

YOUNG JEFFERSONIANS AND ADULT MARSHALLIANS

Constitutional and Regime Transitions
in Public Schools and Nation-States

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ABSTRACT

Constitutional thinkers have much to learn about constitutions in general and constitutional transitions more specifically by extending their studies to all entities that purport to be constitutional rather than confining their analyses to the constitutions of nation-states or, in order to include American states, the constitution of semi-sovereign entities. The constitutions of student councils and nation-states create and empower governing institutions. Both are higher law than any edict enacted by the governing institutions they create. The reasons why high schools rarely experience constitutional transitions as disruptive help explain why nation-states almost always experience constitutional transitions as disruptive. The constitutions of many American states in crucial respects bear a closer resemblance to the constitutions of student councils than the constitutions of nation-states. The more a state constitution resembles that of a student council, some evidence suggests, the less likely that constitutional transformations or regime changes in that state are disruptive.

KEYWORDS: *Constitution, Student Council, Transition, Rule by Law, States*

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Constitutional Studies 1.1

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THE REPUBLIC OF IRELAND encourages students in all public secondary schools to draft and ratify constitutions that establish student councils. Section 27 (3) of the Education Act of 1998 declares, “. . . a board of a post-primary school shall encourage the establishment by students of a student council and shall facilitate and give all reasonable assistance to (a) students who wish to establish a student council, and (b) student councils when they have been established.”² The institutions responsible for implementing this measure, the Department of Education and Skills and the Office of the Minister for Children and Youth Affairs, promulgate guidelines stating, “Where a Student Council does not already have a constitution in place, it should be encouraged to draw one up.” These ministries assist student politicians in Ireland by setting up a website with sample constitutions of student councils (“Student Council Support” 2016). These laws, guidelines and websites are designed to begin the process of constitutional transformation throughout public post-primary schools in Ireland.

The impact of Section 27 (3) is difficult to discern from abroad, but fair reasons exist for thinking that constitutional transformations in Irish public schools are quite different from the constitutional transformations that capture the attention of constitutional theorists. Constitutional commentators frequently speak of constitutional transitions as both difficult and profound. Beau Breslin asserts, “New constitutions emerge out of the destruction of old and dysfunctional political orders” (2009, 31–32). Jon Elster maintains, the “link between crisis and constitution-making is quite robust” (1995, 370). The Irish Parliament almost certainly did not expect that their edict would disrupt public education throughout the realm, think that public schools in Ireland had become dysfunctional, or regard the nation as experiencing an educational crisis. The constitutions of student councils around the world are drafted, ratified, interpreted, amended, and abandoned without any of the consequences that constitutional commentators commonly attribute to constitutional transitions. The constitutional experiences of numerous constitutional associations that exist in civil society, constitutions of parent-teacher organizations, chess clubs, fraternal societies and the like, are similar to that of student governments. Constitutional change and transition are part of the normal life of the constituted entity, rather than a sharp, agonizing break with the constitutional past.

The constitutional experiences of Irish public schools, of public schools more generally, and of civic associations cries out for extending Ran Hirschl’s complaint about the parochial nature of constitutional commentary to the routine exclusion

2. Education Act, 1998, No. 51 of 1998.

in constitutional studies of the constitutions that exist in civil society. Hirschl criticizes the low ratio of national constitutions examined to actual national constitutions in comparative constitutional studies and the routine selection biases that present a distinctive category of national constitutions as encompassing the entire national constitutional experience. He speaks of

the pretense that insights based on the constitutional experience of a small set of “usual suspect” settings—all prosperous, stable constitutional democracies of the “global north”—are truly representative of the wide variety of constitutional experiences worldwide, and constitute a “gold standard” for understanding and assessing it. The question here is this: how truly “comparative” or generalizable is a body of knowledge that seldom draws on or refers to the constitutional experience, law, and institutions of the global south? (2014, 192–93)

No more reason exists for thinking that the relatively small number of national constitutions (and constitutions of semi-sovereign entities) fully captures the global constitutional experience, given the extraordinary number of civic associations with constitutions, than reason exists for thinking that the tiny set of global north constitutions is representative of the constitutional experience of nation-states. The constitutions of nation-states are worth studying as a distinctive category of constitutions, just as some comparativists have reasons for explicitly focusing attention only on a small set of stable constitutional democracies in the global north as a distinctive category of constitutions. Still, when the object of study purports to be the constitutional experience or constitutional transitions, no *a priori* reason exist for excluding constitutions of entities other than nation-states or semi-sovereign entities or for presuming that the constitutional experiences of student governments and civic associations shed no light on the constitutional experience more generally.

Constitutional thinkers have much to learn about constitutions in general and constitutional transitions more specifically by extending their studies to all entities that purport to be constitutional rather than confining their analyses to the constitutions of nation-states or, in order to include American states, the constitution of semi-sovereign entities. The constitutions of student councils are a different species of the constitution genus and do not, as commonly assumed, bear the same relationship to the constitutions of nation-states as James Madison does to Madison, Wisconsin.³ The constitutions of student councils and nation-states create and empower governing institutions. Both are higher law than any edict enacted by

3. Jack Balkin is responsible for this bon mot (1995, 1955).

the governing institutions they create. The differences between the two forms of constitutions are instructive. The reasons why high schools rarely experience constitutional transitions as disruptive help explain why nation-states almost always experience constitutional transitions as disruptive. The comparison between the constitutions of nation-states and the constitutions of student governments also explains why some nation-states experience disruptive regime change without changing constitutions, while public schools experience constitutional transitions without disruptive regime changes. The constitutions of many American states in crucial respects bear a closer resemblance to the constitutions of student councils than the constitutions of nation-states. The more a state constitution resembles that of a student council, some evidence suggests, the less likely that constitutional transformations or regime changes in that state are disruptive.

The constitutions of nation-states and the constitutions of student governments differ sharply in their transgenerational origins and aspirations, and the presence or absence of these transgenerational origins and aspirations helps explain why some constitutional transitions are more disruptive than others. The constitutions of most nation-states are drafted by transgenerational coalitions that enter and exit the political world in fits and starts. The persons responsible for national constitutions tend to be Marshallian in their belief that a constitution should “endure for ages to come.”⁴ Most nation-states experience political crises when their constitutions are created, modified or abandoned because those constitutions are designed to shape the polity for the indefinite future. Future generations are expected to maintain the constitution as the most important symbol and manifestation of the regime’s fundamental commitments. The constitutions of most student councils are drafted by a distinctive generational cohort that enters and exits the school at the same time. Public school students and principals tend to be Jeffersonian in their belief that each new generation is free to adopt the governing arrangements they think best. Student governments and other similarly situated constitutional entities in civil society experience no distinctive political crises when their constitutions are created, modified, or abandoned because no general expectation exists that these constitutions will outlast the framing generation or exist longer than the particular problems that brought them into being. These constitutions are instruments of governance that may be changed whenever governing coalitions or circumstances change. The constitutions of such semi-sovereign entities as American states often resemble the constitutions of student councils in their relative lack of transgenerational coalitions

4. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

and aspirations. Perhaps for this reason, American states tend to experience constitutional transitions as far less disruptive than nation-states.

Marshallian nation-states experience a different relationship between constitutional transitions, regime changes, and political disruption than the Jeffersonian constitutional entities that exist in civil society. Marshallian regimes that regard constitutions as the most important manifestation and symbol of a transgenerational project have the following characteristics.

1. Regime change may occur without constitutional change.
2. Constitutional change is almost always accompanied by regime change.
3. Constitutional and regime changes are inherently disruptive, even when regime changes are not accompanied by constitutional changes.

Jeffersonian regimes that regard constitutions as instruments of governance tend to have the following characteristics:

1. Constitutional change may occur without regime change.
2. Regime change is almost always accompanied by constitutional change.
3. Neither constitutional change nor regime change is inherently disruptive, though disruptions may occur depending on the underlying politics.

Part I of the essay maintains that the constitutions of student councils are constitutions in the same sense that high school basketball is basketball, even though professional basketball is played by different rules, and that the high school musical is a musical, even though the score may be less demanding and the lyrics somewhat different than the same show performed on Broadway. These youth activities are distinctive versions or categories of a more general activity, not pale imitations of the pure adult form. Part II discusses the Marshallian nature and ambitions of nation-state constitutions. Transgenerational coalitions frame, ratify, and maintain these constitutions, these constitutions initiate transgenerational projects, and they are the most important symbol or manifestation of those projects. The presence of these transgenerational coalitions and projects practically guarantees that constitutional transitions will be disruptive and explains why in strong Marshallian constitutional orders disruptive regime changes may take place without any apparent constitutional transition. Part III discusses the Jeffersonian nature and ambitions of student council constitutions. Distinctive generational cohorts frame these constitutions, these constitutions tend to be limited to generational projects, and they are more often regarded as instruments of governance than as sacred symbols of

fundamental regime commitments. The absence of transgenerational coalitions and projects helps explain why constitutional transitions in public schools are rarely disruptive and public schools frequently experience constitutional transitions without accompanying regime changes. Part IV notes the Jeffersonian tendencies of many state constitutions. Most state constitutions most of the time are instruments of governance rather than symbols and manifestations of transgenerational projects. As such, constitutional transitions in American states have historically been less disruptive than constitutional transitions in most nation-states, except during and immediately after the Civil War when state constitutions were invested with Marshallian regime commitments. Part V concludes with thoughts on what the practice of Jeffersonian constitutionalism in civil society suggests about the possibilities of a more self-conscious Jeffersonian constitutionalism in nation-states. As even Jefferson suspected, self-conscious Jeffersonian orders require generations that enter and exit the world together, limit their ambitions to their foreseeable future, and regard constitutions as instruments of governance rather than sacred symbols of fundamental values. These conditions better capture the constitutional experience of public school students than their adult selves.

The following discussion, on the constitutional experience in public schools is necessarily impressionistic. Westlaw word searches failed to turn up a single article written over the last thirty years that even mentioned the constitutions of student councils or other constitutions in civil society. JSTOR was similarly unhelpful. The rare commentaries on the constitutions of student councils occur in short pieces directed at teachers and principals (see Armstrong 1970; Kaminsky 1962). No general empirical study appears to have ever been conducted on the writing, modifying, and abandoning of student council constitutions or, for that matter, the constitutions of civic associations. The consequence of this dearth of information is that this paper relies heavily on a random set of student council constitutions taken from the web, a few internet searches on constitutional transitions in primary and secondary schools, and, mostly, my experience in 1973 as the James Madison of Mephram High School and conversations with others who performed that noble function in their public school.

A brief survey of university and chess club constitutions suggests that this article's conclusions hold for the constitutions of student governments at major universities and the constitutions of various organizations in civil society that are not directly subordinate to state officials as is the case for student governments in public schools. The Preamble to Constitution of the Harvard Graduate Student Government, for example, is generic and makes no mention of any unique mission of that institution (Harvard 2014). The Constitution of the Searcy Knightlife Chess

Club consists largely of rules and regulations, eschewing broad abstract statements of principle whose meaning might be contestable. Far more research obviously needs to be done on the matter; but at least as a matter of practice, the constitutions of nation-states are symbolic representations of a people with distinctive histories and aspirations, while the constitutions of civic associations appear to be instruments of government. In theory, the preamble to the Constitution of the Harvard Graduate Student Government might elaborate the distinctive place of that institution in global education, just as in theory the constitution of nation-states might simply set out rules for governing a polity. The practice of nation-building, however, seems to require constituting a people (see Anderson 1983; Smith 2003), whereas the process of organizing a chess club or student government seems to merely require laying out rules.

I. STUDENT GOVERNMENT CONSTITUTIONS AS CONSTITUTIONS

Comparative constitutional studies routinely ignore the vast majority of texts that purport to be “constitutions” and entities that purport to be constitutional. Selection biases are often unconscious. Much comparative constitutional commentary assumes without argument that the constitutional experiences of western regimes, regimes that have western aspirations, or nation-states encompass the full dimension of the global constitutional experience.⁵ Some scholars forthrightly state exclusionary principles. Walter Murphy excluded regimes that do not respect basic human rights from the constitutional family, even if their founding document is called a “constitution.” “Constitutionalism,” he wrote, “demand[s] adherence . . . to principles that center on respect for human dignity and the obligations that flow from those principles” (2007, 15–16). Other distinguished commentators maintain that the constitution of New York and the constitutions of the other forty-nine states are not really constitutions. James Gardner writes:

The diversity of state constitutional provisions and bills of rights . . . contradicts any “universalist illusions” that state constitutions embody truly fundamental values. State constitutions are not epic social texts; they have “no ‘Founders’; no Federalist Papers; no equivalence of constitution and nationhood; no singularity.” Indeed, the residents of a state cannot really be termed a “people” in the constitutionalist sense because “our state boundaries do not follow ethnic, linguistic, or religious lines.” A state itself is thus not a distinct polity, but merely a “territorially

5. For variations on these complaints, see Hirschl (2014) and Zackin (2013).

defined legal system”—an artificial rather than an organic entity. (1993, 1029–30; quoting Hans Linde)

If neither Indonesia nor New York is a constitutional entity, then clearly the student government of Mepham High School and most civic associations fare no better for all the reasons discussed by Professors Murphy and Gardner. The constitutions of those entities are not epic social texts grounded in a core commitment to human dignity, the student body (or members of the local chess club) is not a people, and neither public schools nor civic associations are natural entities.

The constitutional provincialism that excludes the constitutions of Indonesia, New York, and Mepham High School from the constitutional family is nevertheless puzzling. “Constitution” is not a word like “joint,” which can refer to a knee, a marijuana cigarette, or a speakeasy. When proponents of “constitutional theocracy” (Hirschl 2010), members of a state constitutional convention, or student leaders draft a constitution for their nation-state, state government, or student council of their secondary school, respectively, they think they are drafting a document whose crucial characteristics resemble or are identical to those of the Constitution of the United States and the Constitution of South Africa. The constitutions of student governments and other civic associations are not sham or façade constitutions, constitutions that are designed to disguise a regime’s lack of commitment to fundamental constitutional values.⁶ Students writing constitutions for their public schools are making good-faith efforts to spell out the rules and procedures that will determine in practice the actual powers and structure of the student council, as well as guide future interactions between the student body and the school administration.

Experts routinely use “constitution” without scare quotes when discussing the constitutions of student councils. The Irish Department of Education and Skills, when calling for student councils to adopt constitutions, almost certainly had lawyers on staff who understood the significance of referring to the texts that establish student councils as “constitutions.” “Constitution of University Student Government—State University” is one of the legal forms found in the second edition of *American Jurisprudence*.⁷ Educators routinely use “constitution” when referring to the texts that create and empower student governments. An article in the *Clearing House* declared, “no one would advocate the organization of a student council without adoption of the student-council constitution by the students” (McGinnis 1944, 463). Law professors use “constitution” to refer to these texts in ordinary

6. For sham and façade constitutions, see Law and Versteeg (2013) and Sartori (1962, 861).

7. 4B Am. Jur. Legal Forms 2d § 60:56.50.

conversation. A recent discussion on the constitutional law listserv explored the merits of having students write a constitution for their class. No member of the listserv declared that such a document by definition could not be a constitution (see Caplan 2015).

The constitutions of student councils and the constitutions of nation-states are fundamental instruments for governance. Both create and empower institutions. The constitution of the student government of Colonial High School establishes a student council, composed of a “president, vice-president, corresponding secretary, recording secretary, and treasurer,” as well as representatives from “each grade level,” and authorizes that institution “to plan and regulate all money-making policies in the area of student government” (2011, Article 6 § B). That constitution is higher law than any ordinary measure passed by the student council. The by-laws of the student council of Colonial High School may “not conflict with the elements and spirit of this constitution” (Article 6 § A).

That state governments and student councils may have different purposes than nation-states does not mean their fundamental law is less of a constitution. The constitutions of the student governments in most public schools make no pretense to be documents rooted in a theory of human dignity, do not tell epic stories, or purport to constitute a people. Many state constitutions do not serve those functions. If the central elements of modern constitutions are “a hierarchy of legal authority, the rule of law, and limited government” (see Graber 2013, 24), then the constitution of the Student Council of Colonial High School and the constitution of New York are constitutions proper. “Constitutions,” Hans Linde writes in the context of state constitutions, are “charters for governing” (1993, 932). The same may be said for the constitutions of student governments and of many entities in civil society.

High school constitutions differ from the constitutions of nation-states, but similar differences characterize other common high school and adult activities without any felt need to dispute terminology. High school basketball is not played under the same rules as professional basketball.⁸ The high school musical often has a simpler score and different lyrics than the same musical performed on Broadway.⁹ Nevertheless, no one claims that the thirty-two minute game without a shot clock is

8. Compare the National Federation of State High School Associations’s *2014–15 Basketball Rules Book* (2014) with the National Basketball Association’s *Official Rules of the National Basketball Association, 2013–14* (2013).

9. See generally Music Theatre International (2016), providing 30 and 60 minute musicals for young performers. Thanks to Professor Naomi Graber for this source.

not basketball or that the students are not performing “Hairspray” because certain risqué lyrics have been cut. Even greater differences emerge when we consider the ways younger children perform certain activities. Sometime around the age of thirteen, all Jewish children have a bar or bat mitzvah and appear in some summer camp version of *Fiddler on the Roof* that bears only a family resemblance to the Broadway show. Children regularly play what they and others claim is “baseball” on less travelled streets, with three persons on a team and no pitcher.

High school activities are distinctive forms of a general activity, not simply slimmed down versions of the corresponding adult activity, such that analysis of the most robust version properly focuses solely on adult behavior. Participants in many high school activities are more likely to adhere strictly to the official rules or scripts than participants in the adult activity. Professional basketball players are less likely than college or high school players to be penalized for such violations as palming and travelling. Referees who are loath to blow the whistle when such superstars as Michael Jordan take an extra step to make a spectacular dunk shot adhere rigorously to the rules when high school players take the same extra step when showboating (see generally, Graber 1999). High school musical versions of Gilbert and Sullivan operettas are more likely to sing the words William Gilbert wrote than modernize the lyrics. Professional companies and community theaters performing “I’ve Got a Little List” from *The Mikado* are freer to sing about the persons their twenty-first century audiences might think “never would be missed”¹⁰ than high school students performing under the stern eye of the principal.¹¹ Professional theater companies are more inventive when staging such Shakespeare plays as “A Midsummer’s Night Dream” than high school theater teachers.¹²

Judged by Justice Antonin Scalia’s preferred standards, the constitutions of most student councils are more law-like than the constitutions of most nation-states. Scalia emphasized the rule function of constitutionalism. When possible, he insisted, law should aim for “exact pronouncements” that make clear what conduct is forbidden, what conduct is permitted and what conduct is mandatory (1989, 1182; quoting Aristotle). He would have “the *Rule* of law, the law of *rules* . . . extended as far as the nature of the question allows” (1187). Most constitutions of student

10. For instance, “[t]here is no song in the works of Gilbert and Sullivan that enjoys as rich a tradition having its lyrics revised as does Ko-Ko’s ‘I’ve Got a Little List’ song” (Gilbert & Sullivan 2016).

11. This is strictly impressionistic. The better claim may be that the student musical may change the lyrics but be far less risqué than the community theater or Broadway show.

12. As discussed earlier, most of this is impressionistic, based on personal observations and conversations with students.

councils meet this standard. Provisions tend to be clear and not subject to much interpretive dispute. The powers of the student council of Greenville High School, for example, include:

To consider all financial matters relating to Student Body funds.

To approve the spending of money by organizations at GHS by the Executive Secretary or Treasurer.

To approve the spending money by organizations at GHS unless said organization has a President (chairman) and/or Secretary/Treasurer. (2016)

The analogous provision in the Constitution of the United States, Article I, Section 8, paragraph 1 vests Congress with far more ambiguous powers to “provide for the common Defense and general Welfare of the United States.”¹³ The spending clause in the Constitution of the United States and similar provisions in the constitutions of most nation-states illustrates how the constitutions of nation-states fare worse when measured by Justice Scalia’s legal standards. Numerous provisions are vague and subject to substantial discretion. The Canadian Charter of Rights and Freedoms, for example, “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹⁴ Clearly, this and related provisions in other nation-state constitutions do little to advance the constitutional commitment to rule by clear law.¹⁵ No such provision appears in any constitution of a student council surveyed.

Adult activities garner more publicity and scholarly attention because they are usually more popular, more skillfully performed, and more salient to more lives than the corresponding youth activities, not because they are the pure form of that activity. More people follow LeBron James than the best high school basketball player in Ohio. The best authors write for the Broadway stage and not for the one-act festival in Des Moines, Iowa. The Constitution of the Republic of Ireland has had far more impact on far more people than the constitution of any student council framed under Section 27 (3) of the Education Act of 1998. Nevertheless, that LeBron James is a better basketball player than I was forty years ago and Steven

13. For some of the contemporary debates over the spending clause, see *National Federation of Independent Business v. Sebelius* 567 U.S. ____ (2012); *South Dakota v. Dole*, 483 U.S. 203 (1987).

14. Constitution Act, 1892, Part 1: Canadian Charter of Rights and Freedoms, Article 1.

15. For that constitutional commitment, see Graber (2013, 29–32).

Sondheim writes better musicals than I did in college does not entail that the game I played in high school was “basketball-minus” or the musical I wrote in college was a “musical-minus,” any more than the fundamental law of the student government of Mephram High School that I helped write is a constitution-minus because the Constitution of the United States created a more powerful and enduring government. Constitutions are not more or less constitutions in light of their influence, their prominence, and the skill of the drafting, otherwise the Constitution of Mali would almost certainly be less of a constitution than the Constitution of the United States. Good reasons exist for studying the category of constitutions that are constitutions of nation-states, but those reasons concern the importance of nation-states and not the pristine quality of their constitutional form.

Comparing all forms of basketball, musicals, constitutions, and other related activities engaged in by high school students and adults may improve analysis by increasing observations. Consider a statistically sophisticated professional basketball coach who is aware that different professional teams have different capacities to defend a play called the pick-and-roll. A statistical study of all 30 professional teams might provide some support for the conclusion that the ability to defend the pick and roll is correlated with the amount of practice time devoted to defending that offensive play. Such a study would nevertheless be handicapped by the limited number of professional teams, which limits the number of variables that can be considered and the confidence level of any conclusion. After noting a similar variance in capacity to defend the pick and roll among college and high school basketball teams, our coach might be able to conduct a more robust statistical study that demonstrates that, at all levels of basketball, teams whose players share the ball on offense defend the pick-and-roll better than teams whose offense revolves around one or two players.

Comparing the adult and youth forms of a common activity may also inform analysis by increasing variance. Consider the problems of studying the influence of the star-system on Broadway. We may not learn as much as we would like from examining only Broadway shows if the vast majority of Broadway musicals are vehicles for superstar actresses and actors. By including community theaters and high school productions, we can better see how musicals are selected and performed in the absence of a star system. We may learn, for example, that Broadway producers prefer shows that highlight particular stars and that shows on Broadway are performed in ways that highlight those stars, while high schools tend to select shows that are more ensemble oriented and are performed in ways that diminish attention on any one or two persons. Stars on Broadway sometimes perform monologues or sing encores not in the script. High school musicals more commonly “redistribute”

songs and lines from the star to other cast members. Without the variance provided by examining high school musicals that are not vehicles for stars, we cannot determine fully the myriad ways in which the star system structures professional musicals.

Including the constitutional experiences of public schools in the analysis may provide crucial perspectives on the constitutional experiences of nation-states and semi-sovereign entities during constitutional transitions and regime changes. We know that variance exists among nation-states in the relationship between constitutional transitions and regime changes. While constitutional transitions are commonly associated with regime changes, Americans after the Civil War experienced regime change without abandoning entirely their inherited constitutional text.¹⁶ Variance exists among American states in the extent to which constitutional transitions are disruptive. Louisianans experienced frequent and violent constitutional transitions in the decades after the Civil War, but as frequent but peaceful constitutional transitions during the twentieth century.¹⁷ During the later period, Louisianans experienced constitutional transition without regime change. As is the case with Louisiana and other American states, public school student councils experience frequent constitutional transitions and regime changes without experiencing much disruption, and constitutional transitions in public schools are frequently not associated with regime change. By identifying the common factors that ease constitutional transitions and regime changes in public school student councils and many American states, we may be able to learn more about the relationship between constitutional transitions and regime changes in nation-states, and why regime and constitutional change is more turbulent in nation-states than in civil society.

II. THE CONSTITUTIONS OF ADULT MARSHALLIANS

Chief Justice John Marshall in *McCulloch v. Maryland* spoke of “a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”¹⁸ What Marshall regarded as the precise referent of “a constitution” in that sentence is unclear. “A constitution” might refer only to the Constitution of the United States, whose preamble declares an aspiration to “secure the Blessings of Liberty to ourselves and our Posterity.”¹⁹ More likely, Marshall

16. For a discussion in relation to Louisiana, see Dinan (2006, 12) and Hargrave (1991, 12–13).

17. For the constitutional history of Louisiana, see Hargrave (1991).

18. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

19. Constitution of the United States, Preamble.

used “a constitution” generically, expressing his belief that one defining feature of a constitution is that the text is “intended to endure for ages to come.” That Marshall was speaking of constitutions generically is supported by the most famous sentence in *McCulloch*, “we must never forget that it is a constitution we are expounding,”²⁰ a sentence that plainly speaks of “constitution” as a generic.

Many commentaries agree that constitutions commit regimes to transgenerational projects. Claude Klein and Andras Sajó declare, “The stability of the constitution remains a characteristic aspiration: drafters intend to set values and institutions for generations to come” (2012, 421). Hannah Arendt described constitutions as attempts to arrest “the cycle of sempiternal change, the rise and fall of empires, and establish an immortal city” (1963, 231). Norms and laws that are not intended to be transgenerational, on this view, are not constitutional norms and laws.

Most national constitutions articulate the Marshallian ambition to endure for ages to come. Preambles commonly contain language expressing the framing intention to bind future generations. Preambles and subsequent provisions announce purposes that cannot be achieved during the lifespan of the founding generation. The constitutions of most nation-states aspire to fashion a people, as well as a polity.

Virtually all national constitutions are intended to be transgenerational. Preambles commonly maintain that the regime being established is intended to endure into the unforeseeable future, if not forever (Breslin 2009, 46–68). The preamble to the Constitution of Cambodia speaks of “the nation’s future destiny of moving toward perpetual progress, development, prosperity, and glory.”²¹ The Constitution of Uganda confidently proclaims that the people “solemnly adopt, enact and give to ourselves and our posterity this Constitution.”²² The Constitution of Spain “is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards.”²³ These transgenerational commitments are repeated in constitutional preambles despite the brute fact that most Marshallian constitutions in practice do not survive to adulthood (Elkins, Ginsburg, and Melton 2009). Iranians in 1979 adopted a constitution that spoke of “continuous leadership and perpetual guidance”²⁴ almost immediately after toppling a regime whose

20. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

21. The Constitution of the Kingdom of Cambodia, Preamble.

22. The Constitution of the Republic of Uganda, 1995, Preamble.

23. The Constitution of Spain, Section 2.

24. The Constitution of Iran, 1979, Article 2.

constitution was designed to “continue unchanged until the appearance of His Holiness the Proof of the Age.”²⁵

The constitutions of nation-states do not have explicit or implicit expiration dates, and they lack provisions contemplating their possible demise. The constitutions of nation-states vary in their provisions for amendment, but do not contain provisions detailing how they are to be abandoned and replaced, or provisions indicating the conditions under which abandonment and replacement are legitimate. Few mandate periodic review to determine whether wholesale revision or replacement is necessary.²⁶ National constitutions do not contain the provision found in many state constitutions in the United States that declares, “That all Government of right originates from the People, is founded in compact only, and instituted solely for the good of the whole, and they have, at all times, the inalienable right to alter, reform, or abolish their Form of Government in such manner as they may deem expedient.”²⁷

The Marshallian constitutions of nation-states regularly commit regimes to transgenerational goals. These projects may be acquiescent or militant (see Jacobsohn 2010). Acquiescent constitutions seek to ensure that future generations do not abandon practices established in the past. Justice William O. Douglas in *Griswold v. Connecticut* spoke the language of acquiescent constitutionalism when protecting the right of married couples to use birth control. His opinion declared, “We deal here with a right of privacy older than the Bill of Rights.”²⁸ The Constitution of Iran engages in acquiescent constitutionalism when articulating a commitment to “longstanding belief[s] in the sovereignty of truth and Qur’anic justice.”²⁹ Militant constitutions seek to ensure that future generations achieve aspirations announced in the past. Justice Douglas in *Harper v. Virginia State Bd. of Elections* spoke the language of militant constitutionalism when protecting the right to vote. His opinion declared,

. . . the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have

25. The Constitution of Iran, 1906, The Supplementary Fundamental Laws of October 7, 1907, Article I.

26. Section 49 of the Constitution of Canada requires a review after fifteen years of the provisions for amendment but does not mandate review of other constitutional provisions.

27. Constitution of Maryland, Declaration of Rights, Article I.

28. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

29. Islamic Republic of Iran Constitution, Article I.

restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.³⁰

The Constitution of Malawi engages in militant constitutionalism when committing the regime to “achieving . . . gender equality,” better nutrition, and health, improving the environment, rural life and education, and ensuring the peaceful settlement of disputes.³¹ Acquiescent and militant constitutions are united by their transgenerational ambitions. Both seek to shape the unforeseen future, even as they diverge on the degree to which they envision that ideal future as similar to the present.

The Marshallian constitutions of nation-states seek to forge and maintain national identities. The constitutions of nation-states conceive of citizens as sharing certain fundamental traits and not simply as people who find themselves in the same civic space with needs to form a common government. *Federalist* 2 celebrates “Providence” for giving “this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government” (Pole 2005, 6). Quite frequently, constitutional texts insist that their constituent people share a common history that informs their common values. The Constitution of France speaks of a “French people” who “solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789.”³² The Constitution of Saudi Arabia declares that “the family is the kernel of Saudi society, and its members shall be brought up on the basis of the Islamic faith, and loyalty and obedience to God, His Messenger, and to guardians, respect for and implementation of the law, and love of and pride in the homeland and its glorious history as the Islamic faith stipulates.”³³ While the Constitution of Saudi Arabia maintains that the Saudi Arabian people are united in their celebration of the past, the Constitution of South Africa maintains that the South African people are united in their repudiation of the past. The constitution of the latter nation-state begins by declaring “We, the people of South Africa, recognize the injustices of our past” and promises to “heal the divisions of the past

30. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966).

31. The Constitution of Malawi, Chapter II, Section 13.

32. The Constitution of France, Preamble.

33. The Basic Law of Governance, Saudi Arabia, Chapter Three, Article 9.

and establish a society based on democratic values, social justice and fundamental human rights.”³⁴

Marshallian constitutions enjoy transgenerational support. The coalition that framed and ratified the constitution of the United States included Benjamin Franklin, who was 81 at the time of the constitutional convention, and James Madison, who was 36. The coalition that framed and ratified the Constitution of South Africa was similarly composed of seasoned veterans and political novices (see Klug 2000). When the older members of the pro-constitution coalition leave the political scene, they are replaced by younger coalitional partners as committed to the constitutional vision that animated their predecessors. Andrew Jackson in his “Farewell Address” spoke for the second generation of Marshallian constitutionalists in the United States when he declared: “Our Constitution is no longer a doubtful experiment; and, at the end of nearly a half a century, we find that it has preserved unimpaired the liberties of the people” (Williams 1847, 948). Generation gaps exist. Ran Hirschl details how constitutional politics is often a struggle between established coalitions who support the constitutional order and proponents of a different regime. Nevertheless, in none of the four countries Hirschl surveyed was the established coalition looking to retain power lacking in younger members prepared to carry the constitutional torch to the next generation of citizens (2007).

That Marshallian constitutions are created and maintained by transgenerational coalitions for the purpose of realizing transgenerational goals influences the processes of constitutional transition and regime change in Marshallian nation-states. Transitions from one constitution to another are disruptive.³⁵ Transitions from one constitution to another tend to occur only when regime change occurs. Disruptive regime changes sometimes occur in the absence of constitutional transformation, understood as the replacement of one foundational text with another.

Transitions from one constitution to another are likely to be disruptive when a constitution created and maintained by a transgenerational coalition is by definition or aspiration designed to “endure for ages to come.” Marshallian constitutions are designed to control the future. Marshallians have a vision of a particular future, a particular people who will flourish in that future, and a constitution designed to bring about that future. As such, Marshallian constitutions are thought

34. Constitution of the Republic of South Africa, 1996, Preamble.

35. Ran Hirschl offers an important corollary to the claim made in this paragraph. He observes that some political coalitions create constitutions and empower judiciaries in order to preserve an existing political regime (2007). Hence, the important of “transitions from one constitution to another” as opposed to “constitutional transitions.”

not to expire in the natural course of things or become outdated over time. Instead, Marshallian constitutions are the most salient manifestation and symbol of a transgenerational project (Corwin 1936). The constitution and the transgenerational project stand together. Given this central place of a Marshallian constitution in a political regime, persons are likely to call for constitutional replacement only when they wish to challenge a particular transgenerational project and not merely because they think a different constitution a better means for achieving existing constitutional aspirations. Constitutional transitions involve disruptive struggles between factions with inconsistent visions of the good polity rather than peaceful debates over how the national legislature might be structured to foster common values.

Constitutional transitions in Marshallian orders are almost always a consequence of regime change. Marshallian constitutions are sites for political struggles, as proponents of one constitutional vision seek to supplant proponents of another constitutional vision. The supporters of an existing political regime regard their Marshallian constitution as the important source and symbol of that regime's commitments, not a mere instrumental means of good governance. Hence, the only factions championing constitutional transition are likely to be those factions that simultaneously call for regime change. The Central American experience is typical. Zachary Elkins, Tom Ginsburg, and James Melton observe,

The Dominican Republic and Haiti represent cases of regular death and genetic defects. The pattern is one of churn: each incoming regime uses its power to adopt a new constitution, without inclusion of the other side. This in turn leads to a self-reinforcing pattern of constitutional death. Parties do not invest in negotiation, and constitution making becomes an all or nothing proposition. Constitutions are not devices for accommodation, but for dominance, and so are replaced whenever the particular dominant faction leaves. (2009, 188)

Americans replaced the Articles of Confederation with the Constitution of the United States when more nationalist oriented Federalists seized control over national affairs from more locally oriented anti-Federalists (see Jensen 1966). Charles de Gaulle rose to power in France by bringing about the death of the Constitution of 1946 and creating a strong presidentialist regime (Elkins, Ginsburg, and Melton 2009, 170–71). Both France and the United States have experienced regime change without constitutional transition, but neither has experienced constitutional transition without regime change (162–171).

Marshallian constitutions create dynamics that foster regime change without constitutional transition. Because the Marshallian constitution is intended to endure forever and constitute a distinct people with distinctive aspirations, pressures exist within a polity for all factions to present themselves as the party of the Constitution. Politics in a Marshallian regime may be structured by competition between different parties that dispute the proper interpretation of a constitution that is uniformly regarded as the most important symbol of national unity rather than by competition between pro-constitution and anti-constitution parties. Americans are particularly prone to invest their constitution with fundamentally inconsistent visions. Each of the three major political parties that structured constitutional politics before the Civil War claimed to be the party of the people who remained faithful to the Constitution. Jacksonian Democrats sought to preserve constitutional institutions from the money power. Whigs sought to preserve constitutional institutions from spoilsmen. Republicans sought to preserve constitutional institutions from the slave power (Leonard 2002; Graber 2014). When Republicans wrested control of the national government from Jacksonian Democrats immediately before, during, and immediately after the Civil War, fundamental regime change occurred, even though only three constitutional amendments were added to the Constitution (see Eisgruber 1995).

The United Kingdom presents an even starker example of how Marshallian constitutionalism encourages regime change without constitutional transition. The unwritten English Constitution is said to exist from time immemorial. As a result, throughout most of English history, political movements have presented their reforms as expressions or restorations of the ancient constitution rather than as constitutional amendments, constitutional reforms, or new constitutional commitments. During the debates leading up to the English Civil War, James Coke and other parliamentarians, when challenging what James I and Charles I thought were time-honored royal prerogatives, repeatedly invoked Magna Carta for the propositions that the king could not raise revenues in any way without permission of Parliament (Graber and Gilman 2015, 284–94) and that the king had to explain the cause of any detention in a habeas corpus procedure (470–80). The parliamentarians responsible for the Nineteen Propositions claimed that a legislative right to approve royal ministers and royal marriages was consistent with existing constitutional practice (276–79). This parliamentary vision triumphed in the English Civil War and Glorious Revolution. By the end of the seventeenth century, England had been transformed from a monarchy to a regime largely governed by Parliament without any claim by the winners of that struggle that the character of the regime had changed or that any constitutional transition had occurred.

III. THE CONSTITUTIONS OF YOUNG JEFFERSONIANS

Thomas Jefferson rejected the Marshallian vision of transgenerational constitutional projects and coalitions. The Sage of Monticello famously insisted that all constitutions expire after a short period of time. In a letter dated September 6, 1789, he informed James Madison,

No society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. . . . The constitution and the laws of their predecessors extinguished them, in their natural course, with those whose will gave them being. . . . 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. (1999, 596)

This passage makes a normative and definitional claim. The well-known normative claim is that all constitutions expire after a short period of time. The lesser known definitional claim is that constitutions need not, indeed, cannot, be intended for ages to come. A text may count as a constitution even if that text is self-consciously designed “to set values and institutions” for only a limited period of time.

The constitutions of most student councils and organizations in civil society are quintessential Jeffersonian.³⁶ No one thinks the Constitution of the Mephram High School Student Council is intended to endure for ages to come or bind generations yet unborn. The constitutions of most student councils are neither acquiescent nor militant. They are instruments for governance rather than symbols of and foundations for transgenerational projects. The preambles to the constitutions of student councils are usually generic. The texts are limited to provisions that create

36. The following analysis relied on the sample constitutions prepared for Irish public schools noted in “Student Council Support” (2016), the 1973 Constitution of Mephram High School, which I helped write, and several constitutions of student governments taken from a random web search. They were the Student Council Constitution of Henry E. Harris School, the Constitution of Colonial High School Student Council, the Holleman Elementary Student Council Constitution, the Student Council Constitution of Horace Mann School, the John M. Bailey Student Council Constitution, the Student Council Constitution of I.M. Terrell Elementary, the John Will Elementary Student Council Constitution, the Student Council Constitution of Kay Granger Elementary, the Mansfield High School Student Council Constitution, the WHS (Weston High School) Student Council Constitution, the Greenville High School Constitution, the General Studies Student Council Constitution, the Lincoln East High School Student Council Constitution and ByLaws, and the MTI Student Council Constitution and ByLaws. In addition, for specific reasons explained in the text, the Constitution of the Little Rock Central High School Student Council was surveyed.

and empower governing institutions. Few if any call for future generations to join a common enterprise. Few if any seek to fashion a student body with a distinctive identity.

The Jeffersonian constitutions of student councils lack provisions that appeal to future generations. These texts do not contain expiration dates, but most date from the twenty-first century. No constitution surveyed made reference to posterity, perpetuity, or permanence. Some Jeffersonian constitutions that structure student governments contain provisions that clearly state the general expectation that the constitution will have a short shelf life. Many constitutions surveyed had provisions stating, “The Constitution must be reviewed on a yearly basis” (Lincoln East 2016, Article VII § 1D). This constitutional commitment to periodic revision and replacement partly reflects the common understanding that writing constitutions for a public school student council is a valuable educational opportunity that should be repeated often (see generally Kaminsky 1962). Still, given that writing a new constitution for a nation-state might seem to be as valuable an educational opportunity for adults, the provisions calling for periodic review in the constitutions of student councils also reflects the common understanding that nothing problematic exists with having each new generation of students make constitutional decisions for themselves.³⁷

The Jeffersonian constitutions of most student councils are remarkably generic in their ambitions. Those constitutions that express what might appear to be trans-generational aspirations state such purposes as preparing students for citizenship or fostering better cooperation between students and teachers, aspirations that characterize all public schools. The preamble of the Constitution of Marion Technical Institute is representative. That text declares:

We, the students of Marion Technical Institute, in order to:

- Provide a democratic forum in which students can address school-related issues that affect their lives;
- Maintain a continuous communication channel from students to both faculty and administration . . . ;

37. Remarkably, the constitutions of most student governments are among the most difficult to amend in the world. Most follow the United States in requiring strong supermajorities to make any changes (see Kaminsky 1962, 307). The best explanation for this may be that the constitutions of most student governments take the constitution of their nation-state as a default rule. Still, the constitutions of student governments suggest that the need to modify Donald Lutz’s acute observation that more flexible interpretation is associated with harder to amend constitutions (1995). The better rule may be that more flexible interpretation is associated with constitutions that are either hard to amend or hard to replace.

- Provide leadership training for students in the duties and responsibilities of good citizenship . . . ;

. . . .

do hereby establish and declare this, the official constitution of the Marion Technical Institute Student Council. (Marion 2006, 1)

None of the student council constitutions surveyed suggest that the school in question has a distinctive purpose that the student government was created to maintain and realize. No constitution announced a distinctive commitment to becoming better Eagles or Pirates, maintaining the proud traditions of that school, or abandoning the heinous school practices of the past. Virtually all constitutional provisions seem of the cookie-cutter variety, as if the students had before them several sample student council constitutions and choose a number of provisions from each. Constitutional borrowing, this brief survey indicates, is alive and well in American public schools largely because no one appears to believe that conditions in some public schools compel student leaders to adopt different institutions than those adopted by the student councils in the school districts to the immediate south or three thousand miles away.

The Jeffersonians constitutions of most student councils are as generic in their depiction of the student body. Readers will learn almost nothing about a school's demographics from reading the constitution of that school's student council. The texts surveyed present no information about the racial, gender, religious, social class, or ideological composition of the students at the school or in the school district. The constitutions of student governments are as oblivious to history. Over the past half-century, public schools have been the sites of bitter conflicts over race and religion. None of these conflicts appear to have left a mark on various student council constitutions. Most striking, perhaps, the Constitution of the Little Rock Central High School Student Council bears no trace of the racial controversies that wracked that school during the 1950s.³⁸

The Jeffersonian constitutions of most student governments are created and maintained by a distinctive and narrow generational cohort. Generational cohorts in public schools arrive and exit as a group. The coalition that framed the 1973 Constitution of the Mephram High School student council was composed of students in the tenth, eleventh, and twelfth grades. The majority of those students were seniors, who graduated at the end of the year. No prominent framer of that

38. See Little Rock (2016) and *Cooper v. Aaron*, 358 U.S. 1 (1958).

constitution was a member of the newly elected student council in the fall of 1974. By the fall of 1976, the entire cohort was in college. That framing generation made no effort to recruit entering tenth graders into a coalition committed to maintaining the constitutional order established three years earlier and failed to take any other step that might have preserved their constitution for their fifth or fiftieth reunion.

The young Jeffersonians responsible for the constitutions of student government appear to regard constitutional transitions and regime changes with equanimity. The best evidence, which is admittedly very limited, indicates that student governments change constitutions without a ripple. Educators who have a stake in preventing disruption regularly encourage students to write and replace constitutions for the student government.³⁹ Media reports indicate that struggles over the constitution of student governments are not the causes of the numerous disruptions that plague public schools. These peaceful constitutional transitions are no doubt partly rooted in the vastly lower stakes in the constitutional struggles that do take place in American public schools. No one's life or immortal soul is at stake when high school students abandon one constitution for another. Nevertheless, good reasons exist for thinking that Jeffersonian constitutional practices are partly responsible for the lower stakes in high school constitutional transitions and that these practices have additional dampening effects on any disruptive tendency of those constitutional transitions.

Jeffersonian constitutional orders in public schools are likely to experience smooth constitutional transitions and regime changes. Jeffersonians presume the new generation of leaders is entitled to govern as they see best, even if that means abandoning both the practices and the fundamental values of previous leadership. Graduating seniors rarely exhibit any interest in transforming the constitution they framed as an instrument of governance into the foundation of a transgenerational project. Neither constitutional transitions nor regime changes are inherently disruptive when John Smith and his senior class cohorts have no particular reason for thinking, no interest in ensuring, and no power to make sure that Mary Doe and her freshmen cohorts will operate the student council of their public school as they did.

Regime changes in Jeffersonian orders are likely to generate constitutional transitions. Student leaders do not regard the constitution of their student council as a sacred document to which all factions must pledge allegiance to have any hope of political success. In sharp contrast to the leaders of national political coalitions

39. See Kaminsky (1962, 305); the Republic of Ireland's Education Act, 1998, No. 51 of 1998; and "Student Council Support" (2016).

in Great Britain and the United States, student politicians do not score political points by painting themselves as the rightful heirs of forgotten founders who have graduated and lost interest in the constitutional affairs of the student council. When newly elected student leaders want to take the student council in a new direction, therefore, they have every incentive to change the constitution so as to facilitate that new direction and no incentive to pledge allegiance to the inherited constitution or reinterpret that constitution as consistent with their regime aims.

Jeffersonian constitutions create dynamics that foster constitutional transitions without regime changes. Jeffersonian constitutions that are instruments for governance are more easily replaceable than constitutions that are symbols of the deepest aspiration of a people. Constitutional reform is a far lower stakes game than when Marshallian constitutions are under attack. Jeffersonian constitutional reformers in public schools need ask only whether the existing constitution is serving regime ends, not whether a people or a people's fundamental commitments should be revisited and revised. When a new cohort wins a student government election, they are far freer than adult Marshallians to fashion a constitution that suits their needs. Should students conclude that a different system of elections will better prepare them for citizenship, they can replace the inherited constitution without challenging that inherited regime commitment.

IV. WHITHER STATE CONSTITUTIONS

The constitutions of such semi-sovereign entities as American states are neither fully Marshallian nor wholly Jeffersonian. State constitutions resemble the constitutions of nation-states in their detail, powers granted, and rights. They resemble the constitutions of student councils in their generic purposes and openness to revision. Unsurprisingly, given the combination of Marshallian and Jeffersonian elements in state constitutions, some constitutional transitions in American states are far more disruptive than others.

Prominent scholars are reviving the study of state constitutions. Revivalists highlight how the state constitutional experience is intrinsically important and point to the ways the state constitutional experience informs the constitutional experience more generally. Sanford Levinson writes,

If one is trying to understand the realities of “American constitutionalism,” it is essential to look beyond the U.S. Constitution to the many other constitutions that are part of the American political system. To identify a single constitution, however important it may be, with the entirety of American constitution thinking

about the constitutional enterprise is equivalent to offering a course on European art that turns out to focus entirely on the art of the Italian Renaissance. (2012, 28)

Many state constitutions have features and contain provisions similar to those of the constitutions of most nation-states, but not the Constitution of the United States. Mila Versteeg and Emily Zackin observe,

First, like most of the world's constitutions, state constitutions are rather long and elaborate, and they include detailed policy choices. The exceptional American taste for constitutional brevity, it turns out, is confined to the federal document alone. Second, like most of the world's constitutions, state constitutions are frequently amended, overhauled, and replaced. Thus, the textual stability of the over-two-century-old federal Constitution is exceptional compared not only to other national constitutions but also to the constitutions of the American states, which are characterized, in part, by a commitment to progress and change. Third, like most of the world's constitutions, state constitutions contain positive rights, such as a right to free education, labor rights, social welfare rights, and environmental rights. While the federal Constitution arguably omits explicit declarations of these rights, they are not foreign to the American constitutional tradition. On all these dimensions, it is at the federal level only that Americans' constitutional practices appear exceptional. (Versteeg and Zackin 2014, 1644–45)

State constitutions also have features that resemble the Jeffersonian constitutions that create and empower student councils. Most state constitutions are better conceptualized as instruments for governance than as symbols of transgenerational projects. Preambles to state constitutions tend to be generic, stating little or nothing about a distinctive state history, distinctive state constitutional purposes, or a distinctive state people. The Preamble to the Constitution of Ohio declares, “We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.”⁴⁰ The Preamble of the Constitution of Alaska has more to say about the distinctive heritage of the United States than the distinctive heritage of Alaska. The text states, “We the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land, in order to secure and transmit to succeeding generations our heritage of political, civil, and religious liberty within the Union of

40. Ohio Constitution, Preamble.

States, do ordain and establish this constitution for the State of Alaska.”⁴¹ Alaska aside, most state constitutions abjure references to the distant future.

Many state constitutions clearly assert that state citizens have the right to abandon the present constitution for a different constitution or form of government (see Oulahan 1983, 702, 739). Article I of the Constitution of Wyoming is typical. That provision declares, “All power is inherent in the people, and all free governments are founded on their authority, and institution for their peace, safety and happiness; for the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish the government in such a manner as they may think proper.”⁴² One-quarter of all state constitutions require each generation to vote on whether to call a constitutional convention (see Dinan 2006, 11). The Constitution of Missouri mandates that the secretary of state on a twenty-year basis “submit to the election of the state the question, ‘Shall there be a convention to revise and amend the constitution.’”⁴³

This combination of Marshallian and Jeffersonian elements may explain why substantial variance exists in the ease with which constitutional transitions take place in American states. When state constitutions are understood as advancing Marshallian commitments to transgenerational projects, constitutional transitions have been as bloody as the most disruptive constitutional transitions in nation-states. Considerable violence took place in the post-bellum south, when the victorious Union army imposed egalitarian constitutions on the former Confederate states, and afterwards, when terrorist groups composed of white supremacists overthrew those constitutions (Herron 2014). When state constitutions are understood as Jeffersonian instruments of governance, constitutional replacement occurs without disruption and often without any substantial change in the underlying regime. Most states have had more than one constitution. Several are in double figures (Dinan and the Council of State Governments 2014, 10). Transition is a consequence of regularly scheduled and peaceful constitutional conventions (see Dinan 2006, 29–63). With the exception of southern constitutional experience during and immediately after Reconstruction, hardly any state constitutional transition is associated with the sort of regime change that seems necessary for constitutions to be replaced in nation-states.

Constitutional transitions in some states occur as frequently and with as little cause as constitutional transitions in most public schools. Commentators note

41. Alaska Constitution, Preamble.

42. Wyoming Constitution, Article I.

43. Constitution, State of Missouri, Article XII, Section 3(a).

that “constitutional revision in Louisiana has been sufficiently continuous to justify including it with Mardi Gras, football, and corruption as one of the premier components of the state culture” (Dinan 2006, 12). The Louisiana Constitution of 1913 is a particularly vivid instance of constitutional replacement without substantial regime change. That constitution did little more than alter how sewers were regulated in New Orleans (Hargrave 1991, 12–13). We can learn more about the constitutional experience in Louisiana, these observations suggest, from studying the constitutional experience in Mephram High School than from studying the constitutional experience in the United States or Kenya. We may better understand why constitutional transitions and regime changes in the United States and Kenya are typically disruptive, in turn, by understanding why constitutional transitions and regime changes in Louisiana and Mephram High School are often not.

V. WHITHER JEFFERSONIAN CONSTITUTIONS

One paradox of contemporary constitutional culture concerns the strong encouragement public schools provide students interested in drafting and ratifying constitutions that create and empower student councils. Ireland has even passed a law calling on educators to facilitate this action of student self-government. Mock constitutional conventions are a staple of social sciences classes in the United States. These exercises purportedly prepare students for citizenship. Nevertheless, once young Jeffersonians become adult Marshallians, they are actively discouraged from engaging in constitutional exercises. Marshallian constitutions are not to be tinkered with. Apparently the point of having students draft and ratify constitutions that create and empower student councils is to prepare them as adults to draft and ratify constitutions that create and empower parent-teacher associations.

These constitutional drafting and ratification exercises, at least in the United States, are not patriotic exercises designed to foster greater appreciation for the national constitution. Students who deliberate carefully do not always reproduce the Constitution of the United States in miniature, differing only on those matters where identity is impossible.⁴⁴ The constitutional drafting process in American public schools permits and encourages students to think that American constitutional institutions could be improved. The constitutions of student councils in the United States diverge from the Constitution of the United States both in their conception of the structure of different governing institutions and in the relationships between

44. Members of the student judiciary, for example, cannot hold lifetime appointments.

different governing institutions.⁴⁵ Some constitutions give the highest executive official veto powers. Others do not. Many do not have student judiciaries. Many more have an underdeveloped sense of federalism. One student, one-vote is more common than a bicameral legislature, one branch of which represents students and the other representing grade levels.

Jefferson would have approved the practice of constitutionalism in public schools. He believed that each generation should decide for themselves the constitutional institutions and practices that best realize that generation's values and interests. Public school students do this on a regular basis when drafting constitutions. Past constitutions are relied on, if relied on at all, only as examples of choices the students might make. Some constitutions of student councils expire. Those that do not are not looked upon with any particular reverence. Students draft and ratify new constitutions whenever they feel a new constitution might better serve their purposes.

Constitutionalism in nation-states is far more Marshallian. Constitutions drafted by adult Marshallians announce transgenerational projects that bind the future. Those texts declare the existence of a particular people whose identity is rooted in the distant past and whose fate is tied to a distant future. Such constitutions are looked on as sacred symbols that can be abolished only at the cost of severe political disruption.

The Sage of Monticello recognized how the structure of political generations plays a crucial role transforming young Jeffersonians into adult Marshallians. Jefferson introduced his constitutional vision by imagining "a generation all arriving to self-government on the same day, & dying all on the same day" (Jefferson 1999, 594). The first generation would write a constitution when they entered the world, but both they and the constitution would expire at the same time. Members of the new generation "arriving to self-government on the same day" that every member of the old generation passed from the political scene would neither have to confront members of the first generation when creating and establishing institutions nor already be complicit in the constitutional politics of the past. They would write their new constitution on a clean political slate. Jefferson then acknowledged the practical problems that arise when generations do not arrive and exit at the same time. Transgenerational politics might prevent people from repealing a dysfunctional constitution. Jefferson pointed out, "Factions get possession of the public

45. See, i.e., the constitutions set out in note 36.

councils. Bribery corrupts them. Personal interests lead them astray from the general interests of their constituents” (Jefferson 1999, 597). This is why he insisted that constitutions expire rather than merely be subject to revision.

Jefferson’s proposal that constitutions naturally expire after nineteen years did not prove an adequate substitute for constitutions that could be repealed after nineteen years. The same constitutional politics that Jefferson acknowledged prevents the repeal of constitutional provisions that no longer serve majoritarian values and interests inhibits nation-states from abandoning or replacing constitutions that no longer serve majoritarian values and interests. Members of the framing generation and their transgenerational allies do not acknowledge that their constitutions naturally expire, regardless of what inherited theory might proclaim. Their constitutions must be overthrown, often by violence, if they are to be abandoned. Most constitutions live close to a Jeffersonian life span, but the cause of death is more often war or revolution than disease or old age (Elkins, Ginsburg, and Melton 2009).

Jefferson overlooked how constitutional ambitions also transform young Jeffersonians into adult Marshallians. He complained about “men” who “look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched.” In his view, constitutions were instruments of governance rather than hallowed symbols. In a letter to Samuel Kercheval, July 12, 1816, Jefferson wrote, “laws and institutions must go hand in hand with the progress of the human mind (Jefferson 1999, 2014).” The constitutions of student councils are mere instruments of governance that can be peaceably discarded whenever they become dysfunctional. The constitutions of nation-states are more. National constitutions aspire to fashion a people committed to transgenerational projects. The constitution of the nation-state is simultaneously an instrument for realizing that project, the foundation of that project, and the most sacred symbol of that project. While the instrumental and symbolic roles of the constitution can be separated in theory, they appear to be inextricably bound in practice. Attacks on the means employed by a Marshallian constitution are inevitably interpreted as attacks on the transgenerational ends of that Marshallian constitution. Regimes must be overthrown for constitutional transformations to occur. The Jeffersonian desire for peaceful constitutional transitions that recognize the right of each generation to govern themselves, this comparison of the constitutions of nation-states and student councils suggests, can be realized only in a regime in which each generation abjures the Marshallian project of fashioning a people whose commitments are expected “to endure for ages to come.”

REFERENCES

- Anderson, Benedict. 1983. *Imagined Communities*. New York: Verso.
- Arendt, Hannah. 1963. *On Revolution*. New York: Penguin Books.
- Armstrong, Robert L. 1970. "Student Council: Whither Goest Thou?" *The Clearing House* 44: 553–55.
- Balkin, Jack M. 1995. "Populism and Progressivism as Constitutional Categories." *Yale Law Journal* 104: 1935–2008.
- Breslin, Beau. 2009. *From Words to Worlds: Exploring Constitutional Functionality*. Baltimore: The Johns Hopkins University Press.
- Caplan, Aaron. 2015. "Constitution-Writing Exercise." Posted to conlawprof on March 23.
- Colonial High School Student Council. 2011. "Constitution of Colonial High School Student Council." <https://www.ocps.net/lc/southeast/hco/clubs/Documents/CONSTITUTION-OF-COLONIAL-HIGH-SCHOOL-STUDENT-COUNCIL-revised-09.pdf>.
- Corwin, Edward S. 1936. "The Constitution as Instrument and as Symbol." *American Political Science Review* 30: 1071–1085.
- Dinan, John J. 2006. *The American State Constitutional Tradition*. Lawrence: University Press of Kansas.
- Dinan, John J., and the Council of State Governments. 2014. "Chapter 1—State Constitutions." In *The Book of the States 2014*, edited by The Council of State Governments. Available on The Council of State Governments' Knowledge Center: <http://knowledgecenter.csg.org/kc/system/files/1.1%202014.pdf>.
- Eisgruber, Christopher L. "The Fourteenth Amendment's Constitution." *Southern California Law Review* 69: 47–103.
- Elkins, Zachary, Tom Ginsburg, and James Melton. 2009. *The Endurance of National Constitutions*. New York: Cambridge University Press.
- Elster, Jon. 1995. "Forces and Mechanisms in the Constitution-Making Process." *Duke Law Journal* 45: 364–396.
- Gardner, James A. 1993. "What is a State Constitution?" *Rutgers Law Journal* 24: 1025–1055.
- The Gilbert & Sullivan Very Light Opera Company. 2016. "Mikado." Accessed March 18. <http://gsvloc.org/about-us/gilbert-sullivan-revised/the-mikado/>.
- Graber, Mark A. 1999. "Law and Sports Officiating: A Misunderstood and Justly Neglected Relationship." *Constitutional Commentary* 16: 293–313.
- . 2013. *A New Introduction to American Constitutionalism*. New York: Oxford University Press.
- . 2014. "Constructing Constitutional Politics: Thaddeus Stevens, John Bingham, and the Forgotten Fourteenth Amendment." University of Maryland Legal Studies Research Paper No. 201437. Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483355.
- Graber, Mark A., and Howard Gillman. 2015. *The Complete American Constitutionalism*, Vol. 1. New York: Oxford University Press.

- Greenville High School Student Council. 2016. "Greenville High School Constitution." Accessed March 18. <http://www.greenville.k12.mi.us/HighSchool.cfm?subpage=168398>.
- Hargrave, Lee. 1991. *The Louisiana State Constitution: A Reference Guide*. New York: Greenwood Press.
- Harvard Graduate Student Government of Harvard University. 2014. "The Constitution of the Harvard Graduate Student Government." March. <http://hgc.harvard.edu/wp-content/uploads/Constitution-HGSG-3-4-141.pdf>.
- Herron, Paul E. 2014. "Revision and Reaction: Writing Constitutions in the Southern States, 1860–1902." Ph.D. dissertation, Brandeis University.
- Hirschl, Ran. 2007. *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press.
- . 2014. *Comparative Matters: The Renaissance of Comparative Constitutional Law*. New York: Oxford University Press.
- Jacobsohn, Gary Jeffrey. 2010. *Constitutional Identity*. Cambridge, MA: Harvard University Press.
- Jefferson, Thomas. 1999. *Jefferson: Political Writings*. Edited by Joyce Appleby and Terence Ball. New York: Cambridge University Press.
- Jensen, Merrill. 1966. *The New Nation: A History of the United States During the Confederation, 1781–1789*. New York: Random House.
- Kaminsky, Albert. 1962. "A School Constitution Used as a Functional Teaching Aid." *The Clearing House* 36: 305–305.
- Klein, Claude, and Andras Sajo. 2012. "Constitution-Making: Process and Substance." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and Andras Sajo, 419–441. New York: Oxford University Press.
- Law, David S., and Mila Versteeg. 2013. "Sham Constitutions." *California Law Review* 101: 863–952.
- Leonard, Gerald. 2002. *The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois*. Chapel Hill: University of North Carolina Press.
- Levinson, Sanford. 2012. *Framed: America's Fifty-One Constitutions and the Crisis of Governance*. New York: Oxford University Press.
- "Lincoln East High School Student Council Constitution and By-Laws." 2016. Accessed March 18. <http://isite.lps.org/mschlei/web/documents/Studentcouncilconstitutionandbylaws.pdf>.
- Linde, Hans A. 1993. "State Constitutions are not Common Law: Comments on Gardner's Failed Discourse." *Rutgers Law Journal* 24: 927–956.
- Little Rock Central High School students. 2016. "Constitution of the Little Rock Central High School Student Council." Little Rock Central High School Student Council. Accessed March 18. <http://centralhighstuco.weebly.com/constitution.html>.
- Lutz, Donald S. 1995. "Toward a Theory of Constitutional Amendment." In *Responding to Imperfection*, edited by Sanford Levinson, 237–274. Princeton, NJ: Princeton University Press.

- McGinnis, W. C. 1944. "What Basis for Student Government?" *The Clearing House* 18: 463–464.
- Marion Technical Institute students. 2006. "MTI Student Council Constitution and By-Laws." Marion Technical Institute. <http://www.marionschools.net/cms/lib010/FL01903465/Centricity/domain/43/documents/MTI%20SGA%20Constitution.pdf>.
- Murphy, Walter F. 2007. *Constitutional Democracy: Creating and Maintaining a Just Political Order*. Baltimore: Johns Hopkins University Press.
- Music Theatre International. 2016. "Broadway Junior Collection." Accessed March 18. <http://www.broadwayjr.com>.
- National Basketball Association. 2013. *Official Rules of the National Basketball Association, 2013–14*. <http://www.nba.com/media/dleague/1314-nba-rule-book.pdf>.
- National Federation of State High School Associations. 2014. *2014–15 Basketball Rules Book*. Indianapolis, IN: National Federation of State High School Associations.
- Oulahan, Courts. 1983. "The Proposed New Columbia Constitution: Creating a 'Manacled State.'" *American University Law Review* 32: 635–716.
- Pole, J.R., ed. 2005. *The Federalist*. Indianapolis, IN: Hackett Publishing Company, Inc.
- Sartori, Giovanni. 1962. "Constitutionalism: A Preliminary Discussion." *American Political Science Review* 56: 853–864.
- Scalia, Antonin. 1989. "The Rule of Law as a Law of Rules." *University of Chicago Law Review* 56: 1175–1188.
- Smith, Rogers M. 2003. *Stories of Peoplehood: The Politics and Morals of Political Membership*. New York: Cambridge University Press.
- "Student Council Support." 2016. Republic of Ireland's Office of the Minister for Children and Youth Affairs. Accessed March 18. <http://www.studentcouncil.ie/Running>.
- Versteeg, Mila, and Emily Zackin. 2014. "American Constitutional Exceptionalism Revisited." *University of Chicago Law Review* 81: 1641–1707.
- Williams, Edwin, ed. 1847. *Presidents' Messages, Inaugural, Annual and Special, From 1789 to 1846*. New York: Edward Walker.
- Zackin, Emily. 2013. *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights*. Princeton, NJ: Princeton University Press.