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The Seamy Underside of Constitutional Law

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The "Seamy Underside" Of Constitutional Law*

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I. INTRODUCTION

Every constitutional order has its unpalatable aspects, realities neglected or ignored by the many constitutional and comparative lawyers who are preoccupied with the elegant doctrinal matters scattered along the analytical paths worn comfortably smooth by others. These realities can be found on what I term the seamy underside\(^2\) of a constitution, the locus of desperate struggles for power during such crisis times as war, social disturbances leading to the breakdown of law and order, and economic disasters. An understanding of this seamy underside serves to illuminate the basis, the Holmesian inarticulate major premises if you will, of a foreign constitutional order\(^3\)—

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2. "Seamy underside" proved untranslatable when I presented a draft of this article to a German audience. They came up with the German equivalents of the "shady side" or the "dirty underwear" of constitutional law as the most suitable synonyms.

and of our own.

I will argue that the major premises of most constitutions form a constitutional common stream, \emph{a jus inter gentes} rather than \emph{a jus gentium}. Two of these premises of a bare-bones constitutionalism, the perceived need to struggle for political stability and for a strong state, dwarf all of the others in importance. Their significance can be grasped more readily if we project the unpalatable aspects of constitutions into a comfortable geographic, historical, and psychological distance from our cherished preconceptions. Many of my examples are thus drawn from crises faced in the Third World today and in the early modern Europe where our nation-state system began. Perhaps the most fruitful approach to constitutional politics is to reach back to the roots of a European political underdevelopment, comparing and contrasting them with events in the First, Second, and Third Worlds today. We should, like Machiavelli, Claude de Seyssel, and Sir Thomas More before us, confront contemporary legal and political credos with the chaos of contemporary events, discarding much of the metaphysics, the "theology," and the idealism that has grown up around contemporary constitutional and comparative law in favor of more pragmatic approaches.  

Events in the Third World are of interest because the essence of constitutional politics, attempting to meet crises with power, is more naked or starkly apparent there than under most Western and communist party-state constitutions.

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5. It may be that Third World leaders are more frank, more cynical, or less skilled in dissimulation through law. Clearly, they lack certain advantages their Western and communist party-state colleagues possess. In particular, they lacked those well-developed socio-economic institutions which make the exercise of power more palatable by both concealing and cushioning its impact.
If we can establish the dynamics of a constitutional development, we will better understand our own and our neighbors' constitutions:

[Indications are that legal research on municipal law topics will become increasingly comparative as more scholars realize the analytical value of being able to take into account significant experiences with equivalent or closely related concepts, rules and principles in other jurisdictions. In this sense, comparative legal research will become just another term for sophisticated legal analysis.]

My article seeks to identify the significant "closely related concepts" that are to be found in almost all constitutional systems. Rather than stopping at mere comparisons, I will try to point up useful insights into the nature of legal systems, insights based on an examination of how different groups try to solve the same problems. After a quick look at methodologies, I will examine the bare-bones of constitutions, the amoral (or Machiavellian) content of almost all constitutions, and conclude with a sketch of what constitutions "ought" to contain—the rather pragmatic human rights policies that serve as a basis for evaluating levels of constitutional development.

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6. The United States Constitution, written and unwritten, is "always in a state of becoming, open-ended and developing." A. Miller, Democratic Dictatorship: The Emergent Constitution of Control 40 (1981) (an excellent study). But development is a broader process, divisible into its economic, political, constitutional, technological, etc. parts only for purposes of analytical convenience. Attempts to define these complex phenomena have proved most controversial. See, e.g., H. Brookfield, Interdependent Development xi-xii (1975); G. Meier, Leading Issues in Economic Development 5-7 (2d ed. 1970); G. Myrdal, supra note 3, at 356. This controversy can be turned into an advantage if it encourages a diminution in ethnocentricity and explorations of a wider variety of interacting constitutional means and ends. See Waldo, Comparative Public Administration, in Comparative Administrative Theory 92, 135-38 (F. Le Breton ed. 1968). Development may be defined as "the capability over time to satisfy human needs and desires," where individuals and groups value different gains differently. Uphoff and Ichman, The New Political Economy, in The Political Economy of Development 1, 6-7 (N. Uphoff & W. Ichman eds. 1972). It is also "the process of human emancipation — either from the forces of nature or from the fetters of social hierarchy and domination by man; it generally implies an increase in . . . cooperation." W. Wertheim, Evolution and Revolution 41 (1974). See, e.g., B.O. Bryde, The Politics and Sociology of African Legal Development 1 (1976); H. Jaguribe, Economic and Political Development 4 (1968). Obviously, constitutions and constitutional development — and human rights policies in particular — play a central role in broader development processes, as attempts to mold the conditions of existence. See infra note 62 and text accompanying notes 35, 145-49, 153-59, 167.

II. METHODOLOGIES

Comparative law more or less exhausts itself in devising appropriate methodologies, and it is therefore essential to get one's methods right. Unfortunately, today's methods seem ill-suited to constitutional analysis. Constitutions are either treated as blueprints isolated from one another or lumped together in rather heterogeneous "families" defined by private law characteristics and/or the observer's ethnocentricities. Modern-day Montesquieus would agree with H.C. Gutteridge: "Like must be compared with like; the concepts, rules, and institutions under comparison must relate to the same stage of legal, political and economic development." This amounts to a counsel of methodological despair, for we now know that each country is at a sui generis level of development because of dynamic, many-sided, and exceedingly relative processes. This certainly makes analysis more difficult, but it does not justify the modern-day Montaignes' substitution of ethnocentric expectations for foreign constitutional premises. Daniel Hoffheimer describes some of the dangers of this method:

Western lawyers [looking at China] have been too quick to confuse functional concepts of law with structural regularity. Western ty-
polities of law generally focus on the micro-societal relationships between government on the one hand and individual behavior on the other. The result has been too heavy an emphasis in comparative analysis on the effects of law upon individual rights, the individual's capacity to predict and control the actions of government, his ability to use the legal process to protect his interest, and his capacity to regulate his relationship vis-a-vis his fellows under the law. . . . Comparative lawyers and social scientists . . . tend to underemphasize the macro-societal function of the legal process both as an instrument for, and by-product of, social change. The modern Chinese legal process which grew out of Yenan in particular (as but one period of the unique Chinese legal culture over millenia) offers significant qualifications to common Western assumptions about the nature of law and its relationship to modernization. 11

Exploring such "significant qualifications" is, needless to say, an important aid to understanding our own Constitution and its assumed "structural regularity," "micro-societal" bases, and so forth.

Constitutional events often outpace the ability of politicians, bureaucrats, and judges to manage them—to consolidate the gains realized and to prevent backsliding—especially when politicians and bureaucrats force the pace of events in an attempt to deal with crises. (This seems to be what happened throughout the New Deal, a portion of our constitutional history which continues to be fiercely debated.) It is therefore inevitable that constitutional events will often outpace the analyses of those who lead the contemplative life. They know constitutions to be much more than "a kind of fig leaf on the tough play of power politics." 12 They should also know that constitutions are much more than elegant and static means to the realization of man's finer capacities one small step at a time.

The only potential advantage in a legal perspective on constitutional politics is that it can focus on what politicians do, rather than on what they say or on what social scientists say politicians do. As former Attorney General John Mitchell remarked, look at what we

11. Hoffheimer, supra note 3, at 546-47 (citations omitted). He adds that the life of Chinese law is not logic but experience. Id. at 550. See generally infra note 105. The Yenan experience Hoffheimer refers to shows that Chinese law is not the product of codes or stare decisis but a "creation of Chinese revolution and internal war, a mass political upheaval which has been legitimated primarily by an ideology." Hoffheimer, supra note 3, at 517-18. Should the 13th-15th amendments of our 1787 Constitution be similarly characterized?

do and not what we say. What better authority can we find than this rare moment of candor? The reader may conclude that some of what follows belongs to the realm of political science rather than of constitutional law, but there is no real need to draw this distinction as "constitutional law is mainly juristic theories of politics and economics. . . ."  

What politicians, bureaucrats, and judges do is to attempt to implement their desiderata by marshalling whatever resources come to hand. An example of an analysis focusing on this goal is James Read's excellent study of the 1979 Nigerian Constitution. Having given legal techniques, governmental structures, and human rights their due, he moves on to the "basic question":

[Will it work? Will it promote and facilitate the political arts required to achieve the necessary compromises, to realise fully "the federal character of Nigeria"? Will it succeed to the extent that rumours of further coups will wither away? Time alone can hold the answer. Deep-seated political problems cannot be cured or transformed by constitutions, although they can be accommodated or at least contained.]

A fuller answer to this question in Nigeria would differ substantially from the answer in the U.S. or the U.S.S.R. Yet these answers would address the same amoral goals of political stability and a strong state. "Will it work?" is seldom asked of a Western or communist party-state constitution today, although it should be. The "political arts" are usually assumed, out of a nationalistic fervor or a scholastic inattention. Political elites, particularly those in the Third World, make no assumptions. "Will it work?" is thus the most relevant question a constitutional lawyer can ask. It reflects many of the hopes and fears of the elites whose legal behavior we study. While asking it, we will go far beyond the conventional—Weberian, Kelsenian, Frankfurterian, etc.—lawyers' concern with structures and procedures to compare constitutional functions, similar purposes built into diverse

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13. A. MILLER, supra note 6, at x. See id. at 45 (law is what decision-makers do, the primarily instrumental and bureaucratic "thou shalt nots"). id. at 75 (citing John Mitchell).
14. See infra note 63.
15. Read, The New Constitution of Nigeria, 1979: The Washington Model, 23 J. AFR. L. 131, 166 (1979). Western lawyers tend to identify peace and stability with notions like trust, good faith, and mutual respect. But in many areas of international and domestic politics where these characteristics do not exist, and cannot be created by pretending they do exist, advice should be solicited from Machiavellians on how to make agreements work. See T. SCHELLING, supra note 1.
constitutions. The "political arts" that glue or unglue the political order are so important to this functioning that they will be treated in some detail, even if they are the preserve of traditional political scientists.

III. MACHIAVELLISM AND THE MODERN WORLD

We are daily provided with proofs of Lord Acton's theorem that the "authentic interpreter of Machiavelli is the whole of later history." The "first law of internal policy is to hold onto power. . . . Today, as in Machiavelli's day, our world has become a collection of principalities struggling for survival, maneuvering for position, fighting over spoils. The scale is bigger but the proportions are the same." Machiavelli, the first thoroughgoing theoretician of power,

16. See G. ALMOND & G. POWELL, JR., COMPARATIVE POLITICS, 17 (2d ed. 1978); Öorsi, supra note 1, at 188; S. de SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 17-18 (2d ed. 1973); K. ZWEIGERT & H. KÖTZ, supra note 9, at 24-25, 29; Hoffheimer, supra note 3, at 517. See also Kozolchyk, supra note 7, at 107-08 (citations omitted):

[E]valuation of a legal system's effectiveness [is] a most important function at a time when the effects of a legal system upon the socio-economic development of the country or jurisdiction in question are beginning to be discerned. This type of evaluation, however, requires a redefinition of the term "legal system." It does not suffice to define it as "an operating set of legal institutions, procedures and rules." What must be emphasized is the purposive or functional nature of these institutions. Accordingly, a legal system must be seen as a set of institutions (concepts, rules, and principles of interpretation) impressed with a given purpose or purposes, the system's responsiveness and effectiveness measured against the degree of attainment of explicit as well as implicit goals.

Id. Kahn-Freund, supra note 8, at 384, 392, argues that comparisons of legal methods should focus on the fulfillment of social objectives. That may be so, but often in the Third World and elsewhere, the objectives pursued are those of particular elites, including well-meaning elites who seek to provide what society ought to want. See Öorsi, supra note 1, at 203.

17. That is, considerations of political expedience prevail over those of personal morality; a derogatory expression originating during the French civil wars. F. GILBERT, HISTORY: CHOICE AND COMMITMENT 155-76 (1977); J. Hexter, supra note 4, at 209 (quoting Wyndham Lewis); F. MEINECKE, MACHIAVELLISM 29-56 (D. Scott trans. 1957); Kelley, Murd'rous Machiavel in France: A Post Mortem 85 POL. SCI. Q. 549, 555 (1970); Schiffman, Montaigne and the Problem of Machiavellism (1978) (paper presented to the Sixteenth Cent. Studs. Conf., St. Louis). See 1 Q. SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT 136 (1978) (quoting Thomas Macaulay): Out of Machiavelli's "surname they have coined an epithet for a knave" and "out of his Christian name a synonym for the devil." See also A. GRAMSCI, The Modern Prince, in THE MODERN PRINCE AND OTHER WRITINGS 135, 142 (L. Marks trans. 1957): "Machiavellism has helped improve the traditional political technique of the conservative ruling groups, just as has Marxism; but this must not conceal its essentially revolutionary character, which is felt even today and which explains the whole of anti-Machiavellism. . . ."

18. M. Lerner, supra note 4, at 93 (quoting Lord Acton).

dealt exhaustively with the question “Will it work?” He offered radical criticisms of Christianity, tacitly rejected many principles of classical philosophy, and counseled abandonment of the contemplative life. Machiavelli defended acts of political expediency where these enable the man of virtù to master fortune, to create order from chaos, and to infuse the public with a collective virtù. Advocates and opponents, the creators of Machiavellism, have forgotten the higher ends of virtù to be served by his politics of expediency. They interpret power as the sole end of Machiavellian politics, to which expediency is the sole means. Machiavellians, who seem well-represented among the world’s leaders, adopt a deeply pessimistic view of human nature and, by this pessimism, seek to justify the ruthless pursuit of power and an often-interchangeable wealth. They usually attempt governance by faction in an environment where social changes and shifts in the balance of power, within and among elites, guarantee that no faction will long remain politically viable.

A. Reasons of State

The desire to maximize political freedom in exercising what is

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20. 1 N. MACHIAVELLI, THE PRINCE, in MACHIAVELLI: THE CHIEF WORKS AND OTHERS 10, 35-39 (A. Gilbert trans. 1965) (“Well used we call those . . . [cruelties] that a conqueror carries out at a single stroke, as a result of his need to secure himself, and then does not persist in, but transmutes into the greatest possible benefits to his subjects.”) Id. at 38; Bellah, The Active Life and the Contemplative Life, 105(2) DAEDALUS 57, 67 (Spring 1976); Schiffman, supra note 17. See Berlin, The Originality of Machiavelli, in STUDIES ON MACHIAVELLI 149 (M. Gilmore ed. 1972) (as opposed to the Judeo-Christian morality of faith, charity, mercy, and contempt for the goods of this world, virtù is a virile pagan morality of courage, power, order, discipline, happiness, and the assertion of one’s claims); A. MILLER, supra note 6, at 72; Bellah at 67 (in Machiavelli, “virtùs has become ambiguous in its Italian guise of virtù”).

21. A. BONADEO, supra note 4, at 121; 1 J. BRYCE, supra note 4, at 750; M. LERNER, supra note 4, at 83; B. RUSSELL, HISTORY OF WESTERN PHILOSOPHY 491-92, 494-96 (1961); G. SABINE, supra note 4, at 342; 1 Q. SKINNER, supra note 17, at 137; Winiarski, supra note 4, at 248. Machiavelli argues in THE HISTORY OF FLORENCE that: “If a city tries to sustain herself by means of factions rather than of laws, when one of her factions is left without opposition, of necessity that city becomes divided, because those private methods that she earlier adopted for her security cannot defend her.” A. BONADEO, supra note 4, at 51-52 (quoting Machiavelli). Elite attitudes toward the public are a significant dimension of political behavior: “[R]ussian, Italian, and German experience during the twenties, thirties and forties seems to indicate that alternative political regimes are in our age characterized less by a dispute over the rate of speed of social and political progress than by a different concept of the dignity of the individual.” O. KIRCHEIMER, Politics and Justice, in POLITICS, LAW AND SOCIAL CHANGE 408, 412 (F. Burin & K. Shell eds. 1969) [hereinafter cited as Burin & Shell]. True, the Machiavelli of the DISCOURSES—like Nyerere of Tanzania or Kaunda of Zambia, for example—expresses enthusiasm for republicanism and for a creeping humanism, but these enthusiasms are frequently forgotten when quick political action is perceived as necessary.
often a short-term power and control is epitomized by Machiavellism's enduring contribution to constitutional law: the *ragione di stato* (*raison d'État*), which translates imperfectly as *Staatsraison* or reason of state. Under this justification, rulers act improperly from the standpoint of private morality in order to advance the welfare of the state, a goal far more important than promoting individual rights or interests. Reason of state is thus an opportunism analogous to John Locke's "prerogative" and to a *Realpolitik* in the realm of foreign affairs. For the last few hundred years, this opportunism has rivalled natural law as a means for rationalizing political decisions in the United States and elsewhere. 22 Even so libertarian a natural lawyer as Thomas Jefferson found abundant room for the reason of state justification during his political career and in his philosophy:

A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means. 23

22. J. Hexter, *supra* note 4, at 168-70; M. Lerner, *supra* note 4, at 96; 2 L. McDonald, *Western Political Theory* 218 (1968); A. Miller, *supra* note 6, at 81; Q. Skinner, *supra* note 17, at 248. Natural lawyers, who decry the "wickedness" of Machiavellism, fail to join issue with their opponents, who deem ethical criticisms irrelevant. See Schiffman, *supra* note 17. Natural law attains a practical significance only when recognized as positive law by those who speak for the state. A. Miller, *supra* note 6, at 45. This only happens when it is convenient, and only as a means for justifying decisions made on other grounds. *Id.* The reason of state is analogous to a *Realpolitik*, under which international law obligations must always yield to the national interest in the event of conflict. See Dillard, *supra* note 12 (citing Hans Morganthau). The reason of state justification was not developed fully until Machiavelli's advocates expanded upon the theory, but the technique it justifies is very old indeed. "The position of public law in Rome and Western Europe until the eighteenth century was in principle the same—an area left to the play of power, mitigated by religious and moral sentiments, with a certain amount of bureaucratic rule and order but no effective judicial control." Sawer, *The Western Conception of Law*, in 2(1) *International Encyclopedia of Comparative Law* 14, 24 (R. David ed. 1975) (hereinafter cited as Sawer). Sawer's characterization nicely fits the constitutions of many countries today. For example, it can be argued that reason of state "has always been an operative principle of American Constitutionalism." A. Miller, *supra* note 6, at xii. Despite much intellectual history to the contrary, our Constitution is a grant of power motivated by the instinct for survival shared by the framers and subsequent politicians. *Id.* at 41. "FDR outdid Lincoln in exercising discretionary powers. And Vietnam capped it off with raison d'état applied to a situation far removed from America's shores and not even remotely an actual danger to the country." *Id.* at 80.

Reason of state justifications are widely deployed in the First, Second, and Third Worlds today. In the course of deciding the Communist party Case, the West German Federal Constitutional Court correctly concluded that under Marxist-Leninism, "statements that fundamentally criticize concrete political decisions, and actions that are contradictory to the general political goal, cannot be legally protected . . . ." But the Court is no more tolerant in the face of a perceived crisis than is an apostle of Marxist-Leninism: the Court bans the German Communist Party for "statements" and "actions" that "fundamentally criticize . . . the general political goal" of something called the German "free democratic order." Broad emergency powers granted under a Canadian statute, similar to those the

Lincoln also deployed broad reason of state justifications for steps taken during the Civil War. In a message to Congress, Lincoln responded to a blistering attack by Chief Justice Taney—Ex parte Merryman, F. Cas. (1861) (no. 9, 487)—by asking whether the nation's laws must be allowed to finally fail of execution, even if it had been perfectly clear that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?

4 A. LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 429-30 (R. Basler ed. 1953) (quoted in Murphy & Tanenhaus at 643). This argument is, of course, open to the "slippery slope" objection: if laws are disregarded one by one, the legal system composed of them—and the polity it protects—is eventually destroyed. See infra note 54 and accompanying text.

24. 5 B. Verf. GE85 (1956). The translation used here is from Murphy & Tanenhaus, supra note 23, at 621-26.

25. Id. at 623.

26. The Court found the German Communist Party engaging in a "smear campaign" designed to decrease confidence in the established "value order," id. at 625-26, of what may be termed meliorist incrementalism: "a relative and constant compromise in the present." Id. at 622. This "free democratic order accepts as given existing political and social conditions. It . . . proceeds from the assumption that they can and need to be improved." Id. Marxism does not, of course, accept "as given existing . . . conditions"—a major reason for banning the West German Communist Party. See Socialist Reich Party Case, 2 BVerfG GE1(1952) (quoted in translation in Murphy & Tanenhaus, supra note 23, at 2-603). The same Court, banning a neo-Nazi party stated: "[T]he basic order is . . . heavily laden with values that oppose those of the totalitarian state which . . . rejects human dignity, freedom and equality. . . ." Id. Like the Nazi program, the Socialist Reich Party "indulges in platitudes, lays down general demands that are common property of almost all parties . . . and makes vague, often utopian promises that are hardly compatible with each other." Id. at 604. This can hardly be a legitimate basis for banning the Party, since "platitudes," "general demands," and "vague, often utopian promises" presumably characterize all parties in a democracy and elsewhere. Nevertheless, these assertions are fundamental to the Court's analysis. See also infra note 55.
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House of Lords approved for Britain in *Liversidge v. Anderson*, 27 were found by the Privy Council to be most proper: "The interests of the Dominion are to be protected and it rests with the Parliament of the Dominion to protect them." 28 This notion is elaborated by an Indian Supreme Court Justice, who uses language repeated time after time in Third World constitutional decisions: "If a law ensures and protects the greater social interests then such law will be a wholesome and beneficent law although it may infringe the liberty of some individuals, for, it will ensure for the greater liberty of the rest of the members of the society." 29

The main danger in this Machiavellian constitutional reasoning is apparent. It too readily forms a foundation for the proprietary theory of the state, *l'état, c'est moi* of Louis XIV, of Charles de Gaulle and, some would add, of several American Presidents. Under Machiavellism, it is impossible to distinguish reason of state from more evanescent and often capricious reasons of the ruler or ruling elite of the moment (*intuition de pouvoir*). The modern prince is not thought of as a real person, but as a complex constitutional organ which must respond quickly and forcefully to perceived crises if it is to survive. In this way, *raison d'état* quickly becomes a *raison de groupe*, analogous in many circumstances to the narrow self-interest pursued by senior executives in a corporation. As in McCarthyite witch hunts, politicians may take advantage of a crisis by subordinat-

27. 1942 A.C. 206 (approving a detention without trial on basis that Home Secretary in good faith thinks he has probable cause to order detention). *See* Green v. Secretary of State [1941] 1 K.B. 72. The Privy Council did not apply the subjective *Liversidge* test to a peace-time, non-emergency situation, however: *See* Nakkuda Ali v. Jayaratne 1951 A.C. 66 (P.C).


29. Gopal v. State of Madras, 1950 A.I.R. (S.C.) 27 (Das, J.), *quoted in* H. Groves, COMPARATIVE CONSTITUTIONAL LAW 285, 325 (1963). ("To read the word 'law' as meaning rules of natural justice will land one in difficulties because the rules . . . are nowhere defined and in my opinion the Constitution cannot be read as laying down a vague standard.") *Id.* at 291; *In Re* Article 26 [1940] I.R. 470 (Ir. S. Ct., per Sullivan, C.J. (quoted in H. Groves 279, at 283) ("The duty of determining the extent to which the rights of a particular citizen, or class of citizens can properly be harmonized with the rights of the citizens as a whole seems to us to be a matter peculiarly within the province of the Oireachtas [Parliament]"). *See also* e.g., Highway Authority v. Mebratu Fissiha, 2 J. ETHIOPIAN L. 37 (1965) (S. Imp. Ct.); Lij Aryaya Abebe v. Imp. Bd. of Telecommunications, 2 J. ETHIOPIAN L. 303 (1964) (High Ct.).
ing the interests of a recalcitrant minority to those interests they define for the public. 30

Many constitutional lawyers would like to believe Justice Stephen Field's brave dissent: "the wants of the government could never be the measure of its power." 31 In "terms of actual practice, however, wants—usually expressed as needs—do shape power, if not authority." 32 In this way, brilliant statecraft and obvious knavery alike can succeed during times of crisis, particularly when the knave creates the crisis for his own purposes. When "the safeguards of constitutional government are delivered up to the rulers, the means of getting them back have been delivered up also." 33 The main restrictions on governmental abuse then become "public opinion, the energy . . . of opposition parties, and the consciences of governmental officials." 34 These are frail reeds indeed, and nowhere more so than in the Third World.

B. States of Emergency

If reason of state is the primary means of justification under a

30. See A. Gramsci, supra note 17, at 137-38; G. Lenski, Power and Privilege, passim (1966); L. McDonald, supra note 22, at 218; A. Miller, supra note 6, at xii, 50-51, 102; Murphy & Tanenhaus, supra note 23, at 597-98; Claude, The Western Tradition of Human Rights in a Comparative Perspective, 14 Comp. Jurid. Rev. 3, 9 (1977); text accompanying supra note 29, and infra note 75. The proprietary theory of the state is deeply embedded in Machiavellism, which makes no distinction among the prince maintaining the state, the prince maintaining himself in the state, and the prince maintaining himself. J. Hexter, supra note 4, at 151. Although the King's strictly governmental acts (gubernaculum) were immune to challenge under Roman law, acts which went beyond the scope of this authority (jurisdicctio) were not protected. Modern political and constitutional practices result in a blurring of this distinction, however. C. McIlwain, Constitutionalism, Ancient and Modern 76-78 (rev. ed. 1947). L'état, c'est moi characterizes the careers of Presidents Jackson, Lincoln, Theodore Roosevelt, Wilson, and Franklin Delano Roosevelt and the presidents following him. A. Miller, supra note 6, at 60.

31. Legal Tender Cases, 12 Wall. 457, 649 (1871) (Field, J., dissenting). See Ex parte Milligan, 71 U.S. 2, 121 (1866) (per Davis, J.): No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its [the Constitution's] provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers . . . which are necessary to preserve its existence . . . . Id. But see infra text accompanying note 40.

32. Murphy & Tanenhaus, supra note 23, at 643.

33. K. Wheare, Modern Constitutions 140-41 (1960). See C. McIlwain, supra note 30, at 117-18 (discussing English legal history); B. Russell, supra note 21, at 504-11 (criticizing Machiavelli's philosophy).

34. Murphy & Tanenhaus, supra note 23, at 647.
Machiavellian constitutionalism, the objects of this exercise are the crises lawyers commonly term states of emergency. In his *Legitimation Crisis*, Jurgen Habermas generalizes (in a jargon-laden fashion, alas) four such interrelated crises:

[T]he economic system does not produce the requisite quantity of consumable values, or; the administrative system does not produce the requisite quantity of rational decisions, or; the legitimation system does not provide the requisite quantity of generalized motivation, or; the socio-cultural system does not generate the requisite quantity of action-motivating meaning.\(^35\)

While Habermas uses these concepts to analyze adroitly the problems of “advanced capitalist countries,” the concepts also precisely describe the primary constraints on and failures of development in communist party-states and in the Third World. The tendency toward recurrent crises, but not necessarily the ability to deal effectively with these crises, thus exists independent of a country’s perceived level of development. This is simply another way of saying that development is relative and multidimensional. Nation-building problems in the Third World are mirrored by the national reconstructions regularly required in the First and Second Worlds. How many governments in “developed” countries can satisfy the development criteria they announced for the Third World only a few years ago? Can the “developed” countries themselves secure productivity increases in all sectors of the economy, resolve disputes concerning the distribution of wealth and power, and succeed in encouraging citizens to be favorably predisposed towards change and to cooperate with each other? Instead of development, the outcome of pursuing these policies is often a succession of crises stretching over many years. These give rise to

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Many observers, in their oversimplification of problems in India, mistakenly conclude that the present ills stem from the costly luxury of democracy. . . . But to suggest that the answer to India’s problems lies in more centralization is to miss the point. The problems of India and of many developing countries are caused by a host of related factors—leadership, policy formulation, management and implementation, as well as current international institutions and policies pertaining to trade, aid and financing. Id.
perceptions of a single, overarching crisis of state authority in all spheres, such as in Zambia, in Poland, in Weimar Germany, and in the United States during the Depression.

Constitutional laws are created and manipulated in various ways during attempts to deal with the crises Habermas analyzes. But the relevant constitutional provisos are among the least creative in the constitutional armory, and politicians or jurists are usually far from satisfied with the results. The evidence is massive that govern-

36. In his somber [January 1976] "We are at war" speech . . . President [Kuanda] was responding to no single overriding threat to his personal position. As he pointed out, Zambia has been in a technical state of emergency since Rhodesia's Unilateral Declaration of Independence in 1965. But a combination of economic and diplomatic difficulties aggravated by the Angolan civil war has left . . . Kuanda feeling angry, beleaguered and certain that this is the time to turn and fight what he sees as the enemies of his country.

Macmanus, Zambia's Peace Price, THE GUARDIAN (London), Jan. 30, 1976, at 13, cols. 1-6. Here we have a textbook example of persistent crises and the reactions to them. Crises grow more serious because of the interaction of poor economic performance, adverse international economic conditions, foreign military threats, and an inability to maintain internal order. Leaders attempt a smokescreen for governmental incompetence, and the crises are treated as personal slights requiring highly emotional personal responses.

37. See infra text accompanying notes 138-45.

38. Some governments and their constitutions are born out of crisis—the Third, Fourth and Fifth French Republics, for example. Crisis origins tend to spawn extremely broad executive emergency powers. See, e.g., THE FRENCH CONSTITUTION art. 16 (1958). Most of the recent Western-style constitutions that were created in a more leisurely manner also embody broad emergency powers. See, e.g., BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY arts. 80, 87, 91, 115 (1949); CONSTITUTION OF INDIA, arts. 352-60 (1949); Nanda, supra note 35, passim. Other governments prefer to fall back on more flexible arrangements, such as the Offenses Against the State Acts of Northern Ireland and Great Britain and the War Measures Act invoked in 1970 by Canada's Trudeau to deal with the Front de Liberation du Quebec. Murphy & Tanenhaus, supra note 23, at 644. The 1883 Explosives Act passed the British Commons and Lords in one day and received the royal assent the next day, standing orders having been suspended. The Magna Carta, the Bill of Rights and the Act of Settlement could receive similar treatment. 1 J. BRYCE, supra note 4, at 141. A few constitutions, such as those of the United States and of some communist party-states, are largely silent on government's emergency powers. See U.S. CONST. art. 1, § 8, 9(2), art. 2, § 2(1); H. GROVES, supra note 29, at 190. The American executive's powers, "noteworthy for their delphic nature," have been shaped by reactions to perceived crises. A. MILLER, supra note 6, at 38-39, 124.

39. C. McLILWAIN, supra note 30, at 139-40: "Freedom of thought and expression and immunity for accused persons from arbitrary detention and from cruel and abusive treatment . . . have always been endangered when 'reasons of state' have been thought to require it (emphasis added)." See F. CASTBERG, FREEDOM OF SPEECH IN THE WEST 411-18 (1960). The relevant cases are legion, and a few of the leading cases are cited below. The paucity of analogous cases from the Third World by and large reflects a lack of judicial independence, and of the public confidence in the judiciary needed to initiate a lawsuit.

United States. See United States v. O'Brien, 391 U.S. 367 (1968) (Government's substantial interest in assuring continued availability of draft cards outweighs first amendment freedom to burn one of these cards); Barenblatt v. United States, 360 U.S. 109 (1959) (no first
ments will take whatever steps are perceived as necessary to deal with

amendment right to remain silent on conviction for contempt of Congress, for refusing to disclose possible Communist Party affiliation) (quoted supra note 28); Dennis v. United States, 341 U.S. 494 (1951) (conviction upheld for failure to register party allegedly advocating overthrow of government by force); Korematsu v. United States, 323 U.S. 214 (1944) (conviction upheld on failure to obey statutorily-authorized military order excluding Japanese from designated areas) (discussed infra note 45 and accompanying text); Ex parte Quirin, 317 U.S. 1 (1942) (access to civil courts only guaranteed to citizens, and saboteurs could thus be tried militarily on President's order); Helvering v. Davis, 301 U.S. 619 (1937) (ignoring United States v. Butler, 297 U.S. 1 (1936), Congressional powers unlimited in dealing with old age benefits during economic emergency); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (state mortgage moratorium law interfering with contractual rights upheld because of economic emergency); Schenck v. United States, 249 U.S. 47 (1919) (freedom of speech sacrificed to wartime hysteria); Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978) (state secrets privilege absolute); United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979) (first prior restraint on publication, based on flimsy showing of danger to national security). But see Scales v. United States, 367 U.S. 203 (1961) (saving rights through narrow construction of legislation); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (President's seizure of steel mills because of strikes during Korean War not justified by emergency); Ex parte Milligan, 71 U.S. 2 (1866) (after-the-fact invalidation of military tribunal proceeding in area where civilian courts' functioning unimpaired) (quoted supra note 31, and text accompanying infra note 40).

Australia. See Burns v. Ransley 79 C.L.R. 101 (Austl. 1949) (Communist Party leader's statement that he would oppose war against the Soviet Union constitutes the use of seditious words); Farey v. Burvett 21 C.L.R. 433 (Austl. 1916) (regulation of bread price upheld under British statute authorizing Commonwealth governments to regulate by decree anything deemed necessary or expedient to further war effort). But see Australian Communist Party v. The Commonwealth, 83 C.L.R. 1 (Austl. 1950-1) (strict construction of constitutional grants of power, to restrain Government's power to deal with alleged enemies of the State).


Eire. See In re Article 26 [1940] I.R. 470 (S.C.) (quoted supra note 29) (regulations permitting detention for activities calculated to prejudice peace, order and state security upheld, on President's request for advisory opinion). Detentions without trial or without a jury, and on unworn and unsigned statements, were upheld in Art. 26, as were forcible entry and the seizure of documents in: State (Walsh and others) v. Lennon [1942] I.R. 112; In re Thomas MacCurtain [1941] I.R. 83; In re McGrath and Harte [1941] I.R. 68.

France. See Heyries, Conseil D'Etat 28 June 1918 (upholding decree suspending for duration of War statutory safeguards for civil servants). But see Canal, Conseil D'Etat 19 October 1962 (special military tribunal set up by Head of State's decret-loi to deal with officers of the proscribed O.A.S. contrary to law because all civil, criminal, and administrative decisions reviewable by Cour de Cassation, even in the absence of statutory authorization). See also N. Brown & J. Garner, French Administrative Law 6, 29, 119-22, 126, 158 (1973).

Germany. See Der Spiegel case (discussed by Murphy & Tanenhaus, supra note 23, at 644-45); Communist Party Case, 5 BVerfG GE 85 (1956) (banning the Communist Party) (discussed supra notes 24-26); Socialist Reich Party case, 2 BVerwG GE 1 (1952) (banning the neo-Nazi party) (discussed supra note 26, and infra note 55).

India. Habeas corpus refused in the face of detention orders: State of Bombay v. Atma
a perceived crisis, and that courts will almost always uphold these actions—even if Western-style human rights are infringed in the process. If a court does attempt to redress a violation of rights after the fact, it usually goes out of its way to exculpate those responsible—provided their regime is still in power. Consider the characterization of the Civil War in *Ex parte Milligan*:

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated [emphasis added].

When one regime replaces another by coup, rebellion, or revolution, courts bend over backwards to uphold the legality of the new regime. They may find a shift in Kelsen’s *Grundnorm*, apply a Machiavellian doctrine of civil necessity, or tacitly acknowledge the political facts of life. Judges thus provide little more than a convenient gloss on a hoary maxim: “Treason doth never prosper. What’s

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the reason? For if it prosper, none dare call it treason." The unarticulated premise of most of these cases is the judges' desire to save their necks, advance their careers, or both. Occasional displays of judicial courage are usually futile. For example, Justice Jackson held that military orders are not laws because they are evaluated on the basis of success rather than legality. The Constitution does not approve all that is expedient, he implies, but he was wrong, in this instance at least. The majority of the Court had recourse to a Machiavellian expediency while acceding to the hysteria surrounding Korematsu. For Otto Kirchheimer:

Emergencies, like miracles, may take place in infinite number. In order to be recognized as such they have to be authenticated... Emergencies as well as miracles are exceptions to rules that prevail in "normal" situations. Their contours are determined by these rules of "normalcy" which they "confirm" through being exceptions. In the absence of an authentic rule, emergency in permanence becomes the genuine symbol of the very absence of that system of coordination to which history traditionally affixes the attribute of sovereignty.

I would add that this process of authenticating and dealing with emergencies so alters the canons of a constitutional "normalcy" as


44. O. KIRCHHEIMER, supra note 40 at 196-208; Madzimbamuto, supra note 41. Attorney General v. Mustafa Ibrahim (1964) CYPRUS L.R. 195: "[M]uch time has been spent in the courts of many a country to put the burden of a fallen regime on the broad shoulders of its principals if they are safely out of the way, thus by logical implication absolving all those acting in their and the regime's name." See P. BRIETZKE, supra note 41. The only apparent exception to the assertion in the text is Madzimbamuto, supra note 41, on appeal to the Privy Council: [1968] 3 All E.R. 561. Privy Counselors were safely removed some 7,000 miles from the power of the Salisbury regime, however, and their careers depended upon upholding the tradition of Royal power.

45. Korematsu v. United States, 323 U.S. 214, 244-46 (1944) (Jackson, J., dissenting from a decision affirming a conviction under military orders banning Japanese-Americans from designated areas).

46. Id. See also Tewfik Sherif v. Public Security Dept., High Ct. Order File 22/58 (1965) (Ethiopian authorities repeatedly disobeyed the Court by refusing to produce prisoners in a "habeas corpus" proceeding—a common result of the rare exercise of judicial independence in the Third World).

47. O. KIRCHHEIMER, In Quest of Sovereignty, in Burin & Shell, supra note 23, 160 at 191. See Murphy & Tanenhaus, supra note 21, at 642 ("Emergency [is] a term conveniently invulnerable to precise definition . . . ."); supra note 36.

48. Under "normal" conditions, Western socio-legal theory assumes that a constitution, as interpreted, provides the foundation for economic growth and affluence and operates "as a stabilizing influence, mediating the course of change, lessening its social costs, [and] forcing political activists to look to one lodestone, the Constitution. . . ." Commanger & Morris,
to be the prime mover of constitutional change. The sparse language of the American Constitution, for example, has been used to meet emergencies effectively, but we have paid a price because of the cumulative weight of such precedents: a growing obsolescence of the original concepts. 49 Scholars are beginning to assert that actions taken in response to crises and justified by reasons of state are the driving force behind American constitutional development. 50

The best time to evaluate constitutional arrangements critically is when they are being used to respond to emergencies. All but the worst among constitutions are technically adequate for governance in the absence of severe strain. Emergencies foster the commission of at least some of the eight deadly sins of a “normal” Western constitutional law: excessive specificity, incommunicativeness, retroactivity, incomprehensibility, contradictoriness, unfulfillable demands, capricious change, and irrelevant administration. 51 Much of governance is carried out under what is a martial law in substance and often in name. (Needless to say, this is a congenial state of affairs for the Third World’s many military regimes.) Laws and decisions concerning constitutional matters resemble rough-and-ready military orders. They are specific yet far from precise and have no necessary connection one to another; it is as though more law signifies more order. Such a chaotic body of rules leaves unchecked a significant perpetuator of constitutional and political underdevelopment: the tendency towards

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49. A. MILLER, supra note 6, at 7, 41, 48. See id. at 208 (quoting Harold D. Lasswell): “An insidious outcome of continuing crisis is the tendency to slide into a new conception of normality that takes vastly extended controls for granted. . . .”

50. See M. LERNER, Constitutional Crisis and the Crisis State, in IDEAS FOR THE ICE AGE 305 (1941); A. MILLER, supra note 6, passim; P. MURPHY, supra note 48, passim; C. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948). Lerner finds that American constitutional history has been a crisis history, that we have a crisis democracy that cannot be exorcized by verbal magic. The absence of a crisis theory is therefore puzzling. M. LERNER, at 305-06. Murphy traces the 20th century development of the U.S. Constitution through the crises faced under it: the desire to restrict freedom of speech resulting from the hysteria of World War I, the need to control the economy during the Depression, the powers arising from the “total war” effort of World War II, the responses to perceived Cold War pressures, the acceleration of social changes under Warren Court decisions, and attempts to deal with the trauma of Vietnam. P. MURPHY, passim. To this list can be added the Alien and Sedition Act, the Civil War, the extermination and banishment of Indians, the Cuban Missile Crisis, and President Ford’s 1975 Mayaguez “victory.” A. MILLER, supra note 6, at 77, 79, 89, 113. These are the kinds of crises governments face worldwide. See H. GROVES, supra note 29, at 189.

incoherent and arbitrary political and administrative decisions. Action is inescapably demanded without formal legal authorization, and legally-mandated acts are ignored or prohibited for reasons of convenience or inertia. Cynicism and indifference toward law breed among politicians, bureaucrats, and the public, all of whom see yawning gaps between constitutional law and practice. Pressures then build for a constitutional rationalization to regain a measure of public confidence, in and elite control over, government processes, to consolidate such gains as are realized from mastering a crisis, and/or to prevent a sliding backwards to lower levels of constitutional development. This process is illustrated by the Constitution of the Civil War the incoherent and arbitrary laws and decisions that gave way to new forms of centralized authority in the thirteenth through fifteenth amendments. There was backsliding, especially under the substantive due process Court. Some subsequent crises could not be dealt with adequately, but the means were there to cope with, for example, the nascent crises of the 1960's civil rights movement.

Abraham Lincoln most succinctly posed the Machiavellian dilemma arising under a Western constitutionalism: "Must a government, of necessity, be too strong for the liberties of its own citizens, or too weak to maintain its own existence?" Clearly, the answer is that all but suicidal regimes (Lincoln's included) will err in the short run and abundantly in the direction of maintaining order and the regime's power. Overreactions among leaders preoccupied with their own power and dignity are virtually guaranteed when events impair faculties by inflaming passions. Overreaction insures that dangers and, sometimes, the mildest of oppositions and setbacks automatically become grave menaces. This can be seen in the behavior of Richard M.

52. See Lowenstein, Reflections on the Value of Constitutions in Our Revolutionary Age, in Constitutions and Constitutional Trends Since World War II 191, 199 (A. Zurcher ed. 1951) [hereinafter cited as Lowenstein] (since World War II, constitutions have displayed little elan and are tired, neurotic, cynical and disenchanted); Markovits, Law or Order—Constitutionalism in Eastern Europe, 34 Stan. L. Rev. 513, 525 (1982); Markovits, infra note 99, at 627.

53. See Claude, supra note 30, at 38-39. Some analysts would see a recent backsliding in the Burger Court's "new federalism" and in what has been termed President Reagan's new Articles of Confederation. If my analyses of the logic of constitutional development are correct, these are relatively temporary aberrations in a long constitutional history. See infra notes 117-18, 121 and text accompanying notes 116-21, 128.

54. K. Wheare, supra note 33, at 142 (quoting Lincoln's first Message to Congress after the outbreak of the Civil War). See supra note 23 and accompanying text. Israel's plight also illustrates this dilemma. Seemingly able to keep its enemies at bay only by emulating them, Israel dissipates its legitimacy as an alternative to fascism, militarism, and religious hatred.
Nixon and J. Edgar Hoover, and especially in the Third World, where hardly a sparrow falls from a tree but what it is perceived to endanger an unstable regime maneuvering from within a weak state.\textsuperscript{55} Where perceptions of the magnitude of the crisis are accurate, the means often chosen to deal with it — using the crisis to determine the victor and the vanquished among politicians — serve to perpetuate underdevelopment.

IV. THE LOGIC OF CONSTITUTIONAL DEVELOPMENT

An understanding of where we are now, and of where we are going constitutionally, can only be reached through an understanding of where we have been and of the hazards of a political underdevelopment that has forced us to seek change. A consideration of this constitutional development focuses attention on a classical conception of constitutions as the rather pragmatic means by which the relevant \textit{constituents} of a society \textit{constitute} their polity.\textsuperscript{56} In the eyes of the politicians concerned, the primary goal of constituting is not to nurture democracy, but to create the preconditions to the effective exer-

\textsuperscript{55} See Murphy & Tanenhaus, supra note 23, at 646. There is, of course, no objective definition of a state of emergency, but to paraphrase Justice Stewart in Jacobellis v. Ohio, 378 U.S. 184 (1964), politicians and bureaucrats think they know it when they see it. See A. Miller, supra note 5, at 48. These perceptions also color the ways in which academic lawyers approach the problem. For a subtle example, consider the following characterization of the problem by two careful comparatists: "To what extent can a polity committed to free expression of ideas allow groups that are hostile to the fundamental notion of constitutional democracy to utilize civil liberties to destroy the polity itself?" Murphy & Tanenhaus, supra note 23, at 597. Note the postulates or assumptions, which may not be demonstrably true: the existence of a commitment to "free expression," the hostility of opposition groups to "constitutional democracy" as opposed to the distribution of wealth and power currently secured under it, and the ability of politicians/soldiers/bureaucrats/judges to avoid self-serving definitions of this hostility. See Socialist Reich Party Case, 2 BVerfG GE 1 (1952): "The SRP's [neo-Nazi party's] concept of Reich differs from the notion of Reich in the best German tradition." The SRP's "heap of insults, suspicions, and defamations has nothing to do with constitutionally guaranteed freedom of expression or a genuine political opposition." Another telling example is President Nixon's and F.B.I. Director Hoover's fear of and attempts to destroy the Black Panthers. Murphy & Tanenhaus, supra note 23, at 597-98.

\textsuperscript{56} See P. Merkl, Modern Comparative Politics 332 (1970); B. Nwabueze, supra note 41, at 139; Schochet, Introduction, in Constitutionality 1, 2 (J. Pennock & J. Chapman eds. 1979) [hereinafter cited as Pennock & Chapman]; K. Zweigert & H. Kötz, supra note 9, at 63; Murphy, Liberalism and Political Society, 26 Am. J. Juris. 125, 147 (1981) (at least in part, the U.S. is "an empirical example of a constitutive political decision by a sovereign people"). Under the criteria used by conventional Western jurists, there was no constitution in France until 1791. A polity had nevertheless been constituted for some 1300 years under the recurring political patterns and the minimum of authoritative forms found in much of the Third World. See Keohane, Claude de Seyssel and Sixteenth Century Constitutionalism in France, in Pennock & Chapman, at 47.
cise of power by stabilizing politics and strengthening the state. This is a bare-bones constitutionalism. It consists of varying mixtures of coercion, regimentation, and manipulation (plus some bargaining)—law as the command of the sovereign, H.L.A. Hart’s gunman situation writ very large. Communist party-state constitutions, for example, are “a kind of super-ego, designed to guide the not quite reliable socialist ego and to control its probably bourgeois id.” In many instances, “socialist courts are not used by private plaintiffs for the protection of personal benefits, but by semi-public plaintiffs for the enforcement of socialist standards of behavior.” Most constitutions, including most communist party-state constitutions, have a good deal more in them, but all constitutions contain at least this much. Having described the means (reason of state justifications) and the ends (circumventing or overcoming crises), we now consider the fruits of means and ends interacting over time.

A bare-bones constitutionalism is concerned with gaining and retaining power and often wealth over time. Constitutions are thus made to resemble organizational charts or “power maps” which ag-

57. Effectiveness, as Alexander Hamilton observed in The Federalist Papers, requires that government first control the governed and then be obliged to control itself—for elite purposes or, as the case may be, for broader public purposes as well. See M. Lerner, supra note 50, at 307.

58. S. Finer, Comparative Government 589 (1970). (“[s]ocial structure generates the substantive issues of politics and colours the style in which they are disputed.”) See 1 J. Bryce, supra note 4, at 136; Diamond, The Rule of Law Versus the Order of Custom in The Rule of Law 115, at 117 (R. Wolff ed. 1971); A. Gramsci, supra note 17, at 169-70; Hurst, Law and the Regulation of Social Change, in Law and Change in Modern America 17 (J. & M. Grossman eds. 1971); O. Kirchheimer, Confining Conditions and Revolutionary Breakthroughs, in Burin & Shell, supra note 21, at 385, 390 (during a revolution, the socio-economic frame of a particular society lays down a “conditioning perimeter within which the original choice has to be made and solutions have to be sought.”); J. Merryman, The Civil Law Tradition 143 (1969); A. Miller, supra note 6, at 111 (quoting Napoleon, the “politics of the future will be concerned with the art of moving the masses.”). See also J. Hexter, supra note 4 at 181:

[The fabric of imperatives determines the ordinary day-to-day expectations of men . . . [and] it is resistant to drastic and sudden change. [I]n the Middle Ages it lay relatively thick with respect to matters of male attire and relatively thin with respect to acts of physical violence, whereas today [in, I would argue, some but by no means all countries] it lies thin with respect to the former and thick with respect to the latter.

In all societies, “doom deemers or lawgivers” passively reflect these imperatives, but they also register changes and even help to initiate them. Id. at 181-82.

59. Markovits, supra note 52, at 534.

60. Id. at 561.

61. See infra notes 86, 151, 158-59 and text accompanying notes 86, 122, 129-30, 141, 146-60.

62. I. Duchacek, Power Maps: Comparative Politics of Constitutions 3
aggregate, allocate, and delegate the use of those resources which ruling elites hope to lay their hands on. That is, in the Western sense, constitutions are public law analogues of property rules defining the exercise of control over resources. They are contract rules defining controls over and delegations of the right to use resources, and business association rules aggregating and disciplining smaller units of resource delegation and control. The bare-bones constitution seeks to maximize the use-value of political and economic resources in a somewhat less mechanical way than under Western private laws and much less mechanically than in *laissez faire* markets.

In the short run, the pursuit of wealth and power under an often fluid and short-lived constitution *seems* to be a zero-sum game. Winners are seen to profit only at the expense of the losers. On the other hand, the longer-term development potential of constitutions involves a raising of the game stakes by augmenting political and bureaucratic capabilities. This is far from a zero-sum game, in that those elites who already control or use resources can, *ceteris paribus*, expect to


63. Economic resources are land, labor, capital, technology, and entrepreneurship. The state can control and use any or all of these resources for political purpose, as in the Adola goldfields mined by convict labor in Haile Selassie’s Ethiopia. Predominately political resources include coercion, administrative capacities (especially the ability to communicate with, and regulate the everyday lives of ordinary people), ideology, and legitimacy. See *infra* notes 70-71. While economic resources are typically seen as factors of production and political resources as factors of distribution, these processes so interpenetrate as to become indistinguishable. Most individuals and groups in society take part in both production and distribution, having at their disposal incomes (including those imputed to subsistence peasants) and an (often limited) capacity to grant or withhold political participation and loyalty. See P. MERKL, *supra* note 56, at 306 (quoting David Easton); Tangri, *Economic Systems and Economic Efficiency*, in *THE SOCIOLOGY OF ECONOMIC DEVELOPMENT* 423, at 430 (G. Ness ed. 1970); Uphoff and Ilchman, *supra* note 6, at 80-83; N. UPHOFF AND W. ILCHMAN, *THE POLITICAL ECONOMY OF CHANGE* 53 (1969); G. WILLS, *supra* note 62. Ruling elites hope to exchange political “steering functions” for revenue from the economic system. Elites grant social welfare and related political and material rights, including the right to be left alone in some circumstances, in return for revenue and public loyalty. See J. HABERMAS, *supra* note 35, at 5, 8.
acquire new ones. This is not to say that these positive-sum possibilities are apparent to all of the players, who are not necessarily resource maximizers. A radical growth in resources also means more controllers, and the relative positions of the wealthy and powerful are eroded. If ruling elites are satisfied with their position, they may use their resources (including the constitution) to stem the growth in others' resources and ensure that such growth as takes place will remain firmly under the rulers' control. The effect of these "market" restrictions is to minimize political and economic changes and thus to perpetuate underdevelopment.

A. Political Stability and Instability

Kwame Nkrumah, the Black Star of a resurgent Africa, advised his fellows in the independence struggle: "Seek ye first the political kingdom, and everything else will be given unto you." This political

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64. G. ALMOND & G. POWELL, JR., supra note 15, at 68-69; G. LENSKI, supra note 30, at 315. See 1 J. BRYCE, supra note 5, at 131-32; C. GENONG & R. PEARCE, LAW AND SOCIETY 76 (1965); R. HALE, FREEDOM THROUGH LAW 132 (1952); Samuels, The Economy as a System of Power and its Legal Bases, 27 U. MIAMI L. REV. 261, passim (1973). Even in the short run, resources can always be used more efficiently so that all of the players—including much of the broader public in a few countries—can acquire additional wealth and power. Development is a very different process, however. It requires fundamental and longer-term structural transformations of subsistence and small-scale resource markets (broadly defined). Much of the essence of this process is encompassed by what some theorists have termed politicization: the altering of exchange relations in economic and social markets under national institutions established or transformed under law. It includes social mobilization; the growth of literacy, urbanization and occupational mobility; the channelling of demands through national political institutions; the growth of productivity through a government-sponsored equalizing of imbalances in the distribution of factors of production; and the monetization of the economy through a national network of exchange. Political development is closely bound up with economic development. "Political" and "economic" resources are interchangeable to a much greater extent than is commonly realized, and political interests (especially short-term political survival) will be preferred over attempts to promote a longer-term economic development when the two come into conflict, as they inevitably must. As I define it, development is the outcome of more numerous and mutually-profitable exchanges in broadened markets, which generate a cumulative expansion in the volume of political and economic resources. This is a complex process, one in which constitutional law plays an important but far from decisive role. See Eisenstadt, Social Change and Development, in READINGS IN SOCIAL EVOLUTION AND DEVELOPMENT 3, 4 (S. Eisenstadt ed. 1970); S. FINER, supra note 58, at 123; C. FURTADO, DEVELOPMENT AND UNDERDEVELOPMENT 84 (1967); B. GROSS, THE MANAGING OF ORGANIZATIONS 35 (1964); J. HABERMAS, supra note 35, at 36; J. HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 119-20 (1977); G. LENSKI, supra note 30, at 45 (describing as "privilege" what I have discussed as property); Uphoff and Ilchman, supra note 6, at 88-92; N. UPHOFF AND W. ILCHMAN, supra note 63, at 31, 97.

65. B. DAVIDSON, BLACK STAR, passim (1973); G. HEEGER, THE POLITICS OF UNDERDEVELOPMENT 112 (1974). Many of Mao's aphorisms—"Politics is in Command" and "Fight first the political fight"—have been interpreted to mean that producers must achieve
kingdom precedes other elite goals worldwide, if only because the opportunity to exercise statesmanship is a precondition to attaining many other goals. The most effective way to augment such power as an individual or group possesses is to put that power to use in attempts to capture the "state," 66 a portion thereof, or those who have already captured the state. It requires little power to capture a state, relative to the massive power the state can then exert on your behalf. This is particularly true in the many Third World countries where the state floats free of many socio-economic moorings, as an enclave in the capital city subject to a relatively easy and often temporary capture by the determined and able.

Precisely because wielding state power is so alluring, intense competitions for the opportunity to do so are widespread in the Third World and elsewhere. These competitions generate a political instability or disequilibrium, contrary to the expectations of American theoreticians of a political pluralism. Individuals or elites may write a constitution, but are then unable to cooperate in a coalition and to entrench themselves within the state. This state of affairs perpetuates underdevelopment. Many political and economic resources are dissipated by inconclusive competitions for power. Politically, the problem is which tradeoffs to make between survival in office in the short run or in the long run. On the one hand, it is the problem of placating powerful enemies or eliminating them by fair means or foul, and, on the other, creating new power bases to counter dissidents or winning the reality of political power. R. Dumont and M. Mozayer, Socialisms and Development 330 (1973). They are also statements of the practical philosophy of most politicians.

66. As used herein, "state" refers to the enduring portion of a society's political community, that which remains after a change in government or regime and which is recognized in the international law principle of state continuity. See Chandler v. D.P.P. [1964] A.C. 763, 790 (per Lord Reid) (in examining the U.K. Official Secrets Act, § 1, "prejudicial to the safety or interests of the state." "State" is "not an easy word"—'L'état, c'est moi'—which denotes the organized community rather than the government or the executive.); S. Finer, supra note 58, at 3, 13, 24; G. Marshall, Constitutional Theory 12, 30 (1971); A. Miller, supra note 6, at 55 (the American State, like the corporation, is a lawyer's invention designed to fill constitutional gaps); B. NWABUEZE, supra note 41, at 299 (the Third World "state exhibits every mark of permanence and continuity, its acknowledged artificiality notwithstanding"). This is not to say that distinctions between political policymaking and bureaucratic policy implementation, stressed in Anglo-American constitutional and administrative law, can be maintained with any degree of rigor. See P. Self, Administrative Theories and Politics 149-51 (1972); Waldo, Foreword, in The Administration of Change v, vii (E. Morgan ed. 1974). We should, rather, view constitutional law as a conveyor belt taking politics to the society and economy through the bureaucracy, a process carried out by bureaucratic politicians and politicized bureaucrats.
general support for good government.\textsuperscript{67}

The conventional recipe for political stability under these circumstances, is a constitution which delegates power to groups in proportion to their "real" power. The idea is that new constitutional norms will become durable over time because no group will disadvantage itself by challenging them. This durability means that changes in the occupants of high office will not disrupt rationality within government or the orderly processing of demands.\textsuperscript{68} However, matters are not so simple in the real world. The real power of groups is often impossible to assess and tends to change rapidly. As a consequence, a constitutional consensus is often elusive and ruling elites thus feel justified in imposing their values on the opposition groups who often take to the bush with guns. More fundamentally, those twin pillars of political stability—coercion\textsuperscript{69} and legitimacy\textsuperscript{70}—are in short supply relative to need in most countries.

\textsuperscript{67} See infra note 164 and text accompanying notes 163-68.

\textsuperscript{68} R. Jackson and M. Stein, Issues in Comparative Politics 196-97, 212 (1971); B. Russell, supra note 21, at 496. See 1 J. Bryce, supra note 4, at 141 (constitutional stability depends not so much on form as on an accurate reflection of socio-economic forces); O. Kirchheimer, The Socialist and Bolshevik Theory of the State, in Burin & Shell, supra note 21, at 1, 6 (prerequisites of democracy include an approximate equilibrium among classes).

\textsuperscript{69} The level of effectiveness of governmental coercion is lower than most theorists assume in the Third World and elsewhere, given the relatively small share of production that even the most authoritarian of regimes can harness for coercive purposes. Coercion is expensive to organize, chokes the energies of those using it, and stems the supply of information essential to rational decision making. Nevertheless, there is a strong case for using coercion strategically and in small doses to overcome major development bottlenecks, to raise levels of social discipline, and to strengthen the state. This may shock some Western jurists, but a reluctance to use coercion where necessary helps to perpetuate the "functioning anarchy" of political underdevelopment and the legal fiction that states of emergency are temporary measures taken under extraordinary circumstances. See D. Apter, Political Change 116 (1973); B. Moore, Jr., Social Origins of Dictatorship and Democracy 7, 21 (1973); F. Riggins, Frontiers of Development Administration 127 (1964); E. Schur, Law and Society 59 (1968); N. Uphoff and W. Ilchman, supra note 63, at 70; Barkun, supra note 51 at 117. But see M. Edelman, The Symbolic Uses of Politics 114 (1964): "The employment of language to sanctify action is exactly what makes politics different from other methods of allocating values. . . . Force signals weakness in politics, as rape does in sex." Id.

\textsuperscript{70} "Legitimacy" connotes a faith or trust in individuals, procedures and/or organizations, and is thus a resource in its own right; fewer resources of other kinds are needed to secure compliance with directives regarded as legitimate. The exercise of legitimated power (authority) denotes the ability to make people think that a claim to obedience is self-evident. See supra note 63, infra note 73 and supra text accompanying note 35. Political stability requires a belief in the legitimacy of the exercise of power. This belief must be held by other powerful individuals and groups, but not necessarily by the broader public. A. Stinchcombe, Constructing Social Theories 150 (1968). See O. Kirchheimer, supra note 40, at 439 (legality is only one step to a legitimacy resting on either social continuity or the attractive promise of a new social system).
Ideally, the relationship between coercion and legitimacy is such that might makes right, and right makes might, in a dialectic of effectiveness and validity. This can be described as one of the links between a constitutional reality of the exercise of power and an ideal of rightful exercise. The outcome of this dialectic is often the one described by Machiavelli’s dictum that good arms make good laws. He neglected to explain why this should be the case, but we can now see how directly politics and the power to make laws—for good or ill—grow from the barrel of a gun under crisis conditions in the Third World. Contrary to the expectations of, for example, Hans Kelsen, the constitutions of many countries are not “positivized”, but are subordinated to extra-legal sources of legitimacy. These sources include tradition, ideology, efforts to mobilize and/or terrorize the public for elite purposes, revolution, and the wise exercise of a discretion unfettered by law. But these legitimization efforts frequently fail. Such legitimacy as exists remains the property of charismatic individuals rather than more enduring institutions. This is so until it is dissipated through rapid-fire changes in regimes and by policies which foster public perceptions of governmental injustice and incompetence.


72. See L. McDonald, supra note 22, at 200-01; G. Sabine, supra note 4, at 331-33; Winiarski, supra note 4, at 268.

73. “[E]ven from a sociological point of view, only a domination considered to be ‘legitimate’ can be conceived of as a ‘State’. . . . The domination is legitimate only if it takes place in accordance with a legal order whose validity is presupposed by the acting individuals.” Eekelaar, Principles of Revolutionary Legality, in Oxford Essays in Jurisprudence 22, 27-28 (2d Series, A. Simpson ed. 1973) (quoting Kelsen). But see J. Habermas, supra note 35, at 98 (quoting Nikolas Luhmann). But see also M. Freeman, The Legal Structure 54 (1974); L. Friedman, supra note 71, at 54; J. Kautsky, Communism and the Politics of Development 181-82 (1968); McCarthy, Introduction, to J. Habermas, supra note 35, at xiv-xvi (discussing Habermas’ ideas); B. Moore, Jr., Reflections on the Causes of Human Misery 52-53 (1972); B. Nwabueze, supra note 41, at 25; G. Kennedy, The Military and the Third World 6, 19-22 (1974). Kennedy adds:

The legitimacy crisis in the developing world rests on the inability of any of the competing elites to sustain a political leadership for a long enough time for its concepts of public good to be supported by other elites and by the masses. The conflict situation is a permanent feature of the political system; it is pluralistic, involving conflicts within the governing elite . . . and between the traditional and modernising, between village and city, peasant and worker, landlords and tenants, collective and individual, Europeans and nationals, administrators and subjects, and the rising and falling groups.

Id. at 55.
The time-honored means of dealing with crises where “stock-piles” of legitimacy and coercion are inadequate is the politics of a paternalistic despotism, frequently petty and sometimes benevolent, under a monarchical constitution (as opposed to a constitutional monarchy). This is Machiavellism, of course, complete with legal tactics which echo the use of Roman Imperial law in early modern Europe. The broadest possible notions of state sovereignty are constantly reiterated, even in the face of an acute economic and military dependence on foreign patrons. The “monarch” (sometimes termed President or Chairman of the . . . Council) is wistfully portrayed as the fountainhead of all legitimate power. 74 Reason of state justifications are transmuted into a father-child relationship. The children are not to question what the father-king seeks on their behalf. Laws and institutions do not merely act in loco parentis, they are direct manifestations of the parent’s will. 75 Much as in Machiavelli’s Europe, the poor and powerless have little or no constitutional role to play. “Monarchs” seek to define them into “subjects,” which is to say objects of exploitation for benevolent or other purposes; or into “the

74. See Arkhurst, Introduction, in AFRICA IN THE SEVENTIES AND EIGHTIES 3 (F. Arkhurst ed. 1970); G. Heeger, supra note 65, at 1; Keohane, supra note 56, at 60, 68-69 (as Susser noted in 1519, it often takes an absolute ruler, aided by legal experts, to prevent the “fatal tendency” of groups to encroach on each other); G. Lenksi, supra note 30, at 295-96 (quoting Robert Belah); C. McIlwain, supra note 30, at 76-78; G. Poggi, supra note 35, at 60-62; Sawyer, supra note 22, at 24; Claude, supra note 30, at 13, 15. As the “father of the country,” only the leader (rarely a woman) knows how to reform political organization, corruption, and the moral, socio-economic and legal constitutions of the people. From this follows the right and power to do so, which was given its classic formulation by Ulpian: “What has pleased the prince has the force of lex” because the populus has conferred upon him its whole imperium and potestas. C. McIlwain, supra note 30, at 70 (quoting Ulpian). See A. Bonadeo, supra note 4, at 125; C. McIlwain at 70 (Ulpian’s assertion often applied during the Middle Ages, but Bracton rejected it for England); Keohane, supra note 56, at 48; G. Sabine, supra note 4, at 344-45.

75. See D. Apter, Ideology and Discontent, in IDEOLOGY AND DISCONTENT 15, 22 (1964); R. Dahrendorf, supra note 71, at 317; Esman, The Politics of Development Administration, in APPROACHES TO DEVELOPMENT at 88 (J. Montgomery & W. Siffen eds. 1966); M. Lerner, supra note 4, at 95; Levinson, Idea Systems in the Individual and in Society, in EXPLORATIONS IN SOCIAL CHANGE 297, 299-302 (G. Zollschon & W. Hirsch eds. 1964) (describing an autocratic ideology, composed of an ethnocentrism often shading into xenophobia, a strident nationalism and, occasionally, an anti-intellectualism—an ideology which posits the ruthless state Fichte and Hegel derived from Machiavelli); J. Markakis, ETHIOPIA 208 (1974); G. Sabine, supra note 5, at 349; Hazard, The Common Core of Marxian Socialist Constitutions, 19 SAN DIEGO L. REV. 297, 300 (1982) (the “programmatic element” in such constitutions reflects the fact that “each group of founding fathers has wanted its people to know what is planned for their future”); Markovits, supra note 52, at 521 (quoted infra note 158); supra note 30 and accompanying text (l’état, c’est moi coextensive with a paternalistic despotism); infra note 159.
masses," an undifferentiated lump which must be forced to see the coincidence of interests between rulers and ruled. Rulers also seek to use "public opinion" in an attempt to bypass certain elite demands by purporting to represent inchoate and inarticulate public desires (as in Nixon's "silent majority").

Balancing the harms and benefits from political performances, the poor and powerless usually find these performances seriously wanting. Their reactions range from bemused apathy to open rebellion. These can be significant causes of political instability, particularly when a Lenin, a Juan Peron or a Huey Long comes to organize these reactions for his own political purposes. By this route, demands from below for political changes quickly become stepping-stones to elite power. Elites are always restive when their usually extravagant demands for power, and also wealth, are not satisfied quickly. Since underdevelopment means that there is too little wealth and power to satisfy even the minimum demands of all elite groups, maneuverings among dominant forces within the existing political environment cannot palliate the disputes that arise. Frustrated elites will attempt to alter this environment, and ruling elites will resist these efforts unless they seek a political suicide. Where a rebellion, coup, or revolution succeeds, a new or altered constitutional document follows almost as a matter of course. But the constitutional system and its levels of development and political stability seldom alter significantly.

76. Constitutions are "frequently glorified as expressions of the popular will. In fact many . . . express the political leaders' concept of what the people should want (or . . . reject) for their own good." I. DUCHACEK, supra note 62, at 4. A ruler's or ruling elite's views of public aspirations are inevitably colored by personal experiences, the "mandate of ideological heaven," and special economic and "class" interests. Id. The U.S. President asserts a power to speak for the public interest, but his efforts are diluted and blocked by Congress, special interest groups, other nations, etc. A. MILLER, supra note 6, at 66. Many of President Carter's troubles stemmed from his being perceived an insufficiently strong father-figure. Id. at 132. See infra note 159.

77. See G. ALMOND & G. POWELL, JR., supra note 16, at 204; G. POGGI, supra note 35, at 36-42, 53-55, 79-84, 99-100; B. RUSSELL, supra note 21, at 716 (quoting Lord Byron); Claude, supra note 30, at 20. See also P. MERKLI, supra note 56, at 334: "A brand-new constitution shows its age, so to speak, by a pervasive sense of uncertainty in a world of power-hungry, if not hostile, group forces." When a "movement" which created the constitution breaks up, the whole system may fail to achieve a "working equilibrium." The constitution is then disregarded or discarded, especially if it attempts to introduce competition into a non-competitive political system. Id. at 334-35. Each elite group sees its power as open-ended, as potentially capable of an indefinite expansion and elaboration under a mutable positive law there for the taking. Elites' hopes and fears are fueled by foreign-inspired insurgency and counterinsurgency. In the face of such confining conditions, a revolutionary group "may lose its momentum, return to the incremental pattern, or even cave in completely. The regime's very weakness may have accelerated the simultaneous presentation of demands."
As the last few paragraphs have sought to demonstrate, political stability and instability result from the interaction of phenomena which are so complex and subtle, so different from one country to another, as to seemingly defy comparative analysis. I would nevertheless argue that almost all of the relevant aspects of political stability are encompassed by the practical effectiveness of constitutional attempts to regulate succession to high office. A country's rules of political succession carefully reflect the nature and extent of institutionalized dispute settlement—of a sanction for political failure short of brute force. All constitutions make some provision for succession. In this respect they resemble the last will and testament through which a powerful and wealthy parent attempts to control his or her family's future from the grave. But many constitutions fail to survive the political demise of those in whose interests they were drafted.

To take one general example, Muslim groups have created complex legal systems. Contrary to the "constitution" of the Prophet, however, political instability has prevailed within what should be a unitary community of the Faithful. The chief causes of this instability have been an inability to agree on the manner in which succession to the Caliphate should be regulated. Additionally, an other worldliness may foster the lack of interest in public affairs that has left Muslim countries with weak states in the twentieth century. These states cannot cope with demands from the modernizing elites who are usually dealt with ineffectively by branding them as irreligious. A few Arab leaders have attempted to stabilize, strengthen, and expand their polity under more modern constitutions: Qaddafi of Libya and Sadat of Egypt come to mind from opposite ends of the political spectrum. It remains to be seen whether they are able to dictate a successor with congenial ideological views, although it can be taken for granted that successors will desire stability and a strong state.

For many centuries, political stabilization in Muslim and in most

KIRCHHEIMER, supra note 58, at 391. The most important of these confining conditions is a political/constitutional underdevelopment which frustrates development unless a vicious circle of underdevelopment can be decisively broken.


[T]he region is still weak in comparison to the non-Muslim great powers . . . and there is no ideal Islamic state in existence. . . . Of Islam's first four caliphs, whose golden age Ayatollah Khomeini treasures, three were assassinated. More recently, . . . Syria's Hafez Assad and Libya's Muammar Qaddafi have only narrowly survived attempts on their lives [and Sadat was assassinated].
other countries was attempted through constitutional rules of a hereditary succession to office. These arrangements have proved anachronistic in the twentieth century because of the collapse of the traditional sources of legitimacy that supported kingship. Monarchs who seek to retain genuine, as opposed to symbolic, dynastic power have either been overthrown by coup or revolution or will soon meet this fate. Ethiopia, Iran, Saudi Arabia, and Morocco are prime examples. These monarchs are usually replaced by leaders and constitutions which are monarchical in all but name, yet too unstable politically to give rise to a dynastic rule. One of the motives for dynastic rule noted by Machiavelli and others remains nonetheless: a "prince" needs a power base larger than himself because he inevitably erodes his own power base by making enemies of those he injures while failing to satisfy the expectations of his always-fickle friends. The authoritarian constitutional arrangements used to cope with this problem in communist party-states have not been conspicuously successful. Arrangements developed in the West are all but irrelevant to many contemporary needs in the Third World and elsewhere. This is because Western constitutionalism represents an earlier stage of development: the evolution of liberal democracy.79

B. Strengthening the State

A major reason for the low levels of a government's legitimacy, and hence for its political instability, is that politicians have relatively little long-term bargaining power. They have little to exchange for the loyalty of the broader public. John Kenneth Galbraith's characterization of the Indian State as a "functioning anarchy"80 applies to many Third World states. It is easy to see why order and stability are

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79. See infra notes 117-19, 121, 127 and text accompanying notes 116-37. See also R. JACKSON & M. STEIN, supra note 68, at 196-97; L. MCDONALD, supra note 22, at 194; B. NWABUEZE, supra note 41, at 139. D. C. Rowat observes of the monarchical constitution that:

[Commonwealth countries] are steeped in the [English] monarchical tradition. . . . [Civil servants are servants of the king rather than of the public, . . . the king can do no wrong, and by the process of what one might call 'virtue by association' civil servants can never—well, hardly ever—do wrong. [Since] it was the king who was acting . . . they had to remain anonymous and their actions secret. These ideas . . . [tend to be] preserved mainly for the convenience of the government in power.


not immediately forthcoming. Traditional forms of authority are eroding, and inexperienced politicians and bureaucrats are being cycled through high offices. The mystery is, rather, how some states can continue to function at all. They are incapable of providing many of the services demanded by increasingly urbanized and sophisticated publics. They are often unable either to serve as counterweights for disgruntled elites or to co-opt elites by providing enough high-level civil service jobs. (In contrast, it is frequently asserted that the American State has been exactly as strong as necessary to survive; economizing in the use of political and economic resources which verges on a tautology in that America's generally weak state has in fact survived.) Civilians' dependence on soldiers is inevitable where politics are unstable and the state is weak. Less obvious is the reciprocal need embodied in a scholar's challenge to China's first Han emperor: "You conquered this country in a chariot—can you rule it from a chariot?" Some two hundred years after Machiavelli described many of these dangers of a weak state, the remedy (usually credited to the French and Prussians) was devised and implemented. The physical king became a more remote coordinator of military and bureaucratic structures, each of which began to operate under its own steam. In public law terms, this amounted to a detailed regulation of arrangements wholly internal to these burgeoning hierarchies. This process initially conferred no rights on private individuals or groups. The state was run under the swift decrees in bureaucratic or military jargon that represent the legal style used to deal with states of emergency today. Despite much subsequent talk of liberalism and {\it laissez faire}, ruling elites in Europe took care to strengthen the state's capacity for social guidance for their own purposes. This process moved forward because of nationalistic fervor, political, social and economic crises, the modernization of warfare, and the scramble for colonies.

81. J. ROBINSON, FREEDOM AND NECESSITY 52 (1970) (source not identified). See G. ALMOND & G. POWELL, JR., supra note 16, at 205; id. at 226 (the "major limitation on military organizations as contenders is . . . the fact that their internal structures are not well designed for interest aggregation across a wide range of issues or outside the purely coercive arena"); A. MILLER, supra note 6, at 8, 106 (citing Franz Neumann). See also Bienen, The Background to Contemporary Studies of Militaries and Modernization, in THE MILITARY AND MODERNIZATION 1, at 2, 16, 22 (H. Bienen ed. 1971); R. DAHRENDORF, supra note 71, at 303; S. FINER, THE MAN ON HORSEBACK 14 (2d ed. 1975); M. JANOWITZ, THE MILITARY IN THE POLITICAL DEVELOPMENT OF NEW NATIONS 2, 26-27, 77-78 (1964).

82. See supra notes 51-52 and accompanying text.

83. See S. FINER, supra note 58, at 12-13; O. KIRCHEIMER, supra note 21, at 7. The 19th century U.S. is a partial exception to this generalization. See infra notes 114-15, 132 and accompanying text. See also G. POGGI, supra note 35, at 138 (administrative traditions, often
Similar attempts to strengthen the state are haltingly underway in most Third World countries today. This process is difficult to understand if we succumb to the Anglo-American temptation to segregate administrative laws from the constitution. To do so overemphasizes the constitutional document and exaggerates the openness of its texture, its incompleteness, and thus the substantive weight of its often pious expressions of liberalism, Marxism, and so forth. The points of contact between politics and administration are legion in the Third World and elsewhere; the strength of the state, like the stability of politics, revolves around the ways in which coercion and legitimacy are organized. A major reason why many Third World states remain so weak is that nothing like Max Weber's legal-rational legitimacy exists. In all countries, the public bases its evaluations of the legitimacy of a particular segment of the bureaucracy on the gains and losses flowing from the particular program the segment implements. In addition, notions about the bureaucracy's overall competence and fairness often come into play. The larger the program and the longer it has been in existence, the better insulated its factors tend to be from public and political criticism and control. Consider the Internal Revenue Service and the Social Security Administration in the United States. Commonly in the Third World, the public's contacts with a bureaucracy perceived as venal and parasitic (in the sense that it consumes much more than it produces) almost always lead to harm rather than benefit. Programs are new and constantly being uprooted. The rapid-fire personnel transfers designed to frustrate the formation of cliques that endanger political stability also frustrate consistent policy implementation and the development of expertise. These tendencies in turn operate to minimize the kinds of organizational loyalty that constitute legitimacy within a bureaucracy. The secret of the strong state—that bureaucrats most effectively gain power as a group and at the expense of the public rather than of senior politicians or of each other—is not always grasped. This secret is, however, implicit in the raisons de groupe (reason of state justifications in their interest group form) of a "public sector imperialism."
There is a growing recognition worldwide that the state as a disciplined instrument of ruling elites functions best under stabilizing bureaucracies, carefully defined and coordinated under law. Nowhere is this more obvious than in communist party-states, where the memory of Stalin's "unrestrained and unpredictable hand" remains fresh. Much of the newer legal technology in communist party-states, and such institutions as the procurator, could be profitably adopted in the Third World. The main purpose behind strengthening a Third World state is to augment its "penetration." Penetration involves the extension of state authority into the vast rural areas and pockets of urban opposition. In addition to such obvious advantages of an increased penetration as improved tax collection, transportation, communication networks, and police efficiency, the reach of the state's claim to obedience (penetration) determines the extent to which a centralized legal system can be said to exist. Further, this penetration ultimately determines the state's territorial boundaries. The long-term prize to be sought through the strong state is an administrative machinery that runs automatically, the very kind of bureaucracy that is emerging to provoke some public outcry in Sweden. From the

[C]ommitment or loyalty to particular organizations is a very variable phenomenon depending upon such factors as social culture, career systems and (in public administration) political and professional allegiances. Organizations are frequently valued instrumentally rather than intrinsically, so that their survival or growth depends upon their capacity to serve the goals of their members and sponsors.

86. Hazard, A Soviet Model for Marxian Socialist Constitutions, 60 CORNELL L. REV. 985, 1003 (1975). See Hazard, supra note 75, at 306-08 (the 1977 Soviet Constitution restates the Leninist—post-Stalinist and, in China, post-Gang of Four—practice that the Party guides rather than interferes with the State); Comment, The Socialist Constitution of Cuba (1976), 17 COLUM. J. TRANSNAT'L L. 451, 499 (1978) ("unity of power" and "democratic centralism" identified as the underpinnings of government and state); Markovits, supra note 52, at 526 (law reforms seen as necessary by Eastern Europeans because contradictory, unorganized, or inaccessible laws provide too few guides to correct behavior); id. at 508 (quoted infra in text accompanying note 141).

87. See Brietzke, supra note 84.

88. See Diamant, Bureaucracy in Developmental Movement Regimes, in FRONTIERS OF DEVELOPMENT ADMINISTRATION 486, 513 (F. Riggs ed. 1971); Burin and Shell, supra note 21, at 59; C. WILBER, THE SOVIET MODEL AND UNDERDEVELOPED COUNTRIES 23 (1969); Claude, supra note 30, at 51-52; Klinghoffer, Modernisation and Political Development in Africa, 11 J. MOD. AF. STUDIES 1, 14 (1973); infra note 107; infra note 121 and accompanying text.
Western jurist’s perspective, so successful a bureaucracy becomes a 
major social problem. As the state moves closer to the people 
through an increased penetration, the need for public protection 
under law correspondingly increases. Third World leaders see the 
growth of a stronger state as a boon rather than a problem. They 
therefore dismiss the protections embodied in Western administrative 
laws as irrelevant brakes on governmental decision-making.

C. Constitutional Lawyers and the Third World

Faced with what they see as protracted crises of governance, 
many Third World leaders and lawyers seek accelerators of constitu-
tional development which stabilize politics and strengthen the state. 
Little wonder, then, that they so frequently reject the advice of West-
ern and communist party-state jurists, advice which is almost always 
based on ethnocentric analyses of constitutional normalcy rather 
than crisis. Their canons of normalcy seem designed to retard the 
rate of political and, with few exceptions, economic change. This 
more or less zero-sum game is played by imposing selective limits 
on political and bureaucratic activity. These limits, socialist legality/ 
the rule of law, are deployed in search what Ralf Dahrendorf terms an 
interchangeable law and order socialism/conservatism with a human 
face. Reforms in the absence of crisis are defensive in character, 
incremental “social engineering” projects (to use Pound’s term) im-
plementing rulers’ calculations of the minimum of response or adapta-
tion that will avoid future crises. Miscalculation is as frequent as the 
crises which result. Transplanted to the Third World, these constitu-
tional policies perpetuate underdevelopment and permit most rulers 
to remain in power only in the very short run. As Machiavelli sensed 
long ago, there are no constitutional panaceas ready to be trans-
planted to polities suffering the pains of political underdevelopment. 
As the rapid demise of independence constitutions in the Third World 
suggests, the survival rate is about as great as heart transplant surgery.

89. See supra notes 47-50, 55 and accompanying text; infra notes 90-91, 136-37, 146 and 
accompanying text. The constitution-as-accelerator is a far from unmixed blessing, given the 
many stupid decisions taken by overly-hasty regimes in the Third World.

90. See supra note 64 and accompanying text.

manger & Morris, supra note 48, at xii (quoted supra in note 48); T. HARTLEY & J. GRIFFITH, 
GOVERNMENT AND LAW 11 (1975); G. POGGI, supra note 35, at 122; K. ZWEIGERT & H. 
KÖTZ, supra note 9, at 296-99.

92. See G. ALMOND & G. POWELL, JR., supra note 16, at 231; M. LEHNER, supra note 4,
The political problems faced in the Third World are, if anything, more intractable than those Machiavelli perceived. A great deal has happened since the Renaissance, much of which presses relentlessly upon the Third World in spite of its underdevelopment. The "Western states had two centuries or more for their 'age of absolutism,' a century and a half for their 'age of democratization,' and a century for their 'age of welfare.' The new nations must somehow telescope all three into one single age." How do Westernized constitutional lawyers react to this state of affairs? S.A. de Smith finds that: "Constitutions in developing countries are apt to prove frail structures, mainly because so much value is attached to the acquisition and retention of political power." To the same effect, Benjamin Nwabueze argues that the greatest danger to "constitutionalism" in the Third World is the politicians' capacity to distort and vitiate any

at 87. The legal incentives and constraints may be the same for Western and Third World constitutions, but the non-legal ones will differ substantially. Irreconcilable conflicts were written into independence constitutions in the Third World, between traditional and Western concepts and between English/Continental notions of a coordination of powers and an American separation of powers subject to judicial review. These recipes for ungovernability proved far removed from the comparative lawyer's "happy plagiarism" from foreign traditions. R. Seidman, supra note 79, at 34-35, 357, 374, 380, 395. See C. Clapham, Haile Selassie's Government 181 (1969); G. Marshall, supra note 66, at 1-2; K. Zweigert & H. Kötz, supra note 9, at 13. Comparative law scholarship too often focuses on the irrelevant issue of the faithfulness with which foreign models are reproduced in the Third World. Yoshio Mizuta uses a vivid metaphor to explain the "resistance, expulsion, compromise or fusion" that took place with regard to foreign law in Japan. Some rules were admittedly assimilated, just as "a lion's flesh is composed of the mutton it devoured. However, analysis of the lion's flesh will not reveal the existence of the devored mutton . . . [some of which was] vomited or left indigested." Mizuta, Influence of Foreign Law and Comparative Jurisprudence, in 2 Inchieste Di Oiritto Comparato 491 (M. Rotondi ed. 1973). I would add that in the Third World low levels of penetration mean that state law has not yet "devoured" many social institutions. See supra text accompanying note 88.

93. E.g.: The sudden collapse of colonialism, a sudden mass entry into politics (and, often, an equally sudden exit from it), strident demands for modern goods and services made by a growing bureaucracy, a relatively well-disciplined military, and segments of the public, and the appeal of militant foreign ideologies.

94. G. Almond & G. Powell, Jr., supra note 16, at 362. See also M. Lerner, supra note 4, at 84; R. Unger, Law in Modern Society 135 (1976). For example, the drama and failures of the Revolutions of 1640 and 1789 involved a very gradual replacement of monarchists by republicans and a long struggle to write constitutions. In contrast, the time to debate political changes is a commodity in short supply late in the twentieth century. See Friedrich, The Political Theory of the New Constitutions, in Constitutions and Constitutional Trends Since World War II 13, 14 (A. Zurcher ed. 1951); Burin & Shell, supra note 21, at 391; M. Lerner, supra note 4, at 88-89; G. Poggi, supra note 35, at 110-11. This is not to suggest that Third World leaders are incapable of profiting from the lessons of history, although some seem unwilling to do so.

governmental form that can be devised. These statements can hardly be termed false. But they risk creating a mythology of Third World constitutionalism by suggesting that something essentially different is going on in the Third World. Few politicians anywhere do not seek power avidly, even by distorting and vitiating institutions more hallowed than the newly-created ones in the Third World—when the politicians can get away with it.

Communist party-state constitutions and some Third World constitutions have superficial similarities. There is no pretense of a positivist segregation of law from the pragmatic exercise of political and economic power, and rule is by ukaz under a penal model of politics. But the class relationships that constitute politics in the socialist lexicon either do not exist in the Third World or are of a very different type than those projected under conventional Marxist analysis. Marxist constitutions are “action programs” which prefer the implementation of “a demonstrable doctrine of salvation” to “the guarantee of formal areas of freedom such as underlie the rules of procedure in Western countries.” Many Third World constitutions can be so characterized. But, instead of Marxism, the “doctrine of salvation” is likely to be a relatively autochthonous development creed or a cynical manipulation of traditional ideologies in an attempt to perpetuate the rule of particular individuals or elites. Since evanescent policy pronouncements are paramount, it is not the intention of Third World and communist party-state constitutions to offer Western-style rights in the absence of a political (as opposed to a formally legalistic) corroboration. These similarities notwithstanding, the legal theories of communist party-states contain much of the boosterism and the “in-

96. B. NWABUEZE, supra note 41, at 139. But see R. SEIDMAN, supra note 79, at 420: “African political elites were not so much evil as human. Growing up in an acquisitive milieu, acting within legal institutions that encourage get-rich-quick, African elites typically did not resemble angels.” Are matters so very different in the U.S.?


98. K. ZWEIGERT & H. KÖTZ, supra note 9, at 326 (emphasis deleted). See Szabo, supra note 86, at 67-68; Ghai, State, Law and Participatory Institutions: The Papua New Guinea Experience (1981) (7th Law and Development Symposium paper, Windsor, Canada); Hazard, supra note 86, at 986 (quoting Lowenstein); infra notes 158-59 and accompanying text. In the Marxist-Leninist view, “law is not independent or self-determining and cannot reinforce itself from sources outside social-economic reality.” K. ZWEIGERT & H. KÖTZ, supra note 9, at 296-99. This is not to say that in Western legal systems law is “policy free”; it does have the additional function of setting limits to politics. Id. at 299.
tellectual imperialism" of their Western counterparts when viewed through Third World eyes. Until recently, communist party-state theories were primarily devoted to a posteriori reason of state justifications of particular policies in particular countries. Many Third World lawyers are fighting to free themselves from a foreign legal tradition imposed under colonial rule. Little wonder, then, that even the committed Marxists among them are reluctant to adopt the ethnocentricities of another foreign system.

The emergence of more or less autochthonous constitutions in the Third World suggests the need for autochthonous comparative law techniques to explain them. If these techniques focus on the major constitutional issues in the Third World, they can also be used to generate new and interesting analyses of Western and communist party-state constitutions. The development potential inherent in a constitution is the opportunity to derive an "ought"—a moral imperative—from the "is"—the day-to-day reality of underdevelopment. This takes into account the "can" of political and economic resources which ruling elites hope to mobilize toward this end. This process can be a dynamic one, in which a change in the "is," "ought," or "can" fosters changes in the other parameters which generate still further changes. But the pull of the "is" of underdevelopment and of the vicissitudes of local politics is often so strong as to negate these changes and force a return to a low-level disequilibrium. Clearly, these processes cannot be understood if we pursue conventional positivist analyses of the "is" to the exclusion of the "ought." Nor can we define the "ought" on behalf of Third World elites as a Western constitutionalism or the transition to a dictatorship of the proletariat. While Western jurists usually present a constitution as the end-product of processes giving rise to a political consensus, constitutions are always evolving to reflect hopeful, tired, or cynical attempts to re-

99. See R. David & J. Brierly, Major Legal Systems in the World Today 82, 158 (1968); K. Zweigert & H. Kötzt, supra note 9, at 32; Hoffheimer, supra note 3, at 518; Rheinstein, Comparative Law, 22 Ark. L. Rev. 415, 422 (1968). Communist party-state theories, like those of the common law and the civil law, reflect a rather unyielding legal tradition consisting of "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught." J. Merryman, supra note 58, at 1.

100. See supra notes 62-64 and accompanying text. This is, of course, a different constitutional "is" and "ought" from the one described in supra note 71 and accompanying text. Cf. infra notes 168-69 and accompanying text.
create a consensus out of political competitions.\textsuperscript{101}

Within the parameters of these generalizations, the nature of rules and institutions embodied in a particular constitution depend upon the notions of legal style prevailing in a particular country. Many comparative lawyers\textsuperscript{102} identify five ingredients as constituting legal style: (1) historical background, (2) prevailing ideologies, (3) the nature of especially prevalent institutions, (4) characteristic modes of legal thought, and (5) the kinds of legal sources acknowledged. Only the first two have any real relevance in the Third World. It seems that the most significant dimensions of constitutional styles everywhere are the political and economic means which elites are constrained to adopt in dealings with each other by the circumstances of a particular (under)development and the benevolent, manipulative, or malevolent means they choose for dealings with the poor and powerless. More research is required to ferret out the implications of various combinations of choice and constraint, but an excellent start has been made for the Third World by Almond and Powell.\textsuperscript{103}

V. A SUGGESTIVE TYPOLOGY

A comparative lawyer seeks to push back the frontiers of ignorance by comparing the unknown with what is reliably known about legal systems. (S)he thus needs fixed standards against which to compare the variables of the legal systems chosen for study. Taxonomies or typologies of comparative law\textsuperscript{104} provide fixed standards analogous to those used to study languages or plants. Unfortunately, the


\textsuperscript{102} See K. Zweigert & H. Kôtz, supra note 9, at 61-62.

\textsuperscript{103} See G. Almond & G. Powell, Jr., supra note 15, at 204-07, 220, 231, 371-87, 420-21; infra note 107 and text accompanying notes 109, 111, 132-33, 138-45. See also Middlebrook & Palmer, Military Governments and Political Development: Lessons from Peru, in 5 COMPARATIVE POLITICS SERIES 7, 43-48 (A. Zolberg & R. Merritt eds. 1975); A. Stephan, The State and Society: Peru in a Comparative Perspective (1977). Almond and Powell identify five “models,” each of which arguably spawns a distinctive type of constitution: 1) democratic-populist governments such as Nkruman’s Ghana; 2) governments such as Brazil’s and Indonesia’s, where the middle class pushes for economic growth while the cost to government of keeping order escalates wildly; 3) a more equitable “authoritarian-technocratic-equalitarian” strategy pursued in, for example, Kenya and South Korea; 4) the “authoritarian-technocratic-mobilizational” strategy used in Taiwan, Cuba, Mexico and Tanzania; and 5) such neo-traditional or “neo-patrimonial” states as Saudia Arabia and Kuwait.

\textsuperscript{104} See, e.g., Sawer, supra note 22, at 16 (discussing René David’s taxonomies); L. Wolf-Phillips, supra note 62, at 10-23 (discussing classifications by James Bryce, Sir Kenneth Wheare, Karl Loewenstein, and Benjamin Akzin); K. Zweigert & H. Kôtz, supra note 9, at
ethnocentricities and the arid conceptualism of most comparative law typologies mean that classifying legal systems is a good deal like basing botany on the study of cut flowers grown in a hothouse. The political and economic systems of various Western countries seem to function equally well or poorly under rules or institutions which differ considerably from a juridical point of view. However, such very different countries as France and Haiti are deemed to be closely related within a "family" of law.  

While the comparative study of constitutions has given rise to a surfeit of typologies, the need for a relevant and more analytically useful typology is manifest. The categories described by such a typology must be neither so numerous as to make comparisons impossible, nor so few as to make contrasts impossible. These categories must foster explanations of why certain constitutional forms arise in given circumstances. Additionally, they must also help to predict what constitutional changes will accompany changed circumstances. The typology must be rather loose in structure, so that it can be tailored to fit real-world facts rather than, as is often the case, the facts being tailored to fit the typology. While many classifications are possible within these constraints, I have argued that the most relevant perspective for comparative and constitutional lawyers concerns the logic of

58-59; Kozolchyk, supra note 7, at 109-10; Claude, supra note 30, at 7 (Jellinek's typology) (quoted infra at note 151).

105. See L. Friedman, supra note 71, at 208; J. Hall, supra note 8, at 3-4 (discovery of legal similarities often dissolves perceived differences among peoples); Sawyer, supra note 22, at 18 (in modern Romanistic—and, I would add, in much of common law—scholarship "there is a tendency . . . to adopt value judgements based more on questions of literary style and intellectual brilliance . . . than on either the social suitability or the moral quality of the legal material in question"); K. Zweigert & H. Kotz, supra note 9, at 66 (the "legal ideologies"—political, economic and religious doctrines—"of the Anglo-Saxon, Germanic, Romanistic and Nordic families are essentially similar . . ."); Hoffheimer, supra note 3, at 516 ("an attempt to make Chinese institutions and processes fit theories and paradigms evolved in different cultural settings is likely to obscure the fundamental norms, assumptions and purposes of Chinese law"); Kahn-Freund, On Uses and Misuses of Comparative Law, 37 Mod. I, 8-10 (1974).

106. S. Finer, supra note 58, at 30-40; K. Zweigert & H. Kotz, supra note 9, at 38. The process of comparison involves three stages: 1) select criteria to ascertain comparability; 2) establish similarities and differences among phenomena; and 3), on the basis of (2), establish the essential traits of phenomena and use these traits as overarching definitions. Pécéti, supra note 8, at 52. This is what I have attempted to do. Having identified traits common to nearly all constitutions, I move on to examine the common traits of a specific group of constitutions—the grounds for dividing or classifying legal systems. While doing so, I seek to ignore the detail of norms and institutions peculiar to one constitution. These details may be interesting in their own right and help to convey the "flavor" of a particular constitution, but they only serve to clutter or confuse comparative analyses. See Eörsi, supra note 1, at 181; Kahn-Freund, supra note 8, at 379. Cf. J. Hall, supra note 8, at 117-19; Pécéti, supra note 8, at 55.
constitutional development and of its twin imperatives, political stability and the strong state. With no pretense to a mathematical precision, a graph can be derived by plotting the degree of political stability on one axis and the strength of the state on the other. After additional research into the determinants of stability and strength in different countries, such a graph could locate a constitution spatially in relation to others and describe its forward movement or backsliding over time.

But a more analytically useful starting point is to derive as ideal types the four possible combinations of two bipolar variables: polit-

The examples cited in the typology (infra text following note 109) can be “graphed” as follows:

- Most Third World states and the states of Renaissance Northern Italy are bunched near the intersection of the axes (0), and many seek to move along the broken line toward 1, Sweden. Clearly, Third World states are not fated to tread the same path as other states on the graph. See supra text accompanying notes 93-94, and infra notes 133-37. NB: the overall tendency is convergence in the upper middle portion of the graph which I define as the social democratic/welfare state. See infra notes 118-19, 127 and text accompanying notes 119-37.
- Germany trades off a strong state to obtain political stability during movement from the Nazi regime to the present Federal Republic, 2).
- Compared to Germany, Stalinist Russia trades less strength to obtain less stability as the present U.S.S.R. 3).
- The nineteenth century U.S. trades a bit of political stability for narrow increases in state strength, 5) —1/2 6). See infra text accompanying notes 116-21, 128.
- Although the U.K., like the U.S., has often been classified as a liberal democracy (see infra note 114 and text accompanying notes 114-15), it starts out in the nineteenth century at higher levels of stability and state strength than those of the U.S. The U.K. trades off between these imperatives in ways which bring it much closer to the welfare state than is the U.S. This is because a strong (for its time) bureaucracy grew stronger, the tenets of a laissez faire liberalism notwithstanding, for the reasons Rowat gives (quoted in supra note 79).

108. I.e., Max Weber’s term for entities (types of action, societies, institutions, etc.) constructed “hypothetically” from salient elements and for purposes of comparison and theoretical explanation. The Fontana Dictionary of Modern Thought 296 (A. Bullock & O. Stallybrass eds. 1977) (entry by Julius Gould). Ideal types have also been called “constructed types,” types “adequate on the level of meaning,” the meanings meant by the actors concerned (the impact of thought on action), and even “real types.” Ideal types include Protestantism, economic man, oligopoly, and constitutional monarchy. They are discovered through an in-
ical instability/stability, and weak state/strong state. The typology looks like this:

**Political Instability → Stability**

<table>
<thead>
<tr>
<th>weak state</th>
<th>I. &quot;doubly&quot; underdeveloped (almost all Third World states)</th>
<th>III. liberal democracy (nineteenth century U.S. &amp; Britain)</th>
</tr>
</thead>
<tbody>
<tr>
<td>↓</td>
<td>II. authoritarian regimes (Nazi Germany, Stalinist Soviet Union)</td>
<td>IV. social democratic or welfare states (Sweden)</td>
</tr>
<tr>
<td>strong state</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

These ideal types are useful starting points precisely because it is difficult to find real-world examples corresponding to types II, III and IV! The ideal types focus our attention on exploring and delineating the boundaries between regime types and the movement over time of particular countries along and through the boundaries between types. Vague and shifting these boundaries may be, yet they offer a fair amount of resistance against attempts to penetrate them while chang-

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109. See G. ALMOND & G. POWELL, JR., supra note 16, at 202; see also R. ARON, supra note 84, at 233 (emphasis deleted):

The antithesis between the constitutional-pluralistic regime and the monopolistic regime can be explained in four different ways: antithesis between competition and monopoly; between the constitution and the revolution; between the pluralism of social groups and bureaucratic absolutism and, finally, between the state with parties and the party-state (. . . secular-state and ideological state).

Id. One reason why social democratic/welfare states are a natural endpoint of constitutional development (for the foreseeable future and assuming an economy capable of supporting them) is that they embody workable compromises (syntheses) of Aron's four "antitheses" for many countries. Richard Claude's conclusions remind us of the socio-legal context of this process:

First, a secure legal system is necessary for the dispensing of justice with regularized procedures for settling disputes. Second, assuming a secure legal system, the more economically simple and socially homogeneous the social structure, the greater the reliance on rule-making and rule-adjudication based on systems of personal relationships, customary law and religion. Alternatively, assuming a secure legal system, the more economically developed the social system, the greater the tendency to develop institutionally differentiated legal structures and flexible and rational dispute settling procedures. Where these conditions prevail, construction of a human rights system becomes possible through the development of legislation, regularized settling procedures and/or judge-made law—the institutional tools for adapting a legal system to incremental social and political change.

Claude, supra note 30, at 14. His last few words may seem to express a dubious notion, until it is realized that stability requires the capacity to adjust to incremental changes as well as to crises or revolutionary changes.
ing the basic nature of the polity. 110

Consider, for example, the changes occurring in Franco's Spain and Salazar's/Caetano's Portugal. Surely these were countries somewhere on the borderline of being doubly underdeveloped, pushing toward the strong state under authoritarian constitutions yet unable and unwilling to stabilize politically. The means chosen to pursue authoritarianism made stability turn on the heartbeats and attention span of one man. This unstable structure prevailed despite substantial support from right-wing elites whose political tactics and beliefs were (and largely still are) a major constraint on doing anything else. A diehard left was nurtured underground and acquired its appeal by democratizing an ideology seen by the public as a counterweight to a by-and-large despised despotism.

That these states were not doubly underdeveloped in the Third World sense is illustrated by the closest approximation to a laboratory experiment as occurs in comparative law and politics. Portugal and Ethiopia both began protracted revolutions in 1974. Initially, revolutionary events and military-civilian relations in these countries were astonishingly similar. But events and constitutions soon diverged substantially. Portugal was able to take halting steps down the road to political development, towards social democracy or the welfare state. Ethiopia slipped back into imitations of the underdeveloped political style of the Imperial regime. 111 Spain's Juan Carlos is an eager participant in an experiment similar to Portugal's. He was able to forestall a coup attempt by the Civil Guardia, while the Ethiopian Emperor, the Iranian Shah, and the Saudi kings were unable and unwilling even to attempt genuine reforms. Why should this be so? The combinations of choice and constraint which locate polities on and around the boundaries of my typology and enable us to plot the courses of these polities are deserving of close study.

A. Earlier "Stages" of Constitutional Development: Authoritarianism and Liberal Democracy

Historically, the initial thrust of constitutional development was along the axis of strengthening the state—towards authoritarianism. A Machiavellian bare-bones constitutionalism, and the regular use of reason of state justifications shows this. The authoritarian constitution-in-the-books confers all power on a state responsible to a Machia-
vellian *condottiere*, with no fully settled delegations to citizens, courts or, often, legislatures. This constitution-in-action reflects the fact that no leader can physically manage so wide a span of control. Governance is accomplished through concentrated powers exercised by an inherently unstable balance among military, bureaucratic, and political factions.  

So it has been since Machiavelli’s day. The means of insuring the loyalty of groups powerful enough to contemplate dispensing with the *condottiere* have yet to be found—apart from the crude terror that must sap the energies of the state as well as of the people. Liberalism arose as a European attempt to restrain this tendency toward an authoritarianism. Such authoritarianism either extinguishes itself or degenerates into tyranny, without creating the institutional foundations for political stability. The essence of liberalism, the authority to challenge authority, was first countenanced under a politics tolerant of divergences in *elite* opinions and was then given a formal constitutional framework. Consequently, the bonds of elite organizations began to weaken. Elites fragmented into smaller interest groups able to compete with each other without disrupting overall political arrangements.  

Liberal constitutionalism amounts to an admission that the legitimation of a regime does not rest exclusively with one elite group or another. Under “rules of the game” such as English “gentlemen” learn at public (private) schools and in their clubs, there is tacit agreement over allowing elections to determine who takes the government—so long as the game lasts. Leaders and parties relinquish office because they know that their opponents will do the same when an-
other turn of the wheel ousts them from power. By comparison, in the Second and Third Worlds it is notoriously difficult to return to political life (and, often, to survive physically) after leaving office.

Liberalism can be seen at work most clearly in the development of the British Constitution. There were few of the sudden and dramatic changes that the British were later to foster in the Third World. Flexible constitutional "conventions" thus changed rather painlessly (from the elites' standpoint) as ideas and political circumstances changed at little or no sacrifice to a growing bureaucratic capability. In contrast, liberalism arrived late in a France where the bureaucracy had already firmly entrenched itself: "Without competitive parties until the fin de siècle years of the Third Republic, the French enjoyed no continuous organizational framework for establishing rules and procedures useful in integrating diverse interests and in bargaining for goals and resources for which those involved might otherwise compete in a mutually destructive manner." The result, of course, was a very different constitutional development from Britain's.

In the United States liberalism was initially pushed to its furthest extremity. Stability was deemed so essential yet so difficult to achieve at the founding of the Republic that it was purchased at the price of an extremely weak federal State. This most un-Machiavellian step amounted to a storing up of trouble for the future. A weak State made judicial review both likely and necessary for resolving disputes. Judicial review could emerge and gain influence because, until Dred Scott, review was carefully engineered to avoid most "political" questions touching on a stability achieved through political bargaining. In any event, judicial review could not endanger an entrenched bureaucracy which did not exist. From Dred Scott in 1857 to the Supreme Court's "switch in time" in 1937, judicial review was used sporadically to keep the State underdeveloped. The constitution-in-the-books solidified during liberalism's heyday, and such adaptations to changed circumstances as occurred are the result of a tortuous re-

114. S. De Smith, supra note 16, at 35. See G. Barraclough, An Introduction to Contemporary History 146 (1981) (quoting G. Liebholz): Parliament is little more than "a meeting place in which rigorously controlled party delegates assemble together to register decisions already taken elsewhere. . . ."

115. Claude, supra note 30, at 43.

116. Dred Scott v. Sandford, 60 U.S. 393 (1857) (holding that no freed slave could hold federal citizenship—now overruled by the 14th Amendment—and offering the politically disastrous dictum that the Missouri Compromise was unconstitutional).
interpretation. The American repudiation of a cabinet government in parliament made for intricate and arduous lawmaking processes, lacking in the overall coordination needed to strengthen the State. Federalism may have kept the states together until the Civil War, but it also permitted sectional interests to repress the nascent pushes toward equality and broadened participation that led to the evolution of social democracy (under a stronger state) in other countries.\textsuperscript{117}

Why characterize one of the strongest of military powers as a weak state? The point is that civil-military relations in the United States have been handled during real and perceived crises by aggrandizing the military and such related bureaucratic hierarchies as the F.B.I. and the C.I.A.—a massive but very narrow strengthening of the state. This has had the effect of skewing policy making and implementation in particular directions because of the exercise of narrowly-focused, unchecked state power. Yet it enables many Americans to preserve the comforting image of living in a liberal democracy. Else-

\textsuperscript{117} G. BARRACLOUGH, \textit{supra} note 114, at 146; Claude, \textit{supra} note 30, at 38-39 (citing Barrington Moore Jr.'s discussion of politics in the American South); Giraudo, \textit{Judicial Review and Comparative Politics}, 5 \textit{HASTINGS CONST. L. Q.} 1137, 1138-39, 1159-63 (1979) (an excellent survey). Groups and individuals must strike a balance between the costs of having their preferences overridden and the costs of discussion and stalemate. Heymann, \textit{The Problem of Coordination}, 86 \textit{HARV. L. REV.} 797, 864 (1973). The U.S. Constitution overwhelmingly prefers to incur the latter set of costs. In the U.S., judicial review sustains the aversion to absolutism that characterizes the liberal theory of law and state. Murphy, \textit{supra} note 56, at 129. \textit{See also} Claude, at 38-39: "[T]he Civil War abolished the institution of slavery and introduced a deeply divisive element of racial stratification into a struggle for civil involvement. Because of the basic color divisions . . . , the quest for democratization gained association with issues of sectionalism, ethnicity, civil rights and educational policy." Vogel, \textit{Why Businessmen Distrust their State}, 8 Br. J. Pol. Sci. 45, 53-54 (1978) adds that:

\textit{[T]he American state remains, by virtually every conceivable qualitative and quantitative criteria, the least interventionist in the industrial world. By focusing on the level of subsidies and regulation . . . writers on the American corporation have overlooked the extraordinarily passive role of the American state with respect to the direction of economic development. The United States is virtually the only capitalist nation which engages neither in an incomes policy, wage-price controls, nor in national planning; and the degree of state participation in production is smaller in the United States than in virtually any other nation in the world—industrial or nonindustrial . . . . The American state still lacks essential information about the basic functioning of the economy, and even if that information were available the fragmentation of authority and power within the federal bureaucracy would make any coordinated government policy extremely problematic. \textit{See also} COMPARATIVE CONSTITUTIONAL LAW vii-viii (M. Cappeletti & W. Cohen, eds. 1979): "\textit{[D]if}ferences in procedural systems and institutions present the most marked contrast between common law and civil law countries. On the other hand, basic rules of fair procedure, such as judicial independence and impartiality and the parties' right to be heard are essentially shared in common by Western legal cultures." These aspects of "Western legal cultures," the products of liberalism's heyday, are legally entrenched so as to survive the collapse of liberalism. (Many, including the author, think this a fortunate anachronism.)
where in the West, it became apparent by the end of World War II that liberal democracy had reached a dead end from the standpoint of political and constitutional development. The developmental democracy in the later writings of J.S. Mill and in those of Woodrow Wilson and John Dewey had failed to take account of the extent to which a stronger state had to be purchased at the expense of governments’ responsiveness to electorates. 118

The historical reasons for liberalism’s failure, and the new directions political and constitutional development took as a consequence, are carefully traced by Otto Kirchheimer:

[Constitutions were] used by the liberal forces for assigning to the ruling nobility a specifically circumscribed sphere of competence. The process was rather drawn-out because the only weapon the liberal forces could bring to bear in the contest was their economic position of strength. The delay led to the last phase of the battle being fought while the working class . . . was already pressing forward. Thus, as a result of their common front against feudal semi-absolutism, the working class was brought into closer contact with liberalism. In view of the inevitable gap between them, caused by their contradictory economic interests, the joint struggle of liberalism and Social Democracy for political and ideological freedom was a welcome factor making for cohesion. 119

The “working class” in most Western states found little comfort in the apparent universality of constitutions creating the negative state. Rule formalism and proceduralism offered no creative resolutions of

118. See G. BARRACLOUGH, supra note 114, at 220 (by early in the twentieth century, liberalism was a “jaded force” tacitly displaced by new socio-economic policies); M. LERNER, supra note 4, at 97 (quoted infra note 121); C. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 5, 26, 48, 76 (1977) (discussing ideas of Mill, Wilson, and Dewey); A. MILLER, supra note 6, at 150 (the means of altering the American Constitution—pretense and fiction—“have about run their course,” and institutions show a hardening of the arteries). Alexander Hamilton offered a prescient explanation for the militarization of the American State: “[E]ven the ardent love of liberty will after a time give way to the dictates . . . of safety from external danger. . . . To be more safe, they at length become willing to run the risk of being less free.” A. MILLER, supra note 6, at 53.

119. O. KIRCHHEIMER, supra note 68, at 3-4. In the mid-Victorian England of Bagehot and Trollope:

[I]t was changes in the distribution of wealth rather than changes in legislation or social or political theory which were challenging the existing basis of the constitution [i.e., liberalism]. There was a distant but clearly apprehended danger of a new working-class hegemony, of an attempt to build a paradise for the poor. . . .

A. BRIGGS, VICTORIAN PEOPLE 103 (1972). In America, there is an unbridgeable gap between Roy Harrod’s “democratic wealth” (Fred Hirsch’s “material economy”) and Harrod’s “oligarchic wealth” (Hirsch’s “positional economy”). A. MILLER, supra note 6, at 19. This gap has led to rather inconclusive constitutional struggles since at least the Age of Jackson.
the crises arising long after liberal constitutionalism's heyday and bearing down on the poor and powerless. Administrative functions had to be mass-produced from scratch and immunized from judicial negation. In another article, Kirchheimer concludes that:

Economic liberalism's attack on the compatibility of the rule of law and collectivist forms of society are rearguard skirmishes. The more intensively a particular state went through a period of massive economic and social dislocation and the resultant abandoning of [liberal] constitutionalism, the more urgent thereafter the insistence that community planning for decent living... constitutes a task postulated by the very constitutional order. The Rechtsstaat is transformed into the Sozialrechtsstaat.

Less obvious, perhaps, is the fact that authoritarianism has also exhausted itself from the standpoint of political and constitutional development. Although the Cold War prompted many Western social scientists to devote much thought to the concept of totalitarianism and to its constitutional forms, this concept has been jettisoned from the theoretical baggage of all but the most dedicated of Cold Warriors. For the foreseeable future, a less-than-totalitarian Nazi Germany and Stalinist Russia represent the high-water marks of authoritarianism. The opportunity costs of such strong states, trade-offs measured in terms of a political instability, are simply too great to bear. The prompting towards totalitarianism is an egotistical paternalism which cannot find satisfaction in a regime coextensive with the egotist's lifespan.

Ironically, definitive demonstrations of this proposition were late

120. O. Kirchheimer, supra note 68, at 7; Schochet, supra note 56, at 4-7. See O. Kirchheimer, supra note 40, at 444 (quoted infra note 158).
121. O. Kirchheimer, supra note 40, at 435. See Murphy, supra note 56, at 144: Because it constantly resorts to antecedent explanations of social life, liberalism has been unable to resist the absorption of the body politic by a compulsory and potentially arbitrary state power. Further:

Public authority secures the legitimate expectations of all to essential goods which it is beyond their individual power to acquire. Liberal capitalism can identify abuses of this authority. But it cannot make an effective case against its necessity. [D]emands for absolute property are properly viewed as forms of an asocial selfishness. Id. at 153. See also M. Lerner, supra note 4, at 97: "Machiavelli today confronts us with the major dilemma of how to adapt to the demands of a world in which, as never before, naked power politics dominates the foreign field and determined oligarchies struggle for power internally." Cf. A. Miller, supra note 6, at 161: "[N]o doubt there will be many attempts to transform the 'thou-shalt-nots' of the historical [American] Constitution into a set of obligations (of 'thou-musts')..."
122. See supra text accompanying notes 112-13.
123. See supra notes 74-76 and accompanying text.
in coming, yet this tendency to self-destruction has been recognized since at least Shakespeare's time:

\[
\begin{align*}
\text{[E]very thing includes itself in power,} \\
\text{Power into will, will into appetite;} \\
\text{And appetite, an universal wolf,} \\
\text{(So doubly seconded with will and power,)} \\
\text{Must make perforce an universal prey,} \\
\text{And last eat up himself.}^{124}
\end{align*}
\]

In a similar vein, Rousseau, usually depicted as a fellow-traveler of authoritarianism, wrote:

\[
\begin{align*}
\text{[I]f force creates right, the effect changes with the cause. Every} \\
\text{force that is greater than the first succeeds to its right. As soon as} \\
\text{it is possible to disobey with impunity, disobedience is legitimate;} \\
\text{and the strongest being always in the right, the only thing that} \\
\text{matters is to act so as to become most strong. . . . The strongest is} \\
\text{never strong enough unless he succeeds in turning might into right} \\
\text{and obedience into duty.}^{125}
\end{align*}
\]

This is a message lost on the many petty despots of the Third World who aspire to become tyrants. But their problems are of a different order of magnitude than Hitler's or Stalin's. Most Third World polities have not yet reached the threshold of development at which a tradeoff of stability for state strength becomes a pressing reality. However, this argument cuts both ways. Following Rousseau and the British experience, it suggests that the pursuit of stability need not conflict with a strengthening of the state by less tyrannical means.

**B. The Push Toward Social Democracy or the Welfare State**

Summarizing the "natural" progressions discussed in the last few paragraphs, authoritarian states are slowly trading state strength for an increased political stability, while many Western states trade off aspects of a previously-stabilizing liberalism in an attempt to strengthen the state. These processes are similar to, yet distinct from, those described by "convergence" theories,\(^{126}\) under which Western

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and communist party-states are seen increasingly to resemble each other. The reality of these economic, political, and constitutional processes is that Western and communist party-states are becoming less like themselves in dissimilar ways, for reasons which overlap in part. 127

While our constitutional document sees only the rights of individuals, these have been, are, and will increasingly be extended to various groups under elaborate fictions about juridical "persons." A rudimentary economic planning is carried out by a part of the President's "Curia," the Office of Management and the Budget, under such "constitutional" documents as the Employment Act of 1946 and the 1978 Humphrey-Hawkins Bill. Given the lengthy crisis of economic faith in American government and the technological changes which make planning both possible and necessary, the institutional changes required by a genuine national planning will eventually overcome vociferous opposition. 128 In many communist party-states, a "second legality" or "underground law" is growing up with the "second economy." This growth is occurring alongside the traditional socialist le-


[Problems are at least as much rooted in the nature of industrial society as they are rooted in capitalism proper. For it is not only capitalist societies but socialist ones that must cope with the problem of marshalling a labor force under conditions of growing affluence (including in that term, let us emphasize, the assured provision of basic needs). It is certainly not capitalism alone that will be marked by the growth of bureaucracies organized to oversee the steady flow of production. Scientific and technical elites have already appeared in the power structures of socialism as they have in those of capitalism.

This is not to say that capitalist and socialist nations will not have their general differences in coping with common problems. The capitalist group brings with it the obsolete privileges of inherited wealth, of acquisitiveness as a dubious source of social morale, of the clash between a "business" outlook of decreasing relevance and a technical-planning outlook of uncertain strength. On the other hand, these nations generally enjoy parliamentary forms of government that, if they withstand the transition through planning, may provide useful channels for social adaptation.

On the socialist side we find the advantage of economic systems stripped of the mystique of "private ownership" and the presumed legitimacy and superiority of the workings of the market. On the negative side is the cumbersomeness of their present planning machinery, their failure to develop incentives superior to capitalism, and above all, their still restrictive political attitudes.

The hope, of course, is that we can combine the two—welding the best of socialist economic practice with the best of liberal capitalist political practice. I have no hesitation in setting such a goal as that for which we should strive in the coming middle period. Whether it will be attainable cannot be predicted. Id. See also Vogel, supra note 117; infra text accompanying notes 128-30.

128. A. Miller, supra note 6, at 40, 135-7, 170, 194. (quoting Heilbroner at 137 and Gierke at 194).
gality, the law and order of the older constitutions-in-the-books, in reaction to the overregulation of social and economic life. It entails the addition of “due process” carrots to the sticks of socialist law, in an attempt to foster correct behavior. The emerging concepts of this second legality are familiar to Western lawyers: “a greater interest in procedure, demands for more juridic precision, instances of the legal protection of areas of individual autonomy, and the acceptance of bargaining.”

The extant terminology begins to fail us when we attempt to analyze these kinds of changes. I have therefore decided to redefine existing terms slightly. “Social democracy” here refers to the constitutional goals of Western states dedicated to a genuine socio-economic equalization through gradual reforms that retain as much of liberal democracy as possible. A “welfare state,” on the other hand, is a cradle-to-grave caring for the public, even at the sacrifice of much individual choice. It describes the projected outcome of the search for stability by communist party-states and the constitutional path of those Western states where liberalism was never firmly rooted or where there is a willingness to trade more of the tenets of liberalism for more of the advantages of the strong state. Of course, a particular polity may reflect social democracy in some of its programs and welfare statism or liberalism in others. The ways in which the overall balance is struck and tradeoffs made are topics meriting additional research.

In economic terms, social democracy tends to emphasize affluence while welfare statism prefers communitarian values. The development of social democracy or the welfare state requires the economic potential capable of supporting it, the will among elite groups to pursue it, and the bureaucratic capacity to implement it. The recent history of Britain suggests that these requirements are listed in an ascending order of importance. A meager economic potential caused hardly a second thought among advocates of a British Welfare State. Despite a manifest lack of Conservative will power, many welfare functions continue to mark time in the hands of bureau-

130. Markovits, supra note 52, at 606-07.
131. Cf. THE FONTANA DICTIONARY OF MODERN THOUGHT, supra note 108, at 579, 672-73 (“social democracy” entry by Leopold Labedz and “welfare state” entry by Donald Watt); R. WILLIAMS, KEYWORDS 281 (1976).
crats who have entrenched themselves by creating strong public constituencies. This is an attempt at a grand, new social contract to replace Locke's theoretical construct. It failed under the Wilson/Callaghan Government, but may yet succeed in a more imaginative and competent form.

Combining Machiavelli and Habermas, a major impetus for social democracy and the welfare state is the bureaucratic desire to be of "service." This service is a bartering of welfare programs for public loyalty to the state if not always to the government in power. The public exchanges liberalism's individual political rights—found in the constitution-in-the-books of Western and communist party-state countries alike but often perceived as irrelevant or illusory—for individual economic rights and a few group rights as well. (These economic rights often prove as illusory as the political rights they are seen to displace.) The privatism that is so closely related to liberal individualism is irreversibly undermined by the spread of a rationalizing administration, when polities seek to make up for deficits in legitimacy by turning the state into Earth Mother. This state, as the cornucopia of a "socialized" people, tries to satisfy its bureaucratic raison de groupe quickly: the public's economic and psychological needs to be done for rather than to do. Studies in public administration have fallen in with these desires by emphasizing welfare functions to the neglect of police and military functions and of the coercive forms of action that all of these bureaucratic functions share. Legally, these functions represent the cooperation and coordination of governmental powers: the rough midpoint between a liberal separation and/or limitation of powers and their authoritarian concentration or fusion, such as is found in contemporary Britain.132

This is the same political and legal path being taken by some Third World states, without wasteful lurches towards liberal democracy or authoritarianism:

The drift toward a one-party state has less to do with Marxism than with Africanization. The pattern can be seen in African

132. See E. Fromm, Escape From Freedom (1941); J. Habermas, supra note 35, at 5, 8; Lyden, Synthesis—Cross-Cultural Comparative Studies in Public Administration, in Comparative Administrative Theory 139, 142 (P. Le Breton ed. 1968); T. McCarthy, The Critical Theory of Jurgen Habermas 369-72 (1978); C. MacPherson, supra note 118, at 91 (discussing a different issue); A. Miller, supra note 6, at 130, 134, 147; Claude, supra note 30, at 46 (discussing Maritain's "rights of the working man"); Giraudo, supra note 117, at 1138, 1159. Many examples of the implication of my approach, derived by a different method, can be found in G. Almond & G. Powell, Jr., supra note 16, at 402-15.
states of varying ideological persuasions. A sort of African hybrid of social democracy [the welfare state, as I define it] is taking shape that may not square with European models, but it is more apt to resemble social and political structures in Sweden (perhaps with a touch of Yugoslavia thrown in) than in the Soviet Union or China.\textsuperscript{133}

To an extent which is only now becoming apparent, this is a continuation of trends begun in opposition to colonialism, but interrupted during the immediate post-independence drive towards a strong state based on colonial models. As Yash Ghai observes:

During the colonial period there was a series of protest movements which sought to set up their own alternative institutions based, unlike those of the colonial regime, on wide participation and democratic practices. They pursued political, economic and social welfare objectives, seeking a high degree of self-reliance and autonomy. In both their political and economic aims they were perceived to run counter to the policies of the colonial state, and were thus harassed and suppressed. In such a situation, it may be possible to use the law to challenge the oppressive action of the authorities -- often possible because of the contradictions of the liberal legal order (or the ideology and to some extent the rules of which the colonial state, despite its authoritarianism, partakes). The strategy of turning the law of a state against itself can operate, however, only in a very restricted way.\textsuperscript{134}

The second legality found in many communist party-states is a similar approach to analogous problems.\textsuperscript{135}

The tripartite constraints on creating social democracies or welfare states in the Third World are the same as those in the First and Second Worlds. They are: (1) a paucity of the economic and other resources needed to coerce a socio-economic equalization and to support essential welfare measures; (2) a failure of will among leaders who are often preoccupied with their short-term political survival; and (3) a bureaucracy manifestly incapable of assuming additional "service" tasks efficiently and effectively. Clearly, constitutional law has a major role to play in minimizing and finally overcoming these kinds of obstacles. It is equally clear that the guarantism of eight-

\textsuperscript{133} Manning, \textit{So Far, So Fair in Zimbabwe}, \textit{The New Republic}, Apr. 4, 1981, at 20, 25.

\textsuperscript{134} Ghai, \textit{supra} note 98, at 11 (footnotes deleted, emphasis supplied).

\textsuperscript{135} \textit{See} Markovits, \textit{supra} note 52, \textit{passim}; \textit{see supra} text accompanying notes 129-30.
eenth century constitutions and the forced-draft provisos of authorita-
rian constitutions cannot overcome such obstacles.

Why, then, do so many Western jurists continue to propose lib-
eral democratic solutions to Third World problems, while their com-
munist party-state colleagues often push provisos resembling those in
Stalin's 1931 Constitution? A poor understanding of their own sys-
tems as well as those in the Third World is certainly at work. But we
should not foreclose altogether a more Machiavellian possibility. For-
eign "experts" are often supported and even funded by their own gov-
ernments, and must thus be presumed to be acting in a manner
consistent with their governments' interests. Most Western states
have acted as though they seek a Third World so stable as to be im-
mune to communist blandishments, yet too weak to enforce a reallo-
cation of the world's wealth and power. A liberal democratic Third
World fits these foreign policy aims nicely, and is consistent with a
Western ideology by now a bit outmoded. Communist party-states,
on the other hand, seek the strongest possible states in the Third
World countries they suppose themselves to have captured, in order
to have effective partners in the pursuit of foreign policy insurgency
aims. Little wonder, then, that Third World elites are growing suspi-
cious of, and even hostile toward, the foreign experts of all political
stripes who usually act from the most laudable of motives. Many
knowledgeable people in the Third World are eager to eliminate
"double" underdevelopment. But they see little point in working
hard simply to replicate a "single" underdevelopment of liberal de-
mocracy or authoritarianism.

The Soviet Union has long tried to turn Third World politics and
law into those of the Second World, but it seems that the politics and
martial law of the Third World came to Poland in 1981. This was
evident in the external intervention by military proxy, the mass in-
ternments, the seizure of the media, and the militarization of the
Party and bureaucracy. Like many Third World military regimes, the
"18th Brumaire of General Jaruzelski" poses as a modernizing
force and as an arbitrator among groups in conflict. The reality is
that a sacred principle of communist constitutionalism stands vi-
lated: the overall control of the military by the party (with periodic

136. Cf. J. MERRYMAN, supra note 58, at 158.
137. See supra text accompanying notes 84-85, 126.
138. Rupcik, From 'Party-State' to 'Army-State', THE NEW REPUBLIC, Jan. 6 & 13, 1982,
supra text accompanying notes 51-52, 71-73, 80-81.
purges to discourage temptations toward Bonapartism). This is a constitutional backsliding and is tantamount to being false to one's self in an attempt to resist pushes through the authoritarian boundary and towards a Polish welfare state. But this development seems an inevitable by-product of the pursuit of political stability in authoritarian states, and it is well underway in Poland and the Soviet Union (as the second legality and second economy).

Solidarity's sin was not a revolutionary one but an attempt to accelerate ongoing processes by defending broadly-defined workers' interests against the nominal defenders of these interests, and demanding that an overly-bureaucratized Party and State reform a tattered system of production and planning. Polish workers forcefully posed one of the major dilemmas to be faced under contemporary communist party-state constitutions: "In their struggle for performance," communist party-states "will have to decide whether they want to protect political authority from legal challenges from outside or whether they want to accept modes of regulation which might ensure a more effective utilization of individual autonomy and ego-tism. . . ."

Although Solidarity miscalculated how far it could go, the long-term prospects for welfare states in the Second World are good. Dissident groups are busy exploiting each of many vulnerabilities and learning from the blunders of successive rebellions. The levels of mass mobilization and political development in Poland, and of international political development, meant that Poland—unlike Afghanistan—was no simple repetition of Hungary in 1956 or Czechoslovakia in 1968.

Why should Soviet leaders put so much at risk in an attempt to forestall the seemingly inevitable? Put at risk were American neo-isolationism and trade through d'etente, the neutralist and anti-NATO tide in Western Europe, and relations with Euro-communists who support Solidarity-like movements starting from the opposite end

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139. See Lerner, supra note 138, at 11, 13; Rupcik, supra note 138, at 18; supra text accompanying notes 122-25.

140. See supra text accompanying notes 129-30.


of the political spectrum in Spain, Portugal, and the Third World. Soviet leaders must have seen not a temporary Polish crisis, but a death knell for the whole network of conventional communist party-states. These kinds of perceptions help to perpetuate a vast (Marxist) Sparta. Regrettably, this is the same face that the United States shows to much of the outside world, a destroying of the tenets of liberal democracy in an attempt to save it from the inevitable promptings of welfare statism in our own spheres of influence. This militarization of international politics by two muscle-bound giants carries a particularly strong risk of political instability. Not surprisingly, then, welfare states (rarely social democracies as I define them) are attractive to Third World politicians with a military machismo of their own to worry about.

VI. DEVISING CONSTITUTIONAL PRESCRIPTIONS

Comparison leads naturally to evaluation, a more difficult task which requires us to go beyond descriptions of bare-bones constitutions to attempt policy prescriptions that are both desirable and feasible. Ideally, constitutional and comparative lawyers approach constitutional provisos with the hypothetical sympathy found in the best of philosophical inquiry, rather than with reverence or disdain. As lawyers, they should also suspend judgment until all of the reasonably available evidence is in, and then express an opinion and even act upon it. To do this is, after all, to replicate processes of constitutional development. Racial and cultural minorities know that discrimination is cruel and unjust, and the long-term unemployed know the economic system to be harsh and arbitrary. This knowledge affects their actions, the thoughts and actions of their sympathizers and opponents, and, ultimately, the living constitutions that embody such thoughts and actions. The only danger is that this kind of knowledge


144. See supra text accompanying notes 41, 43-44, 54-55. While elements of capitalism (as in Hungary) and a degree of detachment in foreign policy (as in Rumania) are permitted by the Soviets, the Polish revolt is perceived to stand for something much more fundamental: the incompatibility of socialism and Sovietism. Any relaxation of Soviet control over Poland would be perceived as conducive to more demands and pressures within the Second World, rather than less. Kolakowski, supra note 141, at 24-26; Lerner, supra note 138, at 11; Trost, The Limits of Power in Poland and El Salvador, CRESSET, Apr. 1982, at 24.

145. See Lerner, supra note 138, at 12; Rupcik, supra note 138, at 20; Trost, supra note 144.
will encourage the substitution of wishful thinking for careful observation. Development, like a constitution which pursues it, is self-conscious, goal-oriented, and grounded in stubborn facts enforcing the scarcity of life's satisfactions.\footnote{146} Both involve processes of political and bureaucratic choice within existing constraints.\footnote{147} Constitutional and comparative analyses both can and should delineate these constraints precisely, and "articulate the criteria for choice, . . . [exposing] them to reasoning, deliberation and, ultimately, the test of use."\footnote{148}

The criteria that appear to have the greatest potential for fruitful constitutional evaluations revolve around the protection and enhancement of human rights. It might be thought that the Machiavellian perspective used in this article precludes human rights evaluations,\footnote{149} but this is not the case. Machiavellianism-in-action, as it often is in

\footnotesize
\begin{enumerate}
\item \footnote{146}{P. Brietzke, supra note 41, at 47-50, 53-70; J. Hurst, supra note 64, at 43, 105; A. Miller, supra note 6, at 155; J. Robinson, supra note 81, at 122; B. Russell, supra note 21, at 58, 491; K. Zweigert & H. Kötz, supra note 9, at 327 (approaching an unfamiliar constitution with disdain, the comparatist risks falling "into a foolish position of polarized hostility"). Too often, evaluations are smuggled in too early—as biased descriptions which confuse the constitutional "is" and "ought"—in the form of the observer's preconceptions. Patronizing attitudes, disdain or even hostility characterizes many studies of Third World constitutions written from the First or Second World vantage point of relative contentment and academic security. See J. Hall, supra note 8, at 3; Kozolchyk, supra note 7, at 107-08; K. Wheare, supra note 33, at 72; supra note 3 and text accompanying note 11. (I have argued that this is so because the seamy underside of constitutional law is more starkly apparent in the Third World.) J. Merryman, supra note 58, at 157, seems to offer a way to circumvent this tendency: "[T]o what extent does the legal tradition respond to the demands legitimately made on it by a given society." This criterion of evaluation, like Read's "Will it Work?" (supra text accompanying note 15), sounds a most fruitful line of inquiry until we ask: Who determines which demands are "legitimately made," and how do they do so? If we use our own Western or Marxist criteria of legitimacy, we commit the cardinal sin of comparison. If, on the other hand, we sympathetically adopt the legitimacy criteria advanced by the legal system under study, we run the risk of confusing legitimate demands with politically effective ones—those which prevail by force of arms. See also Kahn-Freund, supra note 8, at 384, 392 (discussed supra in note 16). I argue that these kinds of dilemmas can be circumvented by the approach outlined infra in the text accompanying notes 148-66. See Eörsi, supra note 1, at 203.}
\item \footnote{147}{See text accompanying supra notes 100, 101, 103, and infra note 169.}
\item \footnote{148}{Seidman, Law and Development, 6 L. & Soc. Rev. 311, 316 (1972).}
\item \footnote{149}{On the basis of statements by Machiavelli such as the one quoted supra note 20. Machiavelli saw life as it is, while human rights are "a connected series of utopian concepts. For they are rational thought constructions that project futuristic [or what I would call developmental] images by synthesizing the merely epochal with that which has been longed for since time out of mind." O. Kirchheimer, supra note 68, at 12. See L. McDonald, supra note 22, at 189-90. But I will argue that human rights policies can succeed only if their "oughts" are based on realistic assessments of a country's Machiavellian present and its development potential—constitutional and otherwise—in the foreseeable future. See infra text accompanying notes 163-69.}
\end{enumerate}
the world today, simply serves to illustrate that rights do not exist in the abstract but are granted by particular elites for predetermined purposes. These are the purposes I trace, enhancing political stability and the strength of the state. This perspective on human rights far from exhausts discussions of and responses to suffering. The point is that the status of human rights in a particular country can tell us much about the problems and the progress of constitutional development in that country.

Admittedly, analyses based on notions of human rights are fraught with difficulty because of the diverse and shifting social and ideological contexts in which demands for rights and claims of their fulfillment arise. Nowhere has this been clearer than in the self-satisfied sloganeering of Presidents Carter and Reagan and their cohorts, and in the equally self-satisfied responses of, for example, Soviet leaders and Latin American despots. Like any other means of constitutional evaluation, human rights analyses require a variety of value judgments. Human rights introduce a certain amount of relativity into constitutional analysis, but this does not invalidate the analysis to any greater extent than relativity invalidates classical physics, and it does suggest new possibilities for constitutional analysis. How then can Haiti's human rights performance be compared with Cuba's or El Salvador's with Nicaragua's? The best answer is that evaluations

150. G. MARSHALL, supra note 66, at 32 (quoting Sir William Anson—no committed Machiavellian): Public law consists of "rights which the State asserts to itself against the citizens and rights which it permits to be exercised against itself." See note 29 and text accompanying it. Cf. A. Miller, supra note 6, at 97: "At no time in American history has speech deemed inimical to the vital interests of the State been permitted."

151. Through my analyses I hope to achieve the advantage of linking the lawyer's concern with rights to the social scientist's consideration of the broader question of a political system's capacity. One basis for doing this is suggested by Georg Jellinek's 1892 classification of rights into "four stages of achievement": "passive status (which defines the role of the individual in terms of general subjection to the state); negative status (which assures rights of protection from the state); active status (which extends rights of political and electoral participation); and positive status (which guarantees actions by the state)." Claude, supra note 30, at 7. Jellinek's classification overlaps mine in analytically useful ways. "Passive status" is characteristic of double underdevelopment and of authoritarianism. "Negative" and "active" statuses are prime characteristics of liberal democracy. Many recently-drafted constitutions make extensive claims that varieties of "positive status" will be pursued. Evaluations of these statuses and claims to them can tell us much about the process of constitutional development and the relative positions of particular constitutions within these processes. See Grey, Constitutionalism, in Pennock & Chapman, supra note 56, at 189, 203: "The impressive recent growth of affirmations of support for 'human rights'... suggest that the influence on constitutional development of the age-old conception that human beings can, by reason, ascertain universal moral and political truths has by no means come to an end." Id. See also Claude, supra note 30, at 9 (quoted infra in text accompanying note 156).
should encompass all commonly-asserted claims to rights. Evaluations should particularly emphasize claims based on American-style “negative rights enforced by regularized grievance procedures” and on Soviet-style “positive rights implemented by a system of administrative support.” Evaluations can thus come as close as possible to an ideological neutrality by making sure that everyone’s ox gets gored. For evaluations of the performance of Third World polities, the criteria elaborated in Gunnar Myrdal’s Asian Drama can hardly be improved upon. But the thoughtful criteria suggested by Barrington Moore, Jr.’s Reflections on the Causes of Human Misery are even more useful for the evaluation of constitutions worldwide.

A. Moore’s Criteria

While there is substantial disagreement over the various definitions of human rights, people everywhere are almost uniformly scandalized and their passions aroused when a government exacerbates or does nothing to ameliorate species of human misery. Moore generalizes these miseries, “hardly ever really enjoyed” for their own sake, into four categories of roughly equal importance: poverty, hunger and disease; oppressive socio-economic relations; governmental persecution for dissident beliefs; and war, in both its conventional and guerrilla forms.

The most broadly defensible definition of human rights is the progressive amelioration of these miseries. This can be carried out through the development-oriented policies of a creative and economically-activist state, with some help from a saner international order. The evolution of a “working rights system,” the “satisfaction of the sundry claims to be, to have, to do, and to receive,” can only take

152. Claude, infra note 156, at 8. See Schochet, supra note 56, at 7 (a negative State is uncreative because its functions are “largely restricted to removal of irrelevant public obstacles to citizens’ enjoyment of their rights.”); Waldo, supra note 6, at 138.


154. B. Moore, supra note 73, at 2, passim.

155. Id. “The experience of living in society produces in human beings a distinction between legitimate and illegitimate authority.” Id. at 52-53. J. Farrar, supra note 71, at 20 adds that: “It is easier to condemn particular practices as unjust than to produce an articulate and convincing conception of the just.” On Moore’s criticism concerning war, see Giniger, International Group Urges Peace as a Human Right, N. Y. Times, Aug. 27, 1979, at A2, col. 2 (cited in Hazard, supra note 75, at 308 n.39). Cf. A. Miller, supra note 6, at xv: “Dictatorship is the ‘fifth horseman’ [of the Apocalypse], the consequence of Pestilence, War, Famine, and Death.” Id.

156. Claude, supra note 30, at 9. See id. at 14 (quoted supra note 109). However, a periodic backsliding is inevitable, as the history of modern Europe demonstrates.
place within a broader political/constitutional development. There is growing recognition of this in, for example, the "human right to development" defined in a manner congruent with Moore's criteria and urged by some international organizations as a new standard of international law.\textsuperscript{157}

Under the criteria Moore uses, the legal essence of liberal democracy, the Rule of Law, prefers freedom from governmental persecution to the amelioration of poverty, hunger, disease, and oppressive socio-economic relations.\textsuperscript{158} A Marxist socialist legality reverses these preferences while asserting a series of what are largely non-justiciable rights.\textsuperscript{159} The bureaucratic canons of social democratic and

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The notion that ours is a nation of laws and not men is a myth fulfilling our need for miracle, mystery and authority: Law "is not a homeless, wandering ghost. It is a phase of human life located in time and space." A. Miller, supra note 6, at 43 (quoting Morris Cohen). The "fact that a . . . secretary of state or a military officer could be hailed into court like the ordinary citizen was for Dicey both the necessary and sufficient condition of legal equality." O. Kirchheimer, supra note 40, at 430. But:

\[\text{[T]he implementation of the rule of law is a problematic affair and. . . the mere enumeration of available remedies and jurisdictions does not suffice. [C]ompartamentalization of organizations [separation of powers]. . . may lead to results which might satisfy the tactical needs of participants in the official game, but falls wide of the mark of . . . a step forward in solving the substantive problems involved [as happened in the "War" on Poverty].}\]

\textit{Id.} at 444. See \textit{supra} text accompanying notes 9, 38-44; see \textit{infra} notes 159, 161.

\textsuperscript{159} These are rights to work, leisure, housing, education, etc. They are also stressed in some social democratic or welfare state constitutions. The communist party-state addresses rights to the working class rather than to individuals and the state acts \textit{in loco parentis}: "The child cannot be trusted to handle rights; he is too inexperienced for autonomy." Markovits,
welfare states attempt the best, and sometimes achieve the worst, of both these worlds. None of these legal regimes stresses a reduction in public apathy, in the subtler forms of a petty despotism, or in the fissiparous tendencies that supply the temptations to terrorism (used here in its pre-1981 sense) or guerrilla war. All legal systems fail to deal creatively with the dilemma apparent in, for example, the areas of race relations and welfare entitlements in the West: the "private" goals of "liberty" and the "collectivist" goals of "equality" seem mutually exclusive at many junctures.  

One way around this dilemma (as old as philosophy itself) is to conclude that, as most Third World polities have hitherto made little or no attempt to ameliorate any of Moore's categories of misery, their citizens have nothing to lose. Thus, we should applaud progress towards eliminating any one category. The defect in this line of reasoning is that, in the absence of development, any such progress has its "opportunity costs." These can be defined as tradeoffs between liberty and equality, and as a persecution of dissidents which is senseless because other types of miseries are not ameliorated, the state is not strengthened, and politics are not stabilized. If we place the burden of proof on leaders who argue that it is necessary and effective to abridge one category of rights to expand those in another category, few politicians in the Third World or elsewhere could satisfy this burden. 

supra note 52, at 521. See id. at 519-21; Markovits, supra note 158, at 612; see supra text accompanying notes 9, 74-76. As in many Third World constitutions, evanescent policy pronouncements are paramount in communist party-state constitutions. Consequently, rights issues often become blurred: "To be effective, a command must be precise. . . . Precision, on the other hand, allows the recipient of a command to draw distinctions, to make excuses, and possibly to question the applicability of the command. . . . [S]ocialist law wants to be exactly obeyed, but it does not want to be taken at its word." Markovits, supra note 158, at 627. See R. DAVID AND J. BRIERLY, supra note 99, at 82, 158; Markovits, supra note 158, at 615-17, 631. Reasons for this uneasy combination of precision and ambiguity are not difficult to discern in the Third World where a regime often seeks to impose its demands while ignoring or circumventing rival claims by groups and individuals, in a desperate struggle for political survival. Western-style rights are not intended to be effective in the absence of a political (as opposed to a formally legalistic) corroborration. While the theoretical distinction between justiciable and non-justiciable rights is great, such practical impediments as an inequality of access to Western justice reduce this distinction to one of an (admittedly all-important) vindication of individual rights at the margin in the West. See supra note 98 and text accompanying notes 76, 98, 128-30.

160. See J. FEINBERG, SOCIAL PHILOSOPHY 96 (1973); De Jourvenal, Sovereignty, in INTRODUCTION TO JURISPRUDENCE 377 (3d. ed. D. Lloyd ed. 1972); G. LENSKI, supra note 30, at 36-39; B. RUSSELL, supra note 21, at 770-76 (discussing the ideas of John Dewey and William James); P. STEIN AND J. SHAND, LEGAL VALUES IN WESTERN SOCIETY 59, passim (1974).

161. On attempts to formulate this burden of proof, see B. ACKERMAN, SOCIAL JUSTICE
Ultimately, the liberty/equality dilemma can only be resolved through development, the upward movement of the whole society along the lines described by Myrdal, including fairly rapid reductions in the percentages of those in the most disadvantaged categories rather than the "trickle down" of the 1950s and 1980s.

B. Appeals to Enlightened Self-Interest

Such a policy is fiendishly difficult to devise and implement, but is it not open to the more fundamental objection that politicians and bureaucrats have no incentive even to attempt it? The answer is no, but in order to explain it, I must take a rather pragmatic approach to human rights by focusing on the enlightened self-interest of politicians and bureaucrats. Self-interest is not the loftiest of promptings, of course, but it is the only realistic one. The lesson of social democracy and the welfare state is that development requires the creative and economically-activist intervention of a government which, Machiavelli teaches, is run by persons whose altruism is severely limited. Political and administrative self-interest is often narrow, personal and occupies short time horizons, characteristics reflecting limited capacities as well as an understandable desire for survival in office. The maintenance of order through commands backed by threats, the traditional concern of positivism, is of such overweening importance that a genuine effort is required to stand back from day-to-day preoccupations in order to ponder the longer-term policies associated with human rights.\(^\text{163}\)

Paradoxically, a polity strong and stable enough to ensure a leader's survival in office in at least the short run, and his capacity to deal with the most pressing of crises, is the first step (but no more

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162. See G. Myrdal, supra note 3, passim. See also, e.g., I. Duchacek, Rights and Liberties in the World Today 42 (1973): "Freedom of speech without social justice may become freedom to die from hunger. Material satisfaction without freedom of expression and creative innovation may result in spiritual starvation or death in a welfare prison." Id.

163. See C. Friedrich, The Philosophy of Law in Historical Perspective 92 (1963) (citing Hume); G. Kennedy, supra note 73, at 56; N. Mouzelis, Organization and Bureaucracy 129 (1967); B. Russell, supra note 21, at 593, 622; P. Stein & J. Shand, supra note 160, at v; supra text accompanying notes 64, 67, 74.
than that) to the effective protection and enhancement of human rights. Prudence and moderation will then progressively replace overreaction, as (sane) politicians become more and more preoccupied with the longer-term survival of their regime and with their place in history. A certain amount of backsliding due to misperceptions of crisis is probably inevitable, but leaders become capable of learning and extrapolating from the lessons of Shakespeare and Rousseau. 164 These teachings do not acquire force through eloquence alone; withdrawals of public support and the threat of rebellion constantly reinforce these teachings among politicians who have something to lose. As the Black abolitionist Frederick Douglass argued in 1857, "power concedes nothing without a demand. . . . Find out just what people will submit to and you have found the exact amount of injustice and wrong which will be imposed on them. . . ." 165

Twentieth century politics are characterized by, above all else, numerous demands made by elites and other segments of the public, which are often backed by threats. Politicians and bureaucrats aware of their self-interest will seek to grant as many of these demands as the level of development permits, perhaps in a cynically manipulative fashion. This is so unless "the use of naked coercion [including "terrorism"] so severely undermines . . . the authority of the regime itself that it is difficult . . . to change policy in response to such tactics without compromising their [the rulers'] position entirely." 166 If rulers perceive the polity to be strong and stable enough to cope with these threats, as they perceive them, elite and public demands will be be granted. Such a process serves to align the constitutional "is" and "ought" through the dialectical process referred to above: 167 the daily exercise of power in ways designed to legitimize, and thus to strengthen, that power.

164. See supra text accompanying notes 124-25. See also B. Moore, Jr., supra note 73, at 38-39, 192. Revolution poses a more vehement form of the fundamental contradiction between politics and morality, "the effectiveness of immoral political methods" and the temptation to use them before an unscrupulous enemy mounts a counterrevolution, on the one hand, and, on the other, "the necessity for morality in any social order." Id. Machiavelli's "ruler's dilemma" is discussed in similar terms in 1 Q. Skinner, supra note 17, at 183.


166. G. Almond & G. Powell, Jr., supra note 16, at 189. See id. at 169; H. Groves, supra note 29, at 278-79; supra text accompanying note 58. See also Hazard, supra note 86, at 986: Moscovite protestors "appeal to the leadership to conform to the constitution because they think it sufficiently revered in the Kremlin to restrain abuse of law." Id.

167. See supra text accompanying notes 71-73.
There seems to be a clear moral in all of this for United States human rights policies. More forceful, yet more ideologically-neutral descriptions of what the human rights situation "ought" to be in a particular country are needed. The descriptions should be based upon more thorough determinations of what that situation "is" and extensively informed by careful assessments of what "can" be done to improve rights there. A programmatic yet realistic rights policy should be the aim, one which is the best attainable under existing and reasonably foreseeable levels of constitutional development in a country, but no more demanding than that. The policy would not be an attempt to excuse the marginal rights violations of petty despots who are, after all, able to read the lessons of history and to ponder the fate of leaders who failed to do so. Rather, it would seek to "educate" the self-interested choices of foreign leaders while educating ourselves about the constraints on social justice imposed by lower levels of development—including our own.

VII. CONCLUSION

Paul Diesing uses a parable to analyze development:

[T]he development of money from cattle to gold to paper to computer numbers represents the freeing of the idea of a neutral medium of exchange from irrelevant material connotations. In such cases the logical idea immanent in some piece of reality is also a rational ideal that constitutes the limit of the reality's development or change. Consequently when one uncovers the logic of this sort of system one can both describe the dynamics of the system and prescribe an ideal for it; the good and the true become identical.

Similarly, I have tried to strip constitutions of their institutional details and of the local vicissitudes of politics in order to uncover the developmental logic of constitutional laws and decisions. Following this logic, we can tease out the potential functions of constitutions,

168. See supra text accompanying notes 71, 100.
169. See B. ACKERMAN, supra note 161, at 18 (conceptual problems about rights must be distinguished from problems arising because of an imperfect technology of justice); A. GRAMSCI, supra note 17, at 165 ("no society sets itself tasks for whose solution the necessary and sufficient conditions do not already exist or are not at least in the process of emergence and development"); F. MACHLUP, supra note 108, at 429 (quoting Keynes, in part) ("positive economics tells you 'what is,' normative economics tells you 'what ought to be,' and practical economics tells you 'what you can do to attain what you want'"); supra text accompanying note 94.
171. See Kozolchyk, supra note 7, at 107-08 (quoted supra note 16).
the real-world factors hindering the realization of this potential over time, the important role constitutional law can play in overcoming these constraints, and the constitutional ideal of protecting and enhancing rights—the basis for evaluating constitutional performances.

Political, military, bureaucratic, and judicial responses to perceived crises, justified by Machiavellian reasons of state,\textsuperscript{172} furnish the opportunities for a constitutional development over time and also for a backsliding to lower levels of development. The motivations to push in the direction of a constitutional development—and, sometimes, to protect and enhance human rights in the process\textsuperscript{173}—are furnished by the twin imperatives of stabilizing politics and strengthening the state. These imperatives constitute an enlightened self-interest among politicians and bureaucrats.\textsuperscript{174} Crises cause a pileup of rough-and-ready "constitutional" laws and decisions in military or civil service jargon. The pileup leads to incoherent and arbitrary decisions which, in turn, create pressures for a constitutional rationalization to restore public confidence and the ruling elites' control, to consolidate such gains as are realized, and to prevent backsliding. Stability and strength are sought for political survival in crisis times, and then used to pursue whatever congeries of policy a ruling elite has chosen.\textsuperscript{175}

These kinds of issues, revolving around the "Will it work?" of constitutional law, cannot be dealt with adequately under the analytical methods of conventional constitutional and comparative lawyers.\textsuperscript{176} I therefore propose a typology\textsuperscript{177} which seems to shed considerable light on the developmental logic of constitutional law. For example, analyses based on this typology strongly suggest that the potential in both liberal democracy (including that claimed for the United States)\textsuperscript{178} and authoritarianism has been exhausted from the standpoint of constitutional development, which will proceed syncretically in the direction of social democratic or welfare states.\textsuperscript{179} This and some other conclusions may not win wide acceptance, either be-

\textsuperscript{172} See G. Kennedy, supra note 73, at 55; A. Miller, supra note 6, at 148; S. De Smith, supra note 16, at 20.
\textsuperscript{173} See supra notes 152, 158-59 and text accompanying notes 146-66.
\textsuperscript{174} See supra notes 57, 64-65, 76 and text accompanying notes 56-88.
\textsuperscript{175} See supra text accompanying notes 51-53.
\textsuperscript{176} See supra notes 8-9, 15-16, 92, 99, 103, 105-06 and text accompanying notes 7-16, 95-105, 136-37.
\textsuperscript{177} See supra notes 106-07, 109 and text accompanying notes 106-10.
\textsuperscript{178} See A. Miller, supra note 6, at 19; supra notes 117-18, 121 and text accompanying notes 116-21, 128.
\textsuperscript{179} See supra notes 109, 118-19, 127 and text accompanying notes 119-37.
cause my analysis is faulty or because its implications run counter to the constitutional preconceptions of many lawyers. I would argue that many such preconceptions are based on a scholarship of "nor-
malcy" which fails to account for how painful and chaotic life is on the seamy underside of a constitution during crisis times.

Economists say that there is no such thing as a free lunch. A Machiavellian perspective demonstrates that constitutional law is no refuge for free lunch seekers either. If economics is the dismal science, constitutional law is a tragic one, made so by the hard tradeoffs which appear inevitable during processes of constitutional development in crisis times. But this somber view need not be passive and fatalistic: "One task of human thought is to try to perceive what the range of possibilities may be in a future that always carries on its back the burden of the present and the past." This is what I have tried to do. There are many useful perspectives other than the developmental, but if constitutional lawyers follow it, they have nothing to lose but their deductive chains.

180. See S. De Smith, supra note 16, at 20 (quoted supra note 62); supra notes 47-50, 55, 146 and text accompanying notes 47-50, 89-91, 117, 146.