resolve constitutional doubts for or against a bill as do executive officials when they decide they can, or cannot, consistently with their oaths of office carry out a particular public policy. Even police officers engage in constitutional interpretation when they decide they can or cannot arrest and/or search a suspect. Moreover, leaders of interest groups frequently offer interpretations of the constitution, both to advance and defend their goals. Individual voters can also join in the interpretive process by taking the time before casting their ballots to learn about and judge the validity of specific items on candidates' platforms.

Indeed, the single most important piece of American constitutional interpretation was made by Abraham Lincoln in April, 1861 when he said: "I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual."9 This interpretation was not unreasonable, but neither was it obvious at that time. The constitutional document contained no such language. Among its express objectives was the creation of "a more perfect Union," not a "perfect union" and certainly not a *perpetual* union. That Lincoln's interpretation, as magnificent as modern Americans may deem it, was both contestable and contested was demonstrated by the ensuing four years of civil war; the outcome was a near thing. And the nation that emerged from this conflict was quite different from the (more or less) united states that entered it. Furthermore, one can argue that in 1936 the American electorate did its own constitutional interpretation. Despite massive judicial rejection of the New Deal as illegitimate, voters in 46 of the then 48 states re-elected Franklin Roosevelt by a landslide.

Nor is the United States unique. In 1990, Chancellor Helmut Kohl made one of the most important pieces of German constitutional interpretation when he decided that the country could be reunited by allowing East Germany to be absorbed into the Federal Republic under Article 23 of the Basic Law providing for the accession of new *Länder*. That interpretation meant that he and the leaders of the East Germans could negotiate the terms of reunification pretty much free from judicial oversight and also meant that the Basic Law, with only minor modifications, would continue in force over the newly unified nation. The alternative interpretation, more plausible from the document's plain words, would have been for Kohl to have invoked the provisions of Art. 146, and called for a national convention to create a new constitutional text to govern One Germany. This new agreement would have set the terms of reunification.10

Although we can make powerful arguments that, in a constitutional democracy, constitutional interpretation by whomever done should always be publicly announced and publicly justified, interpretations are often less formally made. They may even be done without interpreters being conscious that they are interpreting. When, for example, a legislator says she should not construe the constitution but is bound by what courts have said the constitution means, she has, by that very claim, engaged in constitutional interpretation: She has asserted that the constitution both gives judges such authority and

denies it to legislators. Of the constitutional texts with which I am familiar, only the German Basic Law comes close to so specifying, and even that document and its larger constitutional order stop quite a distance short of delegating interpretive sovereignty to judges.11 Indeed, the very definition of constitutional democracy precludes any institution from having complete control over determinations of what is and is not legitimate.

Constitutional Interpretation without a Constitutional Text

With terms defined and interpreters identified, we can sketch a plausible scenario and use it as an heuristic device. Let us assume that a new political system, a nascent constitutional democracy, has come into being, without pausing to question how that event came about. Let us also stipulate that the founders decided against drafting a constitutional text because they believed that they fashioned a set of formal governmental institutions and processes necessary for constitutional democracy to endure "for ages to come." They have created a parliamentary system based on the Westminster model, supplemented by a judiciary that, although independent, lacks the power of judicial review. These founders bet that their dominant national political culture(s) would so deeply respect the values of both constitutionalism and democracy as to protect rights at least as effectively as do the institutional arrangements of most constitutional democracies.12

Fulfilling some of the founders' hopes, the first parliament enacts a basic electoral law. It provides that MPs can serve for no more than five years, stipulates that every adult 18 and older can vote, protects freedom to discuss political issues in speech and writing, guards the rights to assemble and petition government, establishes political parties as quasi-governmental organizations, and specifies only minimal qualifications for citizens' standing as candidates for public office. Despite their conformity to democratic values, these arrangements will not automatically lay to rest questions about prudence that will confront choices among public policies. And, most assuredly, the most faithful observance of these or similar processes cannot extinguish questions of the legitimacy of all policies. People who agree that a particular policy would be effective may well doubt its validity under the complex of normative principles that underlie constitutional democracy. Thus, even without a constitutional text, constitutional interpretation will be necessary-and frequently so, for crises have a nasty habit of recurring in different forms. MPs are likely to disagree among themselves about the extent of their own rightful power, that is, about the limits that the norms of constitutionalist and democratic theory impose on their institution. And, outside of parliament, that debate is likely to rage with equal or greater fury as leaders of interest groups and parties out of power seize the opportunity to advance their causes.

As already noted, that a constitutional democracy gives an institution-in our example, parliament-the final decision (final, that is, until the next election) as to the extent of governmental authority cannot, by the very definitions of constitutionalism and democracy, mean that the institution has plenary authority. As a practical matter, it may have total power; but normatively it cannot have total authority.13 Acceptance of the proposition that any institution is may exercise utterly authoritative interpretation of the constitutional order would constitute normative suicide for a constitutional democracy.

Besides, such a statement is itself a piece, an enormously consequential piece, of constitutional interpretation.14 Because constitutionalism imposes serious substantive limits on power and because democracy demands that all citizens enjoy rights to full political participation, the nature of this polity sets significant, if somewhat indeterminate, limitations on governmental power. And that very fact ensures that issues of constitutionality-of legitimacy-will arise. A parliamentary decision, for example, that the most effective way to cope with an economic crisis is to freeze wages and postpone elections beyond the five-year maximum so as to prevent quick reversal would severely damage the political system's democratic credentials, even if parliament's policy were, in fact, the most efficacious way of dealing with the crisis.

This example is too easy. Most putative solutions to problems, such as, the extent to which parliament may regulate campaign financing, are likely to be much more complex. On the one hand, elections (or rather voters and/or candidates) can be bought, murdering democratic processes. On the other hand, money is necessary to publicize the virtues of parties, candidates, and their platforms as well as to expose opponents' sins. Therefore, citizens' rights to contribute money and candidates' rights to collect and spend money can be counted as important aspects of political participation, included in the rights that democratic theory requires a regime to respect. Thus, any answer to the problem of campaign financing raises intricate problems of constitutional interpretation. What really must be construed here, of course, are the demands of democratic theory, for, in a constitutional democracy, democratic theory forms one set of norms included in the constitutional order. With equal ease, one can also cite intelligent public policies that create equally complex problems for constitutionalism. For example, a statute that allowed police to arrest people on suspicion and detain them in order to do background checks might well most protect law-abiding citizens' rights to life, liberty, and property against criminals and so promote "domestic tranquillity." Such a law would also, however, restrict the liberty not only of criminals but also of some law-abiding citizens and raise serious questions about affronting human dignity.

Interpreting democratic or constitutional theory can seldom be a simple task, for there are many different versions of both competing for acceptance as authentic. Although they all share many principles as well as imprecisions in the statement of those principles, each variant tells a slightly different story about processes, institutions, and rights as well as about priorities among them. And, even within each incarnation, major and minor principles, instrumental and ultimate values, as well as processes and goals form intricate networks that can be woven together, not unlike the neutrons of unstable atoms, into a variety of patterns. Interpreting either of these political theories requires, as initial step, choosing which form of each theory to construe. And, always annoyingly present is the question of what mix of the two theories a particular polity has adopted. Like a new-born child, any given constitutional democracy represents only one of many possible combinations of its parents' genes; and, as with a child, development will be affected by the environment in which it lives.

Thus, even in the rather simple form of constitutional democracy we have postulated, MPs-and voters when they go to the polls to judge MPs' records-confront the classic first question of constitutional interpretation: **What** is it that I must interpret? And, because no version of either theory is likely to be completely articulated, would-be interpreters must often exercise their creative imaginations to deduce specific conclusions

from vague or unspoken major premises. Indeed, on occasion, interpreters may have to reason backward to retroduce major premises from specific conclusions. So, too, when interpreters consider the nature of the union of the two theories, the range of possibilities is wide and the necessity of creative imagination may be more pressing. In times of crisis or even after years of dealing with mundane issues, what is likely to emerge is a new, or at least revised, version of either constitutionalist or democratic theory or a new account of their mixture in this particular polity.

And there is no escape from the necessity of creative constitutional construction. When individual MPs or voters refuse to interpret, they permit other MPs, officials of other institutions, or individual voters to do the interpreting. In sum, a public official or private citizen of a constitutional democracy can abdicate his or her own interpretive power but neither singly nor collectively can they destroy the power itself or remove the necessity for its exercise.

Constitutional Interpretation with a Constitutional Text

Let us change the scenario slightly. Foreseeing the difficulties that would occur if serious problems were likely to force the polity to test a public policy's legitimacy against the abstract principles of two not always congruent political theories, the founders decide to draft a basic constitutional text.

They can, of course, utilize many models. First would be the American text of 1787-88 as amended, which speaks in magnificent generalities rather than with "the prolixity of a legal code."15 This sort of terse instrument is based on the belief that the "nature" of a basic constitutional document requires "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."16 Although there is something to be said for such a text's being intelligible to a wide popular audience, the capaciousness of the American model's language demands much (and frequent) interpretation. Clauses such as those prohibiting a state to deny "any person within its jurisdiction the equal protection of the law" or to take away a person's "life, liberty, or property, without due process of law," or forbidding Congress to take private property for public use "without just compensation" all cry out for interpretation, as does the Ninth Amendment's imperative statement that some enforceable norms exist "out there" beyond the text: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

At the other extreme lies the Indian constitutional document. Among its authors' goals was clarity through specificity; and, in the same sized print that would place the American text within a dozen pages, the Indian script's 395 major articles (with many sub-articles listed as A's and B's) and ten special schedules would consume more than 200 pages. Nevertheless, the newer document is replete with the same sorts of broadly phrased commands and prohibitions. For instance, Article 14 says that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Even more open-ended is Article 19's qualification to freedom of speech:

> *Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such*

law imposes reasonable restrictions on the exercise of the right conferred[17] by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to offence.

Perhaps more revealing of the interpretive problems is that specialists in constitutional law find the intricacies of the American system simple compared to those of India. Furthermore, while the American document has been amended only 27 times in 212 years (only 17 times if the first ten are counted as part of the original agreement), with two of those canceling each other out, the Indian text has been amended 48 times in its first half century.

Our founders might resort to a version of Napoleon's injunction against judicial interpretation of his great Civil Code, but that prohibition would probably have as little effect as Moses' command not to change "a jot or tittle" of the Law. The necessity of interpretation is part of the human condition. Establishing a new constitutional order and writing a fresh text may solve some problems but at the same time create-or reveal-others. Anyone familiar with disputes among Jews about the Torah, among Christians about the gospels, and among Muslims about the *Qur'an* knows that the text that unites also divides. As James Madison noted in *Federalist* 39: "[N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas..... When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated."

Moreover, even the most brilliant authors of constitutional texts can foresee only some of the future's problems. Others they will have only vaguely envisioned and others not anticipated at all. Yet others they may foresee but choose not to try to solve: It was caution not ignorance that caused the men at Philadelphia to dance around the edges of the constitutional status of slavery. To cope with these kinds of difficulties in a way that postpones questions of legitimacy, writers of constitutional documents typically resort to abstract language of the kind already quoted. Later officials who can no longer dodge the postponed problem will sometimes seek a formal amendment to the text.[18] But the very nature of the problem may preclude obtaining the extraordinary majority usually required for a formal amendment. At other times, officials may believe they lack time to pursue that process and, instead, go beyond the document's plain words to construe the document's spirit or the nation's constitutional history.[19]

In short, interpreters may turn to the larger constitution, which will include the underlying political theories of constitutionalism and democracy, thus opening up many of the problems of creative construction that a text was supposed to obviate. It is also likely that the broader constitution will encompass many governmental practices that, although initially justified as merely carrying out the terms of the constitutional document, have built up routines that have effected change. In the United States, senatorial courtesy, executive privilege, and executive agreements provide examples. George Washington justified the second of these on constitutional grounds, but the other two were originally defended largely on grounds of prudence and expediency. Each "practice," however, has had a direct and significant impact on relations between the legislative and executive branches and an equally significant, if slightly less direct, effect

on public policies.20 There is also the matter of earlier interpretations. In the Federal Republic of Germany, for instance, the concept "*bundestreue*," loyalty to the federation, utilized by the *Bundesverfassungsgericht*,21 has become a constitutional principle. And in the United States, an uninitiated but intelligent reader of opinions of the Supreme Court will be immediately struck by "string citations" of a dozen or more previous cases and lengthy discussions of such doctrines as "interstate commerce" not found in the constitutional text. That reader will also be struck by the paucity of references to the document itself. The question **what** interpreters interpret constantly arises, though the justices seem blithely indifferent to the fact that what they are frequently construing are their own previous interpretations.

Constitutional Interpretation with a Partial Constitutional Text

The founders' decisions not to prepare a constitutional document and to reject judicial review may be less permanent than they would hope. Israel provides a fascinating example of constitutional ghost writing. Soon after independence, the Provisional Council of State called for a popularly elected Constituent Assembly to draft a constitutional text for the new nation. The country, however, was sharply divided. Several ultra-Orthodox groups claimed that *Halakhah*, Jewish Law, containing, they believed, divine commands, provided the only proper written instrument for governing the Land of Israel. David Ben-Gurion and his then politically dominant party, the Mapai, had their own reasons for not supporting a constitutional document: They thought they would benefit from Westminster-style parliamentary supremacy free from the restraints that a constitutional script might impose. In the face of these obstacles, the efforts of other secular parties to draft a constitutional text failed.22 The most the Constituent Assembly, re-born as the Knesset, accomplished was passage of the famous Harari Resolution of 1950:

> *The first Knesset charges the Constitutional Legislative and Judicial Committee with the duty to prepare a draft Constitution[al text] for the State. The Constitution[al text] shall be composed of individual chapters in such manner that each of them shall constitute a basic law in itself. The chapters shall be brought before the Knesset ... and the chapters together will form the State Constitution[al text].23*

Supposedly, although the resolution does not explicitly so provide, it would take a two-thirds vote in the Knesset to "entrench" such legislation, that is, give it status as a constitutional document that could not be overridden by ordinary legislation.

Between 1958 and 1992, the Knesset enacted nine statutes it labeled "Basic Laws." The constitutional rank of some of them, however, remained unclear: Not all proclaimed themselves to be "entrenched,"24 and some were adopted by simple majority vote. In 1992, a political compromise produced the eighth and ninth Basic Laws, which pertained to civil rights. Sections 2 through 7 of "The Basic Law: Human Dignity and Liberty" protected in absolute terms such rights as those to life, liberty, bodily integrity, privacy, and property, though only prospectively. The Act did not explicitly mention judicial review-§11 said only: "All governmental authorities are bound to respect the rights under this Basic Law"-but, in Bergman v. Minister of Finance (1969), the Supreme Court had held that a similar clause in "The Basic Law: the Knesset" subjected statutes

and regulations challenged as violating it to judicial review.25 Thus one can assume, that many, perhaps most, MKs understood themselves as permitting judges to oversee the law's future.

And, in 1995, the Supreme Court decided the Mizrahi Bank Case,26 which raised the question whether a bankruptcy act violated "The Basic Law: Human Dignity and Liberty." The specific issue paralleled that in the Minnesota Moratorium Case (1934).27 Did a law protecting cooperatives from bankruptcy by extending the time for their repaying loans take away the lending institution's right to property and so contravene the express terms of §3 of the Basic Law: "There shall be no violation of the property of a person"? Because of the limitations on human rights and liberty legitimated by §8 (discussed below), the justices were unanimous in holding that the moratorium did not offend the bank's right to property.

The actual decision in the case was relatively unimportant,28 but the dispute provided the occasion for the justices to describe the Knesset's action in 1992 as "a constitutional revolution."29 In an opinion that commanded the assent of a majority of the Court, President Aharon Barak held that not only the first Knesset, the continuation of the Constituent Assembly, but also all subsequent Knessets continued to wear "two hats." They were both legislative bodies as well as constituent assemblies empowered to create, piecemeal, a constitutional text as well as to enact ordinary legislation. (This perpetuation of the constituent power, a dissenting justice protested, treated that authority as if it were a "personal" attribute to be delegated at will.30) Next, the Court held that "The Basic Law: Human Dignity and Liberty" was a chapter in a budding constitutional document, even though the Knesset had dropped the entrenching clause, adopted the law by a vote of only 32-21, and had not included any admonition about the Act's gravity beyond the title "Basic Law."

Reaching these conclusions required creative constitutional interpretation, and one cannot fault the justices, especially President Barak, for lacking imagination An equally, if not more, plausible interpretation of the Harari Resolution was that it allowed future Knessets to experiment with various Basic Laws and later consolidate and codify them into a single coherent constitutional document, which a Knesset could, by an extraordinary majority, proclaim to be the official constitutional text of the Land of Israel. Common sense as well as sound democratic jurisprudence would seem to require that efforts to establish a constitutional text be done publicly and clearly, not by stealth.

Even if *Bergman v. Minister of Finance* (1969) had alerted members of the Knesset to the probability that the Court would treat §11 as authorizing judges to invalidate future legislation contrary to the Basic Law's terms, retroactive invalidation and constitutional status were more problematic. First, as already noted, the Knesset changed the terms of the bill that became "The Basic Law: Human Dignity and Liberty" so as to make its terms only prospective. Second, examination of similar statutory provisions in other countries would have shown a result different from that which the Israeli Supreme Court reached, For example, the Canadian Bill of Rights of 1961 allowed similar judicial oversight; but that Act was a statute subject to-and was often subjected to-the usual rules of statutory interpretation, including amenability by ordinary legislation. And again, the Knesset cut out the entrenching clause that had been in the original bill. Canada's Chief Justice, Bora Laskin had referred to his country's Bill of Rights as "quasi-constitutional," but he made that statement in a speech31 not as spokesman for the

Supreme Court deciding a case. And, to the extent Laskin had been correct, "quasi-constitutional" is not the same as being a fully established part of the constitutional text or order, for Parliament had provided that it could, by simple legislative act, exempt any statute from the protection of the Bill of Rights.32

Furthermore, even assuming that the constituent authority was a perpetual asset of the second and succeeding Knessets and that the Basic Laws were segments of a legitimate constitutional text, President's Barak's majority opinion paved a wide arena for judicial choice. Section 8 of "The Basic Law: Human Dignity and Liberty" qualified the protection of fundamental rights: "There shall be no violation of rights under this Basic Law, except by a Law fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required."33 These limitations might be prudent; they might even be necessary as a practical matter; but they also give administrators and judges34 vast discretionary authority. Determining what is a "worthy purpose" or the degree to which such a purpose's achievement limits infringement of a constitutional right opens the same enormous ambit for choice as does the more famous use by the American Supreme Court of "levels of scrutiny."35 Barak himself conceded as much.36 All such tests are open-ended, demanding, not merely inviting, interpretive discretion and creativity.

Determining "the values of the State of Israel" presents even more far-reaching difficulties. The country's declaration of independence called itself a democratic and Jewish state. We have already seen that the range of options and the possibilities of creating new concepts are immense when anointing certain values as democratic, but this ambit is puny when compared to that open in determining what are the values of a *Jewish* state. The history of Israel - indeed of Judaism, at least from the time of Moses - demonstrates continually sharp and sometimes violent disagreement about who is a Jew and what values Jewishness connotes. Section 8 opens nothing smaller than the problem of the meaning(s) of the Bible and the implications thereof for a modern nation state.

And, as unabashedly as *Mizrahi Bank* encourages judges-and administrators as well -to engage in theologically inspired constitutional engineering, it also recognizes that a majority of the Knesset possesses similarly broad residual authority to enact, piecemeal, in the form of statutes labeled "Basic Laws" a constitutional document that embodies the numinous values of a Jewish and democratic state. A majority coalition led by Labor might entrench constitutional provisions radically different, politically as well as theologically, from those that a majority coalition led by Likud and heavily dependent upon religious parties would enact. Indeed, were the religious parties to dominate a coalition, we might face the fascinating problem of the legitimacy under constitutionalism of a provision of the constitutional text.37 And either coalition might repeal or amend one or more existing Basic Laws by enacting a new piece of legislation a majority chose to label a Basic Law.38 The possibilities of constitutional creation and re-creation here may not be infinite, but they do stagger the imagination.

Interpretive Discretion and Systemic Change: A Necessary Pathology?

Obviously, interpretations by whomever made, can have a massive impact on the polity itself as well as on particular public policies. Whether a state or province may secede from the nation, whether the nation can raise an army by means of a draft or must rely on

volunteers or local governmental action, or whether public officials may treat citizens unequally because of their race, religion, or sex all pose crucial-and volatile-political issues. This observation is hardly novel. In 1787, as the Philadelphia convention was breaking up, Gouverneur Morris, chairman of the Committee on Style, which had been largely responsible for putting the text into its final form, was congratulated by a friend for making "a good constitution." Morris allegedly replied: "That depends on how it is construed."39 Change is not always progress. There is no guarantee that constitutional interpretation will always be wise or even normatively correct. When transformation occurs, it may threaten both the constitutionalist and democratic elements of constitutional democracy or even the nation's existence. No one familiar with Dante's lament that "to translate is to betray"40 would be surprised by this possibility, for the word "interpret" derives from the Latin *interpretari*, meaning to explain or translate.

Thus a critical question for anyone interested in constitutional interpretation-and, if I am right, anyone interested in politics-is how to maximize the benefits of this fact of life in a constitutional democracy and minimize its threats. The principal benefit is obvious: only by changing can the political system survive. Roscoe Pound's comment about law applies with added force to constitutions: The constitutional order must be stable, yet it cannot stand still.

In the United States, unhappily, this debate has been intellectually stunted because it has focused on *judicial* creativity, although the basic problem concerns all interpreters. We can extrapolate, albeit at some risk, from the discussion about judges to the broader and more interesting question. Close to one extreme along the spectrum of interpretive approaches are "originalists," those who preach that the only valid role for interpreters is to discover the original intention or understanding.41 As nineteenth-century German jurisprudes would have put it, these people claim to think the thought the founders thought and apply it to current difficulties.

Originalists face several serious difficulties. First, they assume the founders had a single unified intent and/or understanding, an assumption that, at least in the United States, extant historical records belie.42 Second, they assert that they can find that single understanding or intent in those historical records but have so far been unable to vindicate that claim as far as most contested issues are involved. Indeed, those records, simultaneously voluminous and incomplete, are replete with contradictory claims, and the founders themselves often changed their minds about what had been in their minds.43 It is not even clear that they intended that their intentions be followed.44 Because people making originalist arguments are seldom professional historians but rather lawyers (or judges who read their briefs and law review articles), most of their evidence consists of collected quotations, often ripped out of context, to support whatever claim they wish to make at the moment.45

The third of many other difficulties is that originalists fail to justify the present's being bound by what was supposedly in the founders' minds but which they not make clear to their own or later generations. This policy would work well only if the founders had been brilliantly prescient, able to foresee and prescribe solutions for (or the means to solve) all major problems the future brings. Unfortunately, such seers seldom establish new constitutional orders or draft constitutional texts. A nation that follows originalism must either: (1) cope with current problems through present-day (mis?)conceptions of old, and possibly outmoded, specific visions of political life; (2) engage in frequent

constitutional change by formal processes such as amendment so that unforeseen problems can be met and new "original understandings" created; or (3) construct a constitutional order whose original understanding is limited to broad precepts of good government consonant with the principles of constitutionalism and democracy.

The first alternative is an invitation to disaster, which originalist interpreters usually avoid by using indeterminate historical evidence to impute to the founding generation the choices that they now deem appropriate, thus exercising creative discretion while shifting responsibility to people long dead. The second alternative threatens to disrupt stability and make it more difficult for citizens to become emotionally locked into the constitutional order.46 And the third alternative resurrects all the problems of constitutional interpretation where there is no text, only the general principles of constitutionalism and democracy-hardly a means of limiting interpretive discretion.

Near the opposite extreme of the interpretive spectrum lies an approach that has been called "contemporary ratification." Nineteenth century German jurisprudes might have said that the object is to think the thought that founders who were as wise and learned as we would have thought had they understood our problems. As Justice William J. Brennan, Jr., put it in 1985:

> *the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution[al document] rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time. ... Interpretation must account for the transformative purpose of the text.*47

If the faults of originalism lie in making creative choices while falsely imputing those choices to the dead, those of adaptionism lie in allowing interpreters to justify their choices according to their own judgments about current needs, restrained only by the general purposes of the constitutional text and the vague contours of the broader constitutional order. This approach threatens to return the polity to governance under the general principles of constitutionalism and democracy, with some guidance from a hortatory document. In its own way, each of these interpretive philosophies-and those that lie between-fail to provide a practical remedy to a fundamental political dilemma: Political stability requires constitutional interpretation; constitutional interpretation, in turn, often demands discretion and choice, which may re-create the constitutional order in important ways; and this re-creation may pose serious risks to constitutionalism, to democracy, and to national survival as well. Recognizing the enormity of the dangers does nothing to lessen the necessity's implacability. Insofar as there is a solution, it requires a real, not merely a formal, sharing of interpretive authority so that no one person or institution can monopolize the processes of constitutional re-formation. It also requires uncommon wisdom and a great deal of plain luck.

Endnotes

1.This research was presented as the inaugural Eckstein Lecture at the School of Social Sciences, University of California, Irvine, January 26, 2000.

2. The title will be *Constitutional Democracy* and is under contract with Johns Hopkins University Press.

3. I do not mean "create" to connote making something out of nothing; rather, I use that word to describe making something distinctively new out of something old.

4. What we have here is analogous to the conventional tripartite distinction among legislative, executive, and judicial power. We may be able to identify a core of each kind of power; but, like processes of constitutional development, all three putative powers are intellectual abstractions. They are not "things" out there that we can see, touch, and measure. In any healthy system of supposedly separated powers, we are apt to find what Charles Jones calls separate institutions competing for shared powers: "The Separated Presidency," in Anthony King, ed., *The New American Political System* (2d ed; Washington, D.C.: American Enterprise Institute, 1990), p. 3. Richard E. Neustadt, *Presidential Power* (Rev. ed.: New York: Wiley, 1976), p. 101, speaks of "separated institution *sharing* powers."

5. A more radical observer might claim that we never live under the same constitutional order even once.

6. Among the more famous usages of this term has been that of the Basic Law of the Federal Republic of Germany. The *Bundesverfassungsgericht* has often employed the term in its opinions. For an inventive use in the American context, see William F. Harris II, *The Interpretable Constitution* (Baltimore: Johns Hopkins University Press, 1993).

7. I include myself here. See also, Carl J. Friedrich, *Transcendent Justice: The Religious Dimension of Constitutionalism* (Durham, NC: Duke University Press, 1964).

8. See, for instance, Walter F. Murphy, James E. Fleming, and Sotirios A. Barber, *American Constitutional Interpretation* (2d ed; Westbury, NY: Foundation Press, 1995), Part III; Murphy, "Who Shall Interpret the Constitution?" 48 *Review of Politics.* 401 (1986); and Murphy, "Constitutions, Constitutionalism, and Democracy," in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley, eds., *Constitutionalism and Democracy* (New York: Oxford University Press, 1993), pp. 14-17. Because of his commitment to representative democracy and opposition to constitutional democracy, at least constitutional democracy maintained other than through political culture and democratic political processes, Robert A. Dahl would give to an elected legislature full interpretive authority, subject only to checks through open electoral processes. Reluctantly, however, he would (like Michael Walzer) allow judges to intervene to ensure that those processes were in fact open: "for an independent body to strike down laws that seriously damage rights and interests that[,] while not external to the democratic process[,] are demonstrably necessary to it would not seem to constitute a violation of the democratic process." *Democracy and Its Critics* (New Haven: Yale University Press, 1989), p. 191. Walzer says: "The judges must hold themselves as closely as they can to the decisions of the democratic assembly, enforcing first of all the basic political rights that serve to sustain the character of the assembly and protecting its members from discriminatory legislation. They are not to enforce rights beyond these unless authorized to do so by a democratic decision." "Philosophy and Democracy," 9 *Political Theory* 379, 397 (1981). But, as John Hart Ely has-perhaps unintentionally-demonstrated, authorizing judges to police political processes inevitably justifies their engaging in much substantive constitutional interpretation. *Democracy & Distrust* (Cambridge: Harvard University Press, 1980).

9. "First Inaugural Address," Roy P. Basler, ed., *The Collected Works of Abraham Lincoln* (New Brunswick, NJ: Rutgers University Press), IV, 262-271.

10. For a discussion of the constitutional implications and alternatives open, see Peter Quint, "The Constitutional Law of German Unification," 50 *Md. L. Rev.* 475 (1991), and his *The Imperfect Union: Constitutional Structures of German Unification* (Princeton: Princeton University Press, 1997). Compare the West German government's decision in 1972 to sign a treaty with East Germany, under which, in effect, the two Germanies recognized each other as legitimate political entities and pledged to deal with each other peacefully and with mutual respect. This recognition seemed to contradict the clause of the Preamble of the Basic Law which read: "The entire German people are called upon to achieve in free self-determination the unity and freedom of Germany." The government of Bavaria thus sought an injunction from the Constitutional Court to prevent the treaty's going into effect; but the day after arguments were concluded, the Federal Government exchanged ratifications with the East, presenting the justices with a *fait accompli*. They were miffed and asserted that "the final power" to uphold the constitutional order was theirs, and the treaty could not be constitutionally interpreted to transform "the German Democratic Republic into a foreign state." The Basic East-West Treaty Case, 36 BVerfGE 1 [1973]; trans. and abridged in Walter F. Murphy and Joseph Tanenhaus, *Comparative Constitutional Law* (New York: St, Martin's, 1977), pp. 232-39. Of course, the treaty did precisely what the Court said it could not validly do and remained in force until 1990. The final constitutional interpreters here, as in reunification eighteen years later, were the Chancellor and his Cabinet.

11. See, however, the *Bundesverfassungsgericht* 's assertion in the East-West Treaty Case, quoted above in note 9, about its "final power." That cry rings hollow because the judges were covering their retreat from a constitutional battlefield.

12. There is a close similarity between what these founders have tried to create and what Robert A. Dahl would see as a good democratic system. See the discussion and citations in Note 8, above.

13. Meir Shamgar, the Past President of the Israeli Supreme Court, has expressed a contrary view: "Of these two doctrines - the doctrine of unlimited sovereignty of the Knesset and the doctrine of the constituent assembly - I definitely prefer the first, namely the doctrine regarding the unlimited sovereignty of the Knesset." But he was making this claim in order to argue that, unlike the British Parliament, the Knesset could legitimately impose constitutional limitations on future Knessets. Moreover, the context leaves me unsure that Shamgar had given much reflection to the broader issues of constitutionalism per se. Concurring in United Mizrahi Bank plc v. Migdal Cooperative Village (1995) 49 (iv) P. D. 221, trans. & excerpted in 31 *Israel Law Review.* 764-802 77 (1997). For discussions of this case, see Part V. below, and sources cited. Of course, before the passage of the two Basic Laws in 1992, Israel's claim to be a constitutionalist state was badly flawed. For different and more nuanced evaluations, see: Martin Edelman, *Courts, Politics, and Culture in Israel* (Charlottesville: University Press of Virginia, 1994); and Gary Jeffrey Jacobsohn, *Constitutionalism in Israel and the United States* (Princeton: Princeton University Press, 1993).

14. See, for example, Art. 28, 3 , of the Irish constitutional text: "Nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas [parliament] which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion or to nullify any act done or purporting to be done in time of war or armed

rebellion in pursuance of any such law." The Supreme Court, however, has rather narrowly interpreted this clause: In re Art. 26 and the Emergency Powers Bill (1976), [1977] I.R. 159.

15. Christopher W. Hammons, "Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions," 93 *American Political Science Review.* 837 (1999), examines 104 American state constitutional texts and concludes that "longer and more particularistic" constitutional texts are more durable. The argument is interesting but, despite the Supreme Court's acceptance during the 1990s of much of the Anti-Federalists' hostility toward a strong central government, state constitutional documents, long or short, are simply not as important as that of the United States. The triumph of the national government in 1861-65 and the success of the national constitutional order since have given the states the luxury of constitutional tinkering, secure in the knowledge that the national government will protect them from foreign invasion, domestic insurrection, and economic disaster.

16. M'Culloch v. Maryland, 4 Wh. 316 (1819).

17. The notion that the state or even a constitutional text "confers" rights is alien to most versions of constitutionalist theory. Cf. Edward S., Corwin's claim that so-called constitutional rights are not "fundamental because they find mention in the written instrument; they find mention there because [they are] fundamental." "The Basic Doctrine of American Constitutional Law," 12 *Michigan Law Review*. 247, 247-48 (1914). Along the same lines, Justice William O, Douglas wrote: "Men do not acquire rights from the government; one man does not give another rights. Man gets his rights from the Creator. They come to him because of the divine spark in every human being." *The Anatomy of Liberty* (New York: Trident Press, 1963), p. 2. See Václav Havel's similar comments, "Kosovo and the End of the Nation-State," *New York Review of Books*, June 10, 1999, p. 4. On the other hand, in their opinions in the Mizrahi Bank Case, cited in Note12, above, several justices of the Israeli Supreme Court spoke of the Knesset's "granting" Israel a constitutional text. I detect here a residue of British imperial rule - it was the Queen's "most excellent Majesty" that "gave" the Canadians the British North America Act of 1867, and the Australians the Commonwealth of Australia Constitution Act of 1900. I detect similar ashes stirring around among the justices' discussions about whether today's Knesset could bind tomorrow's Knesset. I repeat my comment of Note 13: Before 1992, Israel's claim to be either a democratic or constitutionalist state was very weak. Any such claim is still not robust.

18. Cross-national differences in frequency of formal change are stark. Japan and India, for example, have used their constitutional texts for very similar periods. As of early 2000, India, as already noted, had amended its document 48 times, while Japan had yet to do so.

19. Alternatively, officials might do as Thomas Jefferson did in signing the treaty to purchase the Louisiana Territory from France and in persuading the Senate to ratify it: violate their interpretation of the text or the constitutional order and hope either that the future will absolve them of sin or cleanse them from iniquity by some sort of modification of the constitution.

20. For fuller discussions of what a constitution includes and the authority of a constitutional text, see: Walter F. Murphy, "The Nature of the American Constitution," the James Lecture (Urbana: Department of Political Science, University of Illinois, 1989); Murphy, "Constitutions, Constitutionalism, and Democracy," In Greenberg et al., eds., *Constitutionalism and Democracy*, pp. 7-12; and Murphy, Fleming, and Barber, *American Constitutional Interpretation*, ch. 5.

21. See espec.: The Concordat Case, 6 BVerfGE 309 (1957); The Atomic Weapons Referenda, 8 BVerfGE 105 (1958); and The Television Case, 12 BVerge 205 (1961), all translated and reprinted in part in Murphy and Tanenhaus, *Comparative Constitutional Law*.

22. Martin Edelman adds that, early on, some of the secular parties were unwilling to risk dividing the nation by offending the religious views of the Ultra-Orthodox. "The New Israeli Constitution," 36 *Middle Eastern Studies* 1 (2000). I must acknowledge my heavy debt to Prof. Edelman for alerting me, through an earlier version of his fine paper, delivered at the American Political Science Association's Annual Meetings in 1998, to Israel's intriguing constitutional development.

23. Quoted in Jacobsohn, *Apple of Gold,* p. 106.

24. Some Basic Laws, such as that enacted in 1992, "Human Dignity and Liberty," operate only prospectively. Still, in the Ganimat v. Israel, (1995) 49 iv) P.D. 589, trans. In 31 *Israel Law Review* 754 (1995), President Barak said the Supreme Court would give great weight to the purpose of this Basic Law in interpreting earlier statutes.

25. 23 (I) P.D. 693; transl. in 4 *Israel Law Review* 559 (1969).

26. Cited above in note 13.

27. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398.

28. On the narrow issue of the validity of the moratorium, the opinions of the Israeli justices were more like the unpublished opinion of Justice Benjamin N. Cardozo in *Minnesota Moratorium* than that of Chief Justice Charles Evans Hughes for the majority. Murphy, Fleming, and Barber, *American Constitutional Interpretation*, reprint Cardozo's unpublished opinion at pp. 211-13.

29. Not only did President Aharon Barak use this phrase in his opinion, he also employed it in his scholarly analysis of the two basic laws enacted in 1992: "The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law," 31 *Israel Law Review* 3 (1997).

30. Justice Cheshin, at 800.

31. "The Judge as Legislator and Administrator," 11 *Transactions of the Royal Society of Canada* 183, 190 (4th series, 1973).

32. Although Israeli constitutional development has been much influenced by that of Britain, Israel jurisprudence has rejected the British rule that one Parliament cannot irrevocably bind successor parliaments. See Claude Klein, "Basic Laws, Constituent Power and Judicial Review of Statutes in Israel," 2 *European Pub. Law.* 225, 228-29(1996); and Past President Shamgar's opinion in *Mizrahi Bank,* in Note 13, above.

33. Unofficial translation by the Deputy Attorney General and Carmel Shalev, quoted in Klein, "Basic Laws, Constituent Power and Judicial Review of Statutes in Israel," p. 226.

34. Section 11's general wording left open the question whether all courts or only the Supreme Court would have supervisory authority. The Court did not decide this issue, though, in dissent, Justice Cheshin contended that the power, if it existed, should rest exclusively with the Supreme Court.

35. For a discussion of the leading cases as well as reprints of many of the opinions of the justices, see: Murphy, Fleming, and Barber, *American Constitutional Interpretation*, chaps.14-18.

36. At p. 788.

37. The *Bundesverfassungsgericht* and the Supreme Court of India have developed different but somewhat similar jurisprudential bases for such a constitutional doctrine. See espec., for Germany, The Southwest Case, 1 BVerfGE 14 (1951) and the Privacy of Communications Case, 30 BVerfGE 1 (1970); and, for India, Golak Nath v. Punjab, [1967] A.I.R. 1643; Kesavananda Bharati's Case, [1973] S.C.R. 1 (Supp.) (Ind.); and Minerva Mills v. Union of India, [1980] S.C.R. 1789. For broader discussions, see my: "An Ordering of Constitutional Values," 53 *So. Cal. L. Rev.* 703 (1980); "The Right to Privacy and Legitimate Constitutional Change," in Shlomo Slonim, ed., *The Constitutional Bases of Political and Social Change in the United States* (New York: Praeger, 1990); and "Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity," in Sanford V. Levinson, ed., *Responding to Imperfection* (Princeton: Princeton University Press, 1995).

38. Klein ("Basic Laws, Constituent Power, and Judicial Review") raises the question, unanswered by *Mizrahi Bank*, of how or even whether the Knesset might amend a Basic Law.

39. Quoted in Edward S. Corwin, "The Constitution as Instrument and Symbol," 30 *American Political Science Review* 1071 (1936); reprinted in Richard Loss, ed., *Corwin on the Constitution* (Ithaca: Cornell University Press, 1981), I, 168, 170.

40. The phrase sounds better in Italian: *Tradire é tradurre*.

41. Originalists have not, as far as I can determine, discussed "original purpose," perhaps because "purpose," being a broader term than "intent," would infuse interpretation with too much discretion. This omission is especially curious in the American case because that nation's constitutional text opens with a statement of general purposes. One might have thought that, if the drafters of the text had not "intended" or "understood" those general purposes to be important, they would not have written them nor would the ratifiers have approved them. The key to this puzzle lies in originalism's own purpose: to curtail judicial discretion, not to provide a logically coherent methodology for constitutional interpretation.

42. During the Reagan Era, the issue of originalism became a heated political issue. Attorney General Edward Meese and (then) Judges Robert H. Bork and Antonin Scalia urged that judges should follow original intent or understanding in constitutional interpretation. The distinguished constitutional historian Forrest MacDonald, who had been a political conservative before Meese, Bork, or Scalia, delivered what should have a body blow to the argument: "it is meaningless to say that the Framers intended this or that the Framers intended that: their positions were diverse and, in many particulars, incompatible. Some had firm, well-rounded plans, some had strong convictions on only a few points, some had self-contradictory ideas, some were guided only by vague ideals. Some of their differences were subject to compromise; some were not." *Novus Ordo Seclorum* (Lawrence: University Press of Kansas, 1985), p. 224.

43. See espec. : Joseph M. Lynch, *Negotiating the Constitution: The Earliest Debates over Original Intent* (Ithaca, NY: Cornell University Press, 1999); John P. Roche, "The Founding Fathers: A Reform Caucus in Action," 55 *American Political Science Review* 804(1961); Alpheus Thomas Mason, "*The Federalist* - A Split Personality?" 57 *American Historical Review* 625 (1952); and Douglas Adair, "The Authorship of the Disputed Federalist Papers," (2 parts) *Wm. & Mary Q.*, 3rd Series, 97-122 and 235-64 (1944). George W. Carey argues, unsuccessfully, I believe, that Adair and Mason were wrong, that the authors of *The Federalist* were in substantial agreement: "Publius - A Split Personality?" 46 *Review of Politics.* 5 (1984).

44. See, for example: H. Jefferson Powell, "The Original Understanding of Original Intent," 98 *Harvard Law Review* 885 (1985); Charles A. Lofgren, "Original Intent and Original Understanding," 5 *Con'l Comm.* 77 (1988); and James H. Hutson, "The Creation of the Constitution: The Integrity of the Documentary Record," 65 *Texax Law Review* 1 (1986).

45. For critiques of "law-office" constitutional history that American judges often accept as gospel, see: Charles A. Miller, *The Supreme Court and the Uses of History* (Cambridge: Harvard University Press, 1969); Paul L. Murphy, "A Time to Reclaim: The Current Challenge of American Constitutional History," 69 *American Historical Review* 64 (1963); Alfred H. Kelly, "Clio and the Court," 1965 *Sup. Ct. Rev.* 119; Leonard W. Levy, *Original Intent and the Framers' Constitution* (New York: Macmillan, 1988), ch. 1; Articles on the Second Amendment by Saul Cornell, Michael A. Bellesiles, Don Higginbotham, and Robert E. Shalhope in 16 *Con'l Comm.* 221ff (1999); and my two articles " Originalism: The Deceptive Evil," in Robert P. George, ed., *Great Cases in Constitutional Law* (Princeton: Princeton University Press, 2000), and "Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?" 87 *Yale Law Journal.* 1752 (1978).

46. This issue has been and still is disputed. Thomas Jefferson thought that each generation should rewrite its own constitutional text, while James Madison contended in *Federalist No. 49* that frequent "recurrence to the people" would endanger "the public tranquility by interesting too strongly the public passions" and "deprive the government of that veneration which time bestows" and on which every government depends for stability. The empirical data are inconclusive, but they do not help Madison's case. As already noted, the Indian constitutional text has been frequently amended and France has gone through three republics since 1870. On the other hand, the American, Canadian, Irish, and German documents have had rather few serious changes.

47. "The Constitution of the United States: Contemporary Ratification," reprinted in Murphy, Fleming, and Barber, *American Constitutional*