

Like Lycurgus from the Grave:
Constitution-Making, Nation-Making, and the
Intractable Legacies of Founding Moments

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...so long did his city have the first rank in Hellas for good government and reputation, observing as she did for five hundred years the laws of Lycurgus, in which no one of the fourteen kings who followed him made any change...For the institution of the ephors did not weaken, but rather strengthened the civil polity, and though it was thought to have been done in the interests of the people, it really made the aristocracy more powerful.

— *Plutarch*

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INTRODUCTION

The [Nigerian] State shall foster a feeling of belonging and of involvement among the various people of the Federation, to the end that loyalty to the nation shall override sectional loyalties.

*Nigeria Constitution*¹

Recognising the historically diminished use and status of the indigenous languages of our people, the [South African] state must take practical and positive measures to elevate the status and advance the use of these languages.

*South Africa Constitution*²

Supreme power in the Republic of Poland shall be vested in the Nation³...The Republic shall provide conditions for the people's equal access to cultural goods which are the source of the Nation's identity, continuity and development.

*Poland Constitution*⁴

Constitutions need citizens. Without living, breathing individuals to take on these documents' articles and provisions as their own, such foundational texts remain only parchment on ink. Outside the realm of theory, however, these citizens hardly exist behind some constitutionalized veil of ignorance, which unifies their interests and erases their differences without discrimination.⁵ Rather, as the above epigraphs collectively suggest, constitutions emerge under specific historical conditions and around a particular group of people, whose identity echoes throughout these founding texts.

¹ Nigeria Const. art. XV, § 4.

² South Africa Const. art. VII, § 3.

³ Poland Const. art. IV, § 1.

⁴ Ibid., art. VII, § 1.

⁵ John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971), 136.

With the spread of constitutional government over the past century, though, this relationship between the constitution, its citizens, and their collective (or fractured) identity has grown increasingly complex and often opaque. Yet, at the same time, academics and legal experts have readily touted the broad, transformational potential of constitution-writing processes.⁶ Following the overthrow of the Saddam Hussein regime in 2003, for example, discussions of a new, conflict-ending constitution quickly emerged throughout the war-torn country—not only in Iraqi circles, but also among the invading coalition and the international community. As a joint United States Institute of Peace (USIP)-United Nations Development Program (UNDP) Special Report readily emphasized,

Organized effectively, public participation in the process of developing the new Iraqi constitution can mobilize all segments of Iraqi society and forge a collective vision of the country’s future including consensus on a workable state structure and protection of the rights of all Iraq’s people.⁷

Put simply, for the Report’s drafters, constitutions (and the political and social processes associated with their drafting) can allow for Iraqis to develop a common purpose—one that unifies, or at least works to converge, their disparate and often-conflicting identities within this “collective vision.” In a separate report on the same matter, senior UNDP advisor Jamal Benomar

⁶ For a general outline of the most common approaches to constitution-making, see: Andrew Arato, “Forms of Constitution Making and Theories of Democracy,” *Cardozo Law Review* 17 (1995): 191–231; Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge and New York: Cambridge University Press, 2009); Todd A. Eisenstadt, A. Carl LeVan, and Tofiq Maboudi, *Constituents Before Assembly: Participation, Deliberation, and Representation in the Crafting of New Constitutions* (Cambridge University Press, 2017).

⁷ United States Institute of Peace, “Iraq’s Constitutional Process: Shaping a Vision for the Country’s Future,” *Special Report no. 132* (2005): 7.

even went a step further, describing the constitution-making process as an opportunity to begin anew and “define a national identity” for the Iraqi people.⁸

On a straightforward reading, these observations appear relatively unsurprising and pragmatic. Naturally, constitutions rely upon a certain threshold of social cohesion to effectively structure political institutions and processes. If Canada, for example, initiated a new constitution-drafting process in 2020, Quebec’s sudden insistence on an independent, French-speaking state would complicate matters, to say the least. For both the USIP-UNDP report and Benomar, then, the idea of a strong ‘common vision’ or ‘national identity’ emerges in purely negative terms; it describes the absence of an ongoing secessionist movement (or movements), or the simple fact that the benefits of cooperation outweigh those of continued conflict.⁹ Thus, on this line of reasoning, national identity has little relevance within the process of constitution-making—at least beyond a government-enabling, conflict-ending threshold.

If we look critically at these almost-passing observations, though, both reports suggest a far broader and more significant claim: constitutions not only have the capacity to reflect and institutionalize a *preexisting* national identity, but their *drafting process* can also self-consciously construct a *new* national identity, which allows for that constitution to take root. Such a claim hardly remains uncontroversial. Yet, surprisingly, it has emerged only recently as a distinctive area of interest for political theorists.¹⁰ As the Iraqi case demonstrates, this newfound theoretical

⁸ Jamal Benomar, “Constitution-Making After Conflict: Lessons for Iraq,” *Journal of Democracy* 15, no. 2 (2004): 88.

⁹ *Ibid.*, 91.

¹⁰ Note that this area of research concerns itself specifically with the constitution-writing *process*. Among the works that grapple with this issue, to my knowledge, the only book-length treatments are: Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2011);

scrutiny is much needed: because its drafting process in fact *constitutionalized* the “importance of political affiliation along sectarian lines,” Iraq’s continued religious and ethnic strife and inequality remain unsurprising.¹¹ After all, the country’s foundational document (and its forging process) failed to heed the advice of both Benomar and the USIP-UNDP report and build a constitutional government that reached beyond division and difference. Instead, it placed the most divisive of issues at the *heart* of the new Iraqi political identity.

Using this brief discussion of the Iraqi drafting process as our point of departure, this thesis will highlight and explore the linkage between constitution-making and nation-making. Even initially, we can recognize the degree to which these two processes inform one another; naturally, founding moments not only forge the bonds between members of ‘the People,’ but also etch the constitution’s political system into society.¹² Yet, once we begin to really interrogate the connections between these two processes, both historically and conceptually, many enduring social and political inequalities appear to have clear roots in the original constitutional settlement (and the activities and procedures that produced it).

At this point in our discussion, the connections between (1) constitution writing processes, (2) national identity, and (3) enduring socio-political inequality remain largely within the realm of vague conjecture. But, in order to gain novel insight into common political

Serdar Tekin, *Founding Acts* (Philadelphia: University of Pennsylvania Press, 2016); Joanne Wallis, *Constitution Making During State Building* (Cambridge: Cambridge University Press, 2016). I will engage with these three texts at length in Chapter 2.

¹¹ Allen S. Weiner, “Constitutions as Peace Treaties: A Cautionary Tale for the Arab Spring,” *Stanford Law Review Online* 64 (2011): 8–15; Feismal Amin Rasoul al-Istrabadi, “Lessons of Experiences in the Enterprise of Constitutional Design: A Constitution Without Constitutionalism: Reflections on Iraq’s Failed Constitutional Process,” *Texas Law Review* 87 (2009): 1627–55.

¹² Bill Kissane and Nick Sitter, “National Identity and Constitutionalism in Europe: Introduction,” *Nations and Nationalism* 16, no. 1 (2010): 1–5.

phenomena, first, we often have to develop equally novel ways of *talking about* those phenomena. Thus, in this thesis, I develop the concept of Intractable Constitutional Memory (ICM) in order to help unearth and elucidate some of the connections between these three concepts.

To put a complex idea into simple terms, ICM describes the enduring social, political, and historical forces that entrench broad gaps the *de jure* rights guarantees of constitutional systems (e.g., ‘all individuals are equal in the eyes of the law’) and the *de facto* reality (e.g., certain social groups are punished for certain crimes at a far higher rate than other, more privileged groups).¹³ These inequalities remain intractable not only because they exist within the constitutional text itself, either explicitly or implicitly, but also because they bleed into the society’s national identity.¹⁴ As a result, such an exclusionary identity of ‘the People’ continually grants *unequal* access to constitutional rights and liberties over time,¹⁵ even after the passage of supposedly remedial constitutional amendments or laws.¹⁶

¹³ Of course, as James Mayall writes, these gaps are to some degree inevitable; after all, “Political language, with its emphasis on democratic rights and legitimacy, conjures up an image of culturally homogenous nation-states, whereas the reality is that most people live in multi-cultural state-nations, as they have done ever since the age of empire.” See: James Mayall, “Sovereignty, Nationalism, and Self-Determination,” *Political Studies* 47, no. 3 (1999): 485.

¹⁴ Thus, as Daniel Lessard Levin argues in the American context, “Understanding...constitutionalism rather than constitutional doctrine requires that the *image* of the Constitution as received in popular culture be given as much attention as the document itself.” See: Daniel Lessard Levin, *Representing Popular Sovereignty: The Constitution in American Political Culture* (Albany, NY: State University of New York Press, 1999), 1.

¹⁵ Gary Jacobsohn notes this lagging gap between the ‘ideal’ and the ‘actual’ within the American context, explaining that, even after the Civil War, the “constitutional identity of the text may have changed, but the constitutional identity of the American people (citizens and public officials) was only beginning its transition.” See: Gary Jacobsohn, “Rights and American Constitutional Identity,” *Polity* 43, no. 4 (2011): 429.

¹⁶ Chapter 1 engages in a far more rigorous and nuanced discussion of ICM. Note, though, that the mere idea of deeply entrenched constitutional principles and ‘memories’ is not problematic in itself; after all, constitutions in part exist to ensure that future generations can continually engage in political

Naturally, terms like ‘legal memory’ and ‘constitutional memory’ bear the baggage of past usage in the legal and theoretical literature. Yet, in the majority of colloquial, academic, and legal discussion, these terms remain quite intuitive and straightforward. All constitutional texts have clear historical origins—and thus, once constituted, they work *in* and *through time* by anchoring the development of law and politics within this particular historical agreement. In this sense, clear analogies exist between the ways that constitutions and memories operate: looking backward in time, both shape and constrain long-term change. Similarly, both are selective in the issues that they emphasize, choosing to fixate on only certain aspects of either national or personal history.

Here, though, questions abound. What makes these memories specifically constitutional or legal, as opposed to political or cultural? If we *can* call them constitutional or legal memories, then do constitutions and laws simply reflect and embody preexisting political, social, and cultural memories? Or do constitutions themselves *create* memories for political communities, which then operate across time? Also, do these memories exist only through the application of constitutional principles (e.g., in the courts, and among lawyers, judges, and politicians), or do they have a broader resonance across the political community as a whole?

With these questions in mind, the existing legal and constitutional literature uses the idea of memory in a variety of ways. First, constitutions can include certain rights provisions and institutional arrangements that reflect past national struggles. By highlighting these specific (and pre-constitutional) national ‘memories,’ then, these documents attempt to hedge against similar

disagreement within a respected, entrenched, and stable constitutionalized framework. See: Mila Versteeg and Emily Zackin, “Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design,” *American Political Science Review* 110, no. 4 (November 2016): 657.

inequalities and conflicts in the future.¹⁷ On this approach, though, constitutions only amplify memories that already exist within society; any new ‘memories’ that emerge *through* the drafting process remain beyond the scope of concern. Second, from a different angle, legal scholars highlight the uses of personal memories as testimony within a court of law.¹⁸ Or, from a different angle, other scholars underscore how the actual mechanisms of legal interpretation can grapple with unjust histories and the ‘legal memories’ they create.¹⁹

Finally, though, to my knowledge only Aziz Rana utilizes the term ‘constitutional memory’ as a distinctive concept in itself. As he argues in the case of the U.S. Constitution, the *idea* and *memory* of the nation’s founding not only informs citizens’ collective “self-understanding,” but can also (consequentially) blind the public to the country’s enduring colonial legacies of racism and injustice.²⁰ While taking a broader and more theoretical approach than Rana overall, I employ the concept of constitutional memory in a similar manner.²¹

¹⁷ For one of the clearest examples of this approach, Edouard Fagan makes this argument within the context of post-Apartheid South Africa. As we will see, much of the existing literature on constitution-drafting processes takes this approach to national ‘memories’—a concept that we could, in this case, just as easily call national ‘histories’ or ‘divisions.’ See: Edouard Fagan, “The Constitutional Entrenchment of Memory,” in *Negotiating the Past: The Making of Memory in South Africa*, ed. Sarah Nuttall and Carli Coetzee (Cape Town: Oxford University Press, 1998), 249–62.

¹⁸ For a specific and particularly illustrative example, see: Kirsten Campbell, “Legal Memories: Sexual Assault, Memory, and International Humanitarian Law,” *Signs: Journal of Women in Culture and Society* 28, no. 1 (2002): 149–78.

¹⁹ See, for example: Penelope Andrews, “Book Review: ‘Legal Institutions and Collective Memories,’ Edited by Susanne Karstedt,” *Osgoode Hall Law Journal* 48 (2010): 357–71.

²⁰ Aziz Rana, “Colonialism and Constitutional Memory,” *UC Irvine Law Review* 6 (2015): 263–88.

²¹ Note that, overall, these examples of constitutional and legal ‘memory’ are not meant to represent all of the ways that legal and constitutional scholars grapple with the issues of history and time. Rather, the above authors are among the few that refer to these constitutional and legal issues in terms of *memory*—instead of, say, history or tradition.

* * *

Undoubtedly, political theorists and legal scholars have devoted a great number of books and articles to the study of constitutional *texts* and their long-term effects on law, politics, and society. This thesis takes seriously the enduring shadows that constitution-making *processes* cast over national histories.

With this in mind, the remainder of this thesis will unfold in three parts. In Chapter 1, I will flesh-out the concept of Intractable Constitutional Memory—first rooting it in several countries’ constitutional, legal, social, and political histories, and then using those histories to outline its overall theoretical dynamics. Next, Chapter 2 will engage with the three book-length works that recognize the connections between constitution-making and nation-making, and try to channel these connections toward democratic ends.²² As I will argue, however, these authors not only overstate the normative benefits of constitution-making-as-nation-making, but also ignore the ways that even novel (and highly participatory) constitution-making processes can still entrench ICMs within a given political system. Finally, Chapter 3 will explore whether or not we can ‘rescue’ the notion of constitution-making-as-nation-making, and then utilize it to eliminate ICMs at their conceptual roots. As I will show, though, these enduring legacies of constitution-making are likely unavoidable, at least in one form or another. Thus, in the conclusion, I will consider some of the initial components that would go into an ICM-aware theory of constitution-making—one that would attempt to mitigate the *effects* of these founding ‘memories,’ rather than striving to erase them altogether.

²² As shorthand, I will (perhaps inelegantly) call this conjoined process ‘constitution-making-as-nation-making.’

CHAPTER 1: “INTRACTABLE CONSTITUTIONAL MEMORY”

The earth belongs to the living generation...Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right.

*Thomas Jefferson*²³

Black people and oppressed people in general have lost faith in the leaders of America, in the government of America, and in the very structure of American Government (that is, the Constitution, its legal foundation). This loss of faith is based upon the overwhelming evidence that the government will not live according to that Constitution because the Constitution is not designed for its people.

*Huey Newton*²⁴

Founding moments cast inherently long shadows on national histories. As the “symbolic markers of great transitions in the life of nations,” these historical experiences provide political communities with clear points of reference—idealized periods of time, which come to represent and embody their highest values, collective aspirations, and shared beliefs.²⁵ We do not need to look much further than the French Revolution to see this phenomenon quite clearly.

After the storming of the Bastille in July of 1789, French society quickly went through a range of interconnected social and political change. As individuals rejected family privilege, throwing off the yoke of feudalism and its social hierarchy, the National Assembly replaced the

²³ Thomas Jefferson, “Thomas Jefferson to James Madison, 6 September 1789,” in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd, Lyman H. Butterfield, and Mina B. Bryan, vol. 2 (Princeton, NJ: Princeton University Press, 1950). Jefferson drew this 19-year calculation from the work of Marquis de Condorcet, though.

²⁴ Huey Newton, as quoted in Rana, “Colonialism and Constitutional Memory,” 284–85.

²⁵ Kissane and Sitter, “National Identity and Constitutionalism in Europe,” 3.

Estates General.²⁶ This new governing body claimed “sovereignty” in the name of a unified and fundamentally homogenous French nation—thus seeking to “endow France” with a constitution (even though the Assembly frequently “flouted popular sentiment”).²⁷ Such deep social leveling was therefore reflected and ‘constitutionalized’ within the preface to the new constitution—the “Declaration of the Rights of Man and the Citizen”—which granted all French citizens a fundamentally equal set of rights vis-à-vis the political system overall.²⁸ As a result, French political identity was stamped with an aversion to clear markers of social difference; after all, the Revolution was in part fueled by the rejection of the social markers of feudalism—divisions that the Estates General had previously exemplified. By implication, though, this new image of French society left little room for any public display and embrace of difference.

We can easily draw a clear (yet, admittedly speculative) line between the ideals and outcomes of this founding moment and some of the more recent rejections of diversity in France. Insofar as the Revolution established the ‘French People’ as a unified and homogenized group—and the initial constitution drafting process codified and crystallized this specific image of French society—the anguish over immigration and growing anti-European Union sentiment begins to

²⁶ Notably, the Estates General hardly existed as a ‘national’ governing body, but rather was broken-up by France’s three social groupings: the clergy, the nobility, and the peasants.

²⁷ William Doyle, *The Oxford History of the French Revolution*, 2nd ed. (Oxford: Oxford University Press, 2002), 110–11; 114–15; 120.

²⁸ *Ibid.*, 118–119. I focus on the ‘Declaration’ as opposed to the text of the constitution itself because, as Doyle, 118, explains, “it long outlived the constitution to which it was a preamble...and has been looked to ever since by all who derive inspiration from the French Revolution as the movement’s first great manifesto, enshrining the fundamental principles of 1789.” Put differently, even though this first post-Revolution constitution no longer ‘casts a direct shadow’ on French society, law, and politics, the ‘Declaration’ certainly does.

make some sense.²⁹ After all, the recent influx of immigrants from the Middle East and North Africa presents French society with an increasingly large and *unassimilated* population, which stands at odds with the traditional notions of French identity.³⁰ Similarly, and more specifically, this understanding of French national identity helps to explain the recent hostility toward women wearing ‘burkinis’ at beaches across France. As bathing suits that adhere to Islamic standards of modesty, these ‘burkinis’ serve as clear markers of social and religious difference. This implicitly challenges the idea of “what it really means to be French” in the 21st Century.³¹

While this account of French political and constitutional history is far from comprehensive, it nevertheless highlights the broad origins and effects of what I call Intractable Constitutional Memory (ICM)—or, in the case of France, the homogenous image of the political community, which continues to foster xenophobic, anti-immigrant, and militantly-secular sentiments within some corners of French society. Despite the passage of nearly two centuries, not to mention the adoption of five different constitutions between 1789 and today, these sentiments still continue to shape the contours of French social, political, and legal ‘life.’ In other words, the legacy of the founding (and of the initial constitution-writing process)

²⁹ Stanley Hoffmann, review of *The French Melting Pot: Immigration, Citizenship, and National Identity*, by Gerard Noiriel, *Foreign Affairs*, January 28, 2009, <https://www.foreignaffairs.com/reviews/capsule-review/1996-11-01/french-melting-pot-immigration-citizenship-and-national-identity>.

³⁰ Adam Nossiter, “Marine Le Pen Leads Far-Right Fight to Make France ‘More French,’” *The New York Times*, April 20, 2017, <https://www.nytimes.com/2017/04/20/world/europe/france-election-marine-le-pen.html>.

³¹ Amanda Taub, “France’s ‘Burkini’ Bans Are About More Than Religion or Clothing,” *The New York Times*, August 18, 2016, <https://www.nytimes.com/2016/08/19/world/europe/frances-burkini-bans-are-about-more-than-religion-or-clothing.html>.

persists—in part because each of the Republic’s subsequent constitutions either explicitly or implicitly echoed the ideals of the 1789 Declaration.³²

Taking a step back from this specific case, the overall theory of ICM emerges through several interrelated claims.³³ (1) The process of constitution-making naturally leaves clear and specific marks on the ‘founding myth’ (or, in other words, on the overall national identity) of a given country.³⁴ After all, founding moments allow for the members of a political community to come together and publically negotiate and formulate how they will interact, ‘fit together’ into a political system, and so on. Of course, this process will take shape in entirely different ways, depending in part on historical circumstances and the degree to which individuals participate in

³² For example, the first sentence of the current French Constitution (1958, revised in 2008) states, “The French people solemnly proclaim their attachment to the Rights of Man and the principles of sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004.” See: French Const., Preamble.

³³ At the outset, it is important to note what I mean to convey with the idea of ICM. Primarily, it is an empirical concept—meaning that in a diverse and numerous set of cases, we can *observe* that ‘constitutionalized’ political systems appear consistently unable to move beyond some legacy of their founding. Thus, this section (and this thesis as a whole) seeks to make sense of *how* and *why* these legacies hold so much weight within specific constitutional systems, while also exploring whether or not we can re-design constitutions and constitution-making processes in order to avoid these stagnating forces. Thus, ICM is not in itself a normative concept—nor does it necessarily apply equally (if at all) to *all* constitutions around the world. Yet overall, as we will see, it has broad normative implications for the democratic legitimacy of constitutions, especially in the long-term.

³⁴ After all, as John E. Finn argues, “constitutional orders” include not only ‘texts’ and the ‘institutions’ that they create (what he calls the Juridic Constitution), but also ‘citizens’ and ‘cultures’ (what he calls the Civic Constitution). In this sense, then, constitution-making leaves clear and tangible marks on the ‘citizens’ and ‘cultures’ of a given political community, while also linking the operations of these Juridic and Civic constitutions together. See: John E. Finn, *Peopling the Constitution* (Lawrence, KS: University Press of Kansas, 2014), 28–30. Here, ‘founding myths’ are the stories that political communities tell and re-tell to make sense of their values, goals, and shared histories—even if those shared past experiences are largely imagined, or even artificial.

the constitution-making process overall.³⁵ Yet, independent of (and in spite of) these contingent factors, founding moments nevertheless hold a heightened place in countries' political, social, and legal histories, leaving a clear legacy on their national identities.³⁶

(2) As we move away from T_1 (the moment of ratification), however, several fundamental components of the political community begin to naturally shift: social values and norms morph and develop, political ideals evolve, and the mistakes and oversights of past generations come into ever-sharper focus. Even more importantly, though, the make-up of the citizenry changes: some groups might immigrate, while others emigrate; demographics shift; and thus, in time, the natural majorities emerge in entirely different 'corners' of the polity (at least when compared to those of T_1).³⁷ (3) Yet, despite these consistent changes to the composition of the political community (something that is hardly problematic on its own), the marks left by the initial constitution-drafting process on that community's national myth—and corresponding national identity—are particularly 'sticky.' Or, in other words, the values, ideals, and even mistakes of the

³⁵ Note also how these specific historical moments differ from other types of collective 'constitution-making,' which can take place after ratification (i.e., amendment procedures). Even if these amendment processes allow for the citizenry as a whole to re-think some *aspect* of the constitution, individuals nevertheless engage and interact with these moments of constitutional change in a fundamentally different (and, potentially, less significant) manner than they would in a preliminary constitution-drafting process. After all, the negotiations might not even concern an identity-related question (e.g., the 25th Amendment to the U.S. Constitution, which outlines the logistics of presidential succession).

³⁶ After all, as Finn notes in the American case, "The document ratified in 1789 and its formal amendments are self-evidently canonical...in that any discussion of...national identity and civic aspirations must begin with them." See: Finn, *Peopling the Constitution*, 50.

³⁷ This idea of changing majorities over time remains a well-traveled (if not entirely foundational) area of concern for constitutional theorists; after all, it animated a major disagreement between American founders James Madison and Thomas Jefferson concerning the proper 'life span' of a constitution. See, for example: Jefferson, "Thomas Jefferson to James Madison, 6 September 1789." As we will see shortly in point (3), it is the endurance of these 'national myths'—and their links to constitutional outcomes and inequalities—that make these changing majorities particularly concerning.

founding generation at T_1 continue to affect the everyday operations of the political system in reoccurring ways at T_2 , T_{20} , T_{50} , and so on. (4) Thus, even once certain individuals recognize these social and political changes and attempt to bring the constitutional system ‘into the present’ through formal amendments, these marks continue to exist (either explicitly or implicitly) within the community’s founding myth, national identity, and informal political norms and conventions. In cases where the founders favored the interests of some social groups over those of others, either intentionally or inadvertently, these marks only entrench and perpetuate inequalities for the long-term.³⁸

Overall, then, ‘Intractable Constitutional Memory’ describes this enduring legacy, which stems from (and directly calls upon) the country’s constitution-making experiences.³⁹ Note, though, that constitution-making processes do not always represent the true ‘foundations’ of a

³⁸ This is particularly concerning when considering the ever-increasing importance of national identity within constitution-writing processes over the past several decades. After all, insofar as the contours of a given country’s national identity are particularly contentious within (say) a given post-conflict state, then the relevant decisions made during the constitution-making process likely have broad political consequences (e.g., by favoring one ethnic group over another). Thus, once we add-in the component of time, these initially-consequential decisions vis-à-vis national identity will likely cast a long shadow over future political, social, and constitutional change. See: Bill Kissane and Nick Sitter, “The Marriage of State and Nation in European Constitutions,” *Nations and Nationalism* 16, no. 1 (2010): 49–67. Within the African context, focusing specifically on the dangers of a ‘constitutionalized’ national identity see: Alemante G. Selassie, “Ethnic Identity and Constitutional Design for Africa,” *Stanford Journal of International Law* 29, no. 1 (1992): 1–56.

³⁹ This idea of ICM is not *necessarily* undesirable and normatively problematic. We could imagine a hypothetical case, for example, in which a particularly inclusive and democratic constitution-making process leaves clear marks on the country’s founding myth and national identity—marks that perpetuates democratic values and social tolerance over the long-term. As we will see in Section 3 below, however, the possibility of a national identity that remains entirely impartial to different social groups (and thus, incapable of perpetuating ICM-related inequalities in the long-term) is theoretical implausible. As James Tully argues, for example: “A constitution can seek to impose one cultural practice, one way of rule following, or it can recognise a diversity of cultural ways of being a citizen, but it cannot eliminate, overcome or transcend this cultural dimension of politics.” See: James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, The John Robert Seeley Lectures (Cambridge: Cambridge University Press, 1995), 6. For a preliminary discussion of the idea of inherently exclusionary national identity, though, see: Rogers M. Smith, “Citizenship and the Politics of People-Building,” *Citizenship Studies* 5, no. 1 (February 2001): 73–96.

political system. For example, while the drafting of the 1793 French Constitution indeed put the country through a period of constitution-making, it hardly represented the founding of the Republic, at least not in the same way as the post-Revolutionary drafting of the 1791 Constitution. Yet, as I will argue below, this does not mean that ICMs can emerge *only* within ‘original’ constitution-making processes—or, those that mark the starting-point of an entirely new country. Rather, we can think of a sliding scale of constitution-making, in which ‘stickier’ ICMs might emerge from founding moments than from more ordinary drafting processes.

At this point in our discussion, however, this empirical concept remains largely abstract and highly generalized. The next section thus seeks to ground the idea of ICM within three brief historical cases: the United States, Spain, and Poland. These examples are hardly meant to be exhaustive case studies of each country’s constitution-writing experiences, placed alongside some long-term historical analysis of its constitutional development and social change. Moreover, each case is slightly (if not significantly) different, especially with regard to the ‘types of memories’ that it retains. Yet, this variety simply demonstrates how ICMs can emanate from a variety of founding myths—thus collectively illustrating the nuanced dynamics of Intractable Constitutional Memory overall.

1.1 Three Historical Cases of ICM

THE UNITED STATES

Consider, for a moment, all those individuals who would reasonably qualify as ‘full’ members of American society in the late 1780s—the time when political favor quickly turned away from the loose (and largely inefficient) Articles of Confederation, and toward the adoption of a new,

unifying document: the U.S. Constitution. Here, such membership had a relatively high threshold; only white men could feasibly participate in political, public, and intellectual life, and only the wealthy among them could expect to have their opinions heard and interests protected. Put differently, only these wealthy white men could have honestly claimed a voice in the Constitution's chorus of 'We the People.'

As a result, the Constitution itself reflected the importance of this singular, powerful group; fifty-five wealthy white men not only drafted the document in a shuttered Philadelphia building, but also planned the ratification process. By extension, then, their group interests dominated the substance of the text—all in spite of their intentions to, in the words of James Madison, protect “the public goods and private rights” of society overall.⁴⁰ For example, at the time of its ratification, the document excluded all women from full involvement in political—and by extension, public—life (e.g., by voting). In an even more explicit and sweeping manner, the document not only excluded all African Americans from the political domain, but also directly ensured their continued enslavement in the American South and political subordination across the country.⁴¹

Presumably, if the convention included women and African Americans in the drafting and ratification processes, a substantially different document would have taken effect on March 4, 1789. And surely, if the U.S. chose to start anew and rushed to convene a constitutional convention next month, no delegate would (hopefully) even think to propose such broad and arbitrary exclusions of *any* groups. After all, these exclusions seem to go against the fundamental

⁴⁰ As cited in David Robertson, *The Original Compromise: What the Constitution's Framers Were Really Thinking* (Oxford and New York: Oxford University Press, 2013), 5.

⁴¹ *Ibid.*, 178–190.

promises of American political and constitutional life—for example, in the words of a recent U.S. president, that “We come from different places and have different stories, but we share common hopes, and one very American dream.”⁴²

And yet, these initial, constitutionalized exclusions continue to shape the American social and political fabric—even in the face of constitutional amendments, overturned laws, and changing popular opinions.⁴³ On paper, the 14th Amendment extended citizenship and the ‘equal protection’ of the law to all those born in (or naturalized within) the U.S., and the 19th Amendment extended the vote to all citizens, regardless of their sex. And as a result, these formal constitutional changes *presumably* expanded the representative voice of ‘We the People’ in the United States.

Today, though, women make up only twenty-one percent of the U.S. Senate, while African Americans make up only two percent. For each group, these percentages mark historic high-points. From a different angle, by most estimates, women make only eighty cents for every dollar that a man will make for the same work; and African American women, on average, will make only sixty-three cents for every dollar that white men make for the same work.⁴⁴ In this sense, then, the founding era continues to cast a long shadow on American political and social life—not only leaving its marks on the ways that law and the constitution understand the true

⁴² Barack Obama, “Remarks at the Associated Press Annual Luncheon in Washington, DC,” online by Gerhard Peters and John T. Woolley, The American Presidency Project, April 14, 2008.

⁴³ In the case of African Americans and the 14th Amendment, for example, Irene Bloemraad notes, “Although the 14th Amendment to the Constitution guaranteed the federal citizenship of black Americans following the Civil War, this did not ensure rights to social benefits, quality schooling, a jury of peers, or the ability to participate in politics.” See: Irene Bloemraad, “Theorizing and Analyzing Citizenship in Multicultural Societies,” *The Sociological Quarterly* 56, no. 4 (2015): 595.

⁴⁴ “The Wage Gap: The Who, What, Why, and What To Do,” National Women’s Law Center, accessed December 1, 2017, <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/>.

‘identity’ of the American people, but also on how individuals understand their own place within (and relationship to) this collective identity.⁴⁵

In common discourse and throughout American politics, seemingly clear (yet hardly straightforward or easily-attainable) paths exist to address these cases of enduring inequality—on the one hand, through legal victories in the Supreme Court, and on the other, through proactive, remedial legislation in Congress. On this usual approach, the ‘wage gap,’ for example, looks like an accidental shortcoming of the American political and constitutional systems. As we have consistently seen, though, even when the legal system moves successfully toward *de jure* equality, the terrain of *de facto* social, political, and economic opportunity often lags far behind. Of course, many of these issues would likely continue to plague American society in some way, regardless of whether or not the initial drafting process addressed them at all. Yet, the U.S. founding endorsed and crystallized the political salience of these race- and gender-based inequalities, placing them at the center of the new political system. As a result, even though the constitution-making process did not *create* these enduring issues, it likely contributes to their longevity.

SPAIN

As the reign of Spanish military dictator Francisco Franco came to a close in the 1970s, pluralism was on the rise. Contrasting the “unitary nationalist conception” of the country, which undergirded Franco’s authoritarian regime, the emerging democratic movement embraced the “peripheral nationalist claims” of the Basque Country, Catalonia, and Galicia—claims based on

⁴⁵ For an interesting analysis of how *individuals* internalize and engage with these exclusionary renderings of American national identity, see: Laura Van Berkel, Ludwin E. Molina, and Sahana Mukherjee, “Gender Asymmetry in the Construction of American National Identity,” *Psychology of Women Quarterly* 41, no. 3 (2017): 352–67.

these regions' linguistic, cultural, and national differences.⁴⁶ Within this political climate, then, the debates and deliberations surrounding the drafting of the 1978 Constitution had to play a careful balancing act between, on the one hand, these regional claims of autonomy, and on the other, the need for a strong and unified Spanish state.

This completed constitution thus reflected and embodied these dueling imperatives of post-Franco-era Spain: it enshrined “the ‘invisible unity’ of the Spanish people as a collective subject, from whom the constitutive authority was alleged to emanate,” while recognizing “the existence of other collective subjects as well” (e.g., the groups that laid claim to Basque Country or Catalonia).⁴⁷ Put differently, this constitutional ambiguity crystallized and endorsed a once-informal situation in which a unified Spanish national identity coexists uncomfortably with a variety of disparate regional identities. At the same time, these identity-related questions and ambiguities bled into the political and administrative structures of the new constitutional system, creating a “de facto asymmetrical federal state,” which gave entirely *different* and *unequal* rights and privileges to different regions.⁴⁸ Basque Country and Navarre, for example, were granted ‘full fiscal autonomy,’ while Catalonia (and the rest of the regions in Spain) remain a part of the “common system” of taxation.⁴⁹

⁴⁶ Enric Martínez-Herrera and Thomas Jeffrey Miley, “The Constitution and the Politics of National Identity in Spain,” *Nations and Nationalism* 16, no. 1 (2010): 6.

⁴⁷ *Ibid.*, 8–10, describe this arrangement as “an utterly ambiguous and ‘hybrid’ formulation,” which left these semi-autonomous regions entirely uncertain of how they fit into the Spanish ‘whole,’ not only politically and administratively, but also culturally and socially.

⁴⁸ *Ibid.*, 6; Pablo Beramendi, Can Catalonia Split with Spain?, interview by Zachary Laub, September 29, 2017, <https://www.cfr.org/interview/can-catalonia-split-spain>.

⁴⁹ Beramendi, Can Catalonia Split with Spain?

In spite of continued efforts to create a more formal ‘federal’ system, then, these foundational divisions and constitutional ambiguities continue to shape some of the main conflicts within contemporary Spanish politics and society.⁵⁰ Most notably, the region of Catalonia has long pushed for outright secession from Spain, citing Madrid’s consistent infringements on the region’s fundamental autonomy—a claim that we can trace directly back to the debates of the constitution-drafting process.⁵¹ This came to a head in October 2017, when the region successfully held a referendum on independence, although the Spanish government actively worked to suppress this movement and took control of the region shortly after the vote.⁵² Within the context of ICM, then, this active (yet unsuccessful) independence movement remains almost unsurprising; after all, the country’s founding gave full ‘recognition’ and abstract autonomy to Catalonia (and Catalonian ‘national’ identity)—all without giving it any formal pathways to take control of its political affairs.⁵³

POLAND

As Poland emerged from the fall of communist party-rule in 1989, the country stepped into a period of intense debate concerning “questions of identity and collective memory, the meaning of recent history within broader modern Polish history, and the ‘historical’ place of the Roman

⁵⁰ Martínez-Herrera and Miley, “The Constitution and Politics,” 23–27.

⁵¹ Beramendi, Can Catalonia Split with Spain?

⁵² Raphael Minder and Patrick Kingsley, “Spain Dismisses Catalonia Government After Region Declares Independence,” *The New York Times*, October 27, 2017, <https://www.nytimes.com/2017/10/27/world/europe/spain-catalonia-puigdemont.html>.

⁵³ *Ibid.*

Catholic Church and its new role in post-Communist Poland.”⁵⁴ These questions were most salient, though, within the debates surrounding the new constitution’s preamble—the “symbolic site par excellence where the nation is explicitly defined, providing the basis for the [new] constitution.”⁵⁵ Two major ‘camps’ dominated these conversations: on the one hand, those who supported a more ‘ethnic’ vision of the Polish nation, and on the other, those who wished to form a new, liberal-democratic identity that would (in their minds) enable the country to democratize.⁵⁶ This ethnic identity had deep roots in Polish history, though. Since the end of the 19th century, modern Polish identity was consistently framed in opposition to the ‘Other,’ thus eventually creating a “hierarchization of national groups” within the country—one in which Catholic Poles stood at the top, and Jews stood at the bottom.⁵⁷

When it came to the drafting of the new constitution’s preamble, then, the resulting text represented a clear compromise between these two groups: it juxtaposed deeply religious imagery with more civic, tempered ideas about the identity of the Polish people.⁵⁸ In the course of these debates, though, the proponents of the ethnic framing of Polish identity continued to underscore these ‘anti-Other’ sentiments among the public, accusing their opponents of being Jews “through

⁵⁴ Geneviève Zubrzycki, *The Crosses of Auschwitz: Nationalism and Religion in Post-Communist Poland*, (Chicago: University of Chicago Press, 2006), 86.

⁵⁵ *Ibid.*, 86–87.

⁵⁶ Zubrzycki, *The Crosses*, 90–96; Geneviève Zubrzycki, “‘We, the Polish Nation’: Ethnic and Civic Visions of Nationhood in Post-Communist Constitutional Debates,” *Theory and Society* 30 (2001): 629–68.

⁵⁷ Zubrzycki, *The Crosses*, 54–57.

⁵⁸ *Ibid.*, 90–96.

a series of associations and double entendres.”⁵⁹ Thus, as Geneviève Zubrzycki explains, this constitution-making process left “peculiar” marks on the contemporary political system, where

the discursive field on the nation has been reopened and is being shaped by two opposed visions of the nation (civic and ethnic), but neither seems able to mobilize a dominant constituency successfully...Instead of reifying the civic and ethnic categories, the Polish case shows how they both compete and coexist within the broader discursive field of the nation.⁶⁰

Put differently (although perhaps pessimistically), the liberal and democratic values of Poland have a clear, persistent, and foundational ethnic undercurrent; after all, these conceptions of the Polish people sit side-by-side within the 1997 Constitution.

Much like in the cases of the U.S. and Spain (and France), discussed above, these marks on Polish national identity continue to have highly consequential political outcomes. Since it took power in October 2015, for example, the conservative Law and Justice Party (PiS) has continually drawn upon the ethnic conception of the Polish people in order to rally support for its anti-Muslim and anti-immigrant initiatives—policies that it has pursued alongside the active embrace of (and preference for) “white Christianity and generally conservative beliefs on family and sexuality.”⁶¹ In other words, PiS has been able to underscore the idea that Poland ‘belongs’

⁵⁹ Zubrzycki, *The Crosses*, 91.

⁶⁰ Zubrzycki, “We, the Polish Nation,” 654.

⁶¹ Agata Fijalkowski, What’s Next for Poland’s Democratic Decline?, interview by Jakub Lewandowski, December 11, 2017, <https://www.cfr.org/interview/whats-next-polands-democratic-decline>; Mateusz Mazzini, “Poland’s Right-Wing Government Is Rewriting History - with Itself as Hero,” *Washington Post*, February 27, 2018, https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/27/polands-right-wing-government-is-rewriting-history-with-itself-as-hero/?utm_term=.016b8911ed2b.

exclusively to white Catholic Poles, at least in part because the country's founding moments gave equal weight to this view of Polish peoplehood as it did to any democratic, civic ideals.⁶²

ICM, REVISITED

With these historical cases in mind, we can now see some of the clear pattern from which ICMs emerge. During a country's constitution-making process, a series of debates unfold (either explicitly *or* implicitly) about the identity of the political community, how different groups fit into this collective identity, why these groups ought to work together under this new institutional framework, and so on. As the constitution-making process comes to a close, however, these debates—e.g., that Catalonians are simultaneously (but uncomfortably) Catalonian *and* Spanish, or that Poles are implicitly white Christians—get crystallized within the new constitutional system. Then, as history moves from T_1 to T_{20} and T_{50} , these implicit marks on the country's national myths (or, using our terminology, ICMs) continue to skew the political system in one way or another, thereby favoring a specific group, or sustaining an identity-based dispute. Thus, these founding myths continue perpetuate the biases and decisions of the founding generation, even after some or all members of future generations attempt to redress these historical legacies through formal constitutional amendments. After all, these legacies do not primarily exist within the text of the constitution itself, but are rather diffused across the identities, cultures, and everyday practices that the initial process of constitution-making established.

⁶² Note that, even if this clear connection between the drafting process and the policy platform of PiS is overstated, these constitution-making-era debates continue to frame the terms of political debate within Poland. Put differently, even if PiS does not point directly to the ethnic undertones of the founding period when it pursues these policies, it still draws on them for its electoral and legislative success.

Of course, this argument might draw a causal line between the social structure of the founding-era and modern-day inequalities without accounting for a series of confounding variables. In the Polish case, for example, the country's widespread support for anti-immigrant policies might not stem from some enduring 'constitutional memory,' but rather from a widely held sense of xenophobia among the public. Put differently, the concept of ICM perhaps adds unnecessary complexity to a fairly straightforward phenomenon. Again, though, the idea of ICM does not suggest that constitution-making *creates* inequalities (or inequality-engendering sentiments) within a given political community. Instead, it argues that, even if other variables primarily account for certain social and political inequalities, 'constitutionalizing' them (1) heightens their effects and (2) makes them more durable in the long-term.

In light of this conceptual framework, two clear questions remain unanswered, both of which have the potential to undermine the theoretical underpinnings of ICM. First: Are foundational myths really as politically relevant—and legally/constitutionally consequential—as our account of ICM suggests? And second: Are ICMs truly linked to the process of constitution-making, or do they emerge only insofar as the constitutional text makes specific statements about national identity? Or, to frame this second question from a slightly different angle: Are ICMs actually 'constitutional' at all, or does social-cum-constitutional change naturally take place unevenly, and by fits and starts?⁶³ The following section will address these two questions in turn.

⁶³ Or, getting to the heart of all of these questions: Does the theory of ICM create a self-fulfilling theoretical prophesy, of sorts? E.g., one that, 'begging the question,' states: (1) social and political inequalities existed at the moment of a country's founding; (2) similar social and political inequalities continue to exist in the long-term; therefore (3) these later inequalities stem from the fact that the initial inequalities were 'constitutionalized' within that country's founding myth.

1.2 “Stories of Peoplehood” & the Importance of Constitution-Making

Up until this point, our discussion has relied on the underlying presumption that constitution-making processes not only leave their marks on the identity of a given political community, but also that these identities have a tangible impact on everyday political trends, even in the long-term.⁶⁴ Yet, such broad and interlocking claims are hardly self evident and uncontroversial.⁶⁵ Perhaps, this approach entirely underestimates the flexibility of these national myths and resulting identities. Or, perhaps it overlooks the importance of exclusionary laws, thus overstating the role that national identities play in engendering political inequalities. While these potential objections certainly have some merit, founding myths nevertheless play a relatively central role in the everyday (and long-term) operations of modern political systems. The idea of “ethically constitutive stories” helps to substantiate and make sense of this claim.

* * *

As Rogers Smith argues, all political communities rely upon specific, “persuasive” stories that draw together their members, showing them what they all have in common and why they ought

⁶⁴ If this presumption is correct, we could expect to find empirical data demonstrating, for example, that Jews or immigrants in Poland experience higher levels of discrimination, or that they receive fewer social services, and so on, than their white Christian co-citizens.

⁶⁵ After all, a whole body of empirical research exists on the relationship between an individual’s understanding of national identity and her support for different immigration and social welfare policies. For just two examples, which are hardly reflective of the entire field of empirical research on these issues, see: Victoria M. Esses et al., “The Immigration Dilemma: The Role of Perceived Group Competition, Ethnic Prejudice, and National Identity,” *Journal of Social Issues* 57, no. 3 (September 2001): 389–412; Marisa Abrajano and Zoltan L. Hajnal, *White Backlash: Immigration, Race, and American Politics*, Reprint edition (Princeton University Press, 2015). With regard to the concept of ICM, however, any rigorous engagement with these empirical questions lies far beyond the scope of our discussion.

to ‘get along.’⁶⁶ Yet, these “narratives” appeal to far more than some sheer desire for economic gain, or some fear of political retribution; they also draw on “‘ethically constitutive stories’ that claim membership is somehow intrinsic to the core identities of potential constituents.”⁶⁷ Put differently, these stories give individuals the sense that a given political community is ‘made for them,’ usually by underscoring specific markers like religion, race, ethnicity, ancestry, language, culture, history, and so on, as the distinctive characteristics of that community.⁶⁸ Once individuals internalize and embrace a specific account of their political community over time, though, “the very possibility of rejecting it may seem alien, unnatural, immoral;” after all, these narratives provide them with a clear and compelling way of understanding their own identity, and of connecting it to those around them.⁶⁹ Herein lies the political salience of these (potentially inflexible) narratives, though: they not only help to construct a group of ‘insiders,’ but also inherently provide that group with ways of recognizing ‘outsiders’ (e.g., those who do not have a place within the ‘constitutive story’ of the political community).⁷⁰ As these narratives inform the decisions and actions of political leaders, then, they have the potential to continually

⁶⁶ Rogers M. Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (Cambridge: Cambridge University Press, 2003), 129.

⁶⁷ Ibid.

⁶⁸ Smith, “Citizenship and the Politics of People-Building,” 78–79.

⁶⁹ Ibid., 80–82. Clearly, based on this definition, ‘constitutive stories’ are intimately linked to nationalism and national identity. For a rigorous discussion of these concepts (and of how they relate to the theory of ICM), though, see Chapter 3.

⁷⁰ Smith, “Citizenship and the Politics of People-Building,” 77.

skew the outcomes of politics in favor of ‘insiders’—even if the ‘outsiders’ technically belong to the political community, too.⁷¹

Returning to the historical examples discussed above, then, these ‘ethically constitutive stories’ refer to the durable narratives that the French tell themselves about their difference-blind and staunchly secular political community, or to the stories that Catalonians tell themselves about their linguistic and cultural distinctiveness in the face of a broader Spanish identity—narratives that continue to impact political outcomes and shape decision-making today.⁷² In this sense, we can think of ‘ethically constitutive stories’ (or, using roughly analogous terminology, ‘founding myths’) in the same way that Stephen Holmes describes constitutions: as mechanisms that provide the “prearranged,” “preset” bounds within which politics can conceivably occur.⁷³ In other words, these highly consequential narratives provide ICMs with a medium through which they can continually skew and shape political debates and outcomes for the long-term.

Note that these ‘ethically constitutive stories’ do not necessarily originate within constitution-making processes, at least on Smith’s account. As we saw in the historical cases discussed above, though, constitution-making leaves clear and enduring marks on stories of peoplehood (either explicitly or implicitly), even when they merely reframe and ‘constitutionalize’ preexisting national identities. Why, then, do the experiences of constitution-making play an

⁷¹ Smith, *Stories of Peoplehood*, 129.

⁷² As Smith similarly argues in the U.S. case, the founding-era definition of Americans as ‘European-descended men’ has cast a long shadow over American history—a legacy that stems from “the need to define membership in one way expansively, as including all of European descent and serving the rights of all mankind, and in other ways narrowly, as excluding all tribes-people and Africans whose lands and labors Europeans wanted and whose religions and cultures they disdained.” See: Smith, “Citizenship and the Politics of People-Building,” 86.

⁷³ Stephen Holmes, “Precommitment and the Paradox of Democracy,” in *Constitutionalism and Democracy*, ed. Jon Elster and Rune Slagstad (Cambridge: Cambridge University Press, 1988), 231.

especially central and enduring role within these national myths? While we could certainly develop a normatively and empirically complex explanation for this,⁷⁴ I suspect that the overarching answer is quite straightforward: constitution-making processes represent heightened periods of reflection and deliberation—moments that allow for the members of a given community to re-frame their ‘constitutive stories’ to a far greater degree than could possibly occur any other time. After all, as Bill Kissane and Nick Sitter note, constitution-making episodes act as “symbolic markers of great transitions in the life” of a political community.⁷⁵ Again, these episodes grow all the more significant when they take place alongside that community’s *initial* formation.⁷⁶

From a historical perspective, then, these ‘great transitions’ provide future generations with clear points of reference when ‘telling’ and ‘retelling’ these constitutive stories. In this sense, while the text of a given constitution may reflect or suggest the identity of (for example) the American people, it captures this identity—and the constitutive story that sustains it—only partially.⁷⁷ Thus, these constitutive stories (and, by extension, ICMs) flow from the debates that surround the drafting process overall, as opposed to originating within the actual text of the document itself.

⁷⁴ Chapters 2 and 3 will also more directly engage with this question when discussing the links between constitution-making and nation-making overall.

⁷⁵ Kissane and Sitter, “National Identity and Constitutionalism in Europe,” 3.

⁷⁶ For example, in the French and American cases, discussed above.

⁷⁷ After all, as Simone Chambers notes, constitutions seek to “rationalize the political order by introducing overarching unitary principles...in a written form”—meaning, they do not describe the political system *as it currently is*, but rather describes how *it ought to eventually be*. Thus, the text itself hardly provides us with an accurate depiction of a nuanced (and potentially exclusionary) foundational myth. See: Simone Chambers, “Democracy, Popular Sovereignty, and Constitutional Legitimacy,” *Constellations* 11, no. 2 (2004): 158.

Our specific focus on constitution-making does not mean, however, that systemic, ‘durable’ inequalities exist in societies *only insofar as* they stem from these founding moments. Certainly, inequalities emerge through a variety of complex, abstract, and intangible—and often self-reinforcing—social processes.⁷⁸ Under these more holistic explanations, while founding moments may exacerbate or reframe these long-running patterns of discrimination, similar inequalities nevertheless existed before constitution-making ever occurred.⁷⁹ Yet, the existence of non-foundational inequalities hardly undermines the main claim of ICM—namely, that constitution-making has the potential to uniquely entrench specific inequalities within the ‘constitutive stories’ of a given political community. Thus, we can imagine placing a given society’s social, political, and legal inequalities on a sliding scale, of sorts, which links them to founding moments by varying degrees. Even if ICM applies in some cases far more than in others, then, it nevertheless contributes to our understanding of entrenched inequalities in a variety of national contexts.

⁷⁸ Many authors focus on the social and ‘systemic’ (and unmovable) nature of these inequalities from both empirical and conceptual perspectives. On the issue of race, see, for example: Joe R. Feagin, *Systemic Racism: A Theory of Oppression* (New York and London: Routledge, 2006); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Revised (New Haven: The New Press, 2012). For just one example the issue of gender, see: Judith Lorber, *Gender Inequality: Feminist Theories and Politics*, 3rd ed. (Los Angeles, CA: Roxbury, 2005). And finally, for just one example on the issue of social class and political-cum-economic inequality, see: Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age*, 2010 Edition (Princeton: Princeton University Press, 2010).

⁷⁹ For just one example, as Mellissa S. Williams explains in the American context, “the cultural stigmas that dominant groups have historically attached to marginalized group identity have helped sustain discriminatory practices; and discriminatory practices have themselves been causally connected to the ongoing group-structured patterns of distributive inequality.” See: Melissa S. Williams, *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation* (Princeton: Princeton University Press, 1998), 17.

1.3 Constitution-Making-as-Nation-Making & The Stakes of ICM

Taking a step back, the theory of Intractable Constitutional Memory rests on several intuitive claims. (1) Constitution-making leaves clear marks on the national myths of political communities; after all, this process allows for individuals to debate, negotiate, and then *concretize* their collective identity in a heightened, foundational sense. (2) These marks shape the stories that these communities tell and retell about their shared identity—stories that have a clear role to play in defining ‘insiders’ and ‘outsiders.’ (3) As we move away from T_1 , though, gaps begin to form between, on the one hand, how these stories describe the political community, and on the other, the actual, *de facto* identities, values, and goals that make-up the community. (4) And yet, because these stories are particularly ‘sticky,’ they allow for the biases and mistakes of the constitution-making process to cast a long and unmovable shadow over the political system, even in the long-term. (5) Overall, then, these legacies (or, ICMs) are particularly ‘intractable’ because they exist *outside of* any written text, yet have a clear impact on its meaning. Thus, they can endure, even after constitutional provisions are amended and laws are changed.

If we find this account of Intractable Constitutional Memory convincing, then the stakes of constitution-making appear instantly higher. After all, the mistakes and biases surrounding and driving these foundational events (not to mention the text itself) have the potential to impact social and political life in enduring, uncontrollable, and (often) unjust ways. In recent years, the literature on constitutional design has slowly recognized the importance of these ties between constitutions and national identity—in part by constructing theories that self-consciously engage in both constitution-making and nation-making (or, constitution-making-as-nation-making).

On the one hand, this turn in the literature could present us with clear and feasible strategies for avoiding exclusionary constitutive stories, thus enabling us to temper ICMs in one way or another. Certainly, this literature views constitution-making-as-nation-making as a near cure-all—an innovation that not only allows for constitutions to ‘stick’ better, especially within ethnically- or religiously-divided societies, but also produces more normatively desirable documents that can better reconcile the conflicting demands of ‘particularism’ and ‘universalism,’ ‘individualism’ and ‘collectivism,’ and so on.⁸⁰ On the other hand, though, the self-conscious and explicit combination of these processes could leave deeper and more enduring ‘marks’ on a community’s national myths and constitutive stories. After all, an increased emphasis on national identity might lead communities like Poland to make even more exclusionary, consequential, and explicit decisions about ‘insiders’ and ‘outsiders.’

* * *

The remainder of this thesis will take seriously the idea of constitution-making-as-nation-making, analyzing its empirical and conceptual feasibility, as well as its normative desirability—all to see whether or not we can utilize this novel approach to constitutional design in order to eliminate ICMs at their roots. Put differently, this thesis will evaluate whether or not these theories are successful in channeling the processes of constitution-making and nation-making toward democratic ends.

With these goals in mind, and to reiterate, I will carry out this analysis in three parts. Chapter 2 will grapple with the primary book-length works that develop arguments in favor of constitution-making-as-nation-making. As we will see, though, these arguments rely on the

⁸⁰ I discuss the feasibility of these claims at length in Chapters 2 and 3 below.

presumption that (1) national identities can remain entirely neutral and equality-engendering, and (2) that high levels of public participation can buoy the legitimacy of both constitutions and national identities in the long term. Thus, Chapter 3 will look specifically at the plausibility of these two underlying presumptions—both of which, as we will see, rely on unstable and/or unclear logic. Finally, then, in the conclusion, I will consider what an ICM-aware model of constitution-making could look like, and suggest some potential paths forward for constitutional theory and design overall.

CHAPTER 2:

“CONSTITUTION-MAKING, NATION-MAKING, & the IDENTITY of the PEOPLE”

...before examining the act by which a people elects a king, it would be well to examine the act by which a people becomes a people; for this act, being necessarily anterior to the other, is the real foundation of the society.

*Jean-Jacques Rousseau*⁸¹

Whoever considers, in a combined and comprehensive view, the general texture of the Constitution will be satisfied that the people of the United states intended to form themselves into a nation for national purposes.

*Justice James Wilson*⁸²

Since the turn of the 19th century, democratization and constitution writing have gradually emerged as “part of the normative script for the respectable modern state”—or, in other words, as the necessary ‘tickets’ into the club of modern states.⁸³ Alongside these empirical developments, then, theorists, lawyers, and politicians have long grappled with the “social and political foundations” of constitutions; from the works of David Hume, Adam Smith, Thomas Hobbes, and Jeremy Bentham, and even earlier, John of Salisbury, to those of Montesquieu, de Tocqueville, James Madison, Thomas Jefferson (to name only a few), the links between ‘higher

⁸¹ Jean-Jacques Rousseau, “The Social Contract,” in *The Social Contract and the First and Second Discourses*, ed. Susan Dunn (New Haven: Yale University Press, 2002), 162.

⁸² *Chisholm v. Georgia*, 2 U.S. 419, 465 (1793).

⁸³ Zachary Elkins, “Diffusion and the Constitutionalization of Europe,” *Comparative Political Studies* 43, no. 8–9 (2010): 972.

law' and democracy lie on well-trodden theoretical ground—and this is an understatement, to say the least.⁸⁴

In spite of these trends in both empirical developments and political thought, however, democratization has not always yielded written constitutions,⁸⁵ nor have written constitutions always led to democratization.⁸⁶ While this schism has driven some to step back and look at the compatibility of constitutional government and democracy overall,⁸⁷ our concern is primarily with the growing body of literature on constitutional design—a field that has proliferated since the break-up of the Soviet Union in the early 1990s, especially after Jon Elster “lamented” the serious lack of scholarship on the matter.⁸⁸ In broad terms, this literature engages with the various theoretical and technical ways that we can tighten this linkage between constitutions and democracy. Or, in other words, these studies often presume that constitutions have the ability to bolster the norms and goals of democracy, and vice versa.

⁸⁴ This list of theorists comes from Dennis Galligan and Mila Versteeg, “Theoretical Perspectives on the Social and Political Foundations of Constitutions,” in *The Social and Political Foundations of Constitutions*, ed. Dennis Galligan and Mila Versteeg (New York: Cambridge University Press, 2013), 4. I do not reproduce this list because it provides a comprehensive outline of the foundational works on constitutions and democracy, but rather because it underscores the long-running concern with such issues overall.

⁸⁵ For a description of the two clearest examples (the United Kingdom and New Zealand), see: Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999), 205-206.

⁸⁶ As Elkins highlights, the large majority of authoritarian states have formal written constitutions that appear highly democratic on paper. Yet, clearly and predictably, they fall short in practice. See: Elkins, “Diffusion and the Constitutionalization of Europe,” 972-973.

⁸⁷ For example, Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy* (Cambridge and New York: Cambridge University Press, 1988).

⁸⁸ Jon Elster, “Forces and Mechanisms in the Constitution-Making Process,” *Duke Law Journal* 45, no. 2 (November 1995): 364-396; Tom Ginsburg, Zachary Elkins, and Justin Blount, “Does the Process of Constitution-Making Matter?” *Annual Review of Law and Social Science* 5, no. 1 (December 2009): 202.

Beyond these overlaps, we can break this wide-reaching literature into two categories: (1) the ‘institutionalists,’ and (2) the ‘proceduralists.’⁸⁹ For ‘institutionalists,’ the constitution-writing *process* mostly matters insofar as it establishes lasting democratic institutions within (and for) a given state, primarily through the provisions of the constitution.⁹⁰ Put differently, these ‘institutionalists’ mainly concern themselves with the text itself. In contrast, ‘proceduralists’ often focus on various degrees of public involvement in the drafting process—independent of, or at least indirectly linked to, the specific textual provisions that this process generates.⁹¹ To a large extent, the contemporary work in both of these camps focuses on these issues of constitutional design for societies that have deep political or social cleavages—divisions that make democratization (or, even, the very adoption of a national constitution) particularly challenging. Presumably, this narrow focus simply reflects the contemporary context in which these studies have emerged and developed. After all, as Jennifer Widner highlights, over the past half-century,

⁸⁹ I borrow this two-group distinction from Hanna Lerner, “Constitution-Writing in Deeply Divided Societies: The Incrementalist Approach,” *Nations and Nationalism* 16, no. 1 (2010): 69.

⁹⁰ See for example: Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2002); Arend Lijphart, “Constitutional Design for Divided Societies,” *Journal of Democracy* 15, no. 2 (2004): 96–109; Sujit Choudhry, ed., *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford and New York: Oxford University Press, 2008).

⁹¹ See: Elster, “Forces and Mechanisms in the Constitution-Making Process;” Jennifer Widner, “Constitution Writing and Conflict Resolution,” *The Round Table* 94, no. 381 (September 2005): 503–18; Yash Ghai, “The Role of Constituent Assemblies in Constitution Making,” *IDEA*, 2006; Yash Ghai and Guido Galli, “Constitution-Building Processes and Democratization” (Stockholm: International Institute for Democracy and Electoral Assistance, 2006); Devra Coren Moehler, *Distrusting Democrats: Outcomes of Participatory Constitution Making* (Ann Arbor: University of Michigan Press, 2008); Todd A. Eisenstadt, A. Carl LeVan, and Tofigh Maboudi, *Constituents Before Assembly: Participation, Deliberation, and Representation in the Crafting of New Constitutions* (New York: Cambridge University Press, 2017).

200 constitutions have materialized in states that are on the verge of “internal violence;” thus, they often simultaneously play the role of ‘constitution’ and ‘peace treaty.’⁹²

Beyond this institution-forming responsibility, however, constitutions also serve as the foundational charter of the political community—or, in the words of Bill Kissane and Nick Sitter, as the “covenant between a people and a state.”⁹³ In this sense, constitutions not only chart-out *how* a state will operate, but also establish which norms, goals, and identities the political community will pursue and embody. Put differently, they help to create and define the idea and meaning of ‘We the People.’ This latter function of constitutions remains broadly overlooked in the existing literature.⁹⁴ Granted, outside of the work on constitutional design, scholars of multiculturalism and pluralism regularly engage with the links between identity (or, more commonly, identities) and constitutions.⁹⁵ Again, though, this literature fits into the ‘institutionalist’ approach, looking primarily at how specific political arrangements can accommodate conflicting identities or interests in the long-term.

Beyond these differing focuses, both the ‘institutionalists’ and the ‘proceduralists’ are ultimately concerned with the codified, written text of constitutions. After all, even the ‘proceduralists’ worry about *process* only insofar as it impacts the legitimacy (or at least ‘stickiness’)

⁹² Jennifer Widner, “Constitution Writing in Post-Conflict Settings: An Overview,” *William and Mary Law Review* 49, no. 4 (2008): 513.

⁹³ Kissane and Sitter, “The Marriage of State and Nation in European Constitutions,” 49.

⁹⁴ Among the existing studies on this linkage between constitutions and identity (in a general sense), the clearest examples are: Gary Jacobsohn, *Constitutional Identity* (Baltimore and London: The Johns Hopkins University Press, 2004); Beau Breslin, *The Communitarian Constitution* (Johns Hopkins University Press, 2006); and Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community (Discourses of Law)* (London and New York: Routledge, 2010). None of these look at the role that the drafting *process* plays in creating or shaping this political identity, though.

⁹⁵ For a particularly illustrative example: Lijphart, “Constitutional Design for Divided Societies.”

of the text itself. As Hans Kelsen argues, however, this idea of a ‘constitution’ has *two* interrelated forms: (1) formal constitutions (unified written documents, which regulate the processes of government and law); and (2) material constitutions (the formal *and* informal norms of the political system, which flow in part from “customs,” practices, and “judicial decisions”).⁹⁶ Note that within this dichotomy, the un-codified U.K. and New Zealand constitutions would still qualify as ‘formal constitutions;’ after all, their provisions unfold within written statutes, rather than in highly informal and often-diffuse conventions and procedures.

This idea of the ‘material constitution’ has taken on a variety of forms across legal scholarship—mostly within the American setting. In one of the classic texts on the matter, William Bennett Munro described this unwritten constitution in 1930 as “a rambling edifice to which successive generations of statesmen and jurists have each added wings and gables and pillars until only a semblance of the original architecture remains”—an ever-evolving process, which continually provides the ‘formal’ constitution with new meaning.⁹⁷ This idea has recently gained newfound interest among legal scholars; Ernest Young, for example, argues that the bulk of the American legal system now flows from the rules and norms of an “extracanonical constitution.”⁹⁸ Others highlight the significance of the widespread constitutional change that has taken place (and which continues to take place) outside of any formal constitutional

⁹⁶ Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Berkeley and Los Angeles: University of California Press, 1967), 230–32; Lerner, *Making Constitutions*, 15–16.” Thus, one cannot replace the other; they exist side-by-side. At the same time, though, Lerner, 210, does later recognize the capacity for contemporary *material* constitutions to entrench inequalities in a given state; yet, her discussion of this issue still remains under-theorized overall.

⁹⁷ William Bennett Munro, *The Makers of the Unwritten Constitution* (New York: MacMillan, 1930), 3–4.

⁹⁸ Ernest A. Young, “The Constitution Outside the Constitution,” *Yale Law Journal* 117, no. 3 (2007): 408–73.

mechanisms.⁹⁹ Echoing Kelsen most of all, though, Laurence Tribe orients the idea of the “visible constitution” within an “ocean of ideas, propositions, recovered memories, and imagined experience”—all of which directly shapes the foundational qualities of the (specifically American) political system.¹⁰⁰ Overall, then, these contemporary theorists move beyond the purely political and legal framework of Kelsen’s ‘material constitution,’ stretching the concept to include cultural norms and practices as well.

Despite the overall rigor of these discussions, however, none attempts to trace the nature of the ‘material’ or informal constitution back to the origins of its parallel *formal* constitution: the drafting process.¹⁰¹ Perhaps, this general lacuna exists for good reason; it would remain a complex and ever-changing task to link the already-opaque material constitution to some particularity of the drafting process. Moreover, for our purposes, this level of difficulty is likely only compounded for theorists of constitutional design. After all, how can we simultaneously design a formal constitution and the informal norms, practices, and conventions that supposedly emerge *after* its ratification? I suspect that the difficulty of this task is overstated—namely because, as I will argue, national identity stands among the primary drivers of this ‘material’ constitution.¹⁰²

⁹⁹ Richard Albert, “Nonconstitutional Amendments,” *Canadian Journal of Law and Jurisprudence* 22, no. 1 (2009): 5–47; Jack M. Balkin, “Framework Originalism and the Living Constitution,” *Northwestern University Law Review* 103, no. 2 (2009): 549–614. See also: Thomas C. Grey, “Do We Have an Unwritten Constitution?” *Stanford Law Review* 27, no. 3 (1975): 703–18.

¹⁰⁰ Laurence H. Tribe, *The Invisible Constitution* (New York: Oxford University Press, 2008), 9.

¹⁰¹ *Ibid.*, 65, does underscore the importance of grasping “the history that surrounded the drafting process in Congress and the ratification in the states” in order to make sense of the formal text itself. Yet, he neither fully links this history to the nature of the ‘material’ constitution, nor does he dwell on this connection much further.

¹⁰² After all, Tribe, 9, describes his ‘invisible constitution’ as a collection “of ideas, propositions, recovered memories, and imagined experience.” Notably, this description is nearly-congruous with the way that

Yet, I do not mean to suggest that this ‘material’ constitution merely exists as the nation by another name. Rather, of all of the forces that create and shape this invisible constitution, the nation (and nationalism) likely stands near the top of the list.¹⁰³ Furthermore, I suspect that we can *primarily* find the markers of national identity (or, the identity of ‘We the People’) within this informal, invisible constitution—rather than, say, in the articles of the formal constitution itself.

As a result, the remainder of this chapter attempts to fill-in these overall blind spots in the literature on constitutional design and, more broadly, constitutional theory. By now turning to the three (and to my knowledge, only) book length studies that directly engage with the connections between constitution-making and nation-making, we can begin to make sense of the links between drafting processes and Intractable Constitutional Memory—a concept that lies squarely within of this ‘material’ constitution. In other words, we can begin to grasp the ways that the formal constitution writing-process constructs an invisible, informal (yet, entrenched)

Benedict Anderson theorizes the concept of the ‘nation.’ See: Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Revised edition (London and New York: Verso, 2016).

¹⁰³ I will discuss the nuanced distinctions and meanings behind the ‘nation’ and ‘nationalism’ below. For our current purposes, though, I take the identity of ‘the nation’ to be relatively coterminous with that of ‘the people,’ while ‘nationalism’ describes the political will that this nation expresses and channels in a variety of forms. Unlike a ‘people,’ though, which *necessarily* exists within a constitutionalized political environment, on the account of Ulrich K. Preuß, “the nation is a prepolitical community which is constituted by the commonness of such properties as origin, race, language, religion, culture, history, and the like. In this sense, a nation must be distinguished from a nation-state, which is a political organization that incorporates a nation. But with this understanding a nation *can* exist independently of a state” (emphasis added). See: Ulrich K. Preuß, “Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution,” *Cardozo Law Review* 14, no. 3–4 (1993): 646.

constitution by exploring and analyzing this issue of constitution-making-as-nation-making overall.¹⁰⁴

2.1 Finding a People in the World? The Common Constitutional Approaches

From Pufendorf, Rousseau, and Locke to more contemporary theorists, debates over the identity, meaning, and purpose of ‘the People’ have long unfolded on the ever-shifting ground of democratic theory.¹⁰⁵ In a purely descriptive sense, though, we can think of the People in two interrelated ways: (1) simply, as the collective identifier for all the individual members of a state (e.g., for Americans, or Germans, or South Africans); and (2) in more technical yet abstract terms, as the ‘author’ of a state’s constitutional system—the group that underwrites and sustains any legitimate democratic governance.¹⁰⁶ Noting this dual-definition, Margaret Canovan describes (1) as the “individual members themselves, a collection of ordinary, ever-changing

¹⁰⁴ It is important to note early-on in our discussion that this idea of constitution-making-as-nation-making does not apply *solely* to contemporary cases like Iraq, in which the entire territory lacks some pre-existing and unifying national identity altogether. Rather, in one way or another, *all* ‘liberal democracies’ have gone through the process of nation-building in one form or another—that is, they have gone through the “process of promoting a common language, and a sense of common membership in, and equal access to, the social institutions operating in that language.” See: Will Kymlicka, “Western Political Theory and Ethnic Relations in Eastern Europe,” in *Can Liberal Pluralism Be Exported? Western Political Theory and Ethnic Relations in Eastern Europe*, ed. Will Kymlicka and Magda Opalski (Oxford: Oxford University Press, 2001), 19. See also: Jeff Spinner-Halev, “Democracy, Solidarity and Post-Nationalism,” *Political Studies* 56, no. 3 (October 2008): 604.

¹⁰⁵ For a clear outline of these nuanced and ever-changing discussions, see: Margaret Canovan, “The People,” in *The Oxford Handbook of Political Theory* (Oxford: Oxford University Press, 2004), 349–62.

¹⁰⁶ This secondary point comes from the general liberal principle of popular sovereignty, which contends that political authority ultimately flows from the consent of ‘the people.’ See, for example: J. J. Rousseau, *The Social Contract and Other Later Political Writings*, ed. V. Gourevitch (Cambridge: Cambridge University Press, 1997). I will discuss this concept at greater length below.

people with their separate lives, interests and views,” and (2) as “something collective, abstract, dignified and mysterious: an entity...that has a continuous existence and history, transcending and outliving its individual members.”¹⁰⁷ Put differently, the idea of the People simultaneously describes individual identities and a collective identity—a notion at once singular and plural. Commonly, this latter collective identity takes on some variant of two ideals: it refers either to a homogenous group, which shares an ethnic, religious, linguistic, or cultural background, or to a diverse body of individuals, whose political or civic bonds join them together.¹⁰⁸

Note, though, that neither definition of the constitutionalized People contains any explicit normative claims or assumptions about either of these identities. The mere idea of the People says nothing about who *should* be included in the political community, nor does it suggest how we ought to define and make sense of this community in the first place—nor, for that matter, does it say anything about how the actual process of constitution-making addresses either of these two concerns. This ambiguity leads to several problems, not least of all for the theorist of constitutional design (let alone for constitution designers themselves). After all, on the one hand, how can we formulate a constitution that mirrors and respects the People in all of its diversity? Yet, on the other hand, how can that same constitution tap into (if not forge) the bonds, values, and ideas that pull together the People in the first place, allowing for the constitution to ‘take

¹⁰⁷ Margaret Canovan, *The People* (Malden, MA: Polity, 2005), 6.

¹⁰⁸ Debates on this ‘collective identity’ of the people take place throughout the sociological and philosophical literature on the origins of nations and nationalism. For a detailed overview of the main works in this field, see: John Hutchinson and Anthony Smith, eds., *Nationalism*, Oxford Readers (Oxford and New York: Oxford University Press, 1995). For an overview of the more philosophical side of these conversations, see: Ronald Beiner, ed., *Theorizing Nationalism* (Albany, NY: State University of New York Press, 1998).

root?¹⁰⁹ Or, again, how can a single foundational document respect individual difference, all while still encouraging (and *needing*) these individuals to recognize and embrace their overarching commonalities?

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For both Hanna Lerner and Joanne Wallis, this relationship between the People's unifying identity and the constitution has generally broken into two broad, normative ideals: the nation-state paradigm and the liberal-civic paradigm.¹¹⁰ Presumably, proponents of either of these approaches assume that they best-reconcile the competing interests of the individual *and* the collective, thereby mirroring the 'truest' and most legitimate picture of the political community.¹¹¹ Within the nation-state paradigm, then, the People remains a preexisting and widely uniform group (i.e., 'the nation'), which the constitution merely provides with a platform for channeling and realizing its political goals.¹¹² Here, we can think of a country like Poland,

¹⁰⁹ Albie Sachs, one of the founding members of the South African Constitutional Court and one of the key figures in the country's constitution drafting process, eloquently described these dual challenges as South Africa prepared for its transition to democracy: "We are strongly for national unity, for seeing our country as a whole, not just in its geographic extension but in its human dimension...The objective is not to create a model culture into which everyone has to assimilate, but to acknowledge and take pride in the cultural variety of our people." See: Albie Sachs, "Preparing Ourselves for Freedom: Culture and the ANC Constitutional Guidelines," *TDR* 35, no. 1 (1991): 190.

¹¹⁰ Lerner, "Constitution-Writing in Deeply Divided Societies," 71–72; Lerner, *Making Constitutions*, 19–26; Wallis, *Constitution Making*, 23.

¹¹¹ Independent of these distinctions, Keith E. Whittington describes these normative strains of constitutional design as "centrally concerned with the problem of how to reconcile constitutionalism (the protection of minority and individual rights and particular substantive political values) and democracy (a mode of government that places ultimate political authority in popular majorities)." See: Keith E. Whittington, "Constitutionalism," in *The Oxford Handbook of Law and Politics*, ed. Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (Oxford: Oxford University Press, 2008), 284.

¹¹² Lerner, *Making Constitutions*, 21. This approach in part stems from the work of Emmanuel Joseph Sieyès, who argues, "The nation is prior to everything. It is the source of everything. Its will is always legal." See: Emmanuel Joseph Sieyès, *What Is the Third Estate?* (New York: Praeger, 1964), 124.

whose constitution explicitly underscores the religious and ethnic make-up of the Polish ‘People’¹¹³—or even Pakistan, whose constitution paints a highly religious and homogenous picture of its People.¹¹⁴

In contrast, the liberal-civic paradigm expressly does *not* rely on some preexisting cultural or ethnic identity as the basis for the People. Instead, it forms this “minimal” collective identity around the problem-solving procedures and general legacy of the constitution itself.¹¹⁵ This paradigm largely stems from the concept of Constitutional Patriotism, which Jürgen Habermas (among others) has proposed as a way of replacing the citizenry’s cultural bonds of the ‘ethnos’ with the civic, procedural bonds of the ‘demos.’¹¹⁶ On this argument, a state can—and perhaps, should—forge a unifying and constitution-enabling national identity without or in spite of a preexisting, ethnically- or religiously-based People.¹¹⁷ In other words, Constitutional Patriotism assumes that process and procedures can and should replace culture as the overarching basis of a legitimate, ‘constitutionalized’ political community.¹¹⁸ Within this liberal-civic approach, the

¹¹³ Poland Const. Preamble; art. IV; art. VI §§ 1-2; arts. XXXIV-XXXV.

¹¹⁴ Pakistan Const. Preamble; art. II.

¹¹⁵ Lerner, *Making Constitutions*, 22.

¹¹⁶ This is a highly generalized account of this nuanced and complex concept. See: Jürgen Habermas, “Citizenship and National Identity,” in *The Condition of Citizenship*, ed. Bart van Steenberger (London: SAGE Publications, 1994), 20–35; Jan-Werner Müller, *Constitutional Patriotism* (Princeton University Press, 2009).

¹¹⁷ Lerner, *Making Constitutions*, 28.

¹¹⁸ As I will discuss at greater length below, this claim is hardly uncontroversial, and many see process as an altogether insufficient (if not impossible) replacement for culture. See, for example: Craig J. Calhoun, “Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere,” *Public Culture* 14, no. 1 (2002): 169.

U.S. constitution remains the most-cited example—yet, the case of South Africa echoes this paradigm in several notable ways, too.¹¹⁹

Even initially, we can imagine several intuitive critiques of (or at least serious questions about) both paradigms: Within a nation-state constitution, what happens if a portion of the population does not fit into the already-codified image of the (homogenous) People? Similarly, within a liberal-civic constitution, how does culture fit into the equation? Can several preexisting national, ethnic, or religious identities comfortably coexist within a unifying framework of constitutional patriotism? Or, going back to the nation-state paradigm, how can such states incorporate pluralism and diversity into their accounts of Peoplehood? Can they at all? Do they even strive to do so in the first place? By extension, considering our concern with long-term, intractable inequalities: Will nation-state constitutions inherently fail to protect any universal, ‘liberal’ rights, insofar as they rest on a particularistic (if not exclusionary)¹²⁰ understanding of the People? How does the supposedly paradigmatic liberal-civic constitution of the U.S. still traffic in Intractable Constitutional Memories, given that its overarching ‘basis’ for nationhood is supposedly difference-blind?

¹¹⁹ See: Siri Gloppen, *South Africa: The Battle Over the Constitution* (Aldershot, England; Brookfield, Vt.: Ashgate and Dartmouth, 1997). In a personal interview, Justice Albie Sachs even explicitly mentioned the work of Habermas as the direct inspiration for the African National Congress’s non-ethnic and -racial (and particularly participatory) approach to the constitution-writing process—alongside, of course, the liberal-civic approach to South African Peoplehood contained within the constitutional provisions themselves. Albie Sachs, *The South African Constitution-Making Process*, interview by Zachary Kasdin, February 22, 2018.

¹²⁰ By ‘exclusionary,’ I do not necessarily mean that a given constitution (or national identity) *explicitly* casts specific groups outside of the People. Certainly, this type of designation would count as exclusionary. But I also take ‘exclusionary’ to describe a situation in which a constitution favors a specific group of people—thereby *implicitly* placing the interests of that group *over* those of another.

Generally, then: Can we confidently say that either of these paradigms accurately and responsibly tows the line between respecting the interests and identities of individuals on the one hand, and those of the collective political community on the other? Moreover, can we think of any normative reasons why a constitution should extend greater concern to individual rights than to ‘collective interests,’ or are these two considerations “incommensurable”—meaning that neither holds (or can hold) more value than the other?¹²¹ As illuminated by these difficult and wide-ranging questions, the comparative merits of the nation-state and liberal-civic constitutions remain unclear. After all, we can just as easily point to the ICMs that flow from nation-state constitutions (e.g., the Polish state’s explicit favoritism of white Catholics) as we can think of the ‘quieter’ ICMs of liberal-civic constitutions (e.g., the race- and gender-based inequalities of the U.S.).¹²² Note the driving presumption here that, insofar as ICMs stem from a gap in the identity of the People between (1) all of the existing groups and identities that make-up the political community, and (2) the collective ‘identity’ of this political community, which favors or gives full recognition to only certain identities or groups, then the elimination of this gap would thereby eliminate ICMs at their roots.

Rather than attempting to ‘solve’ the clear problems of the liberal-civic and nation-state paradigms, then, below I will instead explore whether or not we can eliminate such ‘gaps’ in the first place, both practically and conceptually. I will then also consider whether we can keep these gaps from forming—and thus, keep these documents from losing their foundational legitimacy—

¹²¹ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 322–23; Jeffrey Lenowitz, “Creating Legitimate Constitutions: The Possible Role of Procedures,” *Unpublished Paper*, 2013, 17.

¹²² See Chapter 1.

in the long term, especially as the political community moves progressively away from its founding generation.

2.2 The Plausibility of Legitimate Constitution-Making-as-Nation-Making

While neither Lerner nor Wallis addresses any of these questions or concerns head-on, each implicitly seeks to avoid such clear pitfalls (or, to eliminate the ‘gaps’) by constructing new paradigms of constitutions and constitution-making altogether, both of which claim to lie beyond both the nation-state and liberal-civic ideals. Put differently, each lays-out a constitutional theory that can supposedly reflect the People ‘as they actually are’ or ‘as they most likely can be,’ rather than needing to either reject or embrace some strong, preexisting (and likely-exclusionary) national identity.

Granted, both Lerner and Wallis are concerned with constitutional-design for ‘deeply divided societies,’¹²³ in which both the liberal-civic and nation-state paradigms remain inapplicable to local circumstances. But they also (perhaps unintentionally) make a deeper

¹²³ While Lerner, *Making Constitutions*, 29, defines ‘deeply divided societies’ by their “intense” and *mutually exclusive* “internal disagreements over the vision of the state,” Wallis, *Constitution Making*, 38, describes some version of the same phenomenon, in which the “people will speak with many voices...some of which will contradict each other.” Surely, though, this context-specific focus does not mean that their observations and theories cannot shed light on the constitution-making processes in a *variety* of national contexts. After all, in a world of ever-increasing globalization and border-porousness, it remains difficult to imagine any society that does not have some currently-pressing internal cleavage that would make a new, either liberal-civic or nation-state constitution-making process difficult. Even if a fairly ‘unified’ state like the U.S. were to initiate a new constitutional convention, as we could imagine, these issues of social, cultural, and political difference would surely color the drafting process.

argument, which generally takes the following form.¹²⁴ (1a) In the absence of a homogenous national identity, or (1b) in the face of deep religious, ethnic, or ‘national’ cleavages within a society, both of which would stymie any constitution-making processes; or (2) in the absence of a preexisting, country-wide commitment to the tenets of liberalism and constitutionalism, which would also stonewall these processes; then (3) the process of constitution-making itself can effectively forge or frame a new and inclusionary national identity. (4a) This national identity (and the nationalism that flows from it) can then: (4b) reflect the people *as they actually are*, acknowledging diversity without any favoritism; and (4c) provide the constitution with a sufficient degree of legitimacy for it to take root within that society. Put simply, both Lerner and Wallis thus seem to argue that the constitution-making process not only provides us with an opportunity to self-consciously *form* the national identity of a given political community. They then also argue that this constructed national identity (and nationalism) can *legitimate* the new constitutional order by linking the society’s many cultural identities to the political realm—all without favoring any one of them.

For our purposes, these claims (primarily, 3 through 4c) are important because they suggest, first, that we have some agency over the shape that a given national identity ultimately takes (which, as I have previously argued, can lead to or avoid ICMs); second, that such identities can remain self-consciously difference-neutral and flexible (thus avoiding ICMs in the long-term); and third, that these constructed national identities can replace the ‘thick’ pre-constitutional identity of the nation-state constitution and the ‘thin’ process-based identity of the liberal-civic constitution altogether. These are hardly uncontroversial claims, and each theorist

¹²⁴ Although I will discuss the specificities of their respective arguments at greater length below, see, for example: Lerner, *Making Constitutions*, 19–29; Wallis, *Constitution Making*, 21–39.

comes to them in a slightly different fashion. Thus, we can now turn to a more detailed discussion of their respective arguments.

* * *

Lerner's Incrementalist Approach. In an environment of constitution-making, tensions naturally run high; after all, insofar as these documents are written with long-term entrenchment in mind, every decision and compromise can cast a potentially long shadow on the identity of the People, and thus on the future prospects of different social groups or political leaders.¹²⁵ Within ethnically- or religiously-divided (and often illiberal) societies, as Hanna Lerner argues, constitution-making has the potential to only exacerbate these national identity-related tensions—not only because each group has its own strong identity, but also because each group “wishes to impose its political philosophy on the state as a whole.”¹²⁶

Here, then, Lerner addresses this constitution-writing impasse, and avoids recommending partition, by developing the “incrementalist approach to constitution-making”—guidelines that attempt to shift this issue of national identity from the present constitutional to the future political arena.¹²⁷ As she explains,

Instead of viewing the moment of enacting a constitution as one that has a profound effect on the identity of the nation, it may be seen as one stage in a long-term evolutionary process of collective redefinition. Instead of perceiving it in terms of formal codification of...unequivocal decisions, it may be viewed as an

¹²⁵ Vicki Jackson, “What’s In a Name - Reflections on Timing, Naming, and Constitution-Making,” *William and Mary Law Review* 49, no. 4 (2008): 1251–53; Lerner, *Making Constitutions*, 30–31.

¹²⁶ Lerner, *Making Constitutions*, 33. In this sense, as she explains, the various identities (e.g., in the case of Israel, the secular and religious visions of a Jewish state, or—at the same time—its majority Jewish and minority Palestinian groups) are irreconcilable within some unified and unifying national identity.

¹²⁷ *Ibid.*, 39.

opportunity for formulating ambiguous...provisions, which in fact embody a decision to defer controversial choices...to the future.¹²⁸

This does not imply, however, that constitutions have to throw-out the idea of a unified People (and thus, the foundation of popular sovereignty) altogether. Rather, the incrementalist constitution embraces the many competing and fractured identities—thereby defining the People as an expressly divided political community, which agrees to continue debating the issue of national identity in the future, just within a constitutional framework.¹²⁹ Lerner abstracts this strategic approach to constitutional design from the historical experiences of Israel (1948-50), India (1946-50), and Ireland (1937/98).

In this sense, by providing these divisive, salient, and contested identities with equal recognition throughout the constitution and its drafting-process, the incrementalist approach thus has the potential to avoid any foundational or future gaps between the lived identities and the constitutionalized identity of the People.¹³⁰ If accurate, this approach rests on two background assumptions, both of which have broad normative implications. First: the benefit of a singular government with a constitutional framework for governance outweighs the potential dangers of this incrementalist approach—e.g., to name only a few: compromised basic rights in the face of religious traditions; “over-rigidity” of the material (as opposed to formal)

¹²⁸ Lerner, *Making Constitutions*, 39.

¹²⁹ *Ibid.*, 44–45.

¹³⁰ Note that Lerner approaches the idea of the constitution-making process from a unique perspective. Rather than focusing on the issue of *who* is involved in the drafting process, or on the *degree to which* the public engages with the drafting and authorization procedures, she instead looks at the ways that constitution-makers can respond to such divisive issues of identity as the constitution-making process unfolds, and then outlines the various strategies that they can employ to deferring these issues in a seemingly constructive and legitimate manner.

constitution, which allows for discriminatory practices and rights violations to go consistently unchecked; and, generally, the inability to move past the identity-based disagreements that triggered the incrementalist approach in the first place.¹³¹ While Lerner implies that this calculus will often come out in favor of the incrementalist approach, she does not address this concern head-on.¹³²

Second, then: a constructed and self-consciously divided national identity can provide constitutions with a level of legitimacy that is sufficient for a given society to accept the document as its own foundational text. After all, even the most novel methods of democratically-oriented constitutional design have little practical relevance if they do not allow for constitutions to ultimately and legitimately ‘stick.’ While Lerner suggests that such forms of national identity can indeed “guarantee popular support in the government,”¹³³ she does not differentiate between an individual’s support of government and her acceptance and embrace of that government’s constitution—nor does she engage with any issues of constitutional legitimacy head-on.¹³⁴

¹³¹ For a broader discussion of these potential dangers, see: Lerner, *Making Constitutions*, 208–29; Lerner, “Constitution-Writing in Deeply Divided Societies,” 82–84.

¹³² Moreover, her later publication, Hanna Lerner, “Critical Junctures, Religion, and Personal Status Regulations in Israel and India,” *Law & Social Inquiry* 39, no. 2 (2014): 387–415, suggests that the incrementalist approach can end up entrenching specifically religious issues far more deeply within the social and political structures of a given society than she suspects in her initial argument for incrementalism. Put in the terminology of this thesis, she notes the capacity of her approach to generate ICMs.

¹³³ Lerner, *Making Constitutions*, 203.

¹³⁴ These issues are, of course, implied throughout Lerner’s argument; yet, she does not seem to grapple with them in the context of a *divided national identity* in any direct manner. Moreover, throughout her argument, it remains unclear what threshold she is using for measuring the ‘legitimacy’ of these improvised constitutional systems in the first place—e.g., legal, sociological, or moral measures of legitimacy. For a discussion of these three distinctions, see: Richard H. Fallon, “Legitimacy and the Constitution,” *Harvard Law Review* 118, no. 6 (2005): 1787–1853. See also Chapter 3.

Presumably, though, the efficacy of this stitched-together national identity in part depends on each individual's calculus about whether or not the benefits of constitutionalism outweigh the importance of imposing their own national identity on the political community as a whole. In this sense, while Lerner's incrementalist approach provides us with a promising framework for constitution-making-as-nation-making—one which has the potential to grapple with the issue of ICM at its roots—her account leaves several crucial stones unturned.¹³⁵

Wallis's 'Constituent Process.' Similarly advocating for such constitution-enabling, constructed national identities, Joanne Wallis adds a slightly different process-based caveat: these constitution-writing procedures must involve the People in the creation of their own (potentially fractured) national identity. Put differently, and drawing on Lerner's implied second claim above, we can frame Wallis's argument in the following manner: a constructed and self-consciously divided national identity can provide a constitution with an acceptable degree of legitimacy for a political community to embrace it as their own, but this occurs if and only if this constitution-making-as-nation-making process involves a very high degree of public participation.¹³⁶ In contrast to Lerner's unique understanding of the drafting 'process,' note how Wallis takes a more

¹³⁵ Also note that one of her three case studies in favor of the incrementalist approach, India, is currently going through a period of intense nationalist fervor, which threatens to undermine the liberal-democratic progress that the country has made since its independence from Britain. See: Max Rodenbeck, "A Mighty Wind," *The New York Review of Books*, April 19, 2018, <http://www.nybooks.com/articles/2018/04/19/narendra-modi-mighty-wind/>. Thus, perhaps, even if constitution-making-as-nation-making has a democracy-enabling and stabilizing effect, it only sows the seeds of particularistic nationalism in the long term. After all, this approach places questions of identity at the *center* of the political, legal, and constitutional systems.

¹³⁶ After all, Wallis, *Constitution Making*, 39, argues that "significant public participation in constitution making...fosters a sense of political community and produces a constitution that enhances the legitimacy and effectiveness of state institutions."

conventional approach by explicitly focusing on the benefits of participation.¹³⁷ Overall, then she develops the above claim in several steps.

First, “complex communities”¹³⁸ lack the degree of “social unity” necessary for them to recognize their common interests and engage in the process of constitution-making—thus allowing for them to exercise their “constituent power.”¹³⁹ Second, in the absence of the unity-bolstering forces of a preexisting national identity, or of a common commitment to liberalism and constitutionalism, nationalism can fill this void. Insofar as these communities do not have some preexisting nation around which they can coalesce, however, nation-building must first take place.¹⁴⁰ Third, then, and crossing paths with Lerner’s theory, the process of constitution-making can *drive* this nation-building process “by recognizing and organizing the popular sovereignty of the people; establishing binding, reciprocal relationships among them, and serving as an expression of their self-determination.”¹⁴¹ And finally, fourth, high levels of public

¹³⁷ See: Ginsburg, Elkins, and Blount, “Does the Process of Constitution-Making Matter?”; Joel I. Colon-Rios, “Notes on Democracy and Constitution-Making,” *New Zealand Journal of Public and International Law* 9 (2011): 17–41. The issue of public participation also drives various organizations’ concerns when it comes to advising different countries on drafting processes. See, for example, Vivien Hart, “Constitution Making and the Right to Take Part in a Public Affair,” in *Framing the State in Times of Transition: Case Studies in Constitution Making*, ed. L. E. Miller (Washington, D.C.: U.S. Institute of Peace Press, 2010), 20–54.

¹³⁸ This term seems to echo the dynamics of ‘deeply divided societies,’ discussed above, having neither a unified cultural identity, nor a pre-commitment to liberalism or constitutionalism.

¹³⁹ Wallis, *Constitution Making*, 25–26. Here, and throughout her discussion, she defines ‘constituent power’ loosely as the ability for the members of a given political community to join together and authorize a unified (and unifying) national constitution. In this sense, ‘constituent power’ echoes the idea of ‘popular sovereignty.’

¹⁴⁰ *Ibid.*, 27.

¹⁴¹ *Ibid.*, 30. For a discussion of similar claims, see also: Vivien Hart and Shannon C. Stimson, eds., *Writing a National Identity: Political, Economic, and Cultural Perspectives on the Written Constitution* (Manchester, UK: Manchester University Press, 1993).

participation allow for this constructed nation (and its corresponding national identity, not to mention the constitution that it enables) to extend “recognition” to each facet of the political community, thereby reflecting and respecting the People in all of its diversity.¹⁴² As Wallis argues, this participation-centric approach to constitution-making-as-nation-making thus avoids “a potentially divisive, exclusionary, and destabilizing view of the state and its people’s identity,” which would presumably lead to ICMs in the long-term.¹⁴³

In one sense, then, this account presents us with a promising way of utilizing participation to etch a flexible and accurate picture of the People within a constitution and its drafting process. At the same time, though, Wallis also leaves several stones unturned, each of which leaves her theory with clear blind spots. First, while she does suggest which forms of participation help to achieve these aims (e.g., mass-education campaigns, public draft consultations, a certain degree of public involvement in the actual deliberations, etc.), Wallis still fails to specify at which level public participation contributes to the legitimacy of the drafting process. By this, I mean that she does not indicate whether participation ‘matters’ because it legitimates the process itself (i.e., constitution-making-as-nation-making is a legitimate endeavor if and only if individuals have the opportunity to engage in the process), or because participation leads to a drafting process that produces better outcomes (e.g., the formal and material constitutions contain a more inclusionary and rights-protecting vision of the People).¹⁴⁴

¹⁴² Wallis, *Constitution Making*, 30–31, 38–39.

¹⁴³ *Ibid.*, 30.

¹⁴⁴ Lenowitz, “Creating Legitimate Constitutions: The Possible Role of Procedures,” 22; Peter Esaiasson, Mikael Gilljam, and Mikael Persson, “Which Decision-Making Arrangements Generate the Strongest Legitimacy Beliefs? Evidence from a Randomised Field Experiment: Decision Making and Legitimacy Beliefs,” *European Journal of Political Research* 51, no. 6 (October 2012): 787–88. Both works make this

Inferring from her overall discussion, she likely means both. Yet, this distinction is particularly important, insofar as it leads to very different process-based recommendations—for example, whether we are primarily concerned with the deliberative and ratification processes, simply assuming that a good document will naturally result, or whether we are equally concerned with the text itself.

Second, though, and on a much deeper level, Wallis constructs a Gordian knot of an argument in favor of constitution-making-as-nation-making (and the role that participation plays within it)—one that does not necessarily hold up to logical and theoretical scrutiny. On the one hand, the first part of her argument suggests that, in order for a group of individuals to exercise their constituent power and legitimate a constitution, they first need a pre-existing, collectively oriented, and unifying national identity.¹⁴⁵ In this sense, national identity is a prerequisite for constitution making. On the other hand, though, she also makes the claim that high levels of public participation in the constitution-making process can create a new national identity, which can in turn legitimate the new constitution in the eyes of individuals. Under this formulation, then, the legitimacy of the constitution-making process remains highly

distinction between the legitimacy-bolstering benefits of the process itself versus the benefits of the process as it relates to outcomes.

¹⁴⁵ The literature on these notions of legitimacy/legitimate is voluminous, and any thorough discussion of either term would go far beyond the confines of this thesis. Yet, I use ‘legitimacy’ in both its moral and sociological forms. On the one hand, then a constitution is *morally legitimate* if and only if its claims to authority are justified through some morally-permissible framework, thus providing individuals with some sort of *duty* to obey the constitution. On the other hand, a constitution is *sociologically legitimate* if the public views it as justified or permissible independent of any fear of coercion or personal gain. By extension, the People can morally and/or sociologically *legitimate* a constitution or its drafting process through various pathways or procedures (e.g., in a variety of accounts, through popular participation, the use of a ratification referendum, education campaigns, public input on the working draft, etc.). For this discussion as it relates specifically to constitutions and constitution-making, see: Fallon, “Legitimacy and the Constitution”; Lenowitz, “Creating Legitimate Constitutions: The Possible Role of Procedures”; Frank Michelman, “Ida’s Way: Constructing the Respect-Worthy Governmental System,” *Fordham Law Review*, no. 72 (2003): 346–47. I will discuss this issue at greater length in Chapter 3.

questionable; after all, the community does not have strong enough *preexisting* bonds to possibly exercise its constituent power and legitimate the drafting process—at least if this unifying national identity comes as a *product* of constitution-making.

Of course, Wallis would likely argue that democratic legitimacy flows from both the preexisting and the post-drafting identities in different (but similarly important) ways. Yet, at the same time, it remains unclear whether she (1) values public participation as a normative ‘good’ in itself, or whether (2) participation matters only insofar as it creates a unifying national identity that enables the constitution to take root. While technical, this distinction is important. After all, in the latter scenario, public participation would seemingly cease to matter in countries that have a highly unified and widely-held national identity, insofar as this preexisting identity would already allow for individuals to exercise their constituent power and collectively authorize the constitution.

Again, like Lerner, Wallis presents us with a compelling framework for constitution-making-as-nation-making, which begins to convincingly reconcile the tensions that cause ICMs. Yet, the ambiguities in her argument leave us with as many questions as answers. At the same time, though, Wallis does try to get around this aforementioned paradox by very briefly invoking the idea of ‘participatory popular sovereignty,’ which has the potential to open-up her understanding of constituent power and political Peoplehood, leaving them more flexible and collectively-defined.¹⁴⁶ With the promise of this idea in mind, we can now turn to the final book-length discussion of constitution-making-as-nation-making, which directly engages with and develops this notion of participatory popular sovereignty.

¹⁴⁶ Wallis, *Constitution Making*, 38–39, 58.

2.3 Participatory Popular Sovereignty as the Panacea? Leaving National Identity Open-Ended

While Lerner and Wallis approach the idea of constitution-making-as-nation-making in terms of reframing and rethinking the drafting process under specific and fractious historical circumstances, Serdar Tekin takes this idea a step further, developing a normative argument for why any democratic constitution-making process ought to simultaneously serve as a process of democratic ‘People-making.’¹⁴⁷ In this sense, such a normative approach has the potential to fill-in the gaps that both Lerner and Wallis left in their respective arguments—thereby making a general case for joining together the constitution-making and nation-making processes.

* * *

Tekin’s popular sovereignty-centered argument unfolds in the following steps. First, insofar as states have grown increasingly diverse and globalized in the past two centuries, hypothetical models of popular sovereignty and consent no longer provide constitutions with legitimacy; after all, it now remains dubious that the inhabitants of any given territory could speak “in one voice.”¹⁴⁸ In reality, of course, theorists have always regarded the ‘social contract,’ ‘popular sovereignty,’ and ‘the People’ as a politically useful thought experiment—a “powerful” and

¹⁴⁷ Tekin, *Founding Acts*, 3–4. In this sense, Tekin helps us to start ‘universalizing’ our approach to and understanding of constitution-making-as-nation-making, insofar as both Lerner and Wallis both make their arguments with specific reference to ‘deeply divided societies.’

¹⁴⁸ *Ibid.*, 2–3.

convenient fiction.¹⁴⁹ Among the most prominent examples, John Rawls approaches the social contract as something to which individuals *would hypothetically* consent insofar as it meets specific standards (namely, in his case, of procedural justice).¹⁵⁰ Tekin seems to imply, though, that these theory-based sources of legitimacy are no longer sufficient (or publically convincing enough) in themselves. On this approach, the “people themselves” are never “the people” in the proper, constitutional sense—a gap that, as we have seen, leads to ICMs in the long-term.¹⁵¹ Second, noting the inadequacy of a hypothetical ‘People’ and its abstract general ‘will,’ Tekin argues that “Constitutional claims of popular sovereignty...lay claim to democratic legitimacy to the extent that citizens themselves take part in the process of constitution-making, thereby underwriting their constitution in a non-fictive sense.”¹⁵² Third, then, rather than stemming from a shared and preexisting identity that binds the political community together, the People instead emerges through “the political experience of constructing life together”—or, in other words, through the process of constitution-making itself.¹⁵³ Fourth, as a product of these normative and empirical issues, the constitution-making and “people-making” processes

¹⁴⁹ Michael Lessnoff, “Introduction: Social Contract,” 6.

¹⁵⁰ Hence the term, ‘hypothetical consent.’ See: John Rawls, *A Theory of Justice*.

¹⁵¹ Tekin, *Founding Acts*, 3.

¹⁵² *Ibid.*, 4.

¹⁵³ *Ibid.*, 6. As he rightly notes, this approach to the ‘People’ echoes the work of Bruce Ackerman, who sees the People in terms of a consistent stream of interactions between political elites and ordinary citizens, as well as that of Jason Frank, who argues that the idea of the People is an inherently normative claim, and not a preexisting empirical entity that can we can ever find in the world. See: Bruce Ackerman, *We the People, Volume 1: Foundations*, Reprint edition (Cambridge, MA: Belknap Press, 1993); Jason Frank, *Constituent Moments: Enacting the People in Postrevolutionary America* (Duke University Press Books, 2009).

naturally take place alongside and intertwined with one another.¹⁵⁴ Finally, and by extension, fifth, from the perspective of democratic legitimacy, the participatory process of constitution-making (and people-making) matters just as much as the actual content of the constitution itself.¹⁵⁵

Clearly, this opening-up and ‘democratization’ of popular sovereignty is intriguing, not least of all because it would allow for the People to directly create their collective and constitutionalized identity—all regardless of the divisive or fractured nature of the community. Put differently, this approach would seemingly eliminate the need for any fixed, constitutionalized identity from the start, thus providing us with the possibility of avoiding ICMs altogether. Again, though, much like Lerner and Wallis, Tekin leaves wide gaps in his argument. (1) While his theory of ‘enacted’ or ‘participatory’ popular sovereignty turns on the ways that individuals actually participate (and have the opportunity to participate) in the drafting process, he fails to specify what types of participation would achieve these theoretical necessities.¹⁵⁶ (2) Like Wallis, he also fails to clearly specify the level at which participation is

¹⁵⁴ Tekin, *Founding Acts*, 6–7. Insofar as the political community *defines itself* in terms of a participatory constitution-making process, then this idea of constitution-making-as-*people*-making is synonymous with our idea of constitution-making-as-*nation*-making.

¹⁵⁵ *Ibid.*, 3–4. Granted, this above outline represents only a portion of Tekin’s overall claims, which mostly center on the theoretical *possibility* of founding a democratic constitution in a democratic manner—thus arguing against the common resignation to this paradox. For our purposes though, the issue of constitution-making-as-nation-making remains most important.

¹⁵⁶ After all, participation can take place at a variety of stages in the drafting process, and in a multitude of disparate ways. At the same time, of the literature on constitutional processes, a large portion underscores the possible harms and drawbacks of public participation. In general, see: Ginsburg, Elkins, and Blount, “Does the Process of Constitution-Making Matter?,” 214–19. More specifically, Stefan Voigt looks at the negative impact of participation on textual coherence; Cass Sunstein warns that higher participation does not automatically yield better (and may in fact lead to more extreme) outcomes; and Devra Moehler argues that participation can in fact push individuals *away* from feeling an attachment to the constitution. See, respectively: Stefan Voigt, “The Consequences of Popular Participation in Constitutional Choice –

significant—e.g., as a normative ‘good’ of the drafting process in itself, or as something that matters only insofar as it leads to better textual outcomes. Granted, he can (and likely does) value participation on both levels; yet, the lack of specificity makes it all the more difficult to imagine the types of participation that would lead to his framing of ‘enacted’ popular sovereignty. And finally, (3) the notion of a ‘participatory,’ constitution-making-based identity remains entirely silent on how this process reflects, incorporates, and reconciles conflicting individual and group-based identities overall.¹⁵⁷

Insofar as this section of Tekin’s argument almost directly mirrors a similar argument made by Simone Chambers in its structure and claims, however, we can perhaps fill-in some of these gaps—thereby buoying the theoretical possibility of constitution-making-as-nation-making.¹⁵⁸ (1) With regard to the specific ways that process can enable ‘democratic popular sovereignty’ to serve its legitimating function, Chambers points to “citizen consultation in the constitution-making process.”¹⁵⁹ In this sense, as she outlines, ‘consultation’ not only includes the

Towards a Comparative Analysis,” in *Deliberation and Decision: Economics, Constitutional Theory and Deliberative Democracy*, ed. Anne Van Aaken, Christian List, and Christoph Luetge (Aldershot, England: Ashgate, 2004), 199–229; Sunstein, *Designing Democracy*; Moehler, *Distrusting Democrats*.

¹⁵⁷ Additionally, though not immediately salient within our discussion, (4) while he brushes off the continued relevance and legitimacy of ‘hypothetical’ popular sovereignty, Tekin does not engage in any sustained critique of this concept—merely dismissing it as something that could doubtfully still seem ‘convincing’ to the majority of the public today. Andro Kitus levels a similar critique against Tekin’s argument. See: Andro Kitus, “Review: Founding Acts: Constitutional Origins in a Democratic Age,” *Contemporary Political Theory*, May 5, 2017.

¹⁵⁸ This similar argument is made by Simone Chambers, “Democracy, Popular Sovereignty, and Constitutional Legitimacy,” *Constellations* 11, no. 2 (2004): 153–73. Yet, she coins the term “democratic popular sovereignty” to refer to this type of participation-based constitutional legitimacy. Without question, Tekin cites her work throughout, and is thus sufficiently forthcoming about the origins of his claims.

¹⁵⁹ *Ibid.*, 153.

presence of everything from media campaigns throughout the drafting process, to widespread submissions of constitutional articles and suggestions from the public, but also suggests that these public engagements actually matter to individuals, and have a real bearing on how they think of and engage with the constitution.¹⁶⁰ (2) Chambers explicitly recognizes the importance of process-based (as opposed to outcome-based) popular sovereignty in terms of its ability to legitimate the constitution; after all, as she argues, insofar as constitutional legitimacy hinges on how “participants feel about it,” then “outcomes cannot be tested or evaluated independent of process.”¹⁶¹

(3) With regard to how ‘democratic popular sovereignty’ can encapsulate and convey the collective identity of the People, Chambers argues in favor of a constitution that “mirrors” the ‘people’ in all of its diversity and (potential) divisiveness, rather than prescribing a difference-blind identity.¹⁶² (4) Finally, like Tekin, she claims that a historically changing understanding of both “respect” and “autonomy” has now rendered ‘hypothetical popular sovereignty’ unable to fully encapsulate the will of the People; unlike Tekin, however, she does not therefore argue that we should dismiss all appeals to “hypothetical agreement,” but rather that we should correct for these shortcomings by also opening-up popular sovereignty to the voices of ‘the people’

¹⁶⁰ Chambers, “Democracy, Popular Sovereignty,” 161–164.

¹⁶¹ Ibid., 157–158. Clearly, she approaches the issue of legitimacy through a purely *sociological* lens. For this distinction, see note 145 above.

¹⁶² Ibid., 159–160. She also argues that, absent this respect for and reflection of “particular histories” and “particular identities,” constitutions will remain altogether unable “to live up to contemporary standards of respect and autonomy.” In this sense, here Chambers echoes the self-consciously-divided national identity of Lerner’s incrementalist approach to constitution-making.

themselves.¹⁶³ With these additions in mind, then, this third facet of constitution-making-as-nation-making appears far more plausible—both theoretically and practically.

¹⁶³ Chambers, “Democracy, Popular Sovereignty,” 155. In this sense, a constitution-making process could *generate* “constitutional principles” through appeals to the hypothetical will of the People, while then confirming or disproving this abstract hypothesis by involving all individuals in the actual authorization and constitutionalization of these principles.

CHAPTER 3: “NATIONALISM, POPULAR SOVEREIGNTY, & the CONSTITUTION”

A nation is therefore a great solidarity constituted by the feeling of sacrifices made and those that one is still disposed to make. It presupposes a past but is reiterated in the present by a tangible fact: consent, the clearly expressed desire to continue a common life. A nation's existence is...a daily plebiscite, just as an individual's existence is a perpetual affirmation of life.

*Ernest Renan*¹⁶⁴

Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires? We may well assert that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her.

*David Hume*¹⁶⁵

At this point in our discussion, it is worth noting how the above theoretical approaches to constitution-making-as-nation-making fit together and build upon one another, and how they all relate to our concern with ICM. If merged, these theorists collectively suggest that the process of constitution-making can directly create a unifying national identity, which can then altogether *eliminate* the gaps between the lived reality of the People and their idealized, constitutionalized form—at least insofar as the drafting process is particularly participatory. Put differently, they claim that relatively modest adjustments to drafting processes can solve many of the foundational issues that have plagued both nation-state and liberal-civic constitutional politics for nearly two centuries.

¹⁶⁴ Ernest Renan, “What Is a Nation?,” in *Qu'est-Ce Qu'une Nation?*, trans. Ethan Rundell (Paris: Presses-Pocket, 1992).

¹⁶⁵ David Hume, “Of The Original Contract,” in *Social Contract: Essays by Locke, Hume, and Rousseau*, ed. Ernest Barker (New York and London: Oxford University Press, 1948), 156.

Such broad claims leave two issues unexamined, however, which are central to the potential ICM-eliminating success of constitution-making-as-nation-making: first, that a unifying national identity (and the nationalism that flows from it) can remain *impartial* to its many internal divisions; and second, that the participation-based legitimacy of the initial drafting process (as well as its resulting constitution and national identity) can translate across generations—even if those later generations do not and cannot ‘participate’ in a similar manner. The following sections will explore the plausibility of these underlying issues in turn. As we will see, though, both of these claims ultimately lie on unstable understandings of national identity and constitutional legitimacy—an issue that forces us to take seriously the notion that Intractable Constitutional Memory may be in fact intractable, regardless of how we might re-structure the drafting process.

3.1 Can We Form a Participatory, Process-Defined National Identity?

Unclear definitions and distinctions have long-complicated (and bedeviled) the study of national identity, nations, and nationalism—not least of all for those trying to make sense of the relationship between these three concepts.¹⁶⁶ These definitions grow all the more opaque,

¹⁶⁶ John Hutchinson and Anthony D. Smith, “Introduction,” in *Nationalism*, ed. John Hutchinson and Anthony D. Smith, Oxford Readers (Oxford: Oxford University Press, 1994), 3–13; John Hutchinson and Anthony D. Smith, “Introduction to Section I: The Question of Definition,” in *Nationalism*, Oxford Readers (Oxford: Oxford University Press, 1994), 15–16. The broad range of disciplines and arenas in which these terms are utilized only further complicates these definitions; after all, from social theorists and historical sociologists, to political philosophers and political scientists, those working on these issues often rely on entirely different definitions and objectives. As a result, perhaps, Walker Connor notes the common tendency of conflating the idea of the nation with that of the state, thus leading many to (incorrectly) equate *nationalism* with the “identification with the state rather than loyalty to the nation.”

though, when making sense of their role within the context of formal, written constitutions.¹⁶⁷ After all, some regard these concepts as prerequisites for constitution making, while others see them as the products of that process itself.¹⁶⁸ Moreover, as we have seen, both the nation-state and liberal-civic approaches to constitution-making rely on seemingly-illegitimate understandings of national identity—yet, neither Lerner, Wallis, nor Tekin (and Chambers) provide us with a clear alternative, at least beyond some sort of participatory process for nation-shaping that recognizes and embraces difference.

With this complexity in mind, several questions emerge: What types of nations and nationalisms are actually compatible with constitution-making-as-nation-making? How can constitutions help to channel the forces of nationalism, allowing for them to complement (rather than undermine) the tenets of liberal constitutionalism? *Can* constitutions achieve this tempering goal in the first place? And similarly, can we plausibly construct these new, tempered nations through the constitution-making process? If so, what role does (and *should*) participation play in

See: Walker Connor, “A Nation is a Nation, is a State, is an Ethnic Group is a...,” *Ethnic & Racial Studies* 1, no. 4 (October 1978): 381–82.

¹⁶⁷ Kissane and Sitter, “National Identity and Constitutionalism in Europe,” 1–5. This complexity is even further exacerbated by the fact that some see the tenets of liberal constitutionalism and those of nationalism as inherently incompatible to one degree or another; much of the political philosophy literature on this matter thus attempts to reconcile (or actively separate) these two ideologies. See: Kissane and Sitter, “The Marriage of State and Nation in European Constitutions,” 65–7.

¹⁶⁸ Among the latter group, for example, Kissane and Sitter argue, “Where a nation’s culture needs to be protected or upgraded, or where there is no congruence between the identity of the state and the culture of its population, political elites may explicitly establish that connection in constitutions. The preambles may express a vision of the nation’s past, the connection between the state and the dominant nation may be expressed in the early articles, and the constitution may prescribe symbols identifying the state with a specific culture or territory.” At the same time, though, and further complicating the matter, they note that the links between national identity and constitutions take on entirely different meaning within the “second time zone” of constitution-making (e.g., those written in 19th century Belgium and Switzerland) than within the “fourth time zone” (e.g., those written in post-communist Poland and Romania). See: Kissane and Sitter, “The Marriage of State and Nation in European Constitutions,” 50.

this type of nation-making? Going back to our initial difficulty, however, the ability to address these questions largely depends on how we conceive of these concepts in the first place. Thus, in order to answer them, a brief discussion of the common approaches to and understandings of the nation, nationalism, and national identity must first occur.¹⁶⁹ Then, we can move on to consider whether or not some ‘third form’ of nation (and nation-shaping) exists, which can underwrite the process of constitution-making-as-nation-making.

* * *

In one of the ‘classic’ descriptions of the nation, Ernest Renan describes it as the aggregated “moral conscience” of individuals, which emerges through the “approval, the desire, clearly expressed” of those individuals “to continue the communal life.”¹⁷⁰ On this approach, then, nations represent and encapsulate the collective interest, which continually drives individuals to put collective goals and considerations over their own personal desires. Similarly, Max Weber orients this collective moral consciousness (or, in his words, “community of sentiment”) of the nation within a cultural context, arguing that its “significance...is usually anchored in the superiority, or at least the irreplaceability, of the cultural values that are to be preserved and developed only through the cultivation of the peculiarity of the group.”¹⁷¹ In this sense, the

¹⁶⁹ Even with this brief discussion, the literature on nations, nationalism, and national identity remains voluminous. For a relatively comprehensive outline of the foundational approaches in sociology and social theory, see: Hutchinson and Smith, *Nationalism*. For a similarly comprehensive of these issues through the lens of moral and political philosophy, see: Ronald Beiner, *Theorizing Nationalism*.

¹⁷⁰ Ernest Renan, “Qu’est-Ce Qu’une Nation?,” in *Nationalism*, ed. John Hutchinson and Anthony D. Smith, Oxford Readers (Oxford: Oxford University Press, 1994), 17–18. Here, he also famously refers to the existence of these nations as an “everyday plebiscite,” which affirms the communal life.

¹⁷¹ Max Weber, *From Max Weber: Essays in Sociology*, ed. H. H. Geertz and C. Wright Mills (New York: Oxford University Press, 1946), 175–76. For Weber, however, these ‘cultural values’ can be rooted in

relationship between the nation and national identity appears quite straightforward: national identity describes the cultural qualities that the nation—both as a collective, and as individuals comprising that collective—takes on as its own. By extension, nationalism then describes the expression of such a desire to ‘cultivate the peculiarity’ of that group.

In the face of these generalized definitions, though, ‘nations’ hardly materialized out of thin air, nor have they existed since humans started organizing themselves into communities several millennia ago.¹⁷² Rather, as Liah Greenfeld emphasizes, these specific types of communities first emerged in sixteenth century England—initially describing only the “elite” of a given territory, but soon coming to represent the idea of a “*sovereign* people” as a whole (and later to represent a unique sovereign people).¹⁷³ Herein lie the historical origins of the common distinction between a particularistic ‘ethnic’ nation, which broadly stems from a shared ethnicity, language, or other distinctive cultural source, and a more universalistic ‘civic’ nation, which stems from shared political principles.¹⁷⁴ This mirrors and echoes the similar distinction (outlined in

everything from ethnicity, to a common language, to a shared history, and even to shared and evolving ideas about what a nation is and should be.

¹⁷² Eric Hobsbawm, “The Nation as Invented Tradition,” in *Nationalism*, ed. John Hutchinson and Anthony D. Smith, Oxford Readers (Oxford: Oxford University Press, 1994), 76–83.

¹⁷³ Liah Greenfeld, “Types of European Nationalism,” in *Nationalism*, ed. John Hutchinson and Anthony D. Smith, Oxford Readers (Oxford: Oxford University Press, 1994), 167. In this sense, ‘the nation’ remained relatively coterminous with the idea of a ‘People’ until this third development, which imbued it with *particularism* (e.g., ethnic, religious, racial, and/or linguistic favoritism). Eric Hobsbawm thus refers to nations and nationalism as a product of “social engineering,” in which states self-consciously developed these “invented traditions.” See: Eric Hobsbawm, “The Nation as Invented Tradition,” in *Nationalism*, Oxford Readers (Oxford: Oxford University Press, 1994), 76–77.

¹⁷⁴ Greenfeld, “Types of European Nationalism,” 167–68. Along the same lines, James Mayall differentiates between the “primordialist” theory of nationalism (e.g., one that stems from “a common language, a homeland...common symbols, a common myth of origin...shared history of triumphs and disasters and...shared hopes and aspirations”) and the “modernist” theory (e.g., one that views nations as communities that “are created [if not entirely *invented*] by nationalists, that is by those who subscribe to

Section 2.1 above) between the nation-state and liberal-civic paradigms of constitution making.¹⁷⁵

As the ever-growing body of normative literature on nations and nationalism suggests, however, this empirically-derived dichotomy lacks theoretical nuance, and forces us to falsely choose between “an illiberal passion for ancestor worship” (i.e., ethnic nationalism) and the unrestrained “devotion to shared political principles” at the expense of cultural tradition (i.e., civic nationalism).¹⁷⁶ Among the most famous attempts to forge this midway-point between the ethnic and civic poles, Benedict Anderson describes nations as “imagined communities,” which are rooted simultaneously in the “horizontal comradeship” of individuals (thus echoing universalism), and the particularistic cultural ties that bind those individuals together in the first place.¹⁷⁷ Beyond this notable example, though, many have tried to develop theories of ‘liberal’ (or

the political doctrine that nation and state should be congruent”). See: Mayall, “Sovereignty, Nationalism, and Self-Determination,” 478–79.

¹⁷⁵ Note that the nation-state and liberal-civic paradigms see either of these two types of nations as the ‘proper’ community on which a given political community should be based. Lerner, Wallis, and Tekin (and Chambers), in contrast, seem to advocate for some third ‘form’ of community that can embody both civic ideals and cultural particularism.

¹⁷⁶ Bernard Yack, *Nationalism and the Moral Psychology of Community* (Chicago and London: University of Chicago Press, 2012), 1–3. Similarly, as Cécile Laborde emphasizes, “National identity is a complex, multi-layered phenomenon, which eludes any simplistic ‘either/or’ approach.” Thus, she breaks-up this dichotomy into ‘four tiers’ of national identity: (1) ethnic, ‘primordial’ links based on kinship and birth; (2) the “broad culture” of language, tradition, and “ways of life” that exist in any community; (3) the political culture, which exists within and through political institutions, ideologies, traditions, and so on; and (4) abstract political principles and procedures, which are expressed within constitutions. See: Cécile Laborde, “From Constitutional to Civic Patriotism,” *British Journal of Political Science* 32, no. 04 (October 2002): 591.

¹⁷⁷ Anderson, *Imagined Communities*, 6–7, 36.

somehow ‘tempered’) nationalism,¹⁷⁸ while others have argued against the liberal embrace of nationalism altogether.¹⁷⁹

Yet, many have moved beyond this tempering and reconciling exercise altogether. Instead, they attempt to replace nations, nationalism, and national identity with patriotism—a concept they claim can, unlike nationalism, actively complement the goals and ideals of liberalism. Unsurprisingly, much like the literature on nations, nationalism, and national identity, the work on various forms of patriotism is voluminous, and any rigorous analysis of its nuances (and differences with nationalism) would go far beyond the scope of our discussion.¹⁸⁰ For our discussion of participatory constitution-making-as-nation-making, however, the idea of “constitutional patriotism” remains the most promising path toward an open-ended, flexible, and ‘universalistic’ national identity. Moreover, this thread of patriotism seems to lie closest to the idea of national identity that Lerner, Wallis, and Tekin collectively imply, at least indirectly.¹⁸¹

Popularized and developed first by Jürgen Habermas, whose initial goal was to develop a new national identity for post-war Germany, constitutional patriotism strives to move away from

¹⁷⁸ See, for example, Yael Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993); David Miller, *On Nationality* (New York: Oxford University Press, 1995); Spinner-Halev, “Democracy, Solidarity and Post-Nationalism,” 604–28.

¹⁷⁹ For just two examples, which come to this conclusion by putting nationalist goals and theories in critical dialogue with those of liberalism and democracy: Judith Lichtenberg, “Nationalism, For and (Mainly) Against,” in *The Morality of Nationalism*, ed. Robert McKim and Jeff McMahan (New York and Oxford: Oxford University Press, 1997), 158–75; Arash Abizadeh, “Does Liberal Democracy Presuppose a Cultural Nation? Four Arguments,” *American Political Science Review* 96, no. 03 (September 2002): 495–509.

¹⁸⁰ The essays in Martha C. Nussbaum, *For Love of Country: Debating the Limits of Patriotism*, ed. Joshua Cohen (Boston: Beacon Press, 1996), provide an overview of some of the terrain, although they often contrast patriotism with cosmopolitanism, as opposed to nationalism.

¹⁸¹ I suggest this despite the fact that both Lerner and Wallis outwardly disqualify this type of identity for deeply divided societies, insofar as it requires some preexisting commitment to constitutionalism and liberal principles in order to convincingly take root.

the idea that “the nation constitutes the prepolitical unity of a community with a shared common historical destiny” (i.e., the ‘ethnic’ or ‘cultural’ nation), and instead toward a national identity based on democracy, constitutionalism, and the protection of “civil rights.”¹⁸² If plausible and normatively appealing, then, constitutional patriotism would seemingly allow for us to embrace constitution-making-as-nation-making without much reservation; the constitution-making process would simply establish the principles around which the national identity would later revolve. Moreover, insofar as this identity stems primarily from a ‘universalistic’ and culturally neutral set of political histories and ideals that evolve through discussions over time (as opposed to some ‘particularistic’ and culturally-distinctive prepolitical community), then we could easily eliminate ICMs at their roots.¹⁸³ After all, such a civic and flexible identity would inherently transform and gain new meaning as demographics, traditions, ideologies, and generations shift—thus inhibiting the political culture and, presumably, the legal system from ever implicitly favoring one group over another.

For Habermas, then, the effective and nation-wide accommodation of small-scale ‘particularism’ and culture with large-scale ‘universalism’ and liberal values seems to be the overarching promise of constitutional patriotism. After all, for him,

[The] political culture must serve as the common denominator for a constitutional patriotism which simultaneously sharpens an awareness of the multiplicity and

¹⁸² Jürgen Habermas, “Citizenship and National Identity: Some Reflections on the Future of Europe,” in *Theorizing Citizenship*, ed. Ronald Beiner (Albany, NY: State University of New York Press, 1995), 256, 258–59. He describes this latter identity as one that disaggregates the “connections between national citizenship and national identity,” and which thus no longer relies and draws upon some ‘prepolitical community’ for its unifying credentials.

¹⁸³ This idea that constitutional patriotism stems from a *process*-based identity comes from Jan-Werner Müller, *Constitutional Patriotism*, 34. Put differently (and in highly simplified terms), this concept strives to enable individuals to ‘argue in the future’ about identity and interests, but simply within specific liberal-democratic bounds.

integrity of different forms of life which coexist in a multicultural society...Particularist anchoring of *this sort* would in no way impair the universalist meaning of popular sovereignty and human rights.¹⁸⁴

In this sense, then, unlike other accounts of culturally sensitive nationalism and national identity that have the potential to discount individual ‘basic rights’ in the interests of the national community, constitutional patriotism purports to allow particularism to flourish *within the boundaries* of liberalism and constitutionalism.¹⁸⁵ Put in the language used above, it would allow for us to shape and develop a unified and unifying national identity that can remain *impartial* to its internal divisions. Certainly, this dynamic approach to national identity and political communities is intuitively compelling—not least of all for our concern with *fixed* identities, which have outsized (and undemocratic) implications in the long-term.

As many critics argue, however, Habermas entirely *discounts* the acceptability of a national identity based on prepolitical (and inherited) cultural communities, all while still *implicitly* constructing constitutional patriotism for communities that have strong “cultural horizons,” prepolitical peoples, and already-held liberal democratic values.¹⁸⁶ Of course, these presumptions likely flow from the context in which Habermas developed this concept in the first place. After all, he ‘tailored’ constitutional patriotism for the specific circumstances of post-World War II Germany, hoping that specific democratic processes would *teach* the German

¹⁸⁴ Habermas, “Citizenship and National Identity,” 264. Although he outlines this type of particularism-cum-universalism in the context of the integration of the European Community (i.e., now the European Union), this general idea echoes across his account of constitutional patriotism.

¹⁸⁵ On an individual-level, Müller describes this process of negotiating similarity and difference (or, national integration) as “not something done to ‘them,’ but something accomplished in common through mutual deliberative engagement (for the most part under state auspices), but above all ‘with them’—in such a way that a reconstituted ‘we’ emerges.” See: Müller, *Constitutional Patriotism*, 89.

¹⁸⁶ Yack, *Nationalism*, 35; Margaret Canovan, “Patriotism Is Not Enough,” *British Journal of Political Science* 30, no. 3 (2000): 415–16, 423; Calhoun, “Imagining Solidarity,” 155.

people to ‘attach themselves’ solely to the institutions of the new German state.¹⁸⁷ By extension, though, the ‘ideal theory’ of constitutional patriotism implicitly assumes that citizens will naturally value, understand, and embrace common democratic norms.

Like nationalism, then, constitutional patriotism relies upon the inherited cultural ties of birth to constitute Peoples—even if these cultural ties flow from liberal-democratic principles overall (e.g., the idea of popular sovereignty).¹⁸⁸ Similarly, as Margaret Canovan notes, the embrace of constitutional patriotism assumes that a state’s commitment to liberalism and constitutional democracy will intrinsically “deserve the loyalty of its subjects,” regardless of whether or not that state’s government is legitimate, or whether it has enough “power” to back up its commitment to these principles in the first place.¹⁸⁹

These critiques thus leave us with an overarching limitation, which renders constitutional patriotism insufficient in our attempts to reconcile constitution-making with nation-making. While constitutional patriotism relies upon a *prepolitical* (and thus, pre-constitutional) community that already values liberal democratic principles, it does not provide us with any mechanisms or strategies for embedding these ideals within less politically unified and liberally educated communities. By implication, then, constitutional patriotism can hardly create a

¹⁸⁷ As Canovan, “Patriotism,” 417, notes, constitutional patriotism was “coined to denote attachment to the liberal democratic institutions of the post-war Federal Republic of Germany. Patriotism in those circumstances meant loyalty to a polity that was non-nationalist...in its structure. It was a truncated state...with a set of liberal democratic institutions imposed from without and designed to run counter to the political traditions predominant in Germany for the previous century.”

¹⁸⁸ Ibid., 423; Yack, *Nationalism*, 36. By extension, as Calhoun, “Imagining Solidarity,” 155, argues, Habermas draws a clear line between “inherited identity and rational discourse,” and then “identifies voluntary [and thus, presumably, sociologically and morally legitimate] public life entirely with the latter, and thus obscures the extent to which it is necessarily also a process involving modes of *cultural creativity* and *communication*” (emphasis added).

¹⁸⁹ Canovan, “Patriotism,” 415–16.

national identity *de novo*, but rather simply *transforms* the ground on which (and boundaries within which) individuals grapple with the various cultural tensions housed within those identities.¹⁹⁰ Without a preexisting national identity (which likely already contains latent cultural biases and leanings), then, constitutional patriotism-based constitution-making-as-nation-making remains a dubious—if not futile—endeavor.

Without the ability to *circumvent* the importance of national identity, nations, and nationalism with some form of patriotism, then, three of our key initial questions still remain unanswered: Can nationalism reconcile particularist identities with universalist principles and ideals, especially if constitutional patriotism failed on this front? Can constitution-making simultaneously forge new, unifying national identities in the first place? And, by extension, what *type* of national identity is amenable to the process of democratic constitution-making? The remainder of this section will consider these questions in turn.

Turning to the first question, it remains unlikely that a national identity could ‘comfortably’ and impartially hold a multitude of particularistic (and conflicting) identities under its unifying umbrella—at least not insofar as that civic national identity always comes *second* to individuals’ ethnic or cultural particularism, which Lerner, Wallis, and Tekin all seem to suggest

¹⁹⁰ In this sense, constitutional patriotism echoes the way that Homi Bhabha describes “national culture,” which “must always itself be a process of hybridity, incorporating new ‘people’ in relation to the body politic, generating other sites of meaning and, inevitably, in the political process, producing unmanned sites of political antagonism and unpredictable forces for political representation.” See: Homi K. Bhabha, “Introduction: Narrating the Nation,” in *Nation and Narration*, ed. Homi K. Bhabha (London and New York: Routledge, 1990), 4.

in one way or another.¹⁹¹ After all, as Ernest Gellner argues, nationalism (and, by extension, a unifying national identity) establishes

an anonymous, impersonal society, with mutually substitutable atomized individuals, held together above all by a shared [‘high’] culture of this kind, *in place of* a previous complex structure of local groups, sustained by folk [or, ‘low’] cultures reproduced locally and idiosyncratically by the micro-groups themselves.¹⁹²

In this ‘proper’ sense, then, nationalism cannot perpetuate a high, unifying culture while *primarily* clinging onto the low cultures that it purports to replace. As Dora Kostakopoulou notes, the empirical success stories of ‘liberal nationalism’ often ignore the long and illiberal paths that those communities took before they were able to even begin reconciling their “shared national culture” with internal particularism and difference.¹⁹³ This tension between nation-wide universalism and local particularism does not automatically disqualify the plausibility of constitution-making-as-nation-making, though; it simply implies that the process of constitution-making-as-nation-making should identify (and perhaps create) what the community as a whole has in common before it settles on a national identity built only on difference.

With this in mind, we can now turn to the second question of whether or not the constitution-making process can form a new national identity in the first place. While several

¹⁹¹ This type of ‘federalized’ and indirectly-held national identity, after all, has led to nearly half a century of ongoing ethnic conflict in Nigeria. See, for example: Rex D. Honey, “Nested Identities in Nigeria,” in *Nested Identities: Nationalism, Territory, and Scale*, ed. Guntram H. Herb and David H. Kaplan (Lanham, MD: Rowman and Littlefield, 1999), 175–98.

¹⁹² Ernest Gellner, “Nationalism and High Cultures,” in *Nationalism*, ed. John Hutchinson and Anthony D. Smith (Oxford: Oxford University Press, 1994), 65 (emphasis added). Note, though, that this account of nationalism and national identity assumes that they are both inherently cultural concepts. I will address this question more directly below.

¹⁹³ D. Kostakopoulou, “Thick, Thin and Thinner Patriotisms: Is This All There Is?,” *Oxford Journal of Legal Studies* 26, no. 1 (January 1, 2006): 105.

theories of nationalism, nations, and national identity emphasize their overall historical artificiality,¹⁹⁴ Karl Deutsch argues that national membership (and thus, national identity) stems from individuals' "ability to communicate more effectively, and over a wider range of subjects, with [national] members...than with outsiders."¹⁹⁵ In this sense, nation building relies on the ability of individuals within a given territory to access a shared form of "social communication" (as opposed to a purely language-based form of communication), which *allows* for them to recognize their common identity and interests.¹⁹⁶

Here, then, constitutions and constitution-making both appear particularly well-suited to the goals of nation-making. After all, they provide individuals with the actual "formal" social and political frameworks that create the "social channels of communication" necessary for nation-building in the first place.¹⁹⁷ Put differently, constitutions *steer* the development and elucidation of the 'language' of national identity, providing individuals with ways of thinking about themselves, others, and the relationships that bind them together. At the same time, these documents—and the conversations that drive their drafting processes—can serve another crucial role in the process of nation-shaping: they often clearly spell out how the various cultural "elements that already exist" within a given society ultimately fit (and can fit) together.¹⁹⁸ Overall, then, on a theoretical level, constitutions and constitution-making are particularly well suited for

¹⁹⁴ For just a few examples, discussed above: Walker Connor, "A Nation Is a Nation," 379–88; Gellner, "Nationalism and High Cultures," 63–69; Hobsbawm, "The Nation," 76–83; Jeff Spinner-Halev, "Democracy, Solidarity and Post-Nationalism," 604–28.

¹⁹⁵ Karl W. Deutsch, "Nationalism and Social Communication," in *Nationalism*, ed. John Hutchinson and Anthony D. Smith (Oxford: Oxford University Press, 1994), 27.

¹⁹⁶ *Ibid.*, 27–28.

¹⁹⁷ *Ibid.*, 28.

¹⁹⁸ Spinner-Halev, "Democracy, Solidarity and Post-Nationalism," 606–7.

nation-making insofar as they, one, initiate the social communication necessary for national identity to emerge in the first place, and, two, stitch together the patchwork of identities and histories that will eventually constitute the nation, whatever form that ends up taking.

Finally, we can turn to the question of which types of national identity and nationalism are amenable to democratic constitution-making. In the above discussion, nationalism (and ‘culturally’-based national identities and nations) was often depicted as a negative, malignant, and inherently corruptible force, which is inherently opposed to the normative *goods* of constitutionalism, democracy, liberalism, and so on. Moreover, and as a result, the theories analyzed above attempted either to ‘scrub’ nationalism of all cultural content, or to altogether eliminate its relevance within these aspiring liberal, constitutional governments and societies. In doing so, however, these theories (1) wrongly discount the potential normative ‘goods’ that nationalism itself perpetuates and enables, and (2) ignore the degree to which nationalism is inherently cultural and interwoven with the principles, values, and mechanisms of the modern liberal-democratic state.

With regard to (1), while nationalism has the potential to traffic in blatant and unjustifiable particularism, at its core, as Liah Greenfeld argues, it also views “the true (natural) society as a sovereign community of fundamentally equal members,” and seeks to craft any given society in this image.¹⁹⁹ By extension, under this argument, nationalism (and a well-held sense of national identity) invests an individual with a sense of “dignity,” primarily because it extends to her the same level of moral worth as it would to any other individual in the community.²⁰⁰ Of

¹⁹⁹ Liah Greenfeld, “The Globalization of Nationalism and the Future of the Nation–State,” *International Journal of Politics, Culture, and Society* 24, no. 1–2 (June 2011): 6.

²⁰⁰ *Ibid.*, 6.

course, this hardly means that nationalism automatically generates liberal, egalitarian societies. Rather, it creates a situation in which all members of (for example) England are ‘equally English,’ in contrast to a feudal society, where ‘Englishness’ was entirely mediated by social class.²⁰¹ While this moral leveling may open the door to greater egalitarianism, then, we can still imagine a deeply inegalitarian caste society that also sees all of its members as belonging to the same nation.²⁰²

Still though, and in a broad sense, the forces of nationalism are compatible with—and have the *capacity* to reinforce—the social radicalism of the American Revolution, which Gordon Wood famously describes as a period that “reconstituted” American society into one in which all individuals could eventually stand before the law in the same sense.²⁰³ Especially within ‘deeply divided’ or illiberal and undemocratic societies, then, nation-building and constitution-making emerge as especially reinforcing practices; nation-building bolsters an egalitarian culture and society in which constitutional democracy can then take root. At the same time, if done in a self-conscious and publicized manner, the combination of nation-making and constitution-making

²⁰¹ Meaning, peasants and lords were ‘English’ in an entirely different sense.

²⁰² Bernard Yack also notes the potential xenophobia that comes with this *domestic* moral leveling: “If we raise people’s status by making them formally equal members of a national community, then we are bound to make them somewhat more uncomfortable than they used to be with individuals who stand outside of that community.” See: “Reconciling Liberalism and Nationalism: Nationalism: Five Roads to Modernity by Liah Greenfeld/Nations Without Nationalism by Julia Kristeva/Liberal Nationalism by Yael Tamir,” *Political Theory* 21, no. 1 (February 1995): 177–78.

²⁰³ Gordon Wood, *The Radicalism of the American Revolution* (New York: Vintage, 1993), 8, 294–95. Of course, this does not mean that the American Revolution inaugurated an era of pure egalitarianism. Rather, it ‘reconstituted’ society in a way that would *slowly* allow for more and more citizens to access their ‘Americanism’ in the same way, unmediated by social class or political standing. Clearly, this ‘leveling’ is still in process, even over a century-and-a-half later.

allows for individuals to formally affirm both the constitutional text *and* their newly-constructed national identity through, say, a national referendum on the constitution.²⁰⁴

Thus, with regard to (2), nationalism and national identity not only inherently have some “cultural component” (as we saw in the above discussion of constitutional patriotism),²⁰⁵ but also, these inherited “cultural artifacts”—and the nationalism that makes them politically salient—stem from the concept that underwrites democratic political legitimacy in the first place: popular sovereignty.²⁰⁶ As Bernard Yack argues, these concepts are interwoven for two reasons. First, insofar as popular sovereignty seeks set the “political community” apart from (and prior to) the creation of “political authority,” then the People needs some common identity *apart from* individuals’ collective subjection to the same political authority in order to bind them together—a role that a culturally-based ‘community’ can easily fill.²⁰⁷ And second, by delegitimizing political rule by any body other than the People of a given territory while failing to provide us with any legitimate way of determining the proper “boundaries between peoples,” popular sovereignty thus makes *preexisting* national ties and boundaries politically salient.²⁰⁸

In this sense, the projects of constitution-building (and thus, of allowing the People to exercise their constituent power) and nation-building both naturally draw upon *preexisting*

²⁰⁴ As we will see in Section 3.2 below, however, this consent-based spin on *national identity* has serious limitations in the long-term—primarily due to the fact that, unlike with constitutions, it remains impossible to formally ‘amend’ a national identity after it is created (independent, of course, of the natural ebb and flow of its substance).

²⁰⁵ Spinner-Halev, “Democracy, Solidarity and Post-Nationalism,” 607.

²⁰⁶ Yack, *Nationalism*, 30, 136-56.

²⁰⁷ *Ibid.*, 145–146.

²⁰⁸ *Ibid.*, 151–152.

cultural identities, histories, and symbols. In other words, they simultaneously traffic in particularism and universalism. Even if a political process like constitution-making can ‘create,’ ‘sustain,’ and ‘alter’ a given national identity,²⁰⁹ then, it still draws upon and contains particularistic cultural legacies and leanings at its roots. Thus, returning to the idea of developing a ‘third form’ of national identity as the ‘cure-all’ for constitution-making-as-nation-making, Lerner, Wallis, and Tekin all rely upon a tiered conception of national identity that remains conceptually *implausible* (if even normatively desirable in the first place). After all, they describe an upper-tier, nation-wide identity that would remain wholly civic, if not based on constitutional patriotism. They then pair this with lower-tier, particularistic identities that would remain wholly religious, linguistic, and/or ethnic in its origins. Somehow, this upper-tier national identity would enable constitutionalism to take root, all while lower-tier group or regional identities sustain the cultural traditions and practices that once divided-up the community.

In the face of these clear (and highly problematic) limitations, then, perhaps we have to resign ourselves to the fact that the constitution-making and nation-making processes inherently leave gaps between the overall identity of the People and the many identities that *in fact* make up the political community. Put differently, and as discussed above, perhaps we have to accept the fact that constitutional systems inherently favor some of their members more than others, especially in the long-term. While I suspect this resignation to the status quo hypostatizes²¹⁰ the theoretical limitations of national identity, our discussion still highlights the need for the process of constitution-making to accept the fact that ‘nationalism is here to stay.’ Thus, rather than

²⁰⁹ Spinner-Halev, “Democracy, Solidarity and Post-Nationalism, 622–23.

²¹⁰ By ‘hypostatize,’ I mean that we unnecessarily treat a theoretical problem or puzzle as an insurmountable boundary to practical change.

trying to erase the marks of nationalism from constitutions and constitution-making altogether, we should instead embrace its ‘moral goods’ while actively learning “how to make the best of the [other] moral difficulties it creates for us.”²¹¹

3.2 Participation in Time: The Problem of Constitution-Making-as-Nation-Making for Future Generations

If our previous challenge to constitution-making-as-nation-making focused on its *a priori* theoretical feasibility (namely, of a purely civic, flexible national identity), the next looks at its implications for political legitimacy in the long-term. As we have seen, theorists like Lerner, Wallis, and Tekin all make some form of the following argument: because constitution-making and nation-making are so intertwined, then any ‘legitimate’ drafting process has to (1) take both into account and (2) allow the public to actively participate in debates surrounding the community’s constitution *and* its national identity. Presumably, then, these participatory processes not only provide individuals with a deeper connection to the founding document and identity that surrounds it, but also generate ‘better’ constitutions and national identities overall. Both Chapter 2 and Section 3.1 of this chapter already engage in several critiques of these claims. If we bar these objections, though, these arguments appear relatively convincing—at least at T_1 (the founding moment). After all, participation would allow the ‘people’ to have some

²¹¹ Yack, *Nationalism*, 286.

agency over the shape that their national identity ultimately takes, just as it allows for them to influence the text of a formal constitution.²¹²

As I will argue below, however, this approach fails to recognize that stark differences exist between constitutions and national identities *after* the moment of ratification. On the one hand, the long-term legitimacy of a given constitutional government rests on the capacity for future generations to participate in government, and to select alternatives to the status quo if it no longer reflects the collective interest. On the other hand, though, no such alternatives exist in the case of national identity, insofar as participatory nation-making can take place only within the constitution-drafting process (in a ‘fundamental’ sense, at least)—nor, for that matter, can we likely apply the formal standards of ‘legitimacy’ to a national identity in the first place.

Thus, rather than opening-up the procedures of government to the evolving will of the People, constitution-making-as-nation-making instead reveals the true degree to which past generations can unduly bind future generations, like an over-strengthening of the ropes that bound Ulysses to the mast of his ship.²¹³ Put differently, constitution-making-as-nation-making not only has the potential to create *less* legitimate constitutions in the long-term, but also

²¹² By ‘agency,’ I simply mean that individuals’ actions have the clear capacity to affect a given outcome (e.g., in this case, to shape the ‘contours’ of a given national identity). We can compare this to cases in which an individual has *no* capacity to affect an outcome (e.g., changing the fact that the sun will rise each day, that it might snow in February, and so on). For our purposes, this agency-centric account of national identity stands in contrast to some of the more ‘ethnically-’ and ‘culturally-based’ accounts of national identity, discussed above—accounts that see nations and national identities as entirely *pre-political* constructs. Echoing this approach, Rogers Smith argues, “No political community is simply natural or primordial. All are the products of long, conflict-ridden histories, and must be understood as human creations.” This comes from “Citizenship and the Politics of People-Building,” 75.

²¹³ This common metaphor for constitutional entrenchment comes from: Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality*, Revised Edition (Cambridge and New York: Cambridge University Press, 1985). In this case, though, we are referring not only to the binding nature of the constitution for future generations (as Elster does), but also to the unmovable ways that national identity can similarly constrain individuals in the long-term.

develops a standard of legitimacy to which it cannot likely rise—at least within the confines of how we currently think of constitutions. The remainder of this chapter will address these points in turn.

* * *

To begin this discussion of legitimacy, let us return to the common argument for public participation in the constitution-making process, exemplified by a 2006 report for the International Institute for Democracy and Electoral Assistance. In it, Yash Ghai and Guido Galli argue that

An important justification for people’s participation [in the constitution-making process] is said to be the legitimacy that it confers on the constitution. If people have participated, they are more likely to have a commitment to it, even if they have not fully understood the process or the constitution, or indeed even if their participation was largely ceremonial.²¹⁴

As we saw in Section 2.3 above, Tekin and Chambers (and, implicitly, Lerner and Wallis) apply this same logic to the nation-making process, suggesting that broad public participation will create democratically legitimate constitutions by narrowing the gap between the political ‘idea’ of the people and the *actual* composition of the citizenry in a given state. On both of these accounts of participation-based legitimacy, however, a glaring question remains unanswered: what do they actually mean by legitimacy? Insofar as much of the constitutional design literature argues that we can create normatively preferable political systems by joining together constitution-making and nation-making, then their definition of ‘legitimacy’ matters immensely for our discussion (and, even more so, for the plausibility of their normative claims).

²¹⁴ Ghai and Galli, “Constitution-Building Processes and Democratization,” 14.

Although discussions of legitimacy echo across every corner of political theory, law, and philosophy, we can break this concept into two ‘varieties’ within the context of constitutions: moral legitimacy and sociological legitimacy.²¹⁵ On the one hand, a constitution is morally legitimate if and only if its claims to authority are supported by moral reasons, thus providing individuals with some sort of duty to obey the constitution.²¹⁶ On the other hand, a constitution is sociologically legitimate if the public simply views it as justified or permissible, independent of any fear of coercion or personal gain.²¹⁷ By extension, the People can morally and/or sociologically *legitimate* a constitution or its drafting process through a variety of pathways or procedures (e.g., through popular participation, the use of a ratification referendum, education campaigns, public input on the working draft, and so on).²¹⁸ We can subdivide these pathways, though, into those that have a “*procedural*” effect (i.e., participation in drafting leads to higher

²¹⁵ For the following discussion of constitutional legitimacy, I draw primarily on: Fallon, “Legitimacy for the Constitution,” 1787–1853; Lenowitz, “Creating Legitimate Constitutions: The Possible Role of Procedures.”

²¹⁶ For example, Paulina Ochoa Espejo argues, “A state is good and just only when it guarantees individual freedom and equality, as well as social coordination. And this guarantee can be made good only when all individuals govern together or unanimously consent to rule—that is, when they all agree.” See Espejo, *The Time of Popular Sovereignty: Process and the Democratic State* (University Park, PA: The Pennsylvania State University Press, 2011), 4–5.

²¹⁷ Fallon, “Legitimacy and the Constitution,” 1795–96, makes a further distinction between sociological legitimacy in a ‘strong sense,’ as described here, and sociological legitimacy in a ‘weak sense,’ meaning a situation in which the public simply *acts as though* the constitution is morally legitimate. I do not include this latter type, however, insofar as it would (quite counter-intuitively) qualify Kim Jong-un’s North Korean regime as sociologically legitimate. This critique comes from Lenowitz, “Creating Legitimate Constitutions,” 6n4.

²¹⁸ For further common examples, see: Ginsburg, Elkins, and Blount, “Does the Process of Constitution-Making Matter?”

levels of moral or sociological legitimacy), or a “*substantive*” effect (i.e., participation in drafting leads to a constitution, the contents of which are more morally or sociologically legitimate).²¹⁹

With such a range of definitions in mind, it appears as though Ghai and Galli see public participation as something that contributes to the *procedural sociological legitimacy* of a given constitution—or, in other words, that including the public in the drafting process will create a document that they will fully take on as their own, regardless of whether or not that participation creates a ‘better’ document overall.²²⁰ In describing the Canadian constitution-drafting process in the 1980s, for example, Simone Chambers notes that the Canadian people “view a constitution as a document that is implicitly prefaced by ‘We the people,’” and which thus rests on at least an imagined “contractual agreement between rational parties” (i.e., what we commonly point to as the basis for a morally legitimate constitution).²²¹

Under these theories, then, a constitution remains sociologically—and sometimes, simultaneously, morally—legitimate only insofar as the People view themselves as playing a role in its construction and as consenting to its provisions.²²² Yet, constitution-making-as-nation-

²¹⁹ Lenowitz, “Creating Legitimate Constitutions,” 13–14. Vincent Depaigne makes this same distinction. Yet, he uses ‘procedural’ legitimacy to describe the ways of ensuring “the consent of citizens to power and law,” and ‘substantive’ legitimacy to describe the common “ethos,” “myth,” or “noble lie” on which a given social contract is based. See: Vincent Depaigne, *Legitimacy Gap: Secularism, Religion, and Culture in Comparative Constitutional Law* (Oxford: Oxford University Press, 2017), 49–51.

²²⁰ Chambers, for example, states: “Legitimacy is tied to process and how participants feel about it.” See: Chambers, “Democracy, Popular Sovereignty,” 157. Generally, see also: Moehler, *Distrusting Democrats*; Widner, “Constitution Writing and Conflict Resolution.”

²²¹ Simone Chambers, “Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis,” *Politics & Society* 26, no. 1 (March 1998): 149–50.

²²² Of course, there is no *consensus* on this idea that some form of either ‘hypothetical’ or ‘actual’ contractual consent is the only way of either sociologically or morally legitimating a constitution. For one clear critique of this approach, see: Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton and Oxford: Princeton University Press, 2004). For our purposes (and as the anecdote

making seems to apply this same normative logic to the construction of a national identity—i.e., that it reflects the true diversity of the People (and is thus ‘legitimate’) only insofar as it emerges from a participatory process. Even if we assume that participation can lead to such an un-rooted and flexible national identity,²²³ this does not automatically result in a legitimate constitution, especially in the long term.²²⁴ Put differently, because the theories of constitution-making-as-nation-making do not develop any substantive definition for ‘legitimacy,’ they fail to realize that stark qualitative differences exist between constitutions and national identities after the moment of ratification, as we will discuss below. Instead, they simply join-together these two processes and then apply the same normative criterion of public participation when evaluating their sociological and moral legitimacy.

Certainly, from the perspective of constitution-making alone, a robust body of literature already grapples with this presumption of participation-based legitimacy—both in relation to constitutions specifically, and in the abstract through theories of deliberative democracy.²²⁵ On

about the Canadian constitution suggests), though, much of the literature on (and public discussions of) liberal democratic constitutional design is concerned with the idea of the ‘social contract’ and its ties to popular sovereignty—a fact we have clearly seen in the discussions of constitution-making-as-nation-making above.

²²³ And, as we saw in Section 2.2, this assumption is likely incorrect.

²²⁴ After all, as Moehler, *Distrusting Democrats*, convincingly (although perhaps reductively) shows, participation hardly leads to automatically-higher levels of sociological legitimacy for constitutions—meaning, it’s a bold step to simply assume that participation will automatically ‘legitimate all that it touches.’ Again, this also assumes that we can apply standards of formal legitimacy to national identity in the first place, all without outlining what it actually means for a national identity to be legitimate.

²²⁵ In addition to Moehler, *Distrusting Democrats*, see also: Zachary Elkins, Tom Ginsburg, and Justin Blount, “Citizen as Founder: Public Participation in Constitutional Approval,” *Temple Law Review* 81, no. 2 (2008): 361–82; Jennifer Widner, “Constitution Writing in Post-Conflict Settings: An Overview;” Hart, “Constitution Making and the Right to Take Part in a Public Affair.” For a good overview of the ways that constitutions can in fact hedge against the dangers of deliberation, see: Sunstein, *Designing Democracy*.

this general line of reasoning, as Donald Lutz succinctly puts it, “Popular sovereignty implies that all constitutional matters should be based on some form of popular consent, which in turn implies a formal, public process.”²²⁶ In this sense, insofar as the members of a state collectively author the constitution, then they ought to have an active role in its creation and authorization. While this premium on participation raises some questions about legitimacy in the long-term (i.e., how can a constitution continue to hold legitimacy if future generations cannot participate in the same way that their ancestors did in the initial drafting process?),²²⁷ constitutional designers and theorists generally circumvent this issue through commonplace mechanisms of constitutional revision. For example, they include sunset clauses for replacing the whole document, modes of judicial review, legislative revision processes, and above all else, formal amendment procedures.²²⁸

These mechanisms thus allow for a given constitution to remain legitimate (both sociologically and morally) by (1) adapting to changes in demographics, political ideals, and cultural values, as well as fixing mistaken institutional design; (2) better representing the ways that the evolving political system actually operates; and (3) reflecting the general need for

²²⁶ Donald S. Lutz, *Principles of Constitutional Design* (Cambridge: Cambridge University Press, 2006), 151.

²²⁷ See: Dennis F. Thompson, “Democracy in Time: Popular Sovereignty and Temporal Representation,” *Constellations* 12, no. 2 (June 2005): 245–61.

²²⁸ Lutz, *Principles of Constitutional Design*, 146; Jackson, “What’s In A Name – Reflections on Timing, Naming, and Constitution-Making,” 1282. Of course, with regard to constitutional amendments, “we’re caught...in Goldilocks’s dilemma of figuring out the ‘just right’ position between the ‘too hot’ of a too easily changeable constitution and the ‘too cold’ of one that is impervious to change.” See: Sanford Levinson, “Amendment,” in *Framed: America’s Fifty-One Constitutions and the Crisis of Governance* (Oxford: Oxford University Press, 2012). Either way, though, formal pathways exist (and are *known* to exist), which would allow for the People to make changes down the line—even if those amendment pathways are particularly hard to traverse (as in the case of the U.S.).

constitutional flexibility and dynamism in the long-term.²²⁹ When it comes to written constitutions, then, citizens still have the option to pursue alternatives to the status quo.

In contrast, national identities and ‘political peoplehood’ both occupy an entirely different area of concern when we think about their potential for democratic legitimacy. For the most part, much of the normative literature on nationalism and national identity focuses on their ability to ensure the rights of minority groups, or on their potential clashes with the tenets of liberalism.²³⁰ Thus, while these arguments might help us to determine the *acceptability* of a national identity at any given time,²³¹ they apply only indirectly to the legitimacy of the nation-making process itself. To be sure, some theorists grapple with the issue of morally acceptable nation-making. Among the more prominent examples, Rogers Smith argues that “the politics of people-making” gains its normative acceptability through the “constitutive stories” of peoplehood that it tells—stories that reveal a common identity and purpose, and which then provide individuals with “anchors of morally compelling identity amidst the shifting seas of competitive community construction.”²³² As we saw in Section 2.1 above, others attempt to introduce new conceptualizations of national identity and nationalism, which can potentially render them more flexible and amenable to liberal ideals and historical change. Note, though, that these discussions of national identity emphasize their potential acceptability, rather than their explicit ‘legitimacy.’

²²⁹ Lutz, *Principles of Constitutional Design*, 151–54.

²³⁰ See the discussion of nationalism, nations, and national identity in Section 2.1, above.

²³¹ I.e., whether or not it systematically excludes a single minority from the political community’s identity—all without giving a justifiable reason for doing so.

²³² Smith, “Citizenship and the Politics of People-Building,” 82; Rogers M. Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership*. Echoing these concerns, Espejo warns, “If a people depends on its nondemocratic history, it may perpetuate such nondemocratic practices” in the future. See; Espejo, *The Time of Popular Sovereignty: Process and the Democratic State*, 176.

And yet, if we return to the ways that the proponents of constitution-making-as-nation-making frame their arguments, both constitutions and nations are subject to the identical standard of *procedural sociological legitimacy*—one defined by “the possibility that each individual affected by [a constitution and a national identity] participates in creating, governing, and changing” it.²³³ If we follow this argument to its logical conclusion, we would need to extend this same degree of participation to future generations, so as to avoid favoring the will of the founding generation for morally arbitrary reasons.²³⁴ Unlike constitutions, though, which commonly include provisions that allow for the People to continuously participate and tinker with their ‘institutions’ after the day of ratification, national identities remain far less tangible and self-consciously pliable.²³⁵ Even if we can imagine some new institution that periodically releases a ‘Public Agreement on the Present National Identity,’ which individuals can play an active role in drafting each year, these national identities would still likely have their *roots* in the original drafting-process.²³⁶ Beyond the day of ratification, then, no formal channels exist that would allow for future generations to pursue alternatives to their existing national identity—thus

²³³ Espejo, *The Time of Popular Sovereignty: Process and the Democratic State*, 157–58. Clearly, Tekin echoes this train of logic entirely, arguing that “Constitutional claims of popular sovereignty...lay claim to democratic legitimacy to the extent that citizens themselves take part in the process of constitution-making”—which, for him, is inherently the same as the process of nation-making. See: Tekin, *Founding Acts*, 4.

²³⁴ On this issue of temporally-concerned legitimacy, see Thompson, “Democracy in Time.”

²³⁵ After all, these identities have a direct hold on *how* individuals view themselves, others, political values and norms, and so on. Or, put differently, as Smith notes, “The interests people pursue...are constituted as much or more by their ideas of who they are and what they value as by sheer biological or material realities.” See: Smith, *Stories of Peoplehood*, 45–46.

²³⁶ From a different angle, this type of continuous and public negotiation of national identity is exactly what Lerner tries to *avoid* with her ‘incrementalist approach’ to constitution-making. After all, this approach removes the debates over national identity ‘from the table’ of constitutional negotiations, insofar as this singular issue keeps these countries from adopting a constitution in the first place.

bringing the plausibility of participatory legitimacy into question, even within the confines of the arguments for constitution-making-as-nation-making themselves.

Granted, the bulk of social and political change hardly occurs through formal, self-aware, and deliberate channels. In the realm of constitutions, for example, Bruce Ackerman famously argues that American constitutional development has moved beyond the formal amendment process, and instead now occurs through transformative moments of “higher lawmaking,” which thus collectively create a truly “living constitution.”²³⁷ Similarly, many note the fundamentally incomplete nature of national identity, regardless of whether it flows from an ethnically- or civically-defined political community.²³⁸ Yet, these mechanisms of change matter only minimally for our interest in the supposed legitimacy of constitutions and national identities. After all, a given individual can hardly *utilize* such informal, cumulative, and often centuries-spanning pathways to pursue any alternatives to the constitutional or national identity-based status quo.²³⁹ Insofar as the proponents of constitution-making-as-nation-making are primarily concerned

²³⁷ Ackerman, *We the People, Volume 1*; Bruce Ackerman, “Oliver Wendell Holmes Lectures: The Living Constitution,” *Harvard Law Review* 120, no. 7 (2007): 1737–1812. See also: Sujit Choudhry, “Ackerman’s Higher Lawmaking in Comparative Perspective: Constitutional Moments as Constitutional Failures?,” *International Journal of Constitutional Law* 6, no. 2 (2008): 193–230.

²³⁸ For just a few examples: John R. Gillis, ed., *Commemorations: The Politics of National Identity* (Princeton, NJ: Princeton University Press, 1994); Samuel P. Huntington, *Who Are We? The Challenges to America’s National Identity* (New York: Simon & Schuster, 2004); Homi K. Bhabha, “Introduction: Narrating the Nation,” in *Nation and Narration*, ed. Homi K. Bhabha (London and New York: Routledge, 1990), 1–7. Or, as Bruner puts it, “Tensions prompted by changes in economic conditions, state authority, real or imagined domestic and international threats, and/or significant changes in cultural markers of national belonging continually cause new groups to become alienated from dominant characterizations of collective belonging, preventing the process of national identity construction from ever being completed.” See: M. Lane Bruner, *Strategies of Remembrance: The Rhetorical Dimensions of National Identity Construction* (Columbia, SC: University of South Carolina Press, 2002), 1.

²³⁹ This also assumes that individuals are actively trying to ‘amend’ a national identity, in the same way that they would (or could) a formal constitution.

with the sociological dimensions of legitimacy,²⁴⁰ then such inaccessible and informal means of change can hardly count as continued (and thus, legitimacy-bolstering) forms of public participation.

Beyond these process-based issues of long-term participation, and as we have consistently seen, constitution-making-as-nation-making also assumes *in the first place* that we can apply standards of legitimacy to national identity. Based on the above discussion, this assumption seems largely incoherent. After all, we can hardly say that these identities have any moral claims of authority over individuals, which then generate duties to obey, at least in the same sense as constitutions.²⁴¹ Simply put, national identities operate in entirely different ways than foundational laws—on both an individual and a national level.

At the same time, we can imagine some general arguments for applying standards of ‘legitimacy’ to national identities. Even if they do not rely upon the same normative underpinnings as constitutions, these identities still claim to represent the ‘correct,’ authoritative image of a political community as a whole. Thus, national identities *do* make some claims of authority, in the sense that they consistently draw the line between ‘insiders’ and ‘outsiders,’ and have power over *how* individuals understand their proper ‘place’ within a national community. As a result, we could describe these identities as providing individuals with duties to obey (in the form of assimilation)—not because they self-consciously threaten Defection X with Punishment Y, but because they (1) provide moral reasons for an individual’s membership in a *specific* political

²⁴⁰ I.e., that certain process-based innovations or provisions will bolster the public’s impression of moral legitimacy.

²⁴¹ Note that if these duties are broken, constitutions (and law) generally stipulate a clear and calculated punishment of some sort (i.e., if you do not obey Provision X, then you are given Punishment Y).

community,²⁴² and (2) reward membership in (and assimilation to the idealized image of) that community with a sense of “trust and worth.”²⁴³

Clearly, then, constitutions and national identities bear some family resemblances, at least when it comes to their general normative ‘acceptability.’ Yet, this does not therefore mean that we can evaluate them by the same standard—especially when that standard (legitimacy) has very specific technical and moral implications. Arguments in favor of constitution-making-as-nation-making neither recognize the nuanced differences between these two concepts, nor do they engage in any rigorous discussion of what legitimacy means in the first place. Thus, this lacuna leaves their theories in a double-bind, of sorts: first, the idea of legitimacy ceases to mean very much at all, which, second, allows for it to refer to really any positive component (or externality) of the drafting process. As a result, they make a myopic case for the *procedural sociological legitimacy* of constitution-making-as-nation-making—one that entirely ignores its long-term *substantive* implications.

* * *

Taking a step back, then, constitution-making-as-nation-making sets an especially high bar for a given constitution’s legitimacy—one that it cannot likely reach in practice, especially in the long-term. Primarily, this issue stems from the differences between an individual’s ability to consent to (or, more broadly, to actively construct and affirm) a constitutional document on the one hand, and a national identity on the other. Constitution-making-as-nation-making mistakenly presupposes the fact that a political system—and the future generations that inhabit it—can

²⁴² Greenfeld, “The Globalization of Nationalism,” 6.

²⁴³ Smith, “Citizenship and the Politics of People-Building,” 75–80.

amend national identities and nations, just as they can the constitutions around which these identities first developed. As we have seen in this section, this is hardly the case, both empirically and conceptually.

Perhaps, with these limitations in mind, we should heed the advice of Dennis Thompson—and, if we reach further back into history, of Thomas Jefferson and Marquis de Condorcet—and hold periodic constitutional conventions in order to keep “a government and its constitution in sync with the changing values of its citizens” and the changing identity of its People.²⁴⁴ Granted, this dramatic solution would still likely do more harm than good. Yet, our overall discussion strongly suggests that Intractable Constitutional Memories are, in fact, the unavoidable products of constitutional government—much like, as Madison famously warned, “the latent causes of faction...are sown into the nature of men.”²⁴⁵ Once we accept this reality, though, we can cease theorizing ways of eliminating the *causes* of ICM (as the proponents of constitution-making-as-nation-making implicitly do with little success), and instead devote our efforts toward mitigating its *effects*. Thus, with this in mind, we can conclude our discussion by attempting to lay-out a preliminary and realistic ‘toolbox’ of constitutional design—one that takes seriously the risks and issues associated with ICM.

²⁴⁴ Thompson, “Democracy in Time,” 258. See also: Jefferson, “Thomas Jefferson to James Madison, 6 September 1789.”

²⁴⁵ James Madison, “Federalist No. 10.” in *The Federalist Papers*, ed. Michael A. Genovese (New York: Palgrave Macmillan, 2009), 49–54.

CONCLUSION:

“TOWARD a REALIST PARADIGM of CONSTITUTION-MAKING”

...so long did his city have the first rank in Hellas for good government and reputation, observing as she did for five hundred years the laws of Lycurgus, in which no one of the fourteen kings who followed him made any change...For the institution of the ephors did not weaken, but rather strengthened the civil polity, and though it was thought to have been done in the interests of the people, it really made the aristocracy more powerful.

*Plutarch*²⁴⁶

We, the People of South Africa, declare for all our country and the world to know: that South Africa Belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people...that only a democratic state, based on the will of all the people, can secure to all their birthright without distinction of colour, race, sex or belief.

*South Africa Freedom Charter, 1955*²⁴⁷

Just as modern constitutions need citizens, so too do modern citizens need constitutions. In an age of ever-increasing social and political complexity, constitutions not only set-up a polity's institutions, but also provide individuals with a sense of stability, identity, and trust in government—not to mention a whole host of other normative and practical benefits. These foundational documents, and the processes from which they emerge, are thus ubiquitous. And as contemporary states transition out of periods of authoritarianism, revolution, or general strife, constitution-making almost unquestionably lies on their horizon. Currently, countries as diverse

²⁴⁶ Plutarch, *Plutarch Lives, I, Theseus and Romulus. Lycurgus and Numa. Solon and Publicola*, trans. Bernadotte Perrin (Cambridge, MA: Harvard University Press, 1914), 297. This epigraph was also introduced on page 2, at the outset of this thesis.

²⁴⁷ South African 'Freedom Charter,' 26 June, 1955, in Hassen Ebrahim, *The Soul of a Nation: Constitution-Making in South Africa* (Cape Town: Oxford University Press, 1998), 415.

as Kazakhstan, Trinidad and Tobago, Venezuela, Bangladesh, and even Scotland are debating the need for (and merits of) constitution-replacement. And certainly, at least some of the 36 countries or territories on the World Bank’s “Harmonized List of Fragile Situations” will write new constitutions in the near future. This thesis introduced a framework for understanding and recognizing the durable legacies that constitution-making processes cast over national histories—legacies that, like Lycurgus from the grave, unduly constrain social, political, and legal progress and entrench inequalities for the long-term.²⁴⁸ It then asked whether or not these legacies are the unavoidable price that we pay for the benefits of constitutional government.

To recapitulate, these questions primarily emerged from the recognition that the processes used to create written constitutions are deeply intertwined with those that shape national identity. As political communities debate and negotiate the structures of their institutions, they also inherently engage in conversations about what it means to be a member of that community, how members relate (and *ought* to relate) to one another, and so on. Thus, the procedures of constitution-writing have a clear and seemingly unavoidable impact on the identity of ‘We, the people.’

In recent years, a growing number of works on constitutional design have embraced these linkages between ‘constitution-making’ and ‘nation-making,’ often arguing that identity-aware processes can generate more legitimate, rights-respecting political systems. This trend toward what I called ‘constitution-making-as-nation-making’ is undoubtedly promising. Intuitively, constitutional design best-practices should account for *all* of the products of constitution-making

²⁴⁸ As the mythic ‘lawgiver of Sparta,’ Lycurgus committed suicide in order to ensure “immortality for his laws,” after he learned that Sparta “would continue to flourish so long as they remained in effect.” See: Julian N. Eule, “Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity,” *American Bar Foundation Research Journal* 12, no. 2/3 (1987): 388.

procedures—not just the text of the document itself. In the above chapters, I attempted to take seriously the normative promises of these arguments in favor of constitution-making-as-nation-making. At the same time, though, I tried to show how an uncritical combination of these two processes will likely lead to less legitimate political systems in both theory and practice.

The basis for this discussion has been the concept of Intractable Constitutional Memory, which tries to highlight the connections between national identity and constitutions, as well as the ways that these connections are rooted within the process of constitution-making. While I developed this concept by analyzing the histories of France, the United States, Spain, and Poland, the idea of ICM echoes across a broad variety of national contexts. Debates surrounding the creation of a new constitution, I argued, leave clear ‘marks’ on the stories that political communities tell about their national identity—marks that place questions of ‘insiders’ and ‘outsiders’ at the center of the political system. As a country moves away from its founding moment (T_1), though, these stories naturally cease to describe the *actual* identities and values of the political community. And yet, because these inequality-engendering legacies (or, ICMs) were left outside of the constitution’s written text, they are particularly ‘sticky,’ and endure even after the community amends its constitution and changes its laws.

Certainly, this concept helps us to understand why certain inequalities endure more than others in countries with a variety of constitutional and legal histories. Yet, the main contribution of ICM to the field of constitutional design, I have argued, concerns its implications for the theories of constitution-making-as-nation-making. After all, insofar as ‘national myths’ can crystallize certain inequalities within a political system for centuries, then the *combination* of constitution-making and nation-making is indeed risky.

Thus, in Chapter 2, I attempted to orient the concerns of ICM within the three main texts that develop theories in favor of constitution-making-as-nation-making. Overall, two arguments emerged from this discussion. (1) These theories indeed begin to close some of the gaps from which ICMs arise—namely, those between the ‘constitutionalized’ identity of the People on the one hand, and the *actual identities* of the ever-changing citizenry on the other. After all, if we can generate ‘accurate’ and flexible national identities from the moment of ratification, then we can presumably limit the likelihood that ICMs will emerge at all. (2) Yet, as I have argued, these three texts under-theorize their solutions for closing these gaps. As a result, they fail to recognize whether or not constitution-making-as-nation-making can continue to ‘work’ after we move away from T_1 .

Finally, then, Chapter 3 went back to the drawing board to see whether or not we can ‘rescue’ these theories by shoring-up their two key claims: first, that high degrees of public participation can generate national identities that reconcile the claims of both ‘particularism’ and ‘universalism;’ and second, that the combination of constitution-making and nation-making creates political systems that are especially legitimate. This first claim, I argued, relies upon unstable theorizing, which entirely overstates the degree to which we can scrub national identities of their historical and cultural roots. Similarly, the second claim applies the same standard of participation-based legitimacy to both constitution-making and nation-making—all without recognizing that stark differences exist between constitutions and nations, especially after the moment of ratification.

Where can we go from here? If these objections are convincing, does this mean that constitution-making-as-nation-making is an inherently futile (if not dangerous) endeavor? Are our hands tied when it comes to ICMs, forcing us to accept their inequality-engendering effects

without recourse? Not necessarily. While I suspect that periods of constitution-making will always cast long shadows over national histories, we can certainly try to make them more manageable. In contrast to the theories outlined in Chapters 2 and 3 above, these more modest goals fit into what I call the ‘Realist Paradigm of Constitution-Making.’ To conclude our discussion of Intractable Constitutional Memory and constitution-making-as-nation-making, then, we can briefly explore some of the preliminary features and concerns of this ‘Realist Paradigm.’ Note, though, that this discussion is entirely speculative and exploratory, rather than some definitive roadmap of all the possible ICM-aware methods of constitution-making.

First of all, we can indeed learn a great deal from the proponents of constitution-making-as-nation-making. Despite their many flaws, these arguments are all motivated by the need for drafting processes to lower the stakes of constitution-making overall. After all, insofar as the outcomes of these processes appear less consequential, then constitution-drafters will likely take less hard-line stances on issues that could tie the hands of future generations. Theorists like Lerner and Wallis attempt to lower these stakes by forging a middle ground between, on the one hand, the liberal-civic values and goals of modern constitutionalism and democracy, and on the other, the particularistic values of various religious and ethnic groups. But we can imagine a series of other, less problematic strategies that achieve similar tempering goals. Vicki Jackson, for example, highlights a series of novel strategies that attempt to spread-out the process of constitution-making past some nearly-mythic Founding Moment—for example, through transitional agreements, interim constitutions, or even longer-term sunset clauses on the initial document.²⁴⁹ Even if the Realist Paradigm does not include any of these specific approaches,

²⁴⁹ See, Vicki Jackson, “What’s in a Name?”

though, they still highlight the need for strategies that reach beyond the common templates of constitution-making overall.

Second, our discussion of ICM reveals the need for the Realist Paradigm to include processes that generate *accurate* ‘constitutive stories’—ones that take the true composition and history of the political community into account. As we saw in the case of Poland, for example, the constitution-making process embraced an image of the Polish people that was implicitly (if not explicitly) white and Christian. Yet, this overlooked the other ethnic, racial, and religious groups that undoubtedly lived within Poland during the drafting process—not to mention the other social groups that could possibly exist within Poland in the future. In contrast, an ICM-aware approach would follow a model closer to that of South Africa, whose ‘constitutive stories’ acknowledge its unjust histories and many disparate identities. Yet, this recognition of injustice and difference exists without making these issues the *only* pathways that individuals can utilize to understand their place within the political community.

Of course, aspirational national myths and ‘constitutive stories’ have a great deal of merit. The *promises* of fundamental equality and political freedom are valuable elements of these stories, even if such lofty political and social ideals are never achieved in practice. Yet, the Realist Paradigm should include these aspirational components only insofar as they speak to political values and ideals, as opposed to ideal ethnic, racial, or religious identities. Put simply, if possible, constitution-making processes should avoid making definitive decisions about who ‘counts’ as a full member of the political community. After all, shifting demographics will inevitably subvert this general ‘definition’ in the long-term. Granted, as we have seen, national identities inevitably contain some ‘cultural’ undertones, which might cause clear lines to eventually develop between ‘insiders’ and ‘outsiders’ in the long-term. But this does not mean that constitution-making

processes have to explicitly ‘choose’ some groups over others. Rather, in practice, they can strive to highlight the common ground that joins the community together—all while recognizing the existing divisions that may lead to future inequality and conflict.

Finally, third, the Realist Paradigm should actively embrace the limits of constitution-making. In one sense—and as the overarching claim of this thesis—these foundational experiences cast long and enduring shadows over national histories. Thus, the way that we design the process of constitution-making undoubtedly matters, as do the strategies that we use to achieve its goals. Yet, we can achieve only so much within the bounds of these processes. As a result, the Realist Paradigm should pair novel forms of constitution-making with more commonplace legal and political innovations, allowing for them to work in tandem. Already, literature on judicial interpretation, for example, grapples with the challenges of whether or not law should be amenable to historical change. Even a preliminary outline of the relevant theories and debates would extend far beyond the confines of this thesis. But, for our purposes, looking *beyond* constitution-making might be the only way for the Realist Paradigm to hedge against the risks of ICM in the long-term.

Taking a step back, then, this thesis showed that any effective and legitimate constitution-making process has to account for *all* of its products: not only the text of the document, but also the national myths and constitutive stories that determine the identity of the political community. Yet, it also demonstrated the need for the contemporary theorists of constitutional design to remain clear-eyed about how much we can (or, really, cannot) achieve by reimagining these processes. As borders continue to grow increasingly porous, and as truly homogeneous communities become far less common in turn, constitution-designers will have to grapple with deep and divisive questions of identity and difference, likely at an ever-higher rate.

If they wish to create liberal, democratic political systems that can *remain* liberal and democratic in the long term, these designers should take seriously the marks that constitution-making inevitably leaves on national identity.

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