

# **The Constitution of the People**

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### **Abstract**

Once the exclusive expressions of the few, modern constitutions have long been a world prose genre. In Western intellectual, political and imperialist discourse the global present of constitutions represents a proliferation of superior practices and universal values born uniquely of European thought and culture. This thesis proposes that constitutions derive their universal truths and their powers not from this (a)historical centre, but in contingent relation to the beliefs, experiences, exigencies and aspirations of the cultures they address and form (as the People). Constitutions function in this respect as rhetorical argumentation. As culturally informed, constitutional history embodies a dynamic, contested and uneven space of relationships not explicated by a linear evolution. Thus, I propose an interwoven and unpredictably circulating world space of knowledge continually shifting its shape throughout the modern era. These propositions are explored through four constitutional texts. Chapter 2 is a genealogy of “the People” in the US Constitution(s), concentrating on the constitutional sanction of slavery, the abolition amendments and civil rights court cases. Chapter 3 elucidates the interrelationship between the declaration of enlightened autonomy in the 1827 Cherokee Constitution and the consequent re-writing of US constitutional law and history required to disguise avarice beneath moral superiority. Chapter 4 considers the constitutions of Vietnam and the creation of a national People as inseparable from struggles against external forces. Chapter 5, on the 2004 Interim Constitution of Iraq, examines the Western creation of an abstract “Iraqi People,” kept distinct from the divisions and aspirations of actual peoples. As read texts and as cultural objects constitutions *exist* in multitudinous, simultaneous, social, legal, political and intellectual realms of interpretation and perceived value. The interdisciplinary approach

taken here is therefore essential and demanded. I conclude that the struggle of human communities has brought progress in world constitutionalism; power reluctantly accommodates the expectations of those that sustain it.

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## Chapter 1

### Introduction: The Writing of Humanity

Who shall say what prospect life offers to another? Could a greater miracle take place than for us to look through each other's eyes for an instant? We should live in all the ages of the world in an hour; ay, in all the worlds of the ages. History, Poetry, Mythology! – I know of no reading of another's experience so startling and informing as this would be.

(Henry David Thoreau 9)

The whole of human history is made up of situations. No one has ever been outside of a local situation; and all our views of the world, all our gathering of data, come from here. Philosophical problems of the reality of the world, of universals, of other minds, of meaning, implicitly start with this situatedness.

(Randall Collins 20)

Perfection could exist only if the entire range of the reader's and writer's experience were identical down to the last detail. Universal and permanent perfection could exist only if this entire range of experiences were identical for all men forever.

(Kenneth Burke, *Terms for Order* 30)

### A Modern World Prose

It is perhaps only now, with the depth of time and multilayered world experiences, the immense and accumulated living and historical knowledge, that we could even begin to comprehend what modern constitutionalism can mean, has meant, achieved, failed to be, could never have been in human lives. Constitutions are a prose with all the surfaces, differences, resistances and unforeseen directions that one might expect of production reflecting, informing and affecting the lived perspectives of a world of cultures, histories and beliefs.

The world present of constitutions, I argue, represents not an inevitable point in a global evolution of human political, social and cultural progress, but the historically contingent consequences of centuries of innumerable struggles to keep and/or to gain a

position in a complex, interwoven, and continually unsettled and changing space. Thus this work opposes the (historically Western) notion that constitutional principles, ideals and figures were revealed essentially complete in the revolutions of late-eighteenth-century France and America, born of an unrepeatably concatenation of European philosophy, religion, law, culture, science and ontology, and then transmitted whole through time and from place to place. Instead it asks: “What are the effects, the unpredictable consequences of the conflicts, resistances and reactions of changing human communities by which current meanings, uses and understandings of such ideas as ‘people,’ ‘freedom,’ ‘right’ and ‘autonomy’ have come into existence?” World constitutional history has been one of continual, multi-sited emergences of new conceptions, paradigms and relationships; not because of a mysterious historical flowering, but through contest, questioning, new interpretations, positions and struggle. As Stuart Hall writes:

We can think of many pertinent historical examples where the conduct of a social struggle depended, at a particular moment, precisely on the effective disarticulation of certain key terms, e.g. “democracy,” the “rule of law,” “civil rights,” “the nation,” “the people,” “Mankind,” from their previous couplings, and their extrapolation to new meanings, representing the emergence of new political subjects. (78)

### **Context and Approach**

What is the position of the literary scholar in relation to the discursive domains of political institutions and law? How will a study of constitutions as a global history of texts, as cultural forms, relate to what may be regarded as the fields of traditionally relevant expertise in constitutional history, legal scholarship and theory and political science? What legitimate (or legitimated) knowledge or understanding will constitutions provide? With these questions in mind, some attention must be given at this juncture to the nature of the contemporary thought and commentary considered throughout, the wider context of this



thought, and this work's relation and approach to it. We may then proceed to the more specific propositions and contentions of this endeavour. The final part of this introduction will present the reasoning behind the choice of constitutional texts investigated in the main chapters, as well as provide an explanation of, and justification for, the particular critical voices and texts employed.

Some of the mainly American thought of recent decades has been of great importance and elicits questions that may be applied more generally to the nature of modern constitutionalism as a history of written texts. Though the movements sketched below will not be pursued further in this study, they will provide a contemporary context for it. To begin with, the interdisciplinary association of literary studies with contemporary legal and constitutional theory is not new. One clear illustration of this association that may be given here is to be found in James Boyd White's *The Legal Imagination*,<sup>1</sup> a work widely taken to be the founding text of the school of thought known as the "law and literature movement." White's study, essentially a pedagogical work aimed at law students, attempts the application of literary criticism, using a wide range of literary texts as illustrations, to legal texts. Importantly, it stresses the significance of the fact that law is a language, a "culture" and a rhetorical construct of power. White posits:

I think that the law is not merely a system of rules (or rules and principles), or reducible to policy choices or class interests, but that it is rather what I call a language, by which I do not mean just a set of terms and locutions, but habits of mind and expectations – what might also be called a culture. [. . .] The law makes a world. [. . .] It is a branch of rhetoric [. . .]. Of course the law is not just language, for it is in part about the exercise of political power. But I think the greatest power of law lies not in particular rules or decisions but in its language, in the coercive aspect of its rhetoric [. . .]. (xiii)

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<sup>1</sup> Originally published in 1973. I refer to the 1985 edition, abridged by the author. Other important works among the many in this area include Ian Ward's *Law and Literature: Possibilities and Perspectives* and Robin West's *Narrative, Authority, and Law*.

In a later chapter, in which Boyd aims to “compare lawyers with poets and historians” (208), he writes: “the activities which make up the professional life of the lawyer and judge constitute an enterprise of the imagination, an enterprise whose central performance is the claim of meaning against the odds: the translation of the imagination into reality by the power of language. Its art is accordingly a literary one [ . . . ]” (208). In this respect it will be central to what follows to consider constitutions not as documents of fact and truth, but as rhetorical, as creative acts of purpose, as an “enterprise of the imagination.”

Unlike the law and literature movement, however, the present work will not use literary texts to compare with and decipher constitutional texts. The aim is to approach constitutions *as* texts, not as that which bear text-like qualities. The interpretation (or, in other words, the reading) of constitutions presents questions and uncertainties that are not fundamentally different to those faced with other texts. In his introduction to a collection of essays by a number of prominent legal theorists on the problems of interpretation, Larry Alexander writes: “the identity of a constitution might [ . . . ] seem inseparable from the question of what interpretive methodology is correct and even whose interpretation should be authoritative” (1). In other words there exists for constitutions as for other significant cultural texts the interrelationship of what the text is, how it is read, and who reads it. (One might see literary critic Stanley E. Fish’s “interpretive communities” in his seminal essay “Interpreting the *Variorum*” for but one illustration of the importance of this in literary theory.) And, as Alexander suggests, this interrelationship is indivisible from questions of power and legitimacy. Jed Rubenfeld’s essay in this collection, “Legitimacy and Interpretation,” in which he makes reference to Jacques Derrida and Stanley Fish among others, makes clear how closely entwined and problematic are literary and legal questions of interpretation:

Perhaps what constitutional law needs [. . .] is no different from what literary criticism needs: a general theory of interpretation. Reflecting this sort of thinking, recent legal scholarship includes a number of efforts to articulate a general theory of interpretation that is supposed to tell us what all interpretation properly consists of and hence what constitutional interpretation ought to consist of. There is, for example, a universal intentionalist position, according to which all interpretation (and therefore constitutional interpretation) properly consists of determining the original intentions of the speaker(s) or author(s) at issue. There is also a vulgar deconstructive position, according to which all interpretation actually consists of readers reading their own constructions into the interpreted object. And Ronald Dworkin has suggested that all interpretation properly consists of striving to make the interpreted object 'the best it can be'. (197-98)

We may draw from the above a relevant basic proposition: the questions faced by readers of constitutions in their various capacities are those which must arise inevitably from their engagement with written texts. Moreover, they are questions quite familiar to any student of the literary criticism of the past half century. Should we rely on the presumed intentions of the author(s), if indeed these are knowable? Does the historical context of the authors matter? Should the text be all that is necessary? If so, who are to be the authoritative interpreters? How did they gain this authority, and what sustains it? Why, and how, are some texts of a canon? What is to be done about the existence of multiple, competing interpretations? In what way do factors external to the text affect meaning? What if no ultimate meaning is possible? Are they all therefore valid?

Of wider concern is therefore not only the constitutional text but the relationships of which it is inexorably a part, and by which it is continuously formed. The way the present study in one respect links with legal study and theories of constitutions may be seen in terms of the historically fraught and problematic relationships of author, text and audience (and the ways that these are inextricable from constructions of power, agency and subjectivity.) Who has the authorial authority to speak of enlightened Truth and ultimate

law through the writing of constitutional texts or through their various discourses of interpretation? How is this gained and sustained? How is authority denied? How is the constitutionally defined and created readership or audience of “the People” formed? What are the means and the contexts by which constitutional arguments move and form? One of the ways in which such questions will be addressed is through the propositions of rhetorical studies on the relationships of author, text and audience. Thus, such theorists as Kenneth Burke, Chaim Perelman and Wayne C. Booth will be important here.

The interdisciplinary linking of legal theory with other contemporary discourses has given rise to further movements, such as that known as “critical race theory.” The broad objectives, philosophy and political history of the latter are given by two of the movement’s key figures, Richard Delgado and Jean Stefancic, in *Critical Race Theory: An*

*Introduction*:<sup>2</sup>

The critical race theory (CRT) movement is a collection of activists and scholars interested in studying and transforming the relationship among race, racism, and power. The movement considers many of the same issues that conventional civil rights and ethnic studies discourses take up, but places them in a broader perspective that includes economics, history, context, group- and self-interest, and even feelings and the unconscious. Unlike traditional civil rights, which embraces incrementalism and step-by-step progress, critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law. (2-3)

According to Delgado and Stefancic the movement draws upon “critical legal studies<sup>3</sup> and radical feminism [. . .] certain European philosophers and theorists, such as Antonio

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<sup>2</sup> See also *Critical Race Theory: The Cutting Edge*, edited by Delgado and Stefancic. Included, for example, among the many essays in this work is Ian F. Haney López’s highly influential “The Social Construction of Race.”

<sup>3</sup> In his defence of liberal theory – which we will later see exemplified by Ronald Dworkin and Bruce Ackerman - against the criticisms of critical legal studies, Andrew Altman defines the position of the latter: “The major theoretical aim of the [critical legal studies] movement is to provide a critique of liberal legal and political philosophy, and at the focal point of the critique, lies the concept of the rule of law. [. . .] CLS scholars argue [. . .] that the rule of law does not exist in contemporary liberal states because the legal

Gramsci and Jacques Derrida as well from the American radical tradition [. . .]” (4). Though critical race theory is often regarded as a split from critical legal studies, due to a perceived inadequacy of the latter to take into account constructions of race and racial divisions, it is the case nonetheless that “From critical legal studies, the group borrowed the idea of legal indeterminacy – the idea that not every legal case has one correct outcome” (4-5). In turn, “critical race theory has splintered” (6). Among the new “subgroups” are “Asian American jurisprudence, a forceful Latino-critical (LatCrit) contingent, and a feisty queer-crit interest group [. . .]” (6). Again, as important as these movements have been, they are not the specific directions that will be taken here, though the relationships between constitutions, law and subjection according to “race” will certainly be significant. The growth of these movements highlights the contention that to understand world constitutional history as a progressive era of the fundamental guarantees of the rule of law, liberty and justice is highly limited. One must also take into account the constructions of ontological difference, subjection, exclusion and dominant and subordinated spaces that are absolutely a part of this history. If we have a narrative<sup>4</sup> of liberty we also have innumerable narratives of its active and violent prevention.

There are two relevant points to be derived from this brief view of contemporary theoretical movements. The first is the fact that constitutions are not documents of certainty. They, their laws and their representations of such ideas as “the People” are

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doctrines of those states are riddled with contradictions and inconsistencies. [. . .] Law cannot perform the liberal task of constraining power and protecting people from intolerance and oppression, so even if the rule of law did exist, it could not accomplish its liberal goals” (3). As with all of these movements, however, one will rarely find clearly defined binary oppositions: “Because of the prominence of the debate between the libertarian and sceptical form of liberalism represented by the law and economics movement and the egalitarian politics represented by the critical legal studies movement, forms of liberalism that are alternatives to both movements tend to be ignored” (Griffin 190).

<sup>4</sup> In the use of “narrative” here and in what follows I shall assume a plain, but in my view comprehensive, definition provided by James Phelan: “narrative is a rhetorical action in which somebody tries to accomplish some purpose(s) by telling somebody else that something happened” (209).

constantly subject to ambiguity, contradictory interpretations and competing discourses. The second is that they are not singular and stable, but exist differently in multiple realms. And yet, as we will see throughout this thesis, for those many discursive communities of ruling elites, political analysts, judiciaries and legal theorists, documents of certainty and singularity are precisely what constitutions must be. They must be that which will yield the answers required to sustain the integrity and the authority of such communities. This is the point of entry for this thesis: the continual, global, multi-sited production and creation of textual certainty and truth is, and has always been, one of perpetual contest and circulation.

The sheer volume and diversity of intellectual endeavour that concerns itself with constitutions and constitutionalism requires that the choice of commentators and texts be determined by certain critical objectives. Accordingly, this thesis has two main intentions. The first is a critique of the history of European and North American constitutional exceptionalism, entitlement and dominance<sup>5</sup> in what I will later define as a world constitutional space of modernity. (The latter, in its historical functioning and circulations, draws upon a description of world literary space as given by Pascale Casanova's *The World Republic of Letters*.) The second is a concern, ultimately, with contributing to contemporary debate on the effects of Western hegemony, globalism and neo-imperialism on identity, agency and human liberty. This reading of constitutions is therefore to take

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<sup>5</sup> Two vital aspects of which are illustrated in F.A. Hayek's seminal *The Constitution of Liberty*. On one hand is a mission and a responsibility inseparable from a sense of ideological crisis and loss of direction quite recognizable in the rhetoric of the present day: "A large part of the people of the world borrowed from Western civilization and adopted Western ideals at a time when the West had become unsure of itself and had largely lost faith in the traditions that have made it what it is" (2). On the other is the sustaining of an essential, ontological difference which itself cannot and should not be taught: "though the beliefs on which these disciples of the West are acting may enable their countries to copy more quickly a few of the achievements of the West, they will also prevent them from making their own distinct contribution. Not all that is the result of the historical development of the West can or should be translated to other cultural foundations [. . .]" (2-3).

place in the light of such contemporary critics as Étienne Balibar, Michael Hardt and Antonio Negri, Paul Gilroy and Slavoj Žižek.

This brings us to the approach to constitutional history that will be taken here. As we will see below in the sketch of political science running from the nineteenth- and twentieth-century British political scientist Lord James Bryce to the post-Soviet neo-conservatism of Francis Fukuyama, Western constructions of a progressive constitutional history sustain a privileged European and North American centre which has the purpose (and still assumes the burden) of disseminating enlightened modernity to a chaotic, reluctant, or inherently incapable periphery. For this reason the historical works employed here are on one hand to provide context for particular constitutions and the contingent circumstances of their appearance, and on the other to offer a critical view of traditionally dominating constitutional discourses. These discourses do not make visible the oppression, marginalization, destruction and enslavement that has significantly characterized Western constitutional ideals, aspirations and desires. Hence we will see such recent studies as Patrick Brantlinger's *Dark Vanishings: Discourse on the Extinction of Primitive Races, 1830-1890*; Toni Morrison's *Playing in the Dark: Whiteness and the Literary Imagination*; Roy Harvey Pearce's *Savagism and Civilization: A study of the Indian and the American Mind*; and Mike Davis' *Late Victorian Holocausts: El Niño Famines and the Making of the Third World*. We will also consider the several controversial works of Donald Grinde and Bruce Johansen on the Great Law of the Iroquois Confederation and, as they argue, its direct influence on the writing of the US Constitution. Differing critical perspectives on modernity – clearly necessary for the contextualization of national constitutions – will come from such writers as Chantal Mouffe, Ernesto Laclau, Timothy Mitchell, Antonio Negri and Jean-François Lyotard. Also important will be the works of Hannah Arendt,

Frantz Fanon, V.G. Kiernan, Eric Hobsbawm and, from the anthropologist's perspective on postcolonial nationalism, Clifford Geertz. At a broader level of critique of historiography itself are the contentions of Michel de Certeau and Michel Foucault.

What is aimed for is not only the political and legal history of constitutional texts, but the cultural and the social. In general terms the approach taken may thus be characterized as belonging to the diverse field of "cultural studies" in its concern for the historical relationships of people, communities, society and power. In further elucidating this position, and its relevance here, the following three perspectives on cultural studies are useful. The first is by Regenia Gagnier: "Cultural studies is the study of the ways that individuals and groups represent themselves to themselves and thereby construct their identities" (468). By which the constitution may be seen as a cultural form endeavouring both to represent the national identity of "the People" and instrumental in forming and creating it. Second is cultural studies as an ongoing political project as given by Lawrence Grossberg and Della Pollock in the "Editorial Statement" of *Cultural Studies* journal: "the study of the effects of discourses as a necessary dimension of all human contexts, articulating relations among discourses, everyday life, social structures and apparatuses of power, with the explicit purpose of defining the possibilities for invention and intervention." The third is provided by Patrick Brantlinger in *Crusoe's Footprints: Cultural Studies in Britain and America*: "in order to understand ourselves, the discourses of 'the Other' – of all the others – is that which we most urgently need to hear" (3).

Though this work will contend that the meanings of constitutions are, in the rhetorical sense, a function of the communities and cultures of the peoples they address in their argumentation, it will not attempt to present the particular manifestations of constitutional ideas as they are experienced, expressed and interpreted in their myriad



forms by specific communities of people themselves. Given the scale of what is being examined – constitutionalism as of a circulation of ideas and practices in a modern world space – a detailed and comprehensive presentation of particular expressions and interpretations would not be feasible here. The concentration is therefore mainly on what we might call, again according to a rhetorical model, the writers or authors of constitutions and constitutionalism. The consequences of the history of constitution writing (and re-writing) are considered in terms of the broad effects of the discourses of power, politics, law and theory upon whole communities, cultures and peoples. (As will be returned to below, the focus in particular is on African and Native Americans in and subjected by the US Constitution, and the many peoples of Vietnam and Iraq.) Such discourses not only affect, but are instrumental in constructing living identity, culture and subjectivity.

This is a study of texts, but it also endeavours to make a contribution to the interdisciplinary exploration of the politics of identity and culture. Thus it is to be hoped that this work may be of interest to (and read by) literary scholars, but also those of other disciplines concerned (as is the case in the movements illustrated above) with the investigation of the interrelationships of text, subjectivity, history, law and power.

### **The Experiences of a World Space**

Constitutions have long ceased to be predominantly Western.<sup>6</sup> Taking together the constitutions and the histories of such writing in Latin America, Asia, Africa and the Middle East, it is the case that by far the majority of life under national constitutions is non-Western and has been for many decades. The constitutions of the latter not only express

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<sup>6</sup> Though aware of the inadequacies of the designation “Western” as an historically definite geopolitical entity, I shall use it nonetheless to mean that which has traditionally been associated with Western Europe and North America.

entirely different experiences from those of Europe and North America, but also of course from each other, and draw upon their unique perspectives in their arguments for autonomy and right to exist. The narrative contained in the Preamble to the 1971 Constitution of Egypt, for example, provides a clear illustration of a claim to inviolable entitlement founded upon the absolute value of cultural “experiences”:

Our people have passed through successive experiences, meantime offering rich experiences on both the national and international levels, by which they have been guided. These experiences finally took shape in the basic documentations of the July 23rd Revolution led by the alliance of the working forces of our struggling people. This people have been able, through deep awareness and refined sensibility, to retain the genuine core of this revolution and to continuously rectify its path and to realize through it full integration between science and faith, political and social freedom, national independence and affiliation on the one hand and the worldwide struggle of humanity for political economic, cultural and intellectual freedom and the fight against all forces and remnants of regression domination and exploitation on the other hand. (“Egypt”)

The interwoven images of a particular “struggling people,” who, with their “deep awareness and refined sensibility” fight “domination and exploitation” in pursuit of the “worldwide struggle of humanity” we will see frequently expressed in various ways in non-Western constitutions. Common too are expressions of new hope, strength and aspiration given narrative sense by connection to a cultural past grievously interrupted by misfortune.

The 1993 Constitution of Cambodia:

We, the people of Cambodia;  
Accustomed to having been an outstanding civilization, a prosperous, large, flourishing and glorious nation, with high prestige radiating like a diamond;  
Having declined grievously during the past two decades, having gone through suffering and destruction, and having been weakened terribly;  
Having awakened and resolutely rallied and determined to unite for the consolidation of national unity, the preservation and defense of Cambodia's territory and precious sovereignty and the fine Angkor civilization, and the restoration of Cambodia into an "Island of Peace" based on multi-party liberal democratic responsibility for the nation's future destiny of moving toward perpetual progress, development, prosperity, and glory;  
With this resolute will;

We inscribe the following as the Constitution of the Kingdom of Cambodia  
[. . .]. (“Cambodia Constitution”)

As non-Western constitutions reflect and construct different needs and historically formed positions from those of Western cultures, it could be said that written constitutions on the whole are no longer *about* Western life and cultural experience. But of course it does not follow from this that world constitutionalism is any less defined as having an essentially Western historical, cultural and ideological content. Or, conversely, as Paul Gilroy phrases it, “Though they are a majority of people on this planet, they can be overlooked, and their experience is not accepted as part of our world’s portrait of itself as a world” (66).

Before examining in later sections of this introduction the ways in which “Western constitutionalism” has been historically sustained (and continually re-created) as both an all defining source and as fundamentally different, I propose a conception of modern constitutional writing that is better able to comprehend and encompass a world of experiences than the typical model of a privileged centre disseminating knowledge concentrically to a chaotic periphery. This I will term “constitutional space.” Pascale Casanova’s explanation of world “literary space” as uneven and structurally, economically and discursively iniquitous, yet ever dynamic and contested, provides an analogous and relevant depiction:

[Literary space is] not an immutable structure, fixed once and for all in its hierarchies and power relations. But even if the unequal distribution of literary resources assures that such forms of domination will endure, it is also a source of incessant struggle, of challenges to authority and legitimacy, of rebellions, insubordination, and, ultimately, revolutions that alter the balance of literary power, and rearrange existing hierarchies. In this sense, the only genuine history of literature is one that describes the revolts, assaults upon authority, manifestos, inventions of new forms and languages – all the subversions of the traditional order that, little by little, work to create literature and the literary world. (175)

As a contested world space, the era<sup>7</sup> of modern constitutions and constitutionalism,<sup>8</sup> I argue, has never at any point been an isolated Western cultural and political experience. Despite the highly visible appearance in late-eighteenth-century America and France of what are taken as being the first modern documentary constitutions, and the subsequent dominating Western usage of this prose form until the early twentieth century, constitutionalism has been throughout, from innumerable cultural perspectives, reactions and interpretations, a matter of world experience, influence and life. It has always been a global space, if a permanently fraught, iniquitous one.

Constitutions rhetorically and discursively, and as a form of power, have always existed in a much wider sense than the texts themselves. As well as the actual deployment of written constitutions are the effects of, and the reactions to, their ideas and their influences; the circulations of the systems of knowledge, privilege and right they have embodied. French constitutionalism and principles, for example, were never simply a “French” experience. They were interpreted, felt materially, culturally and intellectually, and were transformative of the lives of peoples on incalculable levels from Haiti to Algeria to Indochina, prior to and during the independent adoption of constitutions by these nations. The same may be said of course of the US Constitution in Native American lives, in the Philippines, in Vietnam, in Iraq; and of other colonial and imperial powers and their global effects. The experiences of disempowerment, disinheritance, subjugation and loss that the

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<sup>7</sup> An era that political scientist C.F. Strong defines as beginning when the ancient notion of a constitution is put in service of the modern nation: “The roots of constitutionalism lie deep in the history of the Western World [ . . . ] Nevertheless, the modern constitutional state is necessarily nationalist in background and democratic in tendency” (10).

<sup>8</sup> Constitutions and constitutionalism are not necessarily bound to each other, as Michel Rosenfeld explains his introduction to *Constitutionalism, Identity, Difference, and Legitimacy*: “although not all constitutions conform to the demands of constitutionalism, and although constitutionalism is not dependent on the existence of a written constitution, the realization of the spirit of constitutionalism generally goes hand in hand with the implementation of a written constitution” (3).

great principles of enlightened humanity have meant for a significant part of the earth absolutely cannot be discounted in understanding the nature and the present of world constitutionalism. It is precisely these experiences that inform, and are often directly expressed in, a large part of the national constitution writing of that world.

A further important point to be introduced here (and returned to below) regarding “constitutional space” is its interconnectedness throughout. The establishment of a multi-sited and ever-contested space is to defend the value of differing cultural and historical perspectives, but is not to posit a world of autonomous cultural units contributing to a whole. Nor is it to propose that the development of laws can be legitimate only as derived from an imagined and isolated cultural purity, as Montesquieu appears to argue in *The Spirit of Laws*. Laws, he writes, should be considered

in relation to the climate of each country, to the quality of the soil, to its situation and extent, to the principle occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered. (38)

Montesquieu’s argument is certainly not to be dismissed here. Indeed, it will be a central contention that particular constitutions are given significant living meaning from the inside as it were, from the various communities that receive them, rather than solely from above. But it must be acknowledged that neither nations nor the peoples comprising them exist in such isolation, left to blossom in their own organic harmony, not affecting or affected by that which surrounds them.<sup>9</sup> There is difference, but it is difference in a space of

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<sup>9</sup> It is also important to bear in mind that the determination of essential cultural difference according to “climate” has long been used as a means of establishing and imposing specifically directed systems of control and subjugation by colonial and imperial powers. As Napoleon Bonaparte writes in 1799 in a letter entitled

circulation, borrowing, imitating, translating, interpreting (or misinterpreting), reaction and rejection.

In this regard constitutions are not only affected in their content by the historical experiences of the cultures they are about and address, but by the ways in which difference, experience and contingent circumstances are used to negotiate a credible and legitimate position in constitutional space. Every constitution which emerges makes an intervention into a world in which other constitutions already exist; in other words, an interconnected space with a shape and nature defined by that which happens to be its content at that time. In turn, new constitutions affect the nature of the space. (This will be a central theme of Chapter 3 on the 1827 Constitution of the Cherokee Nation.)

The Preamble to the 1992 Congolese Constitution speaks not only of the bloody history of its own constitutions but of the disastrous legacy of colonial nation building upon a long-brutalized region of “different communities.” The promise of a new beginning, new aspirations and adherence to universal values is made not only to the Congolese peoples, but is set in a tone of evident contrition before the world:

Unity, Work, Progress, Justice, Dignity, Liberty, Peace, Prosperity, and Love for the Fatherland have been since independence, notably under monopolyism, hypothesized or retarded by totalitarianism, the confusion of authorities, nepotism, ethnocentrism, regionalism, social inequalities, and violations of fundamental rights and liberties. Intolerance and political violence have strongly grieved the country, maintained and accrued the hate and divisions between the different communities that constitute the Congolese Nation.

The coup d'etat has inscribed itself in the political history of the Congo as the only means to accede to power and to annihilate the hopes of a truly democratic life.

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“Proclamation to the Citizens of Santo Domingo,” “This disposition [“Article 91” of a “new pact designed to strengthen freedom”] derives from the nature of things and the differences of climate. The inhabitants of French colonies situated in America, Asia and Africa cannot be ruled by the same law. Distinctions of tradition, of custom, of interest, the diversity of soil, of culture, of production demand various modifications” (Bonaparte, “Proclamation” 329). Various manifestations of this tactic, still a practice of imperializing power in the present day, will be referred to in this work.

Consequently, We, the Congolese People, concerned to:

- create a new political order, a decentralized State where morality, law, liberty, pluralist democracy, equality, social justice, fraternity, and the general well-being reign;
  - preserve the sacred character of the human person;
  - assure to the individual and the family the conditions necessary for their harmonious development;
  - guarantee the participation of everyone in the life of the Nation;
  - preserve our unity within cultural diversity;
  - promote a rational exploitation of our riches and our natural resources;
  - dispose of ourselves freely and to reaffirm our independence;
  - cooperate with all peoples who share our ideals of peace, liberty, justice, human solidarity, on the basis of principles of equality, reciprocal interest and mutual respect, sovereignty, and territorial integrity;
  - contribute to world peace as a member of the United Nations Organization (UN) and the Organization for African Unity (OAU); and
  - to strive for the creation of large sub-regional economic groupings [ . . . ].
- ("Congo")

The South African Constitution of 1996 offers both closure on a divided past and a promise of a new unified, harmonious beginning to its many peoples and to the world in which is sought a "rightful place":

We, the people of South Africa,  
 Recognise the injustices of our past;  
 Honour those who suffered for justice and freedom in our land;  
 Respect those who have worked to build and develop our country; and  
 Believe that South Africa belongs to all who live in it, united in our diversity.  
 We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -  
 Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;  
 Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;  
 Improve the quality of life of all citizens and free the potential of each person;  
 Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.  
 May God protect our people.  
 Nkosi Sikelel iAfrika. Morena boloka setjhaba sa heso.  
 God seën Suid-Afrika. God bless South Africa.  
 Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika. ("South Africa")

## The Writing of Difference

A section of the lengthy preamble to the immense work called the Lisbon Treaty declares:

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law [. . .]. (“Treaty of Lisbon”)

The historical spring of Europe’s “inheritance” is thus also the world’s source of “universal values.” As an inheritance, the values, bequeathed by a cohesive, unitary past are a Western legal, rightful property to share or hoard, spend or squander, disseminate, impose and withdraw as is seen fit. No matter how well the rest of the world manages to adhere to these values, no part, one extrapolates, may ever usurp this position of centrality and privilege. To do so would perhaps contravene *the* narrative of civilizations, according to which Greece and Rome bestow their “cultural, religious and humanist” treasures directly to Christian Europe. This position, given so naturally in the above, as if its truth were perfectly obvious and beyond reasonable dispute has, we will see, required in fact centuries of concerted intellectual effort and resources to continually create, recreate and sustain.

It has long been known by Western practitioners and theorists of constitutional science that the constitutions of the world are interrelated; that their ideas, structures, expressions are only limitedly understood in isolation, and so must be understood comparatively and organized according to taxonomic systems.<sup>10</sup> On the surface these are systems based on the objective and all-encompassing categories of a science. International law attorney, Robert L. Maddex, for example, has a table in the introduction to his 2008

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<sup>10</sup> The discursive discipline of constitutional comparison is a vast field, interconnecting political and legal history and social science. Thus, sufficient space for anything approaching a full exposition cannot be given here, but some examples will be illuminating and useful – not only in terms of the present arguments, but also as an early indication of the kind of material that will be important throughout this work. A more thorough explanation of the interdisciplinary nature of the present research is given below.



*Constitutions of the World* by which nations are classified according to: “Type of Government”; “Type of State”; “Most Recent Constitution”; “Type of Legislature”; “Judicial or Constitutional Review”; “Ombudsman.” Afghanistan is therefore surmised, respectively, as: “Islamic republic”; “Unitary state”; “2004”; “Bicameral parliament”; “Judicial review”; “No” (xvii). Such systems are of course useful in their own way, and it will be argued that they serve to eliminate perceptions of fundamental difference between Western and non-Western constitution writing in the sense that all constitutions are subject to the same objective classifying criteria. However (as with other disciplines), constitutional comparison is concerned not only with the production of objective categories, of its cherished truths,<sup>11</sup> but with the preservation of its own historical continuity, authority and intellectual origins. This, it seems, is very much dependent upon sustaining Western constitutions as the perpetual historical models. These models set the ultimate parameters for all others, which, in all their differences, can be but variations on original themes.<sup>12</sup>

The British liberal politician, historian and academic Lord James Bryce (1838-1922) frequently appears as a pioneering figure of the field. K.C. Wheare, for example, in his 1951 work *Modern Constitutions*, writes of Bryce as being the first to advance the classification system beyond the traditional, but analytically limited categories of written/unwritten (19-22):<sup>13</sup>

Constitutions may be classified according to the method by which they may be amended [. . .] This method of classifying Constitutions has usually been described as a classification into flexible and rigid Constitutions, a

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<sup>11</sup> See below for Randall Collins’ “sacred objects” of “intellectual communities.”

<sup>12</sup> Some will slip loose of their moorings: “Unfortunately, too many national constitutions today are extremely ineffectual documents or outright shams that try to mask unbridled dictatorships” (Maddex x).

<sup>13</sup> A binary which, it seems to me, ensured that the unwritten British constitution was locked into an essential comparative system with the American and French constitutions. It is all the more interesting therefore that the idea of a British written constitution occasionally raises its head. As Britain declines, so fades the defining significance of its historical difference.

classification which owes its origin to Lord Bryce and is expounded by him in his [1901] *Studies in History and Jurisprudence*. (22)

When Leslie Wolf-Phillips, in the introduction to *Constitutions of Modern States: Selected Texts*, endeavours to examine and advance the accepted systems “with the hope of relating the formal statements of a given text more closely to the realities of the political system of which it is a part [ . . .]” (ix), it is Bryce he must first acknowledge: “There is an abundance of definitions in current usage, but most of them are variations of that put forward by James Bryce in his celebrated Oxford lectures of 1884” (ix).

C. F. Strong (who also refers to Bryce, along with “Edward Jenks and Sir J. A. R. Marriott,” as the originator of the systems he utilizes and proposes to extend (61)) is at pains at the outset of his 1958 *Modern Political Constitutions* to defend the scientific rigour and integrity of his field: “The study of political constitutions is a branch of political science or the science of the state [ . . .] it [political science] is a distinct science, with its own materials and data. These are found in the history of states and in their existing forms” (1). One might expect therefore, given the global deployment and variety of constitutional “data” by the mid-twentieth century, that a collective work of constitutional comparison would have to be of tremendous breadth. And yet virtually all of Strong’s book is dedicated to European constitutions and those of Australia, Canada and New Zealand. (The rest of the world is relegated to a closing chapter called “Constitutional Experiments Among Non-European Peoples.”) The “data” is subject to divisions that pre-exist the categorization: “When we contemplate the failure of political constitutionalism to establish itself even in certain parts of Europe, we are not surprised to find an incapacity successfully to adopt it in some countries outside Europe, even though there might exist in some of these [ . . .] a genuine national sentiment” (Strong 291). Wheare confirms and extends this view:

although almost all countries in the world have a Constitution, in many of them the Constitution is treated with neglect or contempt [. . .] It is only in the states of Western Europe, in the countries of the British Commonwealth, in the United States of America, and in a few Latin-American states that government is carried on with due regard to the limitations imposed by a Constitution; it is only in these states that truly ‘constitutional government’ can be said to exist. For this reason it is inevitable that in discussing the working of Constitutions in the pages of this book, most attention will be given to these countries, for it is only in them that any considerable material exists for the study of Constitutions (6).

From this perspective, constitutions not under the control of Western nations will not make up the content of the era of modern constitutions, or contribute to it definitionally, *even as failures*. It is a method of reading history described by Michel de Certeau as “a selection between what can be *understood* and what must be *forgotten* in order to obtain the representation of a present intelligibility” (158; emphasis in original). Or, as Paul Bové in his surmising of the operation of discursive regimes writes,

Not unless a statement is about an ‘object’ and can be judged in its truthfulness does it enter into a discourse; but once it does it furthers the dispersal of that discourse and enlarges the realm of objects and statements which produce knowledge that can be judged legitimate or illegitimate. (7)

Western constitutional science and history protects its centrality with the idea that constitutional language can only be properly understood and implemented by those of the correct social, cultural and economic advancement or evolution. As there is no alternate or equivalent position from which to grasp such principles other than that already embodied by the West, “translation” has been regarded as difficult or impossible. Political historian John A. Hawgood comments on the problems with “simply producing libertarian constitutions in translation” for those peoples lacking in “the highly developed economic organization and industrial development of the conquerors” (298). He writes:

Though there was much freedom in the translation, this freedom did not always extend to the form of government set up, any more than it had done when the new republics of Latin American had translated the United States

constitution into Spanish and Portuguese for themselves [. . .] The libertarian states have been most grudging with their free institutions except to dependencies situated at great distances from the mother-country, in temperate lands, and populated by people of their own or similar racial stock. (298)

Such is essentially the editorial stance of American political scientists Daniel P. Franklin and Michael J. Baun in their 1995 collection of essays, *Political Culture and Constitutionalism: A Comparative Approach*. In their introduction the editors, like so many before them, posit a universalizing theory of liberal constitutionalism, in this case built around the viability and preparedness of a nation's "political culture." This they define as the "moral, intellectual and cultural climate in a state" (4). If this "climate" is suitable then what they regard as the essential factor of constitutionalism, the rule of law, may prevail. For some nations, Baun and Franklin write, this requisite culture will not occur on its own and requires assistance: "We take in this study an undisguised Western, Northern perspective. It is in the power of industrialized democracies to lead, but in what direction?" (1). Two possibilities of successful modernization and achievement of "political culture" are given: either a state is permitted to develop on an organic, evolutionary basis over time (as Britain and the United States have had the privilege of doing), or "benign occupation" may be necessary (2). The latter, also called "preparatory occupation," is to be distinguished from the "imperialistic" kind because "An occupying power that itself is a democratic, constitutional state will, by its own nature, conduct a benign occupation" (2).

A great many nations have taken on the trappings of constitutionalism in the past, the editors write – elections, parliaments, limits on power and so on – but have often failed due to a lack of the right culture:

Many Western clients during the cold war were not ripe for democracy and, in the absence of massive Western assistance, will slip back to the status of pre-constitutional, authoritarian regimes [. . .] we believe that a large

percentage of the world's states are still without a political culture appropriate to the establishment of a constitutional regime. (10)

To test their thesis, Baun and Franklin sent out a questionnaire to ten “country specialists” asking that they produce an essay around their answers. Many of the respondents, however, describe their constitutional histories, experiences and understandings not in terms of a Western definition of “political culture,” as if such a thing was constant and uniform, but in terms of their own contingent cultural and political histories; their differences and unique circumstances, pride, failures, degradations and triumphs. Rotimi T. Suberu writing for Nigeria, for example,<sup>14</sup> argues that “political culture” is not a singular entity:

traditional political cultures have not been stagnant or static. On the contrary, they have coexisted with, and usually have been affected by, more modern influences and experiences. Consequently, the cultural framework of politics in Nigeria is better conceived not as a derivation of the communal past but as a complex matrix of values and orientations reflecting diverse historical and contemporary events, conditions, and experiences. (204)

The Western role in the early constitutionalism of Nigeria is characterized in Suberu's essay as that which has been contested and fought against, both creating the space for independent existence and affecting its nature:

Any attempts to account for the vulnerability of democratic institutions in Nigeria must invariably revisit their roots in the British colonial experience [. . .] the British-created, multiethnic Nigeria edifice was administered via an autocratic colonial bureaucracy whose policy of “indirect rule” explicitly involved the preservation and consolidation of authoritarian or centralized indigenous political institutions, the corruption and distortion of fragmented or parademocratic precolonial political systems, and the sometimes brutal invention and promotion of ‘warrant chiefs’ or new structures of “traditional” political domination” (198).

Western constitutional thought seems not only to endlessly reconfirm its own historical position by obscuring and making secondary an entire world of historical struggle, thought, triumph, progress (and disaster), but by demanding that the latter be

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<sup>14</sup> Another respondent, Howard J. Wiarda, writing on Mexican constitutionalism, is cited below.

silenced altogether. At least, that is what one extrapolates from Francis Fukuyama in his encapsulation of humanity's future in the post-Soviet age (of which Franklin and Baun above are quite obviously representatives):

Technology makes possible the limitless accumulation of wealth, and thus the satisfaction of an ever-expanding set of human desires. This process guarantees an increasing homogenization of all human societies, regardless of their historical origins or cultural inheritances. All countries undergoing economic modernization must increasingly resemble one another; they must unify nationally on the basis of a centralized state, urbanize, replace traditional forms of social organization like tribe, sect, and family with economically rational ones based on function and efficiency, and provide for the universal education of their citizens. (xv)

The tireless endeavour to keep a centre is inseparable from a purposeful closing out of a whole globe of other voices and experiences; a reluctance or even a refusal to accept that claims to “universal values,” and the pursuit of human social good might be legitimately pursued according to the perspectives of cultural histories other than those of Europe.

Drawing upon Timothy Mitchell's observations, the continual establishment of fundamental difference is central to the process of ensuring that “modern” is synonymous with “Western”: “The modern occurs only by performing the distinction between the modern and the non-modern, the West and the non-West, each performance opening the possibility of what is figured as non-modern contaminating the modern, displacing it, or disrupting its authority” (26).

### **Writing the Performance**

Rightly, it will be said that there does exist a writing of constitutions uniquely reflecting Western intellectual and social history, values, religion and sense of ascendant destiny. But this is not the same as to say that there is something uniform called “Western constitutionalism” moving through the centuries unaffected by the cultures, the differences

and resistances that its systems of knowledge and practices, its entitlements and rights to act, have come into contact with. Nor can it be said that those Western ideas and principles alighted upon a moral and social vacuum, and were not experienced, read and translated by cultures with traditional understandings and multiple conceptions of their own. That is, should it be thought that such hallowed notions as people, justice, liberty, shared resources, accountability, rule of law and so forth have had no other parallel cultural histories, no level of equivalence, no sources other than Western history and ideology? With a different but much related focus, this is a point that Patrick Brantlinger addresses in *Dark Vanishings*:

Race [. . .] homogenized the great diversity of peoples – into the uncivilized stages of savagery and barbarism but also into the stereotypic molds of separate, radically unequal types of mankind [. . .] Through its unifications of widely divergent cultures and societies, racial theory and its subset, extinction discourse, downplayed or ignored the possibility that there might be many degrees, levels, or types of progress toward (or degeneration away from) civilization – or, more radically yet, that there were diverse cultures and civilizations pursuing different but equally legitimate histories. (3)

Without question European constitutional history and thought has affected the political and cultural existence of the rest of the world, but not in a continuous, singular or obvious fashion. There is no point in time in which we would find “Western constitutionalism” replete with its assumed superior, cogent values, as a unified coherent force. It has always been formed, I argue, in reaction to internal and external pressures, in the continual writing and implementation of new strategies, systems and certainties to sustain the appearance of integral unity.

Following the French and American constitutions of the late-eighteenth century, constitutions claiming sovereign space outside North-Western political and cultural dominion begin to appear almost immediately, and continued to accumulate through the

nineteenth century.<sup>15</sup> These texts were often written and promulgated decades before those of most of Europe. Notable among them is of course the Constitution of Saint-Domingue in 1801 under Toussaint L'Ouverture. To Napoleon Bonaparte this declaration of enlightened autonomy by former slaves appears to have constituted a threat exceeding that of immediate differences in the “civilized” world. In a letter to Charles Maurice de Talleyrand in October 1801, he demands swift and cooperative action in the name of common concerns:

You will send a courier to Citizen Otto, Citizen Minister; you will tell him that he can inform the English cabinet confidentially, in exchange for the communication they have made to us of the dispatch of five ships to Jamaica, that six ships and our frigates of the Rochefort squadron . . . will leave for Santo-Domingo during the last decade of Brumaire; the whole will carry about 20,000 landing troops under the orders of General Leclerc. I wish the British Government to give orders at Jamaica that he is to be supplied with all the foodstuffs he may need, for it is to the interest of civilization to destroy the new Algiers that has been growing up in the middle of America. (Bonaparte, “To Citizen Talleyrand” 506.)

If the Constitution of Saint-Domingue was somehow a challenge to the “civilization” of France and Britain it was certainly not because it rejected the professed progressive ideals and hopes of the new European age. On the contrary, it embraced and advanced them to what might be called a natural or logical conclusion, but from a very different point of view:

The representatives of the colony of Saint-Domingue, gathered in Central Assembly, have arrested and established the constitutional bases of the regime of the French colony of Saint-Domingue as follows [ . . . ].  
 Art. 3. – There cannot exist slaves on this territory, servitude is therein forever abolished. All men are born, live and die free and French.  
 Art. 4. – All men, regardless of color, are eligible to all employment.

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<sup>15</sup> For example: Poland in 1791, Venezuela in 1811, Mexico in 1821, the Cherokee Nation in 1827 (the subject of Chapter 3), Argentina in 1853, Tunisia in 1860, Japan and the Philippines in 1899.



Art. 5. – There shall exist no distinction other than those based on virtue and talent, and other superiority afforded by law in the exercise of a public function. (“Constitution of 1801”)

Following the defeat of the French, the second constitution (now of Haiti), under Jacques Dessalines in 1805, contains:

As well in our name as in that of the people of Hayti, who have legally constituted us faithfully organs and interpreters of their will, in presence of the Supreme Being, before whom all mankind are equal, and who has scattered so many species of creatures on the surface of the earth for the purpose of manifesting his glory and his power by the diversity of his works, in the presence of all nature by whom we have been so unjustly and for so long a time considered as outcast children. (“The 1805 Constitution”)

The same embracement of an age of peace, freedom and equality can of course be found in the other constitutions given above as well as the great many others. Presented is not an opposition, but a paradoxical and disturbing reflection of the same hallowed values espoused by enlightened Western thinkers. How could this rationally be confronted? Or, perhaps better put, how could the confrontation be rhetorically presented as rational? On what basis should it be rejected? On the surface it seems contradictory, even absurd, to reject claims for the universal rights of liberty, equality and fraternity directly, by declaring: “Universal right and liberty belongs to us, not you.” But, going by an assertion of Toni Morrison’s, it was a declaration that absolutely did have to be made nonetheless: “The concept of freedom did not emerge in a vacuum. Nothing highlighted freedom – if it did not in fact create it – like slavery” (38). And as will be further considered below (and throughout) the history of Western constitutional principles and the history of the acquisition of land and resources (including human) from those denied access to the universal rights of Humanity are entirely inseparable.

A central point to be made here concerning this early period of constitutionalism is that the “challenge,” the threat, to Western hegemony was there from the outset and has

never disappeared. A fact from which one might posit that Western constitutionalism has virtually always had as a significant aspect of its defining content and practices the continued formulation and creation of itself as different; “performing the distinction,” as Mitchell put it. That difference is largely perpetuated, I argue, not necessarily by a direct denial of the right to participate in the performance of constitution writing, and to the enjoyment of the universal rights contained therein (on the contrary – from civilizing missions to democratization this is held out as a promise of future realization and legitimacy), but by differentiating according to the (ontological, racial, social, cultural, religious, ethnic, historical) nature of the performers in the constitutional rites and practices. As the second of J. L. Austin’s six “rules” for the “smooth [. . .] functioning of a performative [. . .]” states: “(A. 2) the particular persons and circumstances in a given case must be appropriate for the invocation of the particular procedure invoked” (14-15). Analogously to the restriction of marriage to heterosexual couples, the sanctity and social empowerment of the ceremony is entirely linked to the preservation of the status and the power of the particular subjects who are considered fit to be celebrated by its performance.

At the same time that constitution writing can be deemed as not “appropriate” for “the particular persons and circumstances” it will become increasingly the case for a large part of the world and its peoples that it is only through the performance of national constitution writing that legitimacy, recognition, equality, even right to exist as a cultural, political entity may be conferred. Furthermore it is frequently only by inclusion in this national culture, or People, that the myriad distinct groups that constitute many postcolonial and developing nations can have audible cultural voice and representation. (This will be explored in Chapter 4 on the constitutions of Vietnam, drawing particularly on the assertions of Frantz Fanon.) Clearly, therefore, the power to declare a constitutional

performance invalid or of a lesser status (and thereby to effectively silence its participants) has historically been a great one indeed.

The question of performative legitimacy has not been a defining factor in the Western experience or conception of its own constitutional history. The history of constitution writing in the West, it seems to me, has not been about the visible achievement of a requisite level of being, but a continual re-confirmation of always already being the level, of synonymy with it. The French People were called upon to act in the name of God, History and all Humanity:

So was it to copy slavishly the errors or injustices that have long degraded the human species that eternal providence called on you, on you alone since the world began, to re-establish on earth the empire of justice and liberty, in the heart of the brightest enlightenment ever to have illuminated public reason, amid the almost miraculous circumstances providence has been pleased to assemble, to supply you with power to restore to mankind its original happiness, virtue and dignity? (Robespierre 8)

As, according to Thomas Paine in *Common Sense*, were the Americans: “’Tis not the concern of a day, a year, or an age; posterity are virtually involved in the contest, and will be more or less affected, even to the end of time, by the proceedings now” (82). “We have it in our power to begin the world again. A situation, similar to the present, hath not happened since the days of Noah until now” (120).

The struggle then for many non-Western peoples, particularly in the twentieth century, has been to break free of the web of levels which can never be reached; historical entitlement which can never be gained; performances which can never be legitimate precisely because they need to be externally defined as such. Their constitutions in this respect have often been about the creation of a national People in a space of security and freedom from external power by arguing for the absolute legitimacy of entitlement according to *their* particular cultural histories, religions, traditions, expectations and

ideologies (as we have seen in all the examples given so far). As this has occurred according to a wholly different set of criteria and pressures than that of Western constitution writing, the language, the rhetoric and the meaning has thereby also been radically different. As will be demonstrated in Chapter 4, differing, perhaps entirely separate cultures and traditional histories are formed or mobilized into a mass entity of the People. (Thus they and nation are formed in the writing process, rather than assumed to have always existed). It is only as this People that a place of equivalence on a world stage can be hoped for. The 1945 Constitution of Indonesia illustrates this well:

Whereas independence is the inalienable right of all nations, therefore, all colonialism must be abolished in this world as it is not in conformity with humanity and justice [ . . . ]  
 Subsequent thereto, to form a government of the state of Indonesia which shall protect all the people of Indonesia and their entire native land, and in order to improve the public welfare, to advance the intellectual life of the people and to contribute to the establishment of a world order based on freedom, abiding peace and social justice, the national independence of Indonesia shall be formulated into a constitution of the sovereign Republic of Indonesia which is based on the belief in the One and Only God, just and civilized humanity, the unity of Indonesia, democracy guided by the inner wisdom of deliberations amongst representatives and the realization of social justice for all of the people of Indonesia. (“The 1945 Constitution”)

Paradoxically, perhaps, it is in opposition to the very forces that lay claim to “universal” principles that that which approaches anything like true universality emerges. It is as the “people of Indonesia” that the huge number of distinct peoples that constitute this body will have not only justice and liberation from colonial powers, but “contribute to the establishment of a world order [ . . . ].”

### **Arguments of Truths**

There can be no privileged centre or ownership of universal values and truths because there is no transcendent, ahistorical realm to thus command or possess.

Constitutional history has from all places, cultures and times, been a continual process of producing, of writing universal truths. This production is always with rhetorical purpose: constitutions are arguments; they refer and appeal to an imagined universality in order to argue for, explain and justify a particular organization, right to rule, autonomy, right to exist, independence movement, revolution, entitlement, aspiration and so on. These arguments are addressed to living bodies of humanity, to groups whose perspectives are culturally based and formed. Meanings are therefore inextricably bound into multi-layered rhetorical relationships with the perceived cultural values and traditions of the peoples addressed.<sup>16</sup> As Chantal Mouffe argues:

It is always possible to distinguish between the just and the unjust, the legitimate and illegitimate, but this can only be done from within a given tradition, with the help of standards that this tradition provides; in fact, there is no point of view external to all tradition from which one can offer a universal judgement. (37)

It might still be objected that constitutions establish facts and structures that exist or do not, entirely regardless of lived experience, perceptions and interpretations, maintaining objective meanings regardless of what happens. Democracy is a definable fact and the stated procedures occur or they do not; accountability and the rule of law are sustained by the institutions as described, or they are not; justice is just or it is not; suffrage is universal or it is not; and so on. Lived application and experience are thereby questions of adherence to or betrayal of those principles which themselves remain pure. Yet these ideas and what is called fundamental, singular and true have no consistency across time and place; they are that which must appear and be assented to as the inviolable, the irreducible: the Truth must

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<sup>16</sup> Drawing upon a definition given by Carolyn R. Miller, constitutions, for the reasons given above, may properly be considered a *genre* of world prose: “Genre refers to a conventional category of discourse based in large-scale typification of rhetorical action; as action, it acquires meaning from situation and from the social context in which that situation arose” (164).

be credible and it must be convincing. Consequently the vital question is always: convincing to whom? Who is being addressed? Limited suffrage, for example, can be convincingly argued as universal when those whom it excludes are politically powerless and silent.

Those who write and speak for constitutions, it seems, have never been able to derive rhetorical authority and power by calling directly upon the indeterminacy of “universal truth.” The latter has required some form of culturally relevant embodiment. Through all of constitutional history the ultimate authority from which human law is derived has taken many forms: various deities, the nation, a Revolution, the cultural history of the People, ideologies and venerated individuals. (One might conclude from the previous sections that History itself has come to serve as the immutable transcendent perfection that Western nations draw upon for their constitutional authority. And as we will see in Chapter 2, the US Constitution has somehow transcended itself and become an ahistorical, idealized version used to support decisions made with the living document.) The point to be reiterated here is that, crucially, whatever the configuration and manifestation of absolute authority, it must be meaningful to the living cultures and traditions addressed in order to be effectual. As always a great many examples may be given. Here are but three that I find striking:

Japan in 1889:

Having, by virtue of the glories of Our Ancestors, ascended the throne of a lineal succession unbroken for ages eternal; desiring to promote the welfare of, and to give development to the moral and intellectual faculties of Our beloved subjects, the very same that have been favored with the benevolent care and affectionate vigilance of Our Ancestors; and hoping to maintain the prosperity of the State, in concert with Our people and with their support, We hereby promulgate, in pursuance of Our Imperial Rescript of the 12th day of the 10th month of the 14th year of Meiji, a fundamental law of the State, to exhibit the principles, by which We are guided in Our conduct, and

to point out to what Our descendants and Our subjects and their descendants are forever to conform. (“Constitution of the Empire”)

Iran in 1979 (to the present):

Article 56 [Divine Right of Sovereignty]: Absolute sovereignty over the world and man belongs to God, and it is He Who has made man master of his own social destiny. No one can deprive man of this divine right, nor subordinate it to the vested interests of a particular individual or group. The people are to exercise this divine right in the manner specified in the following articles.

Article 91 [Guardian Council]: With a view to safeguard the Islamic ordinances and the Constitution, in order to examine the compatibility of the legislation passed by the Islamic Consultative Assembly with Islam, a council to be known as the Guardian Council is to be constituted [. . .]. (“Iran”)

Ireland in 1937 (to the present):

In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Ireland, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation [. . .]. (“Ireland – Constitution”)

That universal authority is culturally relative was no less true for French and American revolutionary thinkers. Hannah Arendt comments on the paradoxical position they were forced to reconcile:

For the men of the Revolution, who prided themselves on founding republics, that is, governments “of law and not of men”, the problem of authority arose in the guise of the so-called “higher law” which would give sanction to positive, posited laws. No doubt, the laws owed their factual existence to the power of the people and their representatives in the legislatures; but these men could not at the same time represent the higher source from which these laws had to be derived in order to be authoritative and valid for all, the majorities and the minorities, the present and the future generations. Hence, the very task of laying down a new law of the land which was to incorporate for future generations the “higher law” that bestows validity on all man-made laws, brought to the fore, in America no less than in France, the need for an absolute [. . .]. (174)<sup>17</sup>

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<sup>17</sup> The “need for an absolute” in this enlightened age of the rule of reason and law is, it seems, but a continuation of that which Jean-Jacques Rousseau claimed had already long been inevitable: “That is why, in all periods, the Fathers of their country have been driven to seek the intervention of Heaven, attributing to the Gods a Wisdom that was really their own, in order that the People, subjected to the laws of the State no less

### **A Necessarily Interdisciplinary Study**

In discovering where constitutions are produced, the sites and evolutions of knowledge and experiences, the contestations and dominations, the re-configurations and re-appropriations, the successes and the betrayals, a great many sources and directions must be considered. For the purposes of providing an idea of the different kinds of materials examined here, some broad but by no means rigid or impermeable categorizations may be postulated. The arguments of constitutions are not singularly revealed but exist as multiple, contested and conflicting interpretations, and, because of their inextricable relationships not only with power but with empowerment, become the coveted and the jealously guarded property of innumerable layers of interwoven discourses.

There are those for whom a constitutional text must yield (or at least be shown to yield) definitive, unambiguous answers (even when contradicting previous answers, or the answers of equivalent rivals) in the form of, or in support of, positive laws. These will include, among others, judiciaries, legislative assemblies, constitutional lawyers, perhaps supreme religious bodies, such as the Iranian Council of Guardians. Such practitioners derive useful, practical meaning from constitutions precisely because, as far as they are concerned, that is what constitutions do – what they therefore are. Consequently, at multiple sites, they are also engaged in a continual process of reaffirming this purpose of constitutions. At the same time, the preservation, sanctity and continuity of their own

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than to those of nature, and recognizing in the creation of the City the same Power at work as in that of its inhabitants, might freely obey and might bear with docility the yoke of public happiness” (208).



“interpretive communities,” as Stanley Fish<sup>18</sup> puts it, are also paramount. This kind of authority, even at its highest levels, despite the great power it may wield, is never entirely autonomous. Israeli Supreme Court Justice, Aharon Barak, writes that in the judicial reading of constitutions, “There is no ‘true’ interpretation. There is no ‘true’ meaning. There is only ‘proper’ interpretation” (255), implying the pre-existence and constant presence of extra-constitutional rules and agendas to be adhered to. In this regard it is necessary to consider not only legal texts and scholarship, but the contexts in which they occur, where and how they are derived, what other forces are involved, what is preserved, changed and challenged, and what is being reacted to or against.

In another vast, divided and complex realm constitutions are scrutinized not to produce truth in the form of laws, but to be the primary focal texts of the “truth” that Randal Collins, in *The Sociology of Philosophies*, calls the “sacred objects” of intellectual communities:

Intellectual sacred objects are created in communities which spread widely yet are turned inward, oriented toward exchange with their own members rather than outsiders, and which claim the sole right to decide reflectively on the validity of their ideas. Purely local groups such as the tribe or the circle of friends are primarily concerned with their own solidarity and identity; they do not make the kind of universalistic and transcendental claim for the symbols that intellectuals do for their “truth.” (24)

Constitutions and their history are here the ever-fecund resources of study and knowledge for constitutional historians, legal scholars and political scientists.<sup>19</sup> In this domain should also be included those groups of intellectuals who will come to form revolutionary elites and constitutional assemblies; those that build the historical, theoretical and ideological

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<sup>18</sup> Stanley E. Fish. “Interpreting the *Variorum*.” *Critical Inquiry*. Vol 2.3 (Spring, 1976). 465-85.

<sup>19</sup> And, on occasion, literary scholars.

frameworks of the constitutional nation.<sup>20</sup> In their myriad forms and locations, the intellectual communities of constitutions transmit, translate, criticize, organize, circulate and produce the great body of knowledge which is constitutionalism. As above, it will be imperative to consider the political and cultural contexts of their work, what wider purposes are served, and of course the ways in which they preserve and perpetuate themselves.

If constitutions are the sources of the “truth” in the above sense, it is also clear that some are held to produce better truth than others. As has been argued, much of Western constitutional intellectual endeavour has involved both the keeping of its “sacred object” as its rightful, inherited property, and the controlled dissemination of this “truth” as that which is to be the truth of all. Both the power to keep a zone of truer truth and the power to disseminate have been sustained not by greater insight, integrity or wisdom, but by an historically superior interconnectedness of intellectual communities, their resources, networks of distribution, and institutions. This will be a central concern of all the following chapters.

Then we have constitutions as spoken and written about as what would be better described as potent cultural objects than as texts to be directly read, analyzed and understood. Constitutions are here presented, characterized and comprehended as embodiments or representations of ideas,<sup>21</sup> and it is in this respect I think that they are rhetorically most powerful and complex. There might be little or only indirect reference to what is actually written, or perhaps none at all, as it is the constitution in its singular entirety which will bear the intended messages. Certain tenets might be raised in arguments for desired effect, such as “freedom of speech,” “the rule of law” or the “right to bear

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<sup>20</sup> Such groups assemble at the mythological heart of constitutional history: passionate gatherings of selfless individuals, enlightened thinkers, secular philosophers and visionaries.

<sup>21</sup> An interest in the rhetoric of ideas is the main reason for the emphasis on preambles throughout this work.

arms,” or, in more abstract reference, “liberty” and “duty,” without the need to specify what these actually mean legally or in practical operation. Here, in the writing and speeches of politicians, revolutionary elites, leaders of independence movements, various propagandists, educationalists, the media and popular mythologists, constitutions have had an indeterminable plethora of purposes. Purposes moreover which are not intrinsic to the texts, but determined according to contingent circumstances – perhaps an approaching or victorious war, elections, a schools initiative, a brand new start or national celebrations. Constitutions in these manifestations become the simultaneous property of many national and local institutions and their spokespersons, who speak with rhetorical authority because their audiences are already bonded by an assumed familiarity with the subject. (Law makers and intellectuals it should be said – to re-emphasize the porous nature of my “categories” – are not beyond the presentation of constitutions in this way. Revolutionary elites in particular, as we will see, must be able to cross the line from their intellectual domains to speaking to the People. Judicial bodies need to be able to explain the results of their interpretations in a common language. As Rousseau contended: “Those wise men who, in speaking to the vulgar herd, would use not its language but their own, will never be understood” (207).)

With constitutions serving so many rhetorical purposes, there are obviously enormous possibilities of perceived meaning. They will be variously perceived and so will differently exist. Wayne C. Booth argues: “*rhetoric makes realities, however temporary*. And meanwhile it creates a multiplicity of judgments about what those realities *really* are” (16; emphasis in original). Reactions, according to Raymond Williams, will always escape intentions:

Any governing body will seek to implant the “right” ideas in the minds of those whom it governs, but there is no government in exile. The minds of men are shaped by their whole experience, and the most skilful transmission of material which this experience does not confirm will fail to communicate. Communication is not only transmission; it is also reception and response. In a transitional culture it will be possible for skilful transmission to affect aspects of activity and belief, sometimes decisively. But, confusedly, the whole sum of experience will reassert itself, and inhabit its own world. (301)

A constitution might be an object of fear, futility, contempt, hope, aspiration, protection, equality, irrelevance, pride, security, power or empowerment. Moreover, it might be some, all or none of these in varying degrees to the same community of people depending on given circumstances. The reactions, “judgements” and experiences of constitutional “transmission” are not merely assorted opinions of something which itself remains constant and singular, but a constantly moving part of its extant and remembered realities.<sup>22</sup>

Determining the existences of constitutions as cultural objects is a very different task than the investigation of the legal and intellectual representations. The experiences, the knowledge and the perceptions of the former are not captured in the way that the vast discursive systems and institutions preserve and organize the knowledge and authority of the latter. The experiences are too numerous, fluid and subject to change. Much may be gained however, by focusing on what rhetoric theorists Chaim Perelman and L. Olbrechts-Tyteca call “the argumentative situation in its totality [. . .]” (412). That is, who is involved in the argument – who speaks, who listens? Where does it occur (i.e. what is the rhetorical forum of the argument)? What is being argued, and why? What are the reactions and counter-reactions?

The reactions of communities of people to constitutional arguments may be found in direct accounts – letters, pamphlets, petitions, articles, speeches and so on. But the field

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<sup>22</sup> Or, put in Marxist terms: “Not man or men but the struggling, oppressed class itself is the depository of historical knowledge” (Benjamin 123).

must be broadened to include, for example, records of protests, mass movements, uprisings, referenda, silent refusal and flight. Or conversely, mass acquiescence, belief, willingness to die for the nation. In this regard it is important to bear in mind that protest against constitutional usage and rhetoric is by no means necessarily disagreement with the constitution itself. Quite the opposite is likely to be the case. The dispute will occur around differing perceptions of what it is assumed the constitution is *supposed* to be representing, allowing or protecting, and the feeling that something has been breached or inadequately implemented. The pre-Civil War objections by the American Southern States, for example,<sup>23</sup> that the Northern States were in breach of fundamental law (and of the original compromises between state and federal powers at the founding convention) by harbouring runaway slaves was set in terms of a perceived misuse of the federal Constitution not a direct rejection of it. Conversely, the protest against slavery, so clearly sanctioned in the US Constitution, meant objecting to an aspect of the Constitution itself – a different matter entirely.

Constitutional arguments and counterarguments are affected by and intimately connected to the spaces in which they occur. There are spaces legitimized by the constitutions themselves, such as courts and voting booths. Then there are spaces of much more ambiguous and contingent definition such as streets, city squares, fields, workplaces, literature. There are spaces of rights and liberties and spaces of impotence, anger, subversion and oppression. Most important to consider in this respect is the degree of access allowed to legitimate arenas and the ways in which their sanctity is protected. As we will see in Chapter 3, for example, when representatives of the Cherokee Nation are heard by the Supreme Court of the United States, the ultimate legitimacy of the latter as a forum

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<sup>23</sup> See Chapter 2

for constitutional argument is obviously not in question. What is seriously debated however is whether or not American Indians had a right to use it.

Whatever a constitution promises and guarantees to its subjects, and however faithfully it is adhered to by its controlling powers, for those without access to legitimate constitutional fora it will be of little or no value. How many people have been subjects of a constitution but were never in education, were unfairly represented in courts, if at all, could not vote, were not asked their opinion in referenda, were slaves, immigrants, refugees, spoke a different language from that of the ruling class? It is conceivably the case that for much of the modern era such peoples have constituted the majority of constitutional subjects. Howard J. Wiarda's<sup>24</sup> description of the social circumstances of the Mexican Constitution of 1917 is of course peculiar to Mexico, but has much wider implications:

The country was perhaps 90 percent illiterate and 80 percent Indian. Most of the indigenous population did not speak the national language, was outside the money or market economy, and was often unaware of being a part of another entity that is usually thought of as a modern phenomenon: the nation-state called Mexico. (125)

For a great many, therefore, constitutional history (as will be demonstrated from a number of directions in the following chapters) has been one of a struggle to be recognized, at least legally, as a member of a constitution's stated audience, beneficiary and consenting power: "the People." (A struggle, that is, for those who are not by virtue of ethnicity, race, class, gender or socio-economic status naturally, historically already the People.) It is the People to whom access to legitimate arenas of constitutional arguments is theoretically provided.

Constitutional rhetoric is not only about conveying desired arguments, but countering-reacting against situations which threaten its power and integrity. It responds, changes, re-manifests itself in order that its rhetorical arguments are most effectively

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<sup>24</sup> Wiarda is another of the respondents to Franklin and Baun's questionnaire as discussed above.

communicated and power and nation preserved. (A shift to authoritarianism and/or collapse followed by another constitutional regime are of course also possible scenarios.) This would not be because constitutionalism is somehow inherently progressive – on the contrary its concern is consistency, self-preservation and continuity not change – but because it is continually, on its multiples sites of received meaning, reacted to. When that reaction or resistance turns to that which can no longer be ignored or crushed, then it will be accommodated into the constitutional narrative. In *The Age of Capital* Eric Hobsbawm makes a comparable point on conditions following the European revolutions of 1848: “from the point of view of ruling classes the important thing was not what ‘the masses’ believed, but that their beliefs now counted in politics” (98).

### **Choices**

As has been stated above a central purpose of this thesis is to explore ways in which the cultural form of the modern constitution and the ideals represented therein interact and affect each other in an historical world space. A full exposition and mapping of these interactions and circulations would entail an exceedingly larger work than the present one. Consequently a great many constitutions might have been selected other than those considered here, and a great number of interest and importance have therefore been left out. Though it is hoped more extensive work may be carried out in future projects – as in my view it is much needed – the present work restricts itself to four constitutions. These four are not necessary choices, or meant to be representative types, but they are not arbitrarily selected either. The exploration of each of these, it is hoped, will provide some exposition of the arguments raised above. I also hope to have given, though taking great leaps across four centuries, an image of an era not only of a productive space, but one which vastly and

unpredictably changes its nature and complexity over time. The reasoning behind the choice to concentrate on the constitutions of the United States, the Cherokee Nation, Vietnam and Iraq, the particular coherency of this work through the presentation of these, and the aims, purposes and critical voices of each chapter need now to be explained.

Though it is the case that this study does not intend to uphold the US Constitution as the standard by which all else is to be judged, it will nevertheless occupy a central position, as well provide the overall coherency of the thesis. In a certain sense this is unavoidable. The Constitution of the United States has occupied an undeniably unique position in constitutional space. Put simply, it has always been there, with apparent singularity and continuity, unlike the great multitude of distinct French republics and constitutions. It does not define constitutional space in its totality, but there has never been a moment without its defining presence as an ideological, political and cultural force. For this reason each of the remaining main chapters, on the constitution writing of the Cherokee Nation, Vietnam and Iraq has as one of its main concerns an inextricable interrelationship with the military, economic, social and rhetorical dominance of the United States. In American constitutional thought and practice is the ever-present conviction that the Constitution of the United States, its history, progress and ideas, is unparalleled, unique and exceptional. Important to bring out in what follows is thus not only the deep effect this conviction has had upon relations with other cultures and subaltern groups both inside and outside US borders, but the ways in which this thought is affected *by* such relations.

Despite appearances, the US Constitution, I argue, is not in fact a single, amended document, in continuous existence since 1787, but a series of texts constantly written and rewritten into a coherent narrative by numerous levels of official interpretation and legal precedent. (The continuity of the legal narrative is itself subject to fracture and contestation,



with differing streams taking dominating positions, both defining and reacting to contingent circumstances and political ambitions). But it is the comprehensiveness and the longevity of this constitutional narrative and its continuous construction, along with the fact that there has always been something called “the Constitution of United States” at every point, that will allow the historical tracing of an invention absolutely central to modern constitutionalism: the People.

Resisted thereby is the conception of the People (as with any constitutional idea – Freedom, Democracy, Rule of Law, Rights etc) as having any historical consistency or singularity. The People have been formed in the contest, protest, reaction and unforeseen events of an ever-changing triangular relationship formed of an unstable rhetorical ideal, the living body that is understood to constitute the People at a given period of time, and the myriad other communities existing somewhere in relation to this body. Neither the textual idea, nor the configurations of the lived realities, nor the nature of their relations, is ever fixed. Nonetheless, great intellectual, political and judicial energy is concertedly put into sustaining a continuous narrative figure of “the People” that transcends and obscures the realities of hard-won social change gained by living groups of people in US history. It is with the struggles of the latter in mind that this chapter will be largely structured around the constitutional history of slavery, its ideological, textual, political and judicial sanction and termination, and the ways in which the struggles for political and civil rights which follow cause the writers of the constitutional narrative to respond with new continuities and connections.

The Constitution of the United States is not so much written as continuously and conflictingly re-written in legal, political, historical and philosophical discourse. One purpose therefore is to illustrate the instability of the text and its representations of “the

People” and the ways in which these are constructed in their usage in the struggles of various forces. In all the searching and dissection of the Constitution and its history for answers, there is always something to be found. Or, rather, there is an unquestioned confidence in the existence of an inexhaustible text. In all the intense analysis and interpretation there never seems to be the fear that the Constitution might permanently disintegrate under the pressure. Historically, legally, theoretically, it will yield; it will never fail to provide sense to the communities that gather around it.

The breadth and diversity of American scholarship on its own constitution is vast. This study could not hope to examine all of it. Nevertheless the intention here is to provide an exposition of the Constitution mainly as it exists in three discursive fields: that of the Supreme Court judiciary, the theorists and legal scholars, and the historians. Supreme Court cases from the early nineteenth century to the anti-segregation cases of the mid twentieth century form in a sense a backbone to the chapter. These cases and the varying narratives of precedent that are constructed are examined not only according to the opinions of the Court justices, but in the analysis of legal scholars, theorists and historians. Attention (drawing mainly upon the work of Stephen M. Griffin) is given to the history and development of constitutional and legal theory, its division into conflicting camps, the broader theoretical categories, and the relation of the theory to the interpretations of legal practitioners. Among the various constitutional scholars presented here, such highly prominent liberal theorists as Bruce Ackerman<sup>25</sup> and Ronald Dworkin<sup>26</sup> are highlighted, not only for the general importance of their positions, wider analyses and expositions of the competing theories, but

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<sup>25</sup> Of whom Frank I. Michelman writes: “Among contemporary American constitutional theorists of populist inclination, Bruce Ackerman is the one who has grappled most seriously with the question of what counts as an expression of the legislative will of the people” (76).

<sup>26</sup> Andrew Altman asserts that Dworkin is: “perhaps the leading figure in contemporary liberal legal theory [ . . . ]” (7).

for the unanswered questions their work elicits. Also considered are the views of neoconservative commentators, including Justice Antonin Scalia and legal scholar Walter Berns. In relating the narratives of legal theory and practice to history, a number of historical interpretations and perspectives will be important, including those of Charles Beard, Edward Corwin, Max Farrand, J.H. Plumb and Native American scholars Donald A. Grinde and Bruce E. Johansen. And, as is the way with studies of the Constitution, some of the thought of *Federalist* authors and Founding Fathers, James Madison and Alexander Hamilton, will play a significant part.

The 1827 Cherokee Constitution of Chapter 3 belongs to what might be called a subordinated or obfuscated history of world constitutions. These are of nations with constitutional histories that go deep into the modern era (and, as asserted above, often deeper than those of many European nations), and yet are either made secondary to the progressive narratives of world constitutionalism and obscured by the historical constructions and taxonomies of the traditionally dominant, or are effectively erased. As has already been argued, the influence of these constitutions, their effect on a constitutional space of ideas, and the experiences of those affected by them, consequently also become less visible or disregarded.<sup>27</sup> (In Chapter 2 we will see how much is necessarily made absent or excluded from the theories of the Constitution of the United States in order to provide the narrative of a coherent, exceptional and progressive history.) Of the great many

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<sup>27</sup> The constitutions of Latin America, for example, many of which have long, if often fraught, constitutional histories may arguably be counted among these. The presidential style of North American republicanism was taken on in Latin America with the liberation of its colonies from Spain around 1820 (Lane 67). The only exception was Brazil which took on the French constitutional monarchy model, like most of Europe, until 1891 when it changed to the presidential model. Chile's original constitution lasted from 1833 to Pinochet in 1973 (Lane 75). Yet Andrew S. Natsios, Administrator for the United States Agency for International Development, asserts that constitutional democracy entered Latin American in the 1970s, following the defeat of tyranny in Spain, Portugal and Greece, as the third of three "waves" of democracy emanating ultimately from the United States (263).

that comprise this grouping, the 1827 Cherokee Constitution has been chosen because its appearance brings to light, in a particularly sharp and blatant manner, the divisions constructed by Western hegemony between a privileged centre of entitlement and what is deemed a primitive, socially and ontologically un-evolved outside. The use and the performance of the language of liberty, and the employment of the sacred textual form of self-realization, autonomy and modernity by those on the outside simply would not be countenanced. The universal was to be rigidly exclusionary. The Cherokee Constitution is here, too, because it, and what befalls the people it represents, is unquestionably moving. (Does such an emotive judgement not have a valid place alongside the sciences of political institutions and law?) It manifests starkly the ubiquitous and violent collision of aspiration, idealism and hope with the avarice of a stronger power for resources, land and dominance.

As will be seen, a number of historical perspectives will be utilized to provide the relevant context of this chapter. But in order to try and represent the political and legal arguments that constitute this conflict I shall turn to some of the prominent voices of the time. A point already stressed, and to be emphasized throughout, is that constitutional ideas and constructions of “the People” cannot be separated from these power struggles. Hence we will have the differing positions of a number of US presidents of, and preceding, the period in question: George Washington, Thomas Jefferson, James Madison, James Monroe, John Quincy Adams and Andrew Jackson. Other political figures highly vocal in the debates will include Edward Everett, senator of Massachusetts, and New York senator, Henry Storrs, both speaking against forced removal of the south-eastern Native American tribes, and, arguing vehemently against Native American land rights, Wilson Lumpkin, senator of Georgia. On the American legal side are some of the Supreme Court justices on crucial cases involving Cherokee rights and treaties, such as John Marshall (also a central

figure in Chapter 2), William Johnson and Smith Thompson. From the Cherokee point of view are, for example, Elias Boudinot, John Ross and attorney and advocate of the Cherokee cause, William Wirt.

Quite unlike the US Constitution, the Cherokee Constitution of 1827 scarcely exists in general constitutional historiography, as if it were a short-lived anomaly of no lasting influence. If the constitutional era is thought of as a progressive march, then yes, the Cherokee Constitution has been long left behind in the past. But if the era is thought of as an inter-reacting and mutually-affecting space, as I have been arguing, then a different picture emerges. The emergence of the 1827 Constitution, the forces that are unleashed in reaction, and the violence of the forced “removal” in 1838 are far from forming an inconsequential aside in an historical narrative defined by US constitutional hegemony. The writing of the Cherokee Constitution forced into a field of open contest a question that does not so much reveal a permanent rift between Western and non-Western constitutionalism, as cause it by being continually asked: how can professed *universal* rights to space, cultural autonomy, self-determination, and the rule of law be denied whilst preserving the moral sanctity and the entitlement of the deniers? In the formulation of a response, the state and federal institutions of American constitutionalism were, I argue, deeply disturbed and had, with great difficulty, to respond judicially, politically and ideologically with new strategies. Institutional and powerful relationships were uneasily realigned. The past had to be carefully scrutinized in order to re-define the present and future. It was not only re-interpretations of the US Constitution that had to be made, but the intentions of the Founding Fathers, as well as the history of European legal precedent and ontological right stretching back to the earliest settlements of the Americas. In order to deny autonomy on treaty-guaranteed land (to deny in fact a history of treaty-writing precedent), to give forced

removal a legal and moral veneer, and to simultaneously preserve the US constitutional ethos as coherent, familiar narratives had to be re-written. Deep disagreements occurred at all levels, some arguing that the threatened removal would be the death and disgrace of the American enlightened project, the snuffing out of the world's guiding light. These changes are not merely crisis tactics that disappear with the Removal; they form part of a new and permanently altered fabric.

A contention to be brought out in this examination is that constitutional space has always involved a contested and uncertain circulation of knowledge rather than ever being a simple, one-way flow from a centre to a periphery. US constitutionalism does not stride progressively forward unaffected by what it encounters, absorbs, resists, is resisted by or destroys. Not only is it the case that US constitutional Truth forms and shapes in contingent response to what is regarded as a challenge to its hegemony, but at the same time of course profound disruption and change occurs in the lives of the indigenous peoples. The Cherokee Constitution too was a complex contingent response, a determination and organization of existing and past realities with the hopes of confirming a stable future.

What becomes evident in this conflict is a fundamental difference in Western and non-Western constitutional experience that continues to the present day. The writing of the Cherokee Constitution, I will argue, is not only about the re-shaping of Cherokee cultural history and tradition into the new configuration of a constitutional state, but the acknowledgement (by an educated elite at least) that traditional history had been permanently disrupted. Attempts to continue on according to the terms of past existence, it was thought, with good reason, would lead only to dispersal and destruction (as had already long been occurring to the indigenous peoples). This is not to say however that the new system of organization and principles was not informed by the particularities of Cherokee

culture and experience, or that the Cherokees were a homogenous mass with a singular view. As we will see tensions related to new formations of class and privilege, land and adherence to traditional practices were highly significant and fractious. It becomes the task of the new constitution to write and organize *these* differences into a coherent present with a united people. At the same time the past must be visibly closed off as unacceptable to modern life and detrimental to future survival. The US efforts, on the contrary, are to preserve narrative continuity with the past. The past is an inheritance which must be cohesive and unified and must explain and justify the present and the future.

The adopting of new ways of life by the Cherokee and other southeastern native peoples had not in itself been enough to stave off encroachment, oppression, degradation and ultimately violent expulsion. Those who feared the eternal disgrace of the United States and death of the progressive vanguard were wrong. “Principles” could (and can), without evident harm to progress and moral domination, be subordinated to acquisition. The desire for land, resources and *lebensraum* takes precedence – as always it will do – over universal principles and Truth, but it must never be allowed to appear so. Superiority of position and appearance are preserved in the noble continuation of the civilizing mission. Mistakes had been made, and the subjects, it was noted, had proven inherently less capable of coping with modern life than once thought, but lessons had been learnt. With new institutions, methods, organization, comprehensive monitoring and control, there might yet be hope of saving Indian cultures from extinction (and from themselves).

The Vietnamese constitutions considered in Chapter 4 feature an explicit change in perspective and attitude toward Western historical dominance of universal values that marks much of the constitution writing of twentieth-century revolutionary and colonial independence movements. Needless to say perhaps, this new realm of rhetorical possibility

begins most obviously with the 1918 Constitution of the Soviet Union. This is an immense document, but by way of illustration, sections 4 and 5 of Chapter 3 of Article One, “Declaration of Rights of the Laboring and Exploited People”:

4. Expressing its fixed resolve to liberate mankind from the grip of capital and imperialism, which flooded the earth with blood in its present most criminal of all wars, the Third Congress of Soviets fully agrees with the Soviet Government in its policy of abrogating secret treaties, of organizing on a wide scale the fraternization of the workers and peasants of the belligerent armies, and of making all efforts to conclude a general democratic peace without annexations or indemnities, upon the basis of the free determination of peoples.

5. It is also to this end that the Third Congress of Soviets insists upon putting an end to the barbarous policy of the bourgeois civilization which enables the exploiters of a few chosen nations to enslave hundreds of millions of the working population of Asia, of the colonies, and of small countries generally. (“1918 Constitution of the Russian Soviet Federated Socialist Republic”)

Such a statement of righteous defiance nineteenth-century non-Western constitutions could not have made. By that I do not mean to state the obvious concerning differences of development in oppositional ideology, power and organization, but that the constitutional form itself was then far from able to contain such a message, to *be* such a radical medium of communication. In *Counter-Statement* Kenneth Burke writes: “form [. . .] resides in the fulfilment of an audience’s expectations” (204). That is to say, a constitution is dependent for value and efficacy on the “audience’s expectations,” of which there will be many simultaneous layers. The above, and the many revolutionary texts that will follow, fulfil traditional expectations to the degree that they are still recognizably constitutions; still the familiar media through which, despite the radical stance, universal truths are legitimately expressed. No longer, however, is the expectation (i.e. something which has formed before the constitution is written) of a professed or tacit commitment to an enlightenment project



that begins, and is defined by, Western thought. From this point forward, though still absolutely entwined with universal principles, and still obviously of that project, is the possibility of the constitution as a vociferous and open rejection of Western historical, economic and cultural right to own, define and apply such principles. The universe simultaneously broadens and splits.

The constitutions of Vietnam are focused on here specifically as what may be brought to light in doing so is an idea of the immensely complex confluence of forces, histories and ideas in which the constitutional narratives of subaltern nations and peoples are formed and sustained. The decades of conflict in Vietnam come to take on an historical, cultural, social and symbolic significance far wider than that of the internal struggle of particular peoples for independence and freedom from colonial oppression. Hardt and Negri, in their description of the period of this struggle known as the Vietnam War, give global significance to the victory of the Vietnamese over the greater forces of the United States:

Earlier we posed the Vietnam War as a deviation from the U.S. constitutional project and its tendency toward Empire. The war was also, however, an expression of the desire for freedom of the Vietnamese, an expression of peasant and proletarian subjectivity – a fundamental example of resistance against both the final forms of imperialism and the international disciplinary regime. The Vietnam War represents a real turning point in the history of contemporary capitalism insofar as the Vietnamese resistance is conceived as the symbolic center of a whole series of struggles around the world that had up until that point remained separate and distant from one another. The peasantry who were being subsumed under multinational capital, the (post)colonial proletariat, the industrial working class in the dominant capitalist countries, and the new strata of intellectual proletariat everywhere all tended toward a common site of exploitation in the factory-society of the globalized disciplinary regime. (260)

In contextualizing the emergence of the revolutionary movements and the constitutional narrative of Vietnam through most of the twentieth century it will thus be necessary to

consider a range of historical sources, as well as the thoughts of such central contemporary figures as Ho Chi Minh and Vo Nguyen Giap. Taken into account will be not only histories of Vietnam in this period, but broader criticisms of colonialism and its effects from Frantz Fanon, Eric Hobsbawm, Mike Davies and V.G. Kiernan. In terms of the wider significance of the struggle for liberty and cultural expression also considered will be the views of Chantal Mouffe, Ernesto Laclau and Slavoj Žižek.

At a macro-historical level Vietnamese constitutional history may be placed in a category of socialist postcolonial constitution writing and nation building that has also been so significant in North Africa, the Middle East and much of Asia. One might broaden this categorization still further and draw useful parallels with non-Western constitutional experience in general, as far back as Haiti and the Cherokee nation, in the sense that the constitution writing follows upon (perhaps in some way is made possible by) the absolute disruption of traditional life, of seemingly immutable certainties, hierarchies, cultural practices and beliefs. Consequently it is determined (often by a uniquely educated elite) that the vestiges of the old are useless in tackling immediate crises and sustaining future existence. (Thus will the constitution mark a division of time, forever re-appropriating the past into its new narrative.) A new continuity, a new cohesion must be written, meaning in effect that the constitution and the national culture come into existence at the same time. A People appear, at once heralded and created by the constitution as always distinct. As the anthropologist Clifford Geertz writes in *The Interpretation of Cultures*:

As the mass attack (more massive, and more violent, in some places than others) upon colonialism developed, it seemed to create, in and of itself, the basis of a new national identity that independence would merely ratify. The popular rallying behind a common, extremely specific political aim – an occurrence that surprised the nationalists nearly as much as it did the colonialists – was taken for a sign of a deeper solidarity, which produced by it would yet outlive it. Nationalism came to mean, purely and simply, the

desire – and the demand – for freedom. (239)

By no means however could we properly grasp the constitutional experiences and writing of Vietnam (or any other nation) entirely in terms of such general categorizations. The terms, structures, ideas, and tropes of constitutionalism are made meaningful by arguments addressed to and derived from the cultures, histories, needs, pressures and urgencies of the many distinct Indochinese peoples that would come to comprise the People of Vietnam. The constitutions of Vietnam organize a national position under conditions of extreme threat, disturbance and external resistance: a storm of forces that lasts most of the twentieth century including war against French colonialism before and after World War II, Japanese and American imperialism, and incursions by the Chinese and the Cambodians. Additionally, the movements that will lead to the 1945 Declaration of Independence and the first constitution in 1946 of course do not immediately command the support of the entire of what will be Vietnam – decades of internal opposition<sup>28</sup> must be fought before a singular historical narrative can stand. Thus notions of People, liberty, right, independence, equality and so on cannot be separated from the urgent struggles for unity, stability, security and freedom from fear and privation. These, we will see, are the particular arguments of these constitutions.

What comes to light too in this examination is just how uncertain, unpredictable and ever-labile to change and new translation is the circulation of the knowledge of constitutionalism. Western knowledge appears in Indochina from the late nineteenth century in the form of iconic symbols of power and expertise, documents, technology and imported institutions. The values that this knowledge contains are translated into more familiar cultural languages, applied to and contested with existing and traditional values

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<sup>28</sup> Often externally funded, as has been the case all over the developing world.

and expectations by peoples whose direct experience of universal constitutional ideas under colonial powers is likely to entail the deprivation of liberty, security, certainty and livelihood. It is gathered in decades of studies by wealthy and revolutionary elites with purposes of their own. The elite, often with the privilege of travel and foreign education, read, borrow and re-fashion the history and the exploits of Western revolutionaries according to their own cultural positions and ambitions, and in light of newer Marxist-Leninist ideology. They must translate those yet again to mobilize a mass (the future People) of varying expectations and positions into national resistance.

Through successive troubles and upheavals, from constitution to constitution, a narrative of resistance, destiny and unity is built, embellished and reinforced in its narrative. The unity is extended backwards into the distant past: the Vietnamese people struggling since the dawn of time, finally achieving independence and freedom according to their indomitable will and the vision of Ho Chi Minh.

The wider context and significance of the recent constitution writing in Iraq is, in my view, best described by Paul Gilroy. According to Gilroy, the nation-state is enjoying a resurgence of attention, importance and definition, but no longer in the traditional sense as a space of autonomy, self-determination and legal independence. Nations, rather, are to be “the cornerstones” by which “the unipolar global order” is constructed:

Though it was weakened by networking and the emancipation of capital from many of its local ties, the national state is now being strengthened by the new priority attached to security. [. . .] It is the national state that supplies the cornerstones for any global system of judicial or governmental regulation. [. . .] In the unipolar global order created by the economic and military dominance of the United States, practical geopolitics suggests that the waning authority of bodies like the United Nations is being replaced rather than augmented by a range of new initiatives that derive directly from American strategic objectives, though they are often presented in universalist rhetoric. Even at its most belligerent, this shift has been projected through the benign and seductive language of humanitarianism.

On occasions that idiom has even recast the ideal of imperial power as an “ethical” force which can promote good and stability amidst the flux and chaos of the postcolonial world, where the danger of terrorism by nihilistic nonstate actors and rogue or failing governments looms large. (65-66)

The examination of the Iraqi Interim Constitution will, it is hoped, bear out Gilroy’s arguments and stand as a specific (and highly visible) manifestation of the much wider contemporary realities that he describes. At the same time that it is a product of contemporary global politics and law, the writing and construction of the Constitution of Iraq, as we will see immediately below, is a manifestation of a postcolonial, imperialist practice with a long history. In contrast, the intellectual, political and military underpinning of the invasion, as this chapter will endeavour to demonstrate via the voices of a number of prominent advocates and architects of the war, often presents itself as if it had no historical precedent. The historical accounts given are thus not only to piece together the complex and chaotic events between the invasion and the “permanent” Iraqi Constitution of 2005, but also to assess the ways in which cultural and political history must be obscured or obliterated to justify the present. In elucidating the nature of Western neo-imperialist forces and their power to create and disseminate narratives that are entirely in contradiction to lived realities and cultural histories, such critics as Antonio Negri and Edward Said will be significant. Towards the end of this chapter attention will be given to a very different movement in contemporary constitutional writing which has been of particular consequence as a means of conflict resolution in developing nations. This is explicated in reports by Vivian Hart and Jonathan Morrow of the United States Institute for Peace.

The concentration in Chapter 5 on the 2004 Interim Constitution of Iraq under the Coalition Provisional Authority will perhaps prompt the question: why the Interim and not the “permanent” constitution of 2005? If the Interim Constitution is taken, as its title would

suggest, as a preliminary or temporary document whose only function is to be realized in a constitution proper, then it would indeed seem remiss not to closely examine the end as well as the means. An important argument to be made, however, is that the Interim Constitution, to the degree that it serves to realize Western aims and demands, is its own end. Furthermore, it is a contemporary manifestation of an imperialist practice with a long history, by which relative autonomy (perhaps with the promise of a future independence), or at least the appearance of it, is provided, but under the monitoring and control of an external authority.<sup>29</sup> In other words, it is the establishment of “home-rule,” but with the continuation of unfettered access to resources. This is what is at stake (as far as Western power is concerned that is) not democratic, constitutional Iraq.

The Interim Constitution of Iraq was only possible because of a space invented by Western colonial and imperial powers, and already long in use. That is, a temporal space (of no necessary length) inserted between what is characterized as a dependent, pre-modern, primitive past and the promise of an independent autonomous future, ostensibly created in order to provide assistance, advice and expertise in building the institutions of the modern world. As the British High Commissioner of Baghdad explains in a 1925 report to Colonial Secretary L.S. Amery:

Iraq was to give shape to the fixed intention of the British Government to assist the leaders of the people to create a National Government; but as with the country still so disturbed it was impossible to proceed with the work of forming an elective assembly, he [Sir Percy Cox] had decided to institute immediately a Provisional Government to be responsible under his guidance for administration, until further progress could be made in the direction of national

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<sup>29</sup> This could perhaps be taken back to the establishment of administered colonial “mandates” under the Treaty of Versailles. With reference to the fate of the German colonies following World War I, Eric Hobsbawm writes: “These were redistributed among the British and their dominions, the French [. . .] but in deference to the growing unpopularity of imperialism, they were no longer called ‘colonies’ but ‘mandates’ to ensure the progress of backward peoples, handed over by humanity to imperial powers who would not dream of exploiting them for any other purpose” (*Age of Extremes*, 33-34). Iraq itself, despite its first constitution in 1924, remained a British mandate until 1932 and under British control until the revolution of 1958.

institutions. (“Establishing the Kingdom”)

Numerous examples of the mandates and protectorates of twentieth-century “decolonization” might be given, but one further relevant illustration will, I think, suffice here to make the point. With obvious parallels, in the 1933 Tydings-McDuffie act, under which the United States promises to relinquish its hold on the Philippines, it is stated:

Section 1. The Philippine Legislature is hereby authorized to provide for the election of delegates to a constitutional convention, which shall meet in the hall of the House of Representatives in the capital of the Philippine Islands, at such time as the Philippine Legislature may fix, but not later than October 1, 1934, to formulate and draft a constitution for the government of the Commonwealth of the Philippine Islands [. . .]

Section 4. After the President of the United States has certified that the constitution conforms with the provisions of this Act, it shall be submitted to the people of the Philippine Islands for their ratification or rejection at an election to be held within four months after the date of such certification, on a date to be fixed by the Philippine Legislature, at which election the qualified voters of the Philippine Islands shall have an opportunity to vote directly for or against the proposed constitution and ordinances appended thereto. (“Philippine”)

The supervised space of power re-configuration has been critical in sustaining Western authority and credibility in the face of the disintegration of its colonial empires. According to French philosopher and political scientist Raymond Aron’s 1960 lecture, “Dawn of Universal History,” the future of the world remained Europe’s responsibility and purpose: “When men no longer need to tyrannize over each other in order to be able to exploit natural resources, Europe can still be great if she conforms to the spirit of the new age by helping other peoples to cure the infantile diseases of modernism” (69). This would appear to be the essential position taken in the French Constitution of 1958:

The French people hereby solemnly proclaim their dedication to the Rights of Man and the principle of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble to the 1946 Constitution.

By virtue of these principles and that of the free determination of peoples, the Republic offers to the Overseas Territories expressly desiring this to

adhere to them new institutions based on the common ideal of liberty, equality, and fraternity and conceived with a view to their democratic evolution. (“France – Constitution”)

Or, as Linus Pauling in his 1964 Nobel Prize lecture comments: “The world has now begun the metamorphosis from its primitive period of history, when disputes between nations were settled by war, to its period of maturity, in which war will be abolished and world law will take its place” (6). But “world law,” like “civilization” and “modernity” does not descend universally and immediately upon all the world. Some will lack the right “political culture” for implementation, thus requiring assistance; others will disobey, resist, fail to comprehend or avoid. As we will see, the Interim Constitution organizes a space in which “world law” can operate to eradicate the lingering “primitive” in the world and further the “metamorphosis.”

It is perhaps because the Interim (mandatory, provisional, protectorate) period can always be so easily upheld as the reasonable, benevolent transition to autonomy and self-rule when contrasted with unreasonable armed rebellion (by terrorists, insurgents, guerrillas and communists) against Western power, such as in Vietnam, that it is still possible to rhetorically present it as a legitimate practice. In many respects there is nothing new in the Interim Constitution of Iraq in what it represents and what it allows. One will see it repeated and re-played in countless scenarios: the rhetoric of freedom, democracy, civilization; industrial modernity as juxtaposed with doomed, chaotic, hopelessly antiquated tribalism; the benevolent experiment which will boldly give its expertise and blood even at the risk of failure; the benign intervention which does not affect its own experiment; the right and the freedom to act where deemed necessary. The difference perhaps lies in the interconnected immensity of the power and the means to disseminate this rhetoric; a power which can *present* itself as something new.



It is important to bear in mind that the transitional phase was implemented but not experienced (or countenanced) by Western nations in their own constitutional histories. Where in Western history would we find constitutional autonomy right and entitlement as first of all requiring a period of tutelage and administration under another power before it could be properly and maturely expressed; liberation and freedom as the products of military occupation; access to national resources by foreign corporations and governments as the path to industrialized economic prosperity? It is literally unthinkable, a fundamental contradiction. It is only conceivable, has only ever happened, can only happen, somewhere else.

What we will see in Chapter 5 is that the distancing, the sustaining of a different set of practices and expectations from those that define the self-styled constitutional centre of the world, allows constitution writing to become an abstract process divorced from the cultural and historical contingencies which will give it meaning and value. The People become an imaginary construction, a set of ideas for mass (Western) consumption. Iraq becomes both a theatre and a laboratory. Autonomy itself becomes an abstraction: national liberty only according to World Law, freedom under military occupation. But of course it is not an abstraction in the lives, the memories, the perceptions, the grievances and differences of the peoples actually involved.

## Chapter 2<sup>1</sup>

### **The Spirit of the People: The Constitution(s) of the United States**

The sessions were secret; sentries were placed at the door to keep away all intruders; and the pavement of the street in front of the building was covered with loose earth so that the noises of passing traffic should not disturb the august assembly. It is not surprising that a tradition grew up about the Federal Convention which hedged it round with a sort of awe and reverence.

(Max Farrand 109)

#### **The Ideal “People”**

Of the values, institutional structures, aspirations and ambiguities of the Constitution of the United States, no part, I contend, has been as profoundly significant and indeterminable as its essential figure and apparent author: “People.” “People” is fundamental not only to the legitimacy and sense of the text, but indispensable to the powerful telling of the story of the triumph of reasoned society over unreason and oppression. It is a story now told repeatedly in constitution writing and interpretation all over the world.

What is the ideal “People”? What is the relationship between this narrative figure and the living? What I shall argue in this chapter is that the ideal “People” has had a rhetorical purpose and history kept separate from the existence or progress of any discernible body of living humanity. It is a constructed and powerfully perpetuated figure that can be made to transcend historical inequality, inequity, exclusion and difference. The legal, political and academic interpretation of the US Constitution which concertedly sustains the imaginary history of a continuous “People” serves to obscure the innumerable interactions, conflicts and changes that constitute human histories. “People,” thus purified

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<sup>1</sup> With some modification and abridgement this chapter is published as an article in *Cultural Studies*, Vol. 24.4 (July 2010).

and abstracted, like “democracy” and “freedom” also becomes an expedient and exportable commodity.

The perpetuation of “People” and the Constitution as continuous has not happened by chance or without purpose. It is the result of prodigious and concerted legal, political and interpretive intervention. Furthermore, this intervention has never been a neutral endeavour, but one which serves to obfuscate an American human history of struggle, resistance and difference in order to engender an image of inevitable progress towards an ahistorical ideal. The strength of this construction is used to justify the actions of existing American power as a moral force inseparable from an irreproachable, historically legitimated ownership of democratic social values and aims.

Before proceeding, a distinction I make throughout this chapter needs to be clarified. “The People,” or “People,” in quotation marks, will either refer to the word in the constitutional text, or to an ideal or figure used in argumentation. The People, or People, capitalized but without quotation marks, I shall use to refer to that body, however indeterminate, which is presumed to be the object of address or depiction.

### **“People” and People of the 1787 Constitution**

The word “People” occurs twice in the 1787 version of the Constitution of the United States: once in the Preamble and once in Article I; but they do not appear to be the same. The Preamble, most famously, reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. (“Constitution”)

The People portrayed here make their appearance fully formed and without history. They are “of the United States,” but speak from no particular location, with no visible process of becoming; no opposition or dissent; no majority or minority; no inside or outside. The collective being is inseparable from the pragmatic certainty of its acts: to “form,” “establish,” “secure” and “ordain.” It is an entity which can ensure and confer “Justice,” “Tranquility,” “Welfare” and “Liberty”; not, apparently, as these are defined, adjusted and compromised by application and practices, but seemingly as the abstract values themselves. The People act, perhaps, from a place that Giorgio Agamben describes as “an original, pleromatic<sup>2</sup> state in which the distinction among the different powers (legislative, executive, etc.) has not yet been produced” (6).

It is difficult to imagine the People not willing what they did, just as it is hard to conceive of God choosing the continuation of chaos over creation. Founding Father Alexander Hamilton, in 1787, opens the first of the eighty-five articles of *The Federalist* by placing in the hands of the People and their decision to ratify or reject the new Federal Constitution, the life or death of enlightened society:

it seems to have been reserved to the people of this country [. . .] to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend [. . .] on accident and force. (1)

Does it seem possible that History (and Providence) should mock this unrepeatable moment in the destiny of humanity with a People incapable of recognizing the right, the only, sensible decision? Is it possible that the People, at last given the opportunity to free themselves, would choose to remain in chains? Hamilton later remarks that from the “primary truths” of “ethics and politics,” no less than those of “geometry,” may be derived

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<sup>2</sup> “Pleroma,” according to *The Oxford Universal Dictionary*: “Fullness, Plenitude; in Gnostic theology, the spiritual universe as the abode of God and of the totality of the Divine powers and emanations.”

further truths “so obvious in themselves, and so agreeable to the natural and unsophisticated dictates of common sense, that they challenge the assent of a sound and unbiassed mind, with a degree of force and conviction almost equally irresistible” (“Federalist No. 31” 142). The chosen People were thus in possession of absolute free will, but also compelled by reason to the Truth. In every constitutional moment since, the People are named in the Preamble as that incorruptible, reasoning force which acts, which always acted, and by an inherent nature seemingly could never have done otherwise.

From the text we can only speculate on the actual, intended or presumed content of the People. Are they all the population, ruler and ruled, levelled into a wilful homogeneous entity? Or are they the representatives of the population *as* the population: the People distilled into a functional, practical essence? Perhaps they are that mass which collectively and mysteriously agrees to be ruled by another, unmentioned, body. Any definite answer to this is to impose upon the text what is not present.

The second “People” occurs in Article I, Section 2, which reads: “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature” (“Constitution”). This body is no longer the collective unity of the Preamble, but an elite group, re-named as “Electors,” and given a specific task to perform: to choose the “Representatives.” (This is their only democratic involvement in all of the Articles.) “Electors” will have “qualifications,” which are not nationally set, but are determined by the individual states. Implied then is another body, of indeterminable dimensions, comprised of the unqualified, which might also differ in content depending on the rules of the given state. Can the latter be called the “not-People”? Other categories are then introduced: “Free Persons,” “Those bound to service,”

“Indians” and “All other persons.” One might assume, though it is not specified, that the latter three, in the sense that they are presented as distinct from “Free Persons,” also make up at least part of the body of the unqualified. Whether “Free Persons” are coterminous with the “qualified” is not knowable from the text. In any case, none of these latter characters is defined by role, but only by quantity. They are that which will constitute the populations of the states, so that tax duties and the allowable number of representatives can be determined. The category of “All other persons” is not afforded even this quantitative status and amounts to “three fifths” of the rest. The title “Citizen” also variously occurs in the remaining Articles in relation to duty, liability to punishment, and qualification for government office (“Constitution”). But again, it is not evident from the text how “Citizen” overlaps with “People” or any of the other categories. In contrast to the harmony and wholeness of the Preamble “People,” we have in the Articles “the People” as one of several indeterminate entities written into a relationship of suspended division, inclusion and exclusion.

Again, merely by reading the text we can but make assumptions about how these two representations of the People were supposed to relate to each other. The contemporary perceptions and acceptances of the ways in which the qualified “Electors” understood themselves as embodying “We, the People” are not described in the Constitution; neither of course are those of the unqualified and otherwise excluded. From our temporal distance, the Preamble “People” appears as a perfect ideal, abstracted from the material practices and divisions depicted in Article I. Its distant perfection is fortified by the passing of time, and thus the history of the struggle for inclusion becomes, from this perspective, the history of an ever-greater approximation to the ideal. This (energetically sustained) conception obscures the possibility that the “ideal” is itself historically and socially contingent.

Obviously, all of these terms, “people,” “citizen,” “persons,” “representatives,” had contemporary cultural, legal and political meanings in the minds, traditions, practices and writings outside the constitutional text. Also present are the already deeply contested and increasingly ambiguous notions of “sovereignty of the people,” “rule of law,” and “natural rights.” (As will be considered below, much had passed since the strident claims of inviolable entitlement to “the Laws of Nature” and “Right of the People” in the 1776 Declaration of Independence.) All of these ideas had behind them complex histories of changing, contingent conceptions.<sup>3</sup> Equally, such ideas would change in ways the Fathers could not have foreseen or intended. Whatever definitions these notions may have in isolation, they never function as such, but instead exist as configured into relationships with each other. The relationships are never stable, but contingently shift; in the face of this, prodigious intellectual and legal energy is continually employed to engender the appearance of existing and historical stability. The configuration of Article I, section 2 is not one of inherent truth or inevitability, but of hope for function, viability and resolution.

The history of changes of constitutional meanings, practices and relationships is of course the concern of a vast body of legal scholarship and constitutional law (which have their own histories). This chapter will frequently refer to various aspects of this work, but not in order to trace or re-construct a legal history. A central aim, rather, is to demonstrate that it is the use of “People” and “Constitution” by legal scholars and practitioners which functions to obscure the practices by which an illusory, singular, dominating historical narrative is constructed and sustained.

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<sup>3</sup> Even “three fifths” precedes the Philadelphia Convention. The fraction was not a consequence of the Convention’s Connecticut (Great) Compromise, which settled upon the above rules of representation, but of a proposed “revenue amendment” to the Articles of Confederation in 1783 (Farrand 121-22).

### **The Rhetorical Invention of “the People”**

In *Visions of the People* Patrick Joyce, though concerned principally with constructions and conceptions of class in nineteenth-century England, makes an argument quite applicable here: “political languages took their meaning, or were eloquent, to the extent that they resonated with the preoccupations of those who received them” (28). By the same token, the values attributed to the collective American People had to be understood by the politically activated and enfranchised portion of the populace as their values. In this way they could be certain that the Constitution was addressed to them; that they were “the People.” Perhaps, as Joyce further suggests, this relationship was also instrumental in defining this group’s existence: “they [political languages] can be understood as actively creating both political appeals and the objects of such appeals, the political constituency itself” (27). As the living body to whom the rhetorical ideal of “the People” is to appeal does not remain the same historically in either its constitution or its values, it is reasonable to assume that the nature of the perceived ideal, if it is to continue to “resonate,” must also alter.

That the ideal, the transcendent notion of “the People,” might be contingent and subject to historical transformation is powerfully and intellectually resisted. But, paradoxically perhaps, as the following sections will argue, it is in the conflicts of legal, political, historical, social, and scholarly struggles to sustain “the People” and “the Constitution” as unified and coherent that the latter notions are in fact continually transformed in their purposes, functions and meanings. Any attempt to grasp what is meant or intended by “People” or “Constitution” in these various contemporary and historical arguments and positions thus must take into account the contests of forces in which they



emerge. As cultural historian Michael Kammen writes in the much-lauded *A Machine That Would Go of Itself*, “The volume of evidence is overwhelming that our constitutional conflicts have been consequential, and considerably more revealing than the consensual framework within which they operate” (30). Some of these disagreements have developed relatively recently, as we will see. Some go back to revolutionary America and have remained a significant and influential presence throughout US history.

The legal, historical and theoretical analysis of the Constitution of the United States comprises an immense, complexly divided field of endeavour. This has had a degree of exposition in the introduction, but a summary of theories given by legal scholar Jed Rubenfeld may further emphasise the point: “In constitutional law today, there is a surfeit of interpretive approaches: originalist, literalist, activist, passivist; moral-philosophical, structural, law-and-economical; precedent-based, process-based, tradition-based, justice based; and more besides. Some of these converge in any given dispute; others conflict” (198). (One may take the very complexity and proliferation of the theory as evidence in itself of the inseparability of ideas and practices from conflict). Therefore what follows cannot hope to be exhaustive, nor does it intend to be. What can be illustrated, by considering some of the prominent contemporary and historical figures in this field, here and throughout, are the central and enduring contests, and the ways in which “People” and “Constitution” emerge from them. What is ultimately struggled for in these perpetual contests is, it seems to me, the production of a unified consistency, a coherent, irreproachable and exceptional Constitutional History of American liberty.

Much of general significance may be drawn from the views of four prominent contemporary figures on constitutional politics, history and interpretation. The arguments and positions of each of these seem dependent upon differing transcendent notions which

can be relied upon to reveal themselves to the present and to those whose task it is to transform ideals into material practice. The first is from Bruce Ackerman<sup>4</sup> and the power he attributes to the People, who, at certain extraordinary moments, will put into motion the “higher lawmaking” of American constitutionalism. The second is that of Ronald Dworkin<sup>5</sup> and the “moral reading” of the Constitution. He argues, in effect, that there exists a morality above and beyond the motivations and beliefs of the judiciary which should, if the latter are sufficiently attentive and sensitive to it, prevent them from self-interested interpretation and abuse. The third is the preservation of a sacred origin as expressed by neo-conservative Supreme Court Justice Antonin Scalia. Finally is legal scholar Akhil Reed Amar and the construction of an impermeable narrative of legal precedent from the founding to the present, as distilled from the many other competing narratives. The questions that arise from these will all be important to the analysis that follows in this chapter. We may then look at some of the history in which it becomes evident that “People” morality, original intent and legal narrative have never been singular.

Ackerman, Dworkin, Scalia and Amar (and of course the many others) need also to be seen in the context of a recent history of division and tension concerning interpretive methodologies between constitutional theoreticians and practitioners. According to Stephen M. Griffin in *American Constitutionalism*, “contemporary constitutional theory” emerges and develops in the twentieth century following certain pivotal Supreme Court cases:

“Although modern constitutional theory began with the critical reaction to Supreme Court

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<sup>4</sup> Concerning Ackerman’s significance one may recall Frank I. Michelman’s comment in the introduction: “Among contemporary American constitutional theorists of populist inclination, Bruce Ackerman is the one who has grappled most seriously with the question of what counts as an expression of the legislative will of the people” (76).

<sup>5</sup> See also the introduction for Dworkin’s supremacy in liberal theory. It should be recalled that Dworkin, as a liberal theorist, is theoretically opposed by critical law theorists and critical race theorists.

decisions of the *Lochner* era,<sup>6</sup> the starting point of contemporary constitutional theory is *Brown v. Board of Education*.<sup>7</sup> (141). But it was not until the case of *Roe v. Wade*<sup>8</sup> that theorists began to consider their critical positions as “conceptually distinct from the task of commenting in a learned way on constitutional law” (141). Griffin also remarks upon the way in which legal and constitutional theory begins to lose faith in its own interpretive tools as a consequence of the political and critical upheavals of the 1960s and 70s. He writes:

Constitutional theory is thus a reactive and episodic field of inquiry because it has been driven largely by controversial Supreme Court decisions. As scholars developed their arguments after *Roe*, however, they became dissatisfied with the narrowly legal and doctrinal character of their theories. Scholars became theoretically self-conscious, increasingly concerned with whether their theories of interpretation and judicial review were sound in light of relevant developments in academic disciplines such as philosophy, history, political science, and literary theory.

All of this scholarly effort did not result in a consensus on a theory that resolved the issues posed by the controversial decisions of the Warren and Burger Courts. In fact, the emphasis on theory appeared only to increase the division of opinion and to separate scholars into a number of hostile camps.” (142)

In *We the People: Foundations* the authority that Ackerman gives to the People in the unique and unprecedented “ongoing experiment in self-government” (5) of American constitutional politics must be considered in the light of two important factors. First, with respect to Griffin’s assertions above, is the way in which he situates himself in relation to other contemporary theorists, scholars and practitioners. Ackerman defines himself as a

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<sup>6</sup> *Lochner v. New York*: “In 1905, the Supreme Court invalidated a New York regulation limiting the hours of labor in bakeries to ten per day or sixty per week” (Kens 161). This case and the “era” which it defines is marked by the unprecedented “judicial activism” of the Court in its involvement with, and prevention of, state efforts at social and economic reform (Kens 163). According to Ackerman, the case is a primary example of the “pre-New Deal Court,” prior to “1937, in which an activist, regulatory state is finally accepted as an unchallengeable constitutional reality” (40).

<sup>7</sup> The 1954 school segregation case under Chief Justice Warren that will be considered in more detail below.

<sup>8</sup> *Roe v. Wade*: 1973 case under Chief Justice Burger in which the right to legal abortion is given constitutional sanction (Tushnet 262-65).

“dualist” in his interpretation of the Constitution, and believes that “there are two different decisions that may be made in a democracy. The first is a decision by the American people; the second, by their government” (6). A central concern is that

sophisticated wisdom is losing touch with the Constitution’s dualistic roots [. . .] On the level of history, this loss is expressed by the construction of a professional narrative [by the legal system] that gives only grudging recognition to the most distinctive aspect of the dualistic enterprise: the higher lawmaking process by which political movements ultimately gain the constitutional authority to make new law in the name of We the People of the United States. (56-57)

He is not, therefore, a “monist,” for whom power resides primarily in an elected parliament, as is the case in Britain. “Dualism” is related and contrasted to such theories as “Burkean Traditionalism,” “Liberal Republicanism” and “Rights Foundationalism” (7-32). As stated above he also rejects the judicial narrative: “they have built something I will call a professional narrative, a story describing how the American people got from the Founding in 1787 to the Bicentennial of yesterday. This narrative colors the constitutional meanings lawyers and judges give to the particular problems presented to them for decision” (4).

What Ackerman wishes to uncover is that which, in his view, has become dangerously obscured or ignored by the above: the absolute uniqueness of the Constitution. This is to be achieved by the insights and the unclouded vision of the “dualist.” In order to focus on the unparalleled nature of the US Constitution the thought of the rest of the constitutional world must necessarily be put aside. (And so too, therefore, is the possibility that American constitutionalism might be influenced by that with which it has been in contact and that which it presumes to exclude – a central theme of the following chapter.) So unique is the US constitution and its history that no external thought is able to adequately explain it and so needs to be discarded. (It is “the Europeanization of constitutional theory” that Ackerman sees as a deep flaw in much of contemporary legal theory and practice (4).) He

writes: “To discover the Constitution, we must approach it without the assistance of guides imported from another time and place. Neither Aristotle nor Cicero, Montesquieu nor Locke, Harrington nor Hume, Kant nor Weber will provide the key” (3).

The second involves the way in which forging this position requires the establishment of seemingly irreducible points of certainty. Ackerman writes: “In America [. . .] it is the People who are the source of rights; the Constitution does not spell out rights that the People must accept (or settle for)” (15). It is the case however that “Decisions by the People occur rarely, and under special constitutional conditions” (6). There are three exceptional periods in US history, according to Ackerman, that stand above the “normal lawmaking.” These are the moments at which the People have gathered on mass for deep political change: the Founding itself, Reconstruction after the Civil War and the Thirteenth, Fourteenth and Fifteenth Amendments, and the advent of a radically new constitutional politics in 1937 with the New Deal under President Roosevelt (40).

In this progress of triumphant moments we do not see that the People are always in differing relation to that which they are not; to the segregated, the disenfranchised, the enslaved, the marginalized, the non-male, the irrelevant, the primitive, the poor, the newly arrived. Nor do we see that “People” is created in reaction to and in relationship with the marginalized and the subaltern not only in the national boundaries but outside them. Is there a coherent body that is simultaneously definable by that which it excludes and as that which periodically moves to end exclusion? It is significant what Ackerman must forget in order to construct his history. He writes, for example, “As we come to our political maturity, today’s Americans do not encounter one another as if they were explorers setting up a new colony on some previously uninhabited new world” (23). Did the “explorers” perceive their new world as “uninhabited”? Is there a moment in the historical narrative of

the colonization of what would become the United States that is not about encounter with (and destruction of) the inhabitants?

Dworkin argues for the “moral reading” of the Constitution, which requires that interpretation be made “on the understanding that they invoke moral principles about political decency and justice” (2). Dworkin (a “rights fundamentalist”<sup>9</sup> according to Ackerman (11)) favours the strength and judgement of the legal system and its history over the popular mandate: “The moral reading is a strategy for lawyers and judges acting in good faith, which is all any interpretive strategy can be” (11). He opposes the “majoritarian” view in which the democratic voice of the majority necessarily takes precedence, arguing that there are times in which it may be necessary for the judiciary to oppose the majority in the preservation of equality and rights. This is sharply opposed by conservatives who regard, or claim to regard, such judicial power as anti-democratic and anti-People. (15-19). With faith in the text and what the Framers (who include, according to Dworkin, the post-Civil War writers of the Thirteenth, Fourteenth and Fifteenth Amendments) intended to say, he opposes “revisionist” readings. He also accuses the revisionists of wrongly leading some judges to entitle themselves “activist” or “noninterpretivist,”<sup>10</sup> even though they tend to abide by the given constitutional text (74-76).

Some clauses of the Constitution, such as the “due process” of the Fifth Amendment in the Bill of Rights and the “equal protection” of the Fourteenth Amendment are written in what Dworkin calls “exceedingly abstract moral language.” (7) Some, such as the clause stating the minimum age of the president, are obviously more straightforward. It

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<sup>9</sup> This designation will be returned to in a later section of this chapter.

<sup>10</sup> See below for the context and definition of this term.

is the former that require the moral judgement of justices, lawyers and scholars. Only by the revelations of “history” may this judgement be sound:

This is a question of interpretation or [. . .] translation. We must try to find language of our own that best captures, in terms we find clear, the content of what the “framers” intended it to say. [. . .] History is crucial to that project, because we must know something about the circumstances in which a person spoke to have any good idea of what he meant to say in speaking as he did. (8)

In addition to this, “constitutional interpretation must take into account past legal and political practice as well as what the framers themselves intended to say [. . .]” (9-10). The latter is a matter of “constitutional integrity,” of remaining in keeping “with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges” (10). By allowing history to thus reveal intention, and by faithful adherence to “integrity,” the moral reading by judges does not become simply the abuse of power and the deprivation of the power of “the People.”

Certainly, legal decisions that end slavery and segregation and provide an equality of civil rights may be regarded as moral in the sense that indisputably immoral practices are curtailed. It is also the case, it seems to me, that defying the majority in order to create a measure of equality for minorities is a moral act. Yet, is it the case that such decisions are fully comprehensible only as the moral intervention of the law? Does this provide an accurate historical image? What of the history of the struggle and the pain that is undergone by minorities to achieve these victories of minimum expectation? Moral decisions of the judiciary do not erase the history of oppression and marginalization, which neither vanishes from cultural memory nor ceases to affect the living. What should be said of the history of *immorality* based on (and written in) the Constitution? What is judicial morality to the slave or the forcibly exiled Native American? Is morality a condition or a consideration of the

law? As Justice William Johnson states in *The Cherokee Nation v. The State of Georgia*<sup>11</sup> in 1831: “With the morality of the case I have no concern; I am called upon to consider it as a legal question” (Johnson 2558).

Dworkin cites much opposition to his theory, but it is the doctrine of “originalism”<sup>12</sup> that seems to represent the antithesis of his position. James B. Staab, in a book on Supreme Court Justice Antonin Scalia, places Scalia in the lattermost of “At least six major schools of conservative jurisprudence [. . .] Burkean Traditionalism, conservative pragmatism, Legal Process, libertarianism, natural law, and originalism” (xv). According to Dworkin, “The moral reading insists that the Constitution means what the framers intended to say. Originalism insists that it means what they expected their language to *do*” (13; emphasis in original). As a logical consequence originalists must oppose most progressive legislation, including that concerning segregation and civil rights, as it could never have been the aim of either the original Founders or the Reconstruction authors (Dworkin 13-14). Any intervention or interpretation of the Constitution, moral or otherwise, which is not clearly in line with what the Founders wanted “to do” is a breach of the judicial remit. Conservatives such as Scalia therefore deeply oppose the “judicial activism” of the “living constitution” school of interpretation, “which posits that judges can create new rights by interpreting the Constitution to reflect current social values” (Staab 172). (Two well-known applications of the latter progressive approach, the anti-segregation cases of *Bolling v. Sharpe* and *Brown v. The Board of Education*, under Chief Justice Warren, will be considered towards the end

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<sup>11</sup> See Chapter 3.

<sup>12</sup> Griffin describes two oppositions that dominated theory in the 1980s: interpretive and noninterpretive, and originalism and nonoriginalism. As to the former: “Interpretive theories were those that stayed close to the Constitution by making clear inferences from the text and the intent of the Framers. Noninterpretive theories were those that moved beyond the text and original intent in favor of values not found within the document” (152). Theoretically, though falsely in Griffin’s view, “nonoriginalist theories make no appeal to understanding the Constitution in a historical context [. . .]” (155).



of this chapter.) Yet it is precisely “current social values” that seem to be at stake for the originalist. In his introduction Staab quotes Scalia as saying: “My most important job as a judge is to say no to the people” (in Staab, xxvi). It is not all the “people” that he says “no” to however: Scalia

has been a staunch opponent of affirmative action, abortion rights, the right to die, and homosexual rights. At the same time, he has strongly favoured a more pervasive role for religion in society, capital punishment, regulations of libel and obscenity, deregulation of private industry, and property rights. (xxi)

In my view there are two problems raised by original intention. The first is the assumption that there ever was a coherent, univocal intention from the Founders. As we will see below this was certainly not the case. Second is the idea that those intentions and conceptions were ever fully expressed, or able to be expressed in the Constitution. Thomas C. Grey in “Do We have an Unwritten Constitution?”<sup>13</sup> writes,

For the generation that framed the Constitution, the concept of a “higher law,” protecting “natural rights,” and taking precedence over ordinary positive law as a matter of political obligation, was widely shared and deeply felt. An essential element of American constitutionalism was the reduction to written form – and hence to positive law – of some of the principles of natural rights. But at the same time, it was generally recognized that written constitutions could not completely codify the higher law. Thus in the framing of the original American constitutions it was widely accepted that there remained unwritten but still binding principles of higher law. (715-16)

The external, that which constitutes “higher law,” is not an historical constant. (Who now thinks in terms of natural rights or natural law?) The text and its meaning therefore can only be in an ambiguous and shifting relationship with the external; a relationship always determined by human intermediaries for purposes of their own. Originalists must retrospectively create an external (in their case, the infallible Founders; in Ackerman’s, “the

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<sup>13</sup> This essay is often cited as the first to critically explicate the distinction between interpretivism and noninterpretivism.

People”); in Dworkin’s, the morality of US history) in order to write a Constitution that suits present needs.

Whether constitutional history is founded upon an infallible “People,” morality or original intention, what is at stake is the justification of power in the present. Very often, the narrative sense of this history, its structure and progression, is built through the selection of legal cases that lead back to the Founding, and run from the Founding to the present. This we will see in greater detail in a later section from Akhil Reed Amar in his analysis of a deep and divisive debate in legal theory and practice: does the post-Civil War Fourteenth Amendment “incorporate” the 1791 Bill of Rights? Here we will have not only Amar’s particular take and reconstruction of events based on precedent, but will see some of the divergent complexity of legal precedent and theory that runs throughout. Inherent in this problem is, as always, the history of the negotiation of the relationships between “the People” and state and federal power. Suffice it to say at present that it is the imaginary unity of “the People” that ultimately underpins everything. In “Our Forgotten Constitution: A Bicentennial Comment,” Amar asserts: “The Constitution is our supreme law, superior to ordinary legislation, simply because its *source* was the supreme lawmaker, superior to ordinary legislatures: ‘We the People of the United States’” (286; emphasis in original).

What there may never be in the narratives of legal precedent is contradiction, or the sense that one historical narrative has ended and another begun. (The theories of Ackerman, Dworkin, Amar, Scalia, and a great many others, would lose all foundation if the latter were the case.) And yet, as this chapter will later argue, is not continuity with the Founding and a progressive history of liberty, rendered impossible by the absolute antithesis of liberty: slavery? That is, can a constitution which makes slavery an aspect of its *fundamental law* be the same document as that which forbids it? Can a concept of “the

People” which allows slavery (or is perhaps dependent upon it, as Toni Morrison argued in the introduction) be same as that which does not? This irreconcilability (in my view) is hidden beneath narratives of continuity. To reveal it would be tantamount to stating that America collapsed with the Civil War, and then began again with a new Constitution.

Historically, we do not get a picture of harmony, coherency and continuity. A conflict of great significance has been that between the power of the states and the federal government. “The People” emerges as a body of ultimate authority crucial to the balance and negotiation of this unsettled duality. However, the idea of “the People” as the absolute sovereign authority in the United States has been, according to Griffin, a deeply and divisively problematic one throughout its constitutional history. Though it is the case that “the idea of government by the people is obviously crucial to American constitutionalism” (20) two areas of contention have never been satisfactorily resolved. The first is that despite retaining the ultimate power and being that from which the federal and state powers theoretically derive their mandate to govern, the People (beyond the conventions for ratification of the Constitution, to be considered shortly) have never possessed the means or mechanisms for directly exercising that power:

The doctrine of popular sovereignty could not resolve the arguments over nullification, secession, and states rights because there was no practical way to implement the doctrine. There was no institution the people as a whole could use to settle disputes between the federal and state governments. The constitutional convention provided a way to operationalize popular sovereignty in creating the Constitution, but there was no way use the convention as a continuous means of settling disputes (24).

There was, Griffin suggests, a matter of expediency to “the People.” As an idea it served a necessary purpose and then ceased to be of consequence to the immediate realities and exigencies of power and nation-building:

Once the Constitution was ratified and government began operating, however, the power of popular sovereignty as order-creating doctrine necessarily began receding into the background. The task now was not to create a fundamental law but to provide the authority to govern. Popular sovereignty and constitutional conventions had no role here. (24-25)

The second concerns these “disputes,” which arise from a perennial conflict of power that would have grievous consequences:

the Federalists insisted that the people as a whole were sovereign, and this argument apparently prevailed in the ratification debates. Yet the acceptance of the Federalist position did not stop a growing debate over how the Union was formed and whether the states or the federal government were sovereign. Since this dispute was arguably the basis of the Civil War, it is one of the most important constitutional questions in American history. (21)

It must also be understood that the concept of “the People” first appears as a necessary political creation in a crisis of central authority and excessive state power. “The People,” according to the renowned historian Edmund S. Morgan, did not usefully exist in the United States before 1787, and so had to be created. He writes that under the previous Constitution of the United States, the Articles of Confederation, the lack of a strong central government with sufficient powers over the separate state governments, threatened the disintegration of the newly independent union. Morgan argues that it had not been considered possible<sup>14</sup> prior to 1787 for popular representation, such as it was, to function beyond a local level, and it was therefore feared that a central government, given the powers of the states to tax and make laws, would lack accountability and be open to abuse (264-67). James Madison, writes Morgan, in building the idea of a nationally elected House of Representatives at the 1787 Convention, had first of all to imagine and form an electorate: “As the English House of Commons in the 1640s had invented a sovereign

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<sup>14</sup> Not considered possible, that is, in traditional European philosophical and political thinking. See below for an exposition of the influence of Native American thinking and existing practices on US Constitution writing and formation of ideas.

people to overcome a sovereign king, Madison was inventing a sovereign American people to overcome the sovereign states” (267). We might say that here, in essence, is a practice that Joyce observes in the political rhetoric of early nineteenth-century England: “Unities of sentiment and action had to be created which overlaid the differences obtaining within political groups, and these depended on the elaboration of unifying identities, such as ‘peoples’, ‘classes’, or ‘nations’” (27).

Charles A. Beard famously (and controversially) argues that the Philadelphia Constitutional Convention of 1787 was a veritable “*coup d’état*.” The Convention delegates (not yet the Founding Fathers, as they would later be venerated) had been chosen by the state legislatures to propose amendments to the existing Constitution, the Articles of Confederation. According to this document any amendments would require further unanimous approval of the state legislatures. Instead, the Framers discarded the Articles and (unconstitutionally) set about writing a new Constitution. In seeking ratification of their production, the majority of the delegates reasonably concluded that they could not now confidently turn to the state legislatures for unanimous consent, particularly as the newly written Federal Constitution significantly reduced the states’ powers and the relative autonomy they had enjoyed. Thus they avoided the legislatures, and the existing law, by engineering state conventions of delegates, chosen by “the People,” to vote on ratification (Beard 217-38). Of the actual People involved, Beard writes: “a considerable proportion of the adult white male population was debarred from participating in the elections of delegates to the ratifying state conventions by the prevailing property qualifications on the suffrage” (240). Kammen adds to this: “Moreover, most Americans fail to appreciate the extent to which they have accepted a passel of constitutional fictions. Although these are

not entirely false, neither are they historically sound. Most notable, perhaps, is the myth that the entire people of the United States established the Constitution” (13).<sup>15</sup>

The role of the Supreme Court as the body uniquely qualified to legally interpret the Constitution (whether “morally” or not) is not one given to it by the People, the Constitution or its “original” writers. It was, according to Griffin, an emergence, a historical process (one he refers to as the “legalization of the Constitution” (17)) that arises as an answer to the critical need to organize the constitutional ruling institutions in the 1790s. Specifically, “a sharp boundary had to be established between the Constitution and politics” (16). The Constitution, as fundamental law, was originally to serve as a restraint upon and a safeguard against the political abuse of power. However, precisely because the Constitution was fundamental law, there existed no body which could stand external to it in judgement and prosecution in the case of constitutional violation or abuse. Integrity of practice and interpretation depended unsatisfactorily on a continuation of a “certain kind of politics” as personified by the founding “virtuous elite” (15). Conflict, unsurprisingly, began almost immediately. (For a central aspect of this, see below on the division of Madison and Hamilton concerning the First Bank of the United States.) As early as the 1790s, therefore, it was decided that the Constitution was to be made distinct from politics by defining it as functioning according to the practices and disciplines of ordinary law. As such the Constitution would require legal expertise to be correctly interpreted. Moreover, as a document in fact very different in its structure and purpose from ordinary law, it would

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<sup>15</sup> “People,” the idea and rhetorical figure, is used, and takes on meaning and purpose, in argumentation opposing other forms of power or argument. The following passage, for example, from a 1985 textbook, describes the same decisions that Beard addresses above. Here “People” is implied as necessary to a moral confrontation with corrupt state power: “The convention also proposed the revolutionary technique of bypassing the state legislatures, where power-hungry state politicians and pressure groups might exert an influence as pernicious as the speculators had exerted against ratification of the Articles of Confederation. In each state the voters would elect a special convention to judge the new constitution” (Blum et al 135).

require a very particular judicial expertise, that of the Supreme Court (Griffin 11-17). “The Federalist conception of politics, a conception that emphasized the importance of a guiding virtuous elite, was now seen as applicable only to the judiciary. [. . .] the weakest branch of the federal government” (17). Because of the discrepancy between that which was to serve as fundamental law and ordinary law, the “legalizing” of the Constitution could never be entirely complete or coherent (17-18), thus leading to “significant tensions [in] American constitutionalism that persist to this day” (18). It becomes thereby a field of knowledge and power from which the non-experts of the population must be excluded.<sup>16</sup> The “legalization of the constitution” was, Griffin contends, thereby instrumental in diminishing the People as an apparent source of authority (18).

The 1819 Supreme Court case of *McCulloch v. Maryland* under Chief Justice John Marshall<sup>17</sup> provides a clear example of the way in which the uncertainty and contingency of the “People” is transformed into necessary certainties in the effort to resolve conflict between state and federal power and constitutional interpretation. Significant too – particularly with respect to “originalism” – are the ways in which the Founders, in this case embodied by Alexander Hamilton, James Madison and Thomas Jefferson, are divided from the outset and remain in conflict. In addition we will see the fledgling Constitution utilized as a means to allow the pursuit of private wealth.

According to Richard E. Ellis’ summation in *The Oxford Guide to United States Supreme Court Decisions*, the case brought before the Marshall Court essentially concerned “Congress’s power to incorporate the Second Bank of the United States and the right of a

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<sup>16</sup> Kammen writes, “Even though our libraries are filled with books and journals telling us what the specialists think, we do not have a single study that traces what the Constitution has meant to the rest of the populace” (xi).

<sup>17</sup> The Marshall Court is also raised here as its proclamations will be a central factor in the abandonment of the south-eastern Native American peoples to the violence of forced removal, as will be considered in the following chapter.

state to tax an instrument of the federal government” (182). The issue at hand goes back to 1791 and Hamilton’s proposal for the First Bank of the United States, and the opposition to this by Madison and Jefferson on the grounds that the Constitution did not specifically allow for such a federal incorporation (Ellis 182). That conflict (as with the Second Bank) may be characterized as one between the power and right of the federal government (given its theoretical mandate by the People) and the rights of the states.

Fears of an imbalance of power between the states and the government were, according to Hamilton in “The Federalist No. 31,” unfounded. Furthermore, it would not be the government’s role to address perceived imbalance. The Constitution provides the necessary structures and mandate by which the government is to operate, otherwise it is the infallibility and resolve of the People who will mysteriously ensure “equilibrium.” It is necessary, writes Hamilton,

to confine our attention wholly to the nature and extent of the powers as they are delineated in the constitution. Everything beyond this, must be left to the prudence and firmness of the people; who, as they will hold the scales in their own hands, it is to be hoped, will always take care to preserve the constitutional equilibrium between the General and the State Governments. (“Federalist No. 31” 145)

Madison’s view in *The Federalist* is rather different. Here the voice of the American People is understood as speaking through and from the states. This is to be the nature of the republic of the United States. At one and the same time is allowed a strong federal government existing according to the will of the American People *and* state sovereignty as the means by which the People will speak. Madison writes:

it appears on one hand that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation; but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived



from the supreme authority in each State, the authority of the people themselves. The act therefore establishing the Constitution, will not be a *national* but a *federal* act. (“Federalist No. 39” 184; emphasis in original)

The Bank was established, but in 1811 under a Jefferson-controlled Congress, its charter was not renewed and it disappeared. In 1816, at a time of financial and crisis and debt in the aftermath of the War of 1812, the Second Bank was established with the aim of alleviating the “economic chaos” (Ellis 182). Splits arose however: “Despite this, many Jeffersonians continued to oppose the Bank. They viewed it as unconstitutional and denied its economic necessity” (183). The *McCulloch* case then arises, ultimately from a disagreement concerning the state right to tax a federal institution. Some states opted to tax the branches of the new Bank operating in their jurisdictions. One of these branches, in Baltimore, led by James McCulloch, refused to pay. The state of Maryland found McCulloch in the wrong and upheld the bank’s obligation to pay the tax; the case went to the Supreme Court (183).

According to Ellis, Marshall wanted two questions to be answered. First, did the federal government have the constitutional power to authorize a national bank? Second, did the states have the right to tax such banks? Both of these are decided with reference to the People (183-84). As to the first, the answer is yes. In his summation of *McCulloch* Marshall writes: “The government of the Union [. . .] is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit” (Marshall 214). On this Ellis comments:

By asserting this, Marshall offered a nationalist alternative to the theory of the origins of the union propounded by Jeffersonians in the Kentucky and Virginia Resolutions of 1798-1799, which claimed that federal government

was product of a compact of the states and had only specifically granted and limited power. (183)<sup>18</sup>

As to the second question, the answer is no, the states may not have this power. To have it would give the states the right to tax other federal institutions (such as the mail) and would grievously diminish its authority. Such power for the states, Marshall claims, was not what the People had willed (183-84).

Much controversy and opposition remained, not the least of which concerned the fact that “The Second Bank had been capitalized at \$35 million. Eighty percent of its stock (on which substantial dividends were paid) was in private hands, and shareholders appointed four-fifths of the board of directors” (Ellis 184). The central issue, still very much unresolved, relates to the broad interpretation of the constitution, opposed as above by Jefferson and Madison. In 1832 President Andrew Jackson, much more inclined to return power to the states – as we will see in the following chapter concerning his favouring of Georgian rights to act as they saw fit regarding Cherokee treaty-guaranteed land, and his rejection of federal Indian policy – ended the Second Bank. Jackson’s argument marks a return to the Madison and Jefferson position that the Constitution does not expressly allow such federal institutions. The government does not have mandate of the People to thus “loosely” interpret and act upon it. The end of the Civil War brought about diminishment of the argument for primacy of state power, and with the subsequent amendments returned to a national power of the People (184). Such is the significance of Abraham Lincoln’s famous ending to the Gettysburg Address: “government of the people, by the people, for the people, shall not perish from the earth” (Lincoln 429). *McCulloch* (now back in favour)

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<sup>18</sup> In the 1833 case of *Barron v. Baltimore*, Marshall gives a verdict that favours the states over the national government. David J. Bodenhamer writes: “The opinion marked a retreat from Marshall’s earlier nationalism, one impelled by the changing composition of the Court and the growth of states’ rights sentiment” (23). (We will see more of this case below, as Amar’s legal narrative is built upon it.)

and the power it granted to the federal government to establish national programs would become extremely significant in the New Deal era in its alleviation of the Great Depression (Ellis 184-85).

### **The Exclusionary Narrative of “the People”**

“People” is thus ever constructed anew in opposing arguments, and yet presented as an enduring figure in a continuous narrative. Clarence L. Ver Steeg captures the common view of the historical narrative of “People”:

Abandonment of property requirements for voting, emancipation of slaves, the Fourteenth Amendment, the enfranchisement of women, and civil-rights legislation of 1964-65 broadened the definition of ‘people’ [. . .] the people as currently conceived continually animate anew the Constitution and the objects of government it enunciates. This is true even though the theoretical source of authority is not fulfilled in its exercise [. . .]. (87)

American political scientist Ann Norton, in “Transubstantiation: The Dialectic of Constitutional Authority,” makes essentially the same argument. She writes that in relation to its idealized, authorial representation in the Constitution “each people knows itself to be in a state not of being but of becoming and overcoming” (467). That is, there is always something called “people” or “People” which somehow precedes, or transcends, use and context: it never ceases to be “People.” It may “broaden,” but it is always, at each point, “People”; no matter what its content, it is always complete. This un-diminishable construct obscures the conflicts, the violence and resistance, by which changes in the interactions and inclusions of the various groups of living human beings that constitute the People have come about; it continues over centuries only ever becoming another version of itself, removed from time and context. Thus it is a useful figure in arguments as an inviolable and infallible source of power. In this manner Ackerman and others can speak equally of the

constitutional power of the People of today and that of the People of the eighteenth century as if they had a singular explanation. In such a narrative it is not possible to see what J. H. Plumb points out: “The destruction of primitive peoples and slavery are the harsh realities of the American experience, for whose nakedness the Constitution, with its proud declaration of liberty, proved so pathetic a rag” (43).

Ironically, Plumb’s exposure of an iniquitous historical reality is in some ways dependent upon acceptance of a distorting, but prevalent, conception of a dualistic past. On the dominating side of this duality is the ahistorical figure of “People,” as discussed above. This “People” does not enter the world as a consequence of contingent events and influences, but more as a realization, a sudden bringing to wilful life of European Enlightenment philosophies of the immanent power of the collective sovereign. Born anew in the revolutionary Eden of the New World, history flowers when the will of the People momentarily coincides with the peerless Fathers. From Rome to Philadelphia, the narrative is impregnable, never dependent upon *other* histories. Existing in relation to this (and only in relation), forever on the other side of the duality, are the “primitive peoples,” the enslaved, whose primary role in the narrative is to be that which is destroyed, degraded and finally freed.

But of course the histories, the seen and unseen effects of the interactions of living groups of human beings that come to constitute the People, produce realities exceedingly more complex and dynamic. Of particular consequence in this regard has been the great body of research and writing on the Native American influences on America’s conceptions of “the People,” collective sovereignty, unity and constitutions.<sup>19</sup> This scholarship may be

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<sup>19</sup> It is work often vehemently contested, but also vigorously defended. For one illustration among a great many, see Donald A. Grinde and Bruce E. Johansen’s “Sauce for the Goose: Demand and Definitions for

extended back to Donald A. Grinde's seminal work, *The Iroquois and the Founding of the American Nation*. Of the many effects of these influences, two of immediate relevance might be touched upon. The first is a concept of deep consequence and contestation throughout American history: unity. As Grinde and Bruce E. Johansen conclude in *Exemplar of Liberty*: "Native American political concepts must join the pantheon of ideas (Greek, Roman, English, etc) in American history that influenced the minds of Americans as they grappled with the problem of creating a distinct, unique and original form of union" (250).

Fundamental disagreements and uncertainties concerning unity preceded the 1787 Constitution. Seemingly intractable positions were taken on the nature of the sovereignty of the People<sup>20</sup> and their natural rights; how that sovereignty could be collectively expressed; how the power of the People should be codified in constitutions, state or federal; who the People actually were; the nature of government that could work across such a wide and diverse land and be accountable and attentive to the People (Fritz 1-8). But as Grinde and Johansen write, working political and social models (not of the kind to be found in Europe) were already in operation:

unity was of paramount importance in the minds of the founders and the American people, and problems of unity would plague Americans until after the Civil War [. . .] the question today is not *whether* but *to what degree* the Native American confederacies influenced the American concepts of unity. (*Exemplar of Liberty* xxiii; emphasis in original)

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'Proof' Regarding the Iroquois and Democracy." For an account of the development and influence of their studies, as well as the resistance to it, see Johansen's *Debating Democracy: Native American Legacy of Freedom*.

<sup>20</sup> What power do the People retain in a democratic society once they have consented to government of their choice? According to legal historian Christian G. Fritz, those who believed that the People retained complete, undiminished sovereignty faced some difficult puzzles: "The essence of the rule of law – that binding law exists above both the governors and the governed alike – was challenged by the idea that a sovereign people could not be bound even by a fundamental law of their own making" (3). Can the People make a law they do not have to follow? Can God make a stone she cannot lift?

The influence upon ideas of union and sovereign power goes back to what might be regarded as the inchoate beginnings of America's constitutional history. Benjamin Franklin's 1754 Albany Plan of Union, an early attempt at forming a unity of the then British colonies, and that from which the Articles of Confederation<sup>21</sup> would later be drawn, followed meetings and consultation with representatives of the Iroquois Confederacy (*Haudenosaunee*) (*Exemplar of Liberty* 94). On the historical reality of this, Grinde and Johansen are unequivocal: "The Albany Plan was extracted from the Great Law of the Iroquois" (*Exemplar of Liberty* xxiii). The Great Law, according to the *Encyclopedia of the Haudenosaunee*, edited by Johansen and Barbara Alice Mann, contains much that would be familiar to the reader of the US Constitution: federalism, property, separation of powers, democracy, equality, rule of law, and most relevantly here, the People: "Through public opinion and debate, the Great Law gave the Iroquois people basic rights within a distinctive and representative governmental framework" ("Great Law of Peace" 135).<sup>22</sup>

The second related point concerns what Grinde, in *The Iroquois and the Founding of the American Nation*, calls the "distinct American character" (135). American notions of "the People" cannot be fully explained by Europe's social and intellectual history, but neither can they be understood without reference to the peoples who had already long occupied the lands with complex social and political systems of their own: "The men [Benjamin Franklin and Thomas Jefferson] turned not only to Plato, Locke and Rousseau, but also to the Iroquois and other Indian peoples for aid and encouragement in the political, military and economic spheres of human endeavour" (*The Iroquois* xii).

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<sup>21</sup> The failure of the Articles of Confederation is not to be understood as a Native American failure: "With its emphasis on state's rights, a weak executive, and slavery, the document must stand as a gross perversion of Indian democratic ideas" (Grinde, *The Iroquois and the Founding of the American Nation* 136).

<sup>22</sup> See also William N. Fenton's *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy*.

### Amendments, “Spirit” and the Many Constitutions

“People” requires that the constitutional story, of which it is exalted as the main character, have a perceived singular existence that also transcends the difference, argument and opposition which continually forms and interprets it. Such a perception makes it possible for professional and lay commentators to say of today’s Constitution that *it* is the oldest, the first, the longest in continual use, etc. Reading the Constitution as a whole text today, one would move naturally from the beginning to the end, or at least perceive that there is a differentiable beginning, middle and end. That is, one would start with the Preamble and seven Articles of 1787, which, as far as narrative structure is concerned come first, and then move in apparently chronological steps through the twenty-seven Amendments. The Preamble and Articles are historically the oldest, but at the same time they are understood to be coeval with the rest of the current text. The representations and constructions in the 1787 Constitution form, *now*, the opening passages of a long and complex document as if that were their purpose; having been introduced to “People” in today’s Constitution, one anticipates further development as the narrative moves beyond the Articles. But they were not written as opening passages; they *were* the Constitution.

The Amendments so far were written over the course of two centuries: ten in 1791(the Bill of Rights); one each in 1798, 1804, 1865, 1868 and 1870; two in 1913; one each in 1919 and 1920; two in 1933; and one each in 1951, 1961, 1964, 1967, 1971 and 1992 (“Constitution”). It is thereby not merely a question of a document that looks one way in 1787 and another in 2008, but one which has existed in a series of different states depending on what point in time one is considering. That being the case, what is meant by “the Constitution”? Going backwards in time we would see the Amendments fall away, but

the Preamble and seven Articles remain, textually unchanged throughout, as apparently constant, until only they were left. If we choose to call that ever-present remainder (origin) “the Constitution,” then we might come to the popularly held conclusion that “the Constitution” has a continuous, centuries-old existence. But when used, “the Constitution,” unless 1787 or some other date is the obvious subject of discussion, means all of the existing text, Amendments included, as a single document. In a manner analogous to the argument concerning “People” above, whatever its Amendments, it is always called, with equal veracity at every point, “the Constitution.” In 2008 or 1953 or 1801, it is not spoken or written of as a partial document awaiting the input of future authors; new additions are absorbed into the totality. As with “People,” there is a rhetorical “Constitution” which precedes or transcends its own changes and can be used in arguments as an apparently constant and comprehensible figure.

In this regard, a question arises as to the nature of the Amendments: are they (as the word connotes) always additions or alterations to an existing text, or, by their presence, can they fundamentally change the whole text? In the former we have what is effectively the continuation of the text by a constitutionally sanctioned procedure (Article V), by which a continuity of purpose and founding intention is preserved. In this case there is the perception that “the Constitution” is not lost, damaged, or diminished in the proceedings. With the latter we have a *new*, differently cohesive, text; a different narrative.

This may be examined by a consideration of slavery and its abolition in the Constitutions. (For the purposes of this illustrative argument, other oppositions, such as that between the enfranchisement of women in the Nineteenth Amendment and their previous constitutional non-existence, might equally have been chosen.) Article IV, Section 2, establishes that a slave is not only property by virtue of law in a particular state, but



ontologically *is* property and thus remains so even in a state where slavery is illegal: “No person held to Service or Labour in one state, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein be discharged from such Service or Labour” (“Constitution”). (This was later to be succinctly explained by Chief Justice Taney in the case of *Dred Scott v. Sandford* in 1857:

the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States [. . .] the only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights. (Taney 345))

As Article IV is of the 1787 Constitution, it therefore has featured, textually unchanged, in every Constitution since. The Thirteenth Amendment of 1865 officially abolishes slavery with, “Neither slavery nor involuntary servitude [. . .] shall exist within the United States, or any place subject to their jurisdiction” (“Constitution”). We can thus make, for the purposes of this argument, a division of Constitutions into those which are prior to this Amendment, and so contain only the sanction and legal protection of slavery, and those after, which, textually, contain the sanction *and* the abolition.

To bring this back to the above question, does abolition add to, or alter, a text that protects slavery? Or does it create, by its presence, a new text? That the latter is more accurate, I posit, can be determined by attention to narrative difference. Prior to 1865, one could read through the whole Constitution and find slavery to be as much a fact as the separation of powers and the tax laws; there is nothing to contradict it, or call it into doubt or suggest that it might be ended. It adds a tone to those pre-1865 Constitutions which cannot be altered no matter how much one may wish it were otherwise, like a novel in which a loved character unexpectedly dies. Moving into post-1865 is analogous, perhaps, to a new author (long after the original had died) extending said novel to reveal that the loved

character had in fact not died after all and would now play a prominent part. Surely this is now an entirely different novel? After 1865, this same section of Article IV changes from an uncompromising absolute into an aberration, a fall from grace, forever to be followed by its amending redemption. The reader of the latter may be one of two types. The first (who is difficult to imagine, but conceivable) reads with fresh eyes, unaware of its contents and of American history. This reader (a future archaeologist?), passing through the sections on slavery, would eventually reach abolition and feel perhaps a sense of surprise, relief, annoyance or confusion. To all the other readers, who know the story before they read it, the sin of the Fathers always already contains its resolution. Its narrative is complete and cohesive in a different way; it is a different text.

Without the perception of new narrative cohesion, how could the Constitution of today be cited as complete and sacred in its entirety (and ever thus) whilst containing within in its opening Articles silent, legally (at least) un-interpretable text? One solution, it seems, is to declare existing sections of text invisible. Edward S. Corwin, in a detailed section-by-section analysis of the Constitution, has but this to say about the section on humans as property: “The paragraph is now of historical interest only” (170). Perhaps this would be true if, as with other nations, and as with the United States in 1787, the old Constitution was discarded and a new one written. But the 1787 Articles are not “historical” text; they are existing text.

In an intriguing book called *Interpreting the Bible and the Constitution*, internationally renowned theologian and scholar of Christian history Jaroslav Pelikan<sup>23</sup>

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<sup>23</sup> This work should be classed within a longer, wider debate relating religious belief and the Constitution in American life, going back to Robert Bellah’s essay “Civil Religion in America.” See also Sanford Levinson’s “‘The Constitution’ in American Civil Religion” (cited in this chapter), and Levinson’s important work *Constitutional Faith*.

draws a comparison between the perceived relationship of the New Testament to the Old Testament, and that of the Amendments to the Original Constitution. The Christian Establishment, he points out, could never presume to amend the Bible, obviously, as the official canon was established long ago as complete; nevertheless the New Testament was, at the outset of the Christian Era, added to an existing, and very old, sacred Hebrew text. This had to be done in such a way as to make it appear continuous rather than as superseding or correcting the Old Testament, the latter being as equally and absolutely a part of Holy Scripture as the former (12-14). He writes: “Both the words ‘New Testament’ [. . .] and the word ‘amendment’ here connote continuity as well as change, a change that is perceived as clarifying, carrying out, making explicit, supplementing, and fulfilling the existing code, but not as annulling its fundamental spirit [. . .]” (13-14).

But the opposition between slavery and its abolition creates two paradoxes if seen in terms of Pelikan’s idea of change that also preserves continuity of “fundamental spirit.” Firstly, if it is said that the sanction of slavery was itself a contradiction of the “spirit” of the 1787 Constitution as a whole, and the Thirteenth Amendment thus a re-alignment with the “spirit,” then we have the semantic inconceivability of Article IV being unconstitutional constitutional text. Laws, behaviours, beliefs may be considered unconstitutional if they are in breach of the text; but how can the text be in breach of itself? For the Constitution of today to be considered sacred in its entirety, Article IV would have to be simultaneously constitutional and unconstitutional. Secondly, if slavery was in keeping with the original “spirit,” then abolition is in *defiance* of the 1787 Constitution, and the whole notion of a progressively realized narrative of liberty would be reversed.

One confronts the impossibility of determining a consistent “spirit” when reading the secession declarations of the Southern states just prior to the American Civil War.

These highlight as the chief cause of their disaffection the violation by the Northern states of Article IV. According to the “South Carolina Declaration of Causes of Secession,” for example, the Northern states, far from returning escaped slaves as constitutionally obliged to do, “have denounced as sinful the institution of Slavery [. . .]. They have encouraged and assisted thousands of our slaves to leave their homes; and those who remain have been incited by emissaries, books, and pictures, to servile insurrection” (374). As the “compact” had been wilfully disregarded, there was no further compulsion to remain a part of it: “We affirm that these ends for which this Government was instituted have been defeated, and the Government itself has been destructive of them by the action of the non-slaveholding States” (373). On one hand this conclusion is a naked attempt to impose intentions on founding aims and draw a continuity that suits the contemporary argument. But on the other hand, were they not right in their assertion that their Constitution was being actively violated by the Northern states; that the refusal to return human property, and indeed its theft, was, therefore, unconstitutional? As Sanford Levinson writes, “The very ambiguity of the written Constitution helped to legitimize civil war” (“‘The Constitution’ in American Civil Religion” 131).

Such paradoxes and contradictions only become apparent when one attempts to reconcile the different constitutional texts; or tries to find the “spirit” that abides in the words, unaffected through the centuries; or looks for a way that a singular, consistent meaning of “People” can encompass the existence of slavery and its absence. “Spirit,” “the Constitution,” and “the People” are powerful in argument because they avoid recognition of struggle, organization and expressions of difference. The abolition of slavery did not suddenly mean that the People had expanded to include African Americans, or that the 1791 Bill of Rights immediately “broadened” its scope. For African Americans it would be

another century before further Amendments ostensibly guaranteed equality of participation and voice. Segregation, “equal but separate” (to which I will return below), lynching, restriction of political and civil rights, are indicative not so much of forceful preservation of the old, but of the violent refusal of new paradigms. What became *possible* were new relationships involving the newly theoretically included. New arguments, resistances, expectations became conceivable which were not when slavery was constitutional.

### **Interpreting “1808”**

The opening paragraph of Article I, Section 9, which guarantees the continued trade in slaves until 1808, is couched in terms of an arrangement of power between Congress and the states, favouring the latter: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight [. . .]” (“Constitution”). At the same time the specificity of the date implies another power – one that is not any of the ruling houses described in the Constitution and is not the People. This power appears in the passage above like an unexpected authorial intervention, telling of an external arrangement that is not to be meddled with by any of the forces set in motion. No explanation is offered or, evidently, deemed necessary. Why this year and not another? Why set a time limit at all? What would happen if it were disobeyed?

As if to re-iterate its importance and mysterious inviolability, the year 1808 is stressed again, in Article V, which outlines the rules for Amendment. According to this Article all may be amended: “Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first [the slave trade] and fourth Clauses in the Ninth Section of the first Article; and that no State, without

its Consent shall be deprived of its equal Suffrage in the Senate” (“Constitution”). The trade was in fact stopped by the 1807 “Act to Prohibit the Importation of Slaves” and made effective from January 1, 1808, though it should be noted that neither of the above constitutional passages promises or demands its cessation by 1808, only that it may not be constitutionally prevented before this date. Its cessation, one might assume, would close it off in history and make it something the writers of the subsequent narrative could turn away from as solved and no longer to be interpreted to meet contemporary needs. After all, to whom would it be addressed after 1808? As above, such is Corwin’s attitude: “This paragraph referred to the African slave trade and is, of course, now obsolete” (76).

Yet it has maintained its rhetorical usefulness long beyond 1808. In the 1857 *Dred Scott v. Sandford* case, referred to above, the slave Dred Scott appealed to the Supreme Court to uphold his argument that because he had been taken by his owner from the slave state of Missouri to Wisconsin Territory where slavery was illegal, he should be considered legally free (Taney 339). The court, presided over by Chief Justice Taney, decides against Scott not directly in terms of the presented reasoning, but because,

There are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808 [. . .] these two provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen [. . .].  
(Taney 342)

As Scott was thereby not a “citizen” he did not have the right to appeal to the Federal Court. The Court thus chooses to detach “1808” from the text and impose upon it meanings nowhere present in the Constitution used to justify the decision. “1808” ceases to be the

result of the power arrangement the constitutional text implies or of the historical context and circumstances which produced it; it ceases to be a date marking the proposed, and actual, end of a particular practice and is projected onto the authorial intention, thereby becoming an indicator of the “negro race as a separate class of persons” indefinitely. In fact, the invented narrative is taken even further back by Taney, to the 1776 Declaration of Independence itself: “neither the class of persons who had been imported as slaves, nor their descendants, *whether they had become free or not*, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument” (341; emphasis added). But this construction of course is not about the Declaration or the intentions of the Founders, it is about maintaining a pro-slave state position in the face of concerted popular and political opposition on the eve of the Civil War. The Court makes a display of textual interpretation whilst mysteriously connecting to long-dead forces external to the text. (In terms of maintaining a contemporary position by interpreting the past, it is interesting that this Court decision is now firmly relegated to an anomalous place in the progressive narrative of American legal history. In *The Oxford Guide to United States Supreme Court Decisions*, Walter Ehrlich comments: “American legal and constitutional scholars consider the *Dred Scott* decision to be the worst ever rendered by the Supreme Court [. . .] Taney’s opinion stands as a model of censurable judicial craft and failed judicial statesmanship” (278). Like slavery itself, it can now be understood as a mistake rather than as characteristic or indicative of the true “spirit.” That said, in “The Bill of Rights and the Fourteenth Amendment” Amar explains that “John Bingham, the main author of Section One [of the Fourteenth Amendment]” (1223) used Taney’s equation of “people” and “citizen,” by which the “negro race” were legally and ontologically excluded, in order to draw a semantic and legal link between the Preamble

“People,” the “citizen” as beneficiary of the “rights” and “freedoms” of the Bill of Rights, and the newly inclusive “citizens” of the Fourteenth Amendment (1223). It would appear therefore that “Dred Scott,” though it may be “failed” and “the worst,” still retained the sanctity of a Supreme Court Decision.)

In 1983, at an international conference of constitution writers and experts organized by the American Enterprise Institute for Public Policy Research, the key speaker on the US Constitution, Walter Berns, gave a different interpretation of “1808”: “everyone there [at the Philadelphia Convention of 1787] agreed that what they were doing with respect to Negro slaves was unjust, that it was contrary to natural right. The constitutional provision having to do with the slave trade is itself an index of that” (173). The “constitutional provision” in question gives no clue one way or the other as to the Founders’ ethical beliefs. If the 1787 Constitution demanded the unconditional end of the trade in 1808, then we might infer a reluctant acquiescence to its temporary continuation on the part of some Founders. Or we might infer something entirely different. In any case we cannot discover the historical context and writer beliefs by reading the text. If Berns had supported his statement with the weight of his historical expertise, then one would be inclined to accept his assertion; instead he pointedly refers only to the constitutional passage for authority.

Ackerman uses the 1808 clause as part of his argument against what he terms “rights foundationalism.” Adherents of this interpretive school maintain that constitutional rights are “entrenched” in the text and thus protected from change by any means, including democratic. If the great majority demanded, for example, that a certain religion be made illegal and chose politicians to carry this out, such an enactment could not take place if freedom of religious practice had been constitutionally protected. Should such negative change somehow occur in law then the judiciary would have autonomous license to correct



the anomaly. Alternatively, as has been the constitutional experience of most other nations, an entirely new constitution would have to be written to contain the desired changes in rights, the writing of new rights or the eradication of old ones. The American Constitution, argues Ackerman, differs from those of Europe in that its rights are not entrenched: democracy takes precedence and so the People can move to have rights overturned, changed, or introduce clauses that exclude or restrict. Such changes must stand, without judicial interference, until the People change their collective mind (10-16). Ackerman is aware of the potential for abuse in this and writes that he does not “take much joy from this discovery,” but such is the nature of America’s unique and long-lasting (and therefore successful) constitutional system (16). Entrenchment in the Constitution has been tried in the past, he writes, but with ill effect:

Insofar as America has had constitutional experience with German-style entrenchment, the lessons have been very negative. The Founders were perfectly aware of entrenchment in 1787, but they did not use the device to serve the cause of human freedom. They used it to entrench the African slave trade – explicitly forbidding the American people from enacting an amendment barring the practice before the year 1808. (15)

Again the 1808 clause becomes, in the service of a much broader, modern argument, not the contingent product of decisions and compromises of the time of its writing, but a mistake, a contradiction to the essential spirit of “the Constitution” and the higher power it gives to “the People.”

All of these interpreters, like many others, choose (because, as experts, it surely must be a choice) to take the text as a starting point, an origin from which to derive desired meaning. The interpretation of “1808” (any interpretation) is possible because it has been released from the meaning given to it in historical context and the circumstances which specifically produced it. This can happen, I argue, because the 1787 Constitution is not

presented as a text distinct from that which is later amended and interpreted; a text constructed with different motivations, ambitions and prevailing notions of what constituted the People. Instead it becomes part of the mysterious, ahistorical “Constitution” with meaning somehow carried along and entirely available to those who know how to read it. As Michel de Certeau puts it, “Modern Western history [. . .] forces the silent body to speak. It assumes a gap to exist between the silent opacity of the ‘reality’ that it seeks to express and the place where it produces its own speech, protected by the distance established between itself and its object (*Gegen-stand*)” (157).

“1808” was, according to Max Farrand in one of his many esteemed works on US constitutional history, the result of a compromise concerning shipping. Put briefly, the Northern state delegates at the Philadelphia Convention wanted navigation acts that would require all American goods to be transported in American ships, thus supporting the Northern shipbuilding industry. To ensure their interests were met they desired that Congress have the right to write acts of navigation without the limitation of approval by a two-thirds majority of both legislative houses (which would numerically favour the Southern states). The South, wanting the freedom to use whatever shipping was the cheapest, therefore pushed forward a proposal for the two-thirds majority on acts of navigation. At the same time the South needed protection on continued slave importation, which some of the Northern delegates disapproved of. So a deal was struck. The South got twenty years of untouchable slave trade in return for withdrawing the demand for a legislative vote on shipping (128-31). Is it possible to abstract from this practical arrangement a story of Founder ethical intentions or the abiding “spirit” of “the Constitution”? Is this piece of business visible in Article I? Perhaps such interpretations as above could not be made without the concerted and repeated insistence on the text as the

ultimate source. In this vein, in “Nietzsche, Genealogy, History,” Michel Foucault writes: “From the vantage point of an absolute distance, free from the restraints of positive knowledge, the origin makes possible a field of knowledge whose function is to recover it, but always in a false recognition due to the excesses of its own speech” (143).

### **Legal Intervention**

The perceived and accepted continuity has not happened by chance. It has taken prodigious and concerted intervention by legal scholars and practitioners, academics, politicians and mythologists in an endless endeavour to make the past fit current needs and arguments. In this regard Certeau writes:

This practice of history [. . .] is not content with a hidden ‘truth’ that needs to be discovered; it *produces* a symbol through the very relation between a space newly designated within time and a *modus operandi* that fabricates ‘scenarios’ capable of organizing practices into a currently intelligible discourse – namely, the task of ‘the making of history.’ (160; emphasis in original)

The production of constitutional “intelligible discourse” is dependent upon the perpetuation of the notion that the Constitutions are interpretable; that they can, and must, provide desired meanings. Existing, active documents must have their existing, active interpreters.

I. A. Richards, arguing for the meaning of words as generated in context rather than as having meaning in isolation, admits of the inherent uncertainty in interpretation:

Its [the Usage Doctrine’s] evil is that it takes the senses of an author’s words to be things we know before we read him [. . .] Instead, they are resultants which we arrive at only through the interplay of the interpretive possibilities of the whole utterance. In brief, we have to guess them and we guess much better when we realize we are guessing [. . .] than when we think we know. (55)

The professional interpreters of the Constitutions do not present themselves as guessers; they deal in fact, law and truth. Yet they do not agree on how the Constitutions of the past

are contained and configured in the Constitution of the present. Nor, it seems, have they ever done. There are multiple interwoven, often conflicting accounts, all endeavouring to tell *the* story, and thus to have the power to define the meaning, function and purpose of the existing document. From the vast, dense, accumulated knowledge of legal precedent, consistencies of purpose are found. The skeletal structure remains essentially the same: dates of founding and Amendments, landmark cases, pivotal decisions, individuals and movements, turning points. What differs is how these points are interpreted and navigated; how one point leads to another; how one follows another; how the constitutions and their Amendments are connected; how the constitutional *now* is reached. In the process, not only is the present Constitution given continuity, but so is the legal profession, which continually reinforces the privileged power of its practices and language to join the past to the present.

In an extensive analysis called “The Bill of Rights and the Fourteenth Amendment,” Amar builds the legal, historical, and constitutional support for a proposed solution to the long-running legal disagreements on whether the Fourteenth Amendment ““incorporate[s]”” the 1789<sup>24</sup> Bill of Rights (1194).<sup>25</sup> What appears to be the central textual and historical difficulty is characterized by Amar as, “the 1789 Bill tightly knit together citizen rights and state rights [against federal power]; but the 1866 Amendment unravelled this fabric vesting citizens with rights *against* states” (1260; emphasis in original). As fully “incorporated,” the Amendments of the Bill of Rights may be legally interpreted as limiting state

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<sup>24</sup> I have used 1791 as the date of the Bill of Rights, this being the year of ratification. Amar uses 1789, the year of congressional proposal.

<sup>25</sup> The following reading does not attempt to reveal the complexity and detail of Amar’s argument; it is simply to present an example of the time-honoured method of precedent as proof.

encroachment upon individual civil liberties, as well as the originally intended limiting of federal intrusion on states (1194).

The supporting knowledge to Amar's intervention is not simply presented, but organized to move in logical steps from the Founding to the present day.<sup>26</sup> His account begins with the pivotal (to his narrative at least) 1833 Supreme Court case of *Barron v. Baltimore* under Chief Justice Marshall, whose ruling upholds the notion that the Bill of Rights cannot be used against states as it was written to limit federal power not state rights (1198). In exploring the constitutional bases of Justice Marshall's decisions, Amar leads us back to the beginning, to the Bill as related to Article I, Sections 9 and 10 of the Original Constitution, and to the arguments of Madison and Hamilton over the Bill with the enemies-at-the-origin, the Anti-Federalists<sup>27</sup> (1198-1203). From this irreproachable point of origin (a place which an argument such as Amar's "produces," as Certeau put it), the path of Justices, legal cases, legal scholars, constitutional law and text is built. It wends its way forward through the decisions and varied and conflicting schools of antebellum constitutional thought regarding interpretation of the Bill, to the writing of the Fourteenth Amendment and the conditions and arguments surrounding its construction. Eventually it reaches "the extraordinary number of twentieth-century legal giants who have locked horns in the debate [. . .]" (1194). These are considered and placed according to the correctness or

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<sup>26</sup> What one would assume to be an objective history of legal *fact* occasionally appeals for a more subjective consent from its readers. In a phrase by phrase interpretation of the Fourteenth Amendment's second sentence Amar asks: "Can we really say that the Bill's 'rights' and 'freedoms' are truly privileges and immunities of 'citizens of the United States?'" His answer: "Of course we can. In *ordinary, everyday language* we often speak of the United States Constitution and Bill of Rights as declaring and defining rights of Americans as Americans" (1222; emphasis added).

<sup>27</sup> As Amar writes elsewhere: "we must exercise special caution in using writings of those who opposed the Constitution and lost; their understandings of the meaning of the document may often be inferior to the Federalists" ("Our Forgotten Constitution: A Bicentennial Comment," 289).

incorrectness of their arguments. Finally we get to Amar's own intervention in the last 22 pages of 90. Along the way, other paths are declared wayward. The early antebellum "Barron Contrarians" (1203-05) (i.e. those Justices and scholars who have ruled and argued against the states), for example, are obliquely silenced with, 'It is tempting to dismiss all these folks as dolts, but we must resist" (1205).

Amar provides a sample list of the modern "legal giants" and their views on "incorporation." Some are in favour: "Justice Black insists on 'total incorporation' [. . .]" (1196); some disagree: "Justice Frankfurter [. . .] insists that, strictly speaking, the Fourteenth Amendment never 'incorporated' any of the provisions of the Bill of Rights" (1196); some are less definite: "Justice Brennan tried to steer a middle course of 'selective incorporation'" (1196). Amar himself argues for an "alloy" of the above: "'refined incorporation' [. . .]" (1197).

Needless to say, all these ultimately irresolvable disputes (because no ultimate ground or Truth will ever be found) are not purely abstract speculations. The legal stories that get the upper hand directly affect the life quality of individuals, groups, perhaps whole populations. Justices find and build the narratives of precedent that they may bring into use when supporting their decisions; the decisions themselves become part of the narrative. Some narratives, perhaps because they are told so often, achieve a certain veneration and appearance of permanence, but this is really only relative to their usefulness in providing viable solutions to existing problems. At times it seems that judicial interpreters, constrained by accepted or anachronistic constructions in judging given circumstances, must give their decisions new historical coherency. On May 17, 1954, Chief Justice Earl Warren gave the Supreme Court's decision on *Bolling v. Sharpe*, which concerned whether the legal separation of black and white school children in the District of Columbia was in

accordance with the Constitution. On the same day, Warren writes, the Court had already decided the case of *Brown v. Board of Education*, in which, as is known, it was decreed that school segregation was in contravention of the Fourteenth Amendment's Equal Protection Clause: "No State shall make or enforce any law which shall [. . .] deny to any person within its jurisdiction the equal protection of the laws" ("Constitution"). The peculiar difficulty facing the plaintiffs of *Bolling v. Sharpe*, however, was that the Fourteenth Amendment was written as applicable only to the states, and not to the constitutionally segregated seat of the Federal Government, the District of Columbia. The African American citizens of Washington D.C. therefore could not demand equal treatment under the Equal Protection Clause. So they appealed instead for justice according to the "due process of law" in the Fifth Amendment, enacted in 1791. The dilemma facing the Judges, then, was whether "due process," of the Fifth, could be construed, in this case, as implying the "equal protection" of the Fourteenth. If so, segregation in the District of Columbia could be declared unconstitutional. (This uncertainty as to the textual, historical and legal relationship between the Fifth and the Fourteenth Amendments is a significant occurrence of precisely the long-standing problem that Amar endeavours to resolve above, thirty five years later.)

Before looking at how that decision was made, it is necessary to go back to *Brown v. Board of Education* to appreciate the stance that Warren takes. In this case he explains that he cannot turn to history to determine the application of the Fourteenth Amendment to educational equality, for the following reasons. Firstly, he writes, at the time of its appearance the Amendment provoked deep division and disagreement about how it should be applied to racial equality in general. Most unusually, then, Warren concludes that the Amendment cannot be understood by its supposed intention at the time of writing because

that intention cannot be definitely determined. Secondly, the public education system was entirely different when the Amendment appeared: there was no free education in the South, and what did exist in the North was considerably limited and rudimentary. Needless to say, “education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states” (*Brown v. Board of Education*, 220). Thirdly, Warren argues, he cannot turn to a re-interpretation of the 1896 *Plessy v. Ferguson* case and its infamous and deeply influential “separate but equal” doctrine. Warren reasons that the debate can no longer be about whether educational facilities are “tangibly” equal, and therefore justifiably separate, as this only perpetuates and justifies segregation rather than question it as a doctrine: “We must look to the effect of segregation itself on public education [. . .] We must consider public education in the light of its full development and its present place in American life throughout the Nation” (221). The Court determines that segregation is itself “inherently” detrimental and thus in contravention of the Equal Protection Clause. In other words, the Warren Court manages a progressive overturning of unfair, exclusionary legislation by choosing not to accept given continuity with past Constitutions and their interpretations. It seems that Warren was not trying to explain whether the 1954 Constitution did or did not justify segregation, but had already decided, via contemporary evidence that it had to be stopped. To simply announce this without telling it through the Constitutional story would obviously have been considered an abuse of judicial power. (The possibility of such abuse is apparently what worries those who oppose “living constitutionalism” and declare that the People and the text are their only source of power.)

Returning to *Bolling v. Sharpe*, Warren turns to a different, non-demonstrable, extra-legal level of narrative to explain the Court’s decision: “the concepts of equal



protection and due process, both stemming from our *American ideal of fairness*, are not mutually exclusive” (227; emphasis added). He admits that the two guarantees are not “interchangeable,” but goes on to say that “classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect” (228). Although he then links together recent Supreme Court rulings to support his argument, it seems in the concluding paragraph that he returns to the more emotive argument that he began with: “In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government” (228). Without the obligation of adherence to the traditional practices by which the present must be justified by continual, purposeful re-telling of the whole story, could he not have dispensed with the whole case by that statement alone?

### **Many Peoples, Many Stories**

Ackerman argues that the constitutional historical narrative is popularly produced as a constant affirmation of a common bond:

the narrative we tell ourselves about our Constitution’s roots is a deeply significant act of collective self-definition; its continual re-telling plays a critical role in the ongoing construction of national identity [. . .] To discover the Constitution is to discover an important part of oneself – insofar as one recognizes oneself as an American. (36-37)

Imagine if that were true? Everyone telling each other the same story (or at least telling the story until it *became* the same) back and forth until their own identities, histories and narratives were gone; everyone subsumed and explained by “national identity”. The fictional character of “the People” projected backwards to fit and be present at every key

moment of the legal narrative (or whichever one happens to be dominating) would in a sense come to life, and become the “collective” past, the “collective” memory.

What are “our Constitution’s roots”? This takes for granted the existence of a singular, stable point, an origin from which all emerges. As we have seen, such a place only exists by retrospectively forcing it to be so. If it is true that all grow from “our Constitution’s roots,” then from whence come the inequities and differences of the present? A homogenous historical collective, denying all narrative difference assumes not only a single, all-encompassing story, but an equality of stories. There is not a story that the different and interrelated groups of living people can tell each other about *their* collective constitutional roots. Perhaps the hope of resistance to the destructive idea that there is such a story lies partly in realizing just what a concerted level of intellectual *energy* is continually devoted to constructing a collective history without differences. Neither the People nor “People” ever stays stable or coherent. New histories, demands, grievances, groups and memories continually serve to undermine such notions.

## Chapter 3

*Imperium in imperio?***The 1827 Constitution of the Cherokee Nation**

It is asked if a nation may lawfully take possession of a part of a vast country, in which there are found none but erratic nations, incapable by the smallness of their numbers, to people the whole? We have already observed in establishing the obligation to cultivate the earth, that these nations cannot exclusively appropriate to themselves more land than they have occasion for, and which they are unable to settle and cultivate. Their removing their habitations through these immense regions, cannot be taken for a true and legal possession; and the people of Europe, too closely pent up, finding land of which these nations are in no particular want, and of which they make no actual constant use, may lawfully possess it, and establish colonies there. We have already said, that the earth belongs to the human race in general, and was designed to furnish it with subsistence: if each nation had resolved from the beginning, to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants. People have not then deviated from the views of nature in confining the Indians within narrow limits.

(Emmerich de Vattel 100; para. 209)

So they concluded that they were destined to try to civilize him and, in trying, to destroy him, because he could not and would not be civilized.

(Roy Harvey Pearce 53)

**Conditional Forever**

The 1827 Constitution of the Cherokee Nation was a creation and a promise of new possibilities. To the state of Georgia and to the federal government of the United States, these same possibilities would expose an unforeseen ideological and political crisis of thought. The existing legislative, judicial and constitutional systems of control of Native American culture, land and life by the United States – systems which were themselves a consequence of a history of European practice long preceding the 1787 Constitution – were confronted by a deeply disruptive questioning of perceived destiny, direction, right, responsibility and honour.

Article I, Section 1, of the Cherokee Constitution founds the eternal inviolability of sovereign national space on a series of agreements made with the United States: “THE BOUNDARIES of this nation, embracing the lands solemnly guaranteed and reserved forever to the Cherokee Nation by the Treaties concluded with the United States, are as follows; and shall forever hereafter remain unalterably the same [ . . . ]” (“Constitution of the Cherokee”). The treaties, embodying historical conditionality and inequities of power, are here given a radically new rhetorical significance. What were conditional become “unalterably the same,” placed beyond abrogation and betrayal. The very contracts which had traditionally textualized loss are turned into a constitutional declaration of sovereignty and permanence.

Unconditional space never figured in the white colonial and American view of arrangements made with the indigenous peoples. Nevertheless, a central difficulty for the early-nineteenth century federal and state policy makers would lie in determining precisely what it was about the Cherokee constitutional avowal that was unacceptable, as the nature of the transgression was not immediately obvious in either the constituting act or the document itself. The Cherokee constitution writers had, after all, not broken their side of the treaty pacts by stating that they would abide by them for all time. Although participating parties may at some point violate treaty agreements, clearly they do not enter into them openly vowing to do so. By Emmerich de Vattel’s definition, “A treaty, in Latin *faedus*, is a compact made with a view to the public welfare by the superior power, either for perpetuity, or for a considerable time” (102). The *potential* of “forever” at the moment of agreement is necessary in order for stipulated conditions to have any sense: “If, as agreed, we do this and we do not do that, then the treaty will remain binding.” Time limits were not written into the treaties. Furthermore, with the treaties still respected despite the

constitutional declaration of sovereignty, the Cherokees continued to be linked to the United States, according to the latter government's own terms, backed by its history of reason, justice, enlightened good will and honour, forever.

What was wrong? Such was the challenge posed by William Wirt<sup>1</sup> in an article for the *Cherokee Phoenix*, expressing the "opinion" of the Cherokees, as given to him in 1830:

They have, it seems framed a Constitution, modelled a form of Government, and made laws for themselves. But what offence is there in this? Their right of self government was never before disputed: their mode of doing it, is, consequently a question for themselves alone. Why is it more offensive in them to have a written, rational constitution and laws, than to have them unwritten, barbarous and resting in tradition, which they have had heretofore, and which they have constantly enforced without any objection from the state of Georgia? ("On the Right of the State of Georgia," 11)

The declaration of sovereignty contradicted neither the letter nor the spirit of the treaties. As Justice Smith Thompson, speaking in support of the Cherokees in the 1831 Supreme Court case *The Cherokee Nation v. The State of Georgia*, points out, treaties, whatever the disparity in the circumstances of their creation, do not erase the sovereignty of the weaker power. In fact, in a paradoxical way they might preserve it: "a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power" (2582).

Thus it was the *nature* of Native American sovereignty that had to be examined. Whatever this nature, it could not be obvious, or an unquestionable given, as with that of European nations and the United States. There had to be found (or created) different kinds of sovereignty, some naturally legitimate, some not. Did the Cherokees have an essential

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<sup>1</sup> William Wirt: James Monroe's attorney general who became "principal counsel" for the Cherokees following the passing of the Indian Removal Bill in 1830. He acted on the Cherokees' behalf in bringing the appeal against Georgia to the Supreme Court in *The Cherokee Nation v. The State of Georgia*, to be considered below (Wilkins 207-09).

sovereignty that preceded the treaties, forming an inviolable foundation of their Constitution independently of those agreements (a pre-existing state recognized and preserved in the treaties, and one that could be returned to if the treaties were broken)? Or, was that sovereignty really only created as a function of the treaties in order to make it viable according to accepted Western legal and traditional practice? If the treaties were to be taken as implying an essential and original sovereignty, then for those who vociferously objected to the idea of Native American rights to land, the Cherokee Constitution could only be regarded as a dangerous development. The history of treaties codified and sustained essentially unequal levels of rights to exist and act, and so could thereby encompass the notion of degrees of sovereignty. But immanent, original sovereignty does not have degrees; it is irreducible.

In any case, *they* were never supposed to write national constitutions. That was the privilege of Humanity, a universal inclusiveness from which the Native Americans, like so many others, were ontologically excluded. Entrance into the universality of Humanity, even with an expression of total, faithful commitment to its precepts, would not be readily permitted to the non-European. Nonetheless, it is in the Preamble to the Constitution that, without agreement or condition, and answerable only to the ultimate authority of the “Ruler of the Universe,” the Cherokees declare themselves to be rightful members of the enlightened:

WE THE REPRESENTATIVES of the people of the CHEROKEE NATION in Convention assembled, in order to establish justice, ensure tranquility, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with humility and gratitude the goodness of the sovereign Ruler of the Universe, in offering as an opportunity so favorable to the design, and imploring his aid and direction in its accomplishment, do ordain and establish this Constitution for the Government of the Cherokee Nation. (“Constitution of the Cherokee Nation”)

To those such as Andrew Jackson, this was not their right or their destiny. Or rather, as he asserts in his Second Annual Message in December 1830, the destiny of the indigenous peoples was not to be included in Humanity, but to naturally make way for it: “Humanity has often wept over the fate of the aborigines of this country [ . . . ] But true philanthropy reconciles the mind to these vicissitudes as it does to the extinction of one generation to make room for another [ . . . ]” (520-21).

The strategies and policies that will emerge in response to Cherokee constitutionalism, I argue, do not (and perhaps cannot) directly attack the adoption and institutionalisation of enlightened principles. After all, decades of governmental and philanthropic energy and expense, as we will see, had already gone into convincing the Indians that such adoption of civilization was the only option to annihilation. Paradoxically, as John Quincy Adams elucidates in his last Address to Congress in 1828, the government policy had become, by its very moments of success, a crisis requiring immediate attention:

We have been far more successful in the acquisition of their lands than in imparting to them the principles or inspiring them with the spirit of civilization. But in appropriating to ourselves their hunting grounds we have brought upon ourselves the obligation of providing them with subsistence; and when we have had the rare good fortune of teaching them the arts of civilization and the doctrines of Christianity we have *unexpectedly* found them forming in the midst of ourselves communities claiming to be independent of ours and rivals of sovereignty with the territories of the members of our Union. This state of things requires that a remedy should be provided – a remedy which, while it shall do justice to those unfortunate children of nature, may secure to members of our confederation their rights of sovereignty and soil. (Adams; emphasis added)

Instead, what had to be systematically and violently undermined were the essential worthiness and rights of the participants in the constitutional performance. They were, whatever they might have built, adopted and declared, “those unfortunate children of nature,” and had to be re-confirmed and re-invented as such. What had to be re-established

was the absolute, ontological inequality that conquest, and subsequently the treaty system, had legally sustained for centuries.

The appearance of the Cherokee national sensibility (as well as that of the other south-eastern Native Peoples) and institutions presented a crisis for which there was no direct historical, legal, political or philosophical precedent, no immediate solution, no obvious and agreed upon course of action. Impassioned, bitter arguments occurred in the Supreme Court and Congress, as well as between Congress and the Executive, and between the federal government and the state governments. If “unalterably the same” was doomed in its utterance, it was not because the forces of its negation coherently existed as such, but because the existing forces had the opportunities and the resources to re-organize and formulate new strategies from traditional and accepted practices.

## **Two Policies**

The federal government practice and ideology regarding the treatment and contact with the remaining culturally distinct Native American peoples of the late-eighteenth and early-nineteenth centuries is broadly covered by what was called the “civilization policy.” Against this (and, as I will argue, from it) emerged the “removal policy,” first proposed, according to Native American historians Theda Purdue and Michael D. Green, as a potential alternative to treaty-protected homelands by Thomas Jefferson in 1803 (86-87). It is as a consequence of and a reaction to both the common aim and the ideological clash of these policies that the Cherokee demand for constitutional, national independence makes its appearance.

The civilization policy, initiated and promoted in 1791 by George Washington and his Secretary of War Henry Knox, aimed to forge a new era of relations, peace and order



between Native America and the white populations (Purdue and Green 75). It was to be a policy befitting an enlightened nation, a nation of reason and justice, and a hoped for means of ending, or at least mitigating, the warfare and mutual animosity of the past. In his Third Annual Address in October 1791, Washington argues that “rational experiments should be made for imparting to them the blessings of civilization as may from time to time suit their condition” (105). It was, he continues, to be a policy of decency as well as order: “A system corresponding with the mild principles of religion toward an unenlightened race of men, whose happiness materially depends on the conduct of the United States, would be as honorable to the national character as conformable to dictates of sound policy” (105).

Purdue and Green suggest that it was also matter of absolute necessity:

When they became civilized, they would be integrated into the mainstream of American society as fully equal members. Knox and Washington believed that since there could be no place in the United States for uncivilized people, the cultural transformation of the Indians was their only alternative to extinction. Saving them in this manner was thus the honorable thing to do. (164)

The meaning of “extinction” needs to be clarified, as it was not, from the US government point of view, intended as necessarily synonymous with genocide. It was, rather, the threat of the obliteration of existence as culturally and politically distinct entities. The choice, Elias Boudinot<sup>2</sup> claimed in “An Address to the Whites” in 1827, was stark: “There are, with regard to the Cherokees, and other tribes, two alternatives; they must either become civilized and happy, or sharing the fate of many kindred nations, become extinct” (15). The “alternative” to civilized, cultural sovereignty was to become, as Thompson put it, “the mere remnant of tribes which are to be found in many parts of our country, who have

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<sup>2</sup> Elias Boudinot was a prominent Cherokee, educated in white missionary schools. “An Address to the Whites” was a speech given on a speaking tour to raise funds for a printing press. Successful in this venture, Boudinot became the editor of the first Cherokee newspaper, *The Cherokee Phoenix*. He would later form part of the small and unrepresentative group that signed the 1835 Treaty of New Echota, ceding all eastern Cherokee land to Georgia. For this, ultimately, he would be murdered in 1839 (Parins 1442-44).

become mixed with the general population of the country: their national character extinguished; and their usages and customs in a great measure abandoned; self government surrendered [ . . . ]” (2587). This is not to say of course that the threat of genocidal extinction was not present in the contemporary American thinking: “[Civilize or vanish as distinct] was a basic assumption which governed the thinking of the men who molded American Indian Policy, remote from the brutal outlook of many frontiersmen, who would happily have accepted the total destruction of the aborigines” (Prucha 213).

It would seem that if the preservation of cultural distinction was to be had only by the relinquishing of traditional life, custom and law in favour of “civilization,” then the constitutional politicisation of the treaty-guaranteed space as “unalterably the same” was vital. What else but the land would be left to demarcate difference and sovereignty? This space, though regarded as an ancient possession, was consequently infused with, and made to stand for, a political and cultural meaning it could not have had before. Unlike with Western constitution writing,<sup>3</sup> which assumes without question (or the need to) an already-existing and definite space, in subaltern constitutions the defining of historical national space and its creation are inseparable.

Cherokee constitutional independence had also begun to assume a significance far beyond the borders of self-preservation. In this context, the “alternative to extinction” must be qualified by the fact that Native Americans were not all regarded as equally capable or promising material for the receiving of civilization. Although civilizing proceeded with Washington and Knox “Believing that Indians were intellectually capable of changing their ways of life and assuming that they would recognize the superiority of Anglo-American

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<sup>3</sup> What, for example, will be added to Britain’s notion of historical, national, cultural space by the promulgation of a written constitution? Or Europe’s?

culture and prefer it to their own [. . .]” (Purdue and Green 75), the Cherokee and other south-eastern Native Peoples were considered unique material: “These tribes, the Cherokee, Creek, Chickasaw, Choctaw, and Seminole, were distinguished by character and intelligence far above the average aboriginal. Because of their progress and achievements they came to be known as The Five Civilized Tribes” (Preface, Foreman<sup>4</sup>). Their position at the vanguard of Native American progress provided the Cherokee intelligentsia with a sense of profound responsibility, as can be seen from the way in which Boudinot shifts the model of civilization (as that which must be approached by the worthy to stave off extinction) from the United States to the Cherokees: “if the Cherokee Nation fail in her struggle, if she die away, then all hopes are blasted, and falls the fabric of Indian civilization” (“An Address to the Whites” 15). But as with the Cherokee Constitution itself, the emergence of an alternative, indigenous model of civilization that other tribes might identify with was a part of no civilization policy. Justice William Johnson articulated a growing fear: “There is one consequence that would necessarily flow from the recognition of this people as a state, which of itself must operate greatly against its case [. . .] Must every petty kraal of Indians, designating themselves a tribe or nation [. . .] be recognized as a state?” (2562).

Removal of the south-eastern tribes to allocated lands west of the Mississippi was voted narrowly by the Senate into government policy in 1830 with the Indian Removal Bill (Washburn, Introduction to “House Debate” 1017), but this apparently new thinking or solution to the “Indian problem” was long in forming. As mentioned above, it was first mooted by Thomas Jefferson in 1803 following the acquisition of the vast lands of the Louisiana Territory, a new wilderness where the inveterate and unrepentant “hunters” could

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<sup>4</sup> Grant Foreman (1869-1953) was a prominent and prolific historian of early Oklahoman life and settlements.

be sent en masse, there to be free from the demands and ever-enclosing presence of white civilization. Prucha writes that “gentle pressure” was put on the various chiefs to move at this time; they and their peoples were to go by “inclination,” not force. Those who insisted on retaining the traditional ways of life were especially encouraged to move (226).

The 1811-1814 civil war of the Creeks, the result of a violent uprising of those who rejected the march of the new ways against those in the process of adopting them, resulted in total devastation. Crushed by General Jackson (with help of Choctaw, Cherokee and Chickasaw warriors), the Creeks lost 20 million acres under the Treaty of Fort Jackson. Encouraged by this newly exposed vulnerability, Jackson and other interested parties began to push harder for the end of the treaty preservation of Indian land rights, advocating placing all of the tribes entirely under federal and state law. Between 1815 and 1820 thousands of new settlers rushed into the former Creek lands, but with the crash of the cotton boom and the Panic of 1819, more land was urgently demanded. There were two deep obstacles in Jackson and the states’ path: firstly, the southern tribes not only demanded to stick with the existing treaties, but refused to cede more in further agreements.<sup>5</sup> The second problem was the US Government itself, as Congress refused to relinquish its venerable system of treaties, and thereby its sovereign authority over Native American affairs, to the states (Purdue and Green 79-82).

## **Two Policies?**

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<sup>5</sup> A problem which, even in 1803, had already been around for a “considerable time” according to Jefferson: “The Indian tribes residing within the limits of the United States have for a considerable time been growing more and more uneasy at constant diminution of the territory they occupy [ . . . ] and the policy has long been gaining strength with them of refusing absolutely all further sale on any conditions [ . . . ]” (Jefferson, “Confidential Message to Congress”).

The removal policy might appear to oppose and succeed the civilization policy, as if an eighteenth-century view of a New World (a strip of emancipated colonies on the edge of a seemingly boundless wilderness), replete with revolutionary ideals and the confidence of a new age of Humanity, was naturally replaced by a land- and resource-hungry realism, more in keeping with early nineteenth-century industrial capitalism (and scientific racism). The white population of the United States had grown, as had its needs; the unexploited wilderness was now populated by peoples who were no longer “noble” and/or “savage,” but increasingly, and stubbornly, simply in the way.

The two positions – remove to allocated lands west of the Mississippi, or civilize on protected sovereign homelands – it is true, had uncompromising exponents who clashed in highly charged confrontations. Revolutionary voices of the young nation seemed to fear not just the transformation of the New World into something more brutal, but its ideological demise if the Indian Removal Bill of 1830 were to be approved. Henry Storrs, Whig representative of New York, for example, declared,

The eye of other nations is now fixed upon us. Our friends are looking with fearful anxiety to our conduct in this matter. Our enemies, too, are watching our steps. They have lain in wait for us for half a century, and the passage of this bill will light up joy and hope in the palace of every despot. It will do more to destroy the confidence of the world in free government, than all their armies could accomplish. (1068)

Those who spoke for removal, such as Wilson Lumpkin, democrat representative of Georgia, were no less disinclined to countenance extreme views:

Pages may be filled with the sublimated cant of the day, and in wailing over the departure of the Cherokees from the bones of their forefathers. But if the heads of these pretended mourners were waters, and their eyes were a fountain of tears, and they were to spend days and years in weeping over the departure of the Cherokees from Georgia, yet they will go. (1087)

But at a level of content and language, opposition of the policies becomes far less distinct. The attitudes towards Native American sovereignty are obviously different, but at the heart of both of these policies prevail common, historically related aims (and would continue to do so long afterwards): the acquisition and the securing of land, and the minimizing or eradication of cultural and traditional difference by the processes of “civilization.” William L. Anderson, who has written extensively on the history of south-eastern Native American peoples, argues: “On the surface, the original goal of the “civilizing” policy seemed generous and philanthropic; beneath the surface however, the policy represented a new attempt to wrest the Indians’ land from them” (viii). According to Jefferson in 1803, the Native Americans would willingly sell off their land once they had learned to use it more efficiently:

to provide an extension of territory which the rapid increase of our numbers will call for, two measures are deemed expedient. First. To encourage them to abandon hunting, to apply to the raising of stock, to agriculture, and domestic manufacture, and thereby prove to themselves that less land and labor will maintain them in this better than in their former mode of living. The extensive forests necessary in the hunting life will then become useless, and they will see advantage in exchanging them for the means of improving their farms and of increasing their domestic comforts. (Jefferson, “Confidential Message to Congress”)

The choice that Jackson advocated was essentially to civilize and assimilate as individuals (rather than as a people), or go west. He first proposed (somewhat cautiously) the idea of assimilation and the nullification of the old treaty-purchase system to James Monroe in 1817:

I have long viewed treaties with the Indians an absurdity not to be reconciled to the principles of our Government. The Indians are the subjects of the United States, inhabiting its territory and acknowledging its sovereignty, then is it not absurd for the sovereign to negotiate by treaty with the subject [. . .] I beg you will not be astonished at the ground I assume until you examine it well. (Jackson, “To the President,” 279)

In a further passage of this letter, Jackson stresses the need for “obedience,” yet still is constrained to set his uncompromising requests in the Washington-Jefferson language of paternalism, philanthropy and civilizing education: “Good policy [. . .] would point to just and necessary regulations by law [. . .] circumscribe their bounds, put into their hands the utensils of husbandry, yield them protection, and enforce obedience to those just laws provided for their benefit, and in a short time they will be civilized [. . .]” (280). Monroe, in response, seems rather taken by the idea of abrogating a history of legal government practice, and promises to consider it seriously, for the sake of the Indians: “The view which you have taken of the Indian title to lands is new but very deserving of attention” (331). He later continues:

It has been customary to purchase the title of the Indian tribes, for a valuable consideration, tho’ in general that of each tribe has been vague and undefined. A compulsory process seems to be necessary, to break their habits, and to civilize them, and there is much cause to believe, that it must be resorted to, to preserve them. (332)

Although Jackson complained that treaties with the Indians were “absurd,” the removal advocates used them nevertheless to facilitate the permanent exchange of traditional lands in the east for land west of the Mississippi.<sup>6</sup> Of particular relevance in this regard was the non-representative 1835 Treaty of New Echota, settled with a breakaway group of Cherokees,<sup>7</sup> which provided the legal impetus and justification for forced removal in 1838. As is unequivocally stated in Article I of this Treaty: “The Cherokee nation hereby

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<sup>6</sup> Treaties, in fact, would continue as standard procedure until the Indian Department Appropriations Act ended the practice in 1871. From that time, “Agreements continued to be couched in the language of treaties, yet were expressed in the form of statute law” (Washburn, Introduction to “Indian Department” 2183).

<sup>7</sup> According to Theda Purdue in “The Conflict Within: Cherokees and Removal,” this group, the Treaty Party, was comprised of an emergent middle class, led by Major Ridge. As mentioned above, Boudinot too was an ardent member. Lacking the wealth, property and access to power of the new elite it was perhaps, as Purdue speculates, class envy and aspiration which led them to accept the special attentions and favours of Jackson et al, and sign away everything.

cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoliations of every kind [. . .]” (“Treaty with the Cherokees,” 2464). The treaty passed despite the unequivocal condemnation and disgust of some:

I should not consider a treaty made with them in their present wretched and forsaken condition, as morally binding on them. I will not consent to take advantage of men in their situation [. . .] There is one plain path of honor, and it is the path of safety, because it is the path of duty [. . .] Acknowledge your treaties. Confess your obligations. Redeem your faith [. . .] I will not consent that Government shall operate on their fears. It is unmanly and dishonorable. (Storrs 1066)

The historical interrelatedness of the two policies in terms of language, aim and sanctioned practices is important to consider because otherwise there is a risk of characterizing the Cherokee Constitution as a kind of culmination of a liberal, educative civilizing ethos, which is then but torn away by the succeeding violence and intolerance of the removal. From this view the 1827 Constitution becomes but a passive consequence of competing forces beyond its control, rather than a purposeful, oppositional stance against wider historical trends and practices. Civilizing missions are merely paradoxical if understood as anything other than a form of control. That is, the apparent sense and logical endpoint of a civilizing mission is the achievement of the independence of its charges, the reaching of adulthood by those it has categorized as Humanity’s children. Why civilize if not to achieve the state of “civilized”? And yet this realization is precisely that which will never be allowed to occur; notions of sovereign political autonomy are always overridden by the colonizing, dominating power’s need for the land and its resources. Civilizing programs function by sustaining a perpetual, unrealizable promise of future parity, a promise of equal access to the fruits of modernity. At no point, either by state or federal government, civilizers or removers, was an independent, constitutional Native American



nation envisaged. The Cherokee Constitution was, in this way, not a triumph of the civilization policy, but its failure.

### **Rethinking the Present**

It is perhaps the impossibility, the inconceivability, of a constitutional Cherokee Nation that causes the Supreme Court under Chief Justice John Marshall to turn its judicial head away from the law in 1831. Here, in the case of *The Cherokee Nation v. The State of Georgia*, the Cherokees present a bill protesting the violation and negation of their land, laws and independence by Georgia (with the direct support of the Jackson administration) in total contravention of the agreements of the various treaties.<sup>8</sup> Marshall first admits the precipitous state of affairs by which,

A people once numerous, powerful, and truly independent [. . .] gradually sinking beneath our superior policy, our arts and arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made. (2555)

But what must be decided before the specifics of the bill may be addressed, Marshall explains, is whether or not the Court has the authority and the jurisdiction to hear the case at all, and whether the Cherokees are such a body as may be constitutionally permitted to bring it. In other words, before the highest body of legal and constitutional interpretation can determine whether Georgia and Jackson are breaking national law, it must define its own interpretive limits (2554-55).

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<sup>8</sup> On this, historian Francis Paul Prucha writes, “At the end of 1828 the Georgia legislature passed a law which added Cherokee lands to certain northwestern counties of Georgia. A second law, a year later, extended the laws of the state over these lands, effective June 1, 1830. Thereafter the Cherokee laws [including the Constitution] and customs were to be null and void” (235). (Prucha, it should be noted, is also the author of the seminal text, *The Great Father: The United States Government and the American Indians*.)

As the first basis for determining this, Marshall turns to Article III, Section 2 of the US Constitution: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [. . .] to Controversies [. . .] between a State, or the Citizens thereof, and of foreign States, Citizens or Subjects.” As the Cherokees have come before the Court as a foreign state, it is the veracity of this status which the Court must decide before the case can be heard. Marshall agrees that the Cherokee Nation does constitute an independent state, operating autonomously according to its own written laws and institutions, and that the US had always dealt with them as such in its treaty agreements: “The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts” (2555). One might think that that would adequately resolve the preliminary problem; not so, however: “A question of much more difficulty remains. Do the Cherokees constitute a *foreign* state in sense of the constitution?” (2555; emphasis added).<sup>9</sup> The “difficulty” with the designation “foreign” is twofold. Firstly, even though in general two independent states are naturally foreign to each other, “the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where [*sic*] else” (2555). Though independent and in possession of their own territory, the Cherokee are still in the United States and thus ultimately subject to its laws, restrictions and agreements. Rather than foreign, Marshall writes, they are “domestic dependent nations [. . .] they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian” (2556).<sup>10</sup> Thus we see the early appearance of a significant new subject; no

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<sup>9</sup> Rhetoric theorists Chaim Perelman and L. Olbrechts-Tyteca write that a judge faced with conflicting rules in hearing a case cannot choose one in favour of the other for fear of weakening the status of the rule not chosen, but must “introduce distinctions for the purpose of reconciling what, without them, would be irreconcilable” (414-15). The essential motivation for this distinction and compromise is the preservation of a coherent legal system, rather than adherence to a metaphysical plane of truth and justice (415).

<sup>10</sup> According to Jay Fliegelman, eighteenth-century liberal political and social philosophy concerning ideal government was paralleled and shaped by new thinking concerning the proper education of children. The role

longer do we have the metaphor of dependent children who, after a period of expert tutelage become independent adults and seek their own way, but independent dependents.

Secondly, Marshall asks, what did the Founding Fathers intend by “foreign States” in the Constitution? Or, perhaps, as another Justice of the Court puts it: “With the morality of the case I have no concern; I am called upon to consider it as a legal question” (Johnson 2558).<sup>11</sup> Because, Marshall writes, at the time of the writing of the Constitution the Native Americans did not approach the courts but went “to the tomahawk, or to the Government” the Founders could not have meant them to be included in the Supreme Court’s constitutional remit (2556). Ergo, “foreign state” did not mean them. He adds further support to this argument by pointing to Section 8 of the “third article [*sic*<sup>12</sup>]” of the US Constitution: “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes [. . .]”. That is the conclusive proof: “foreign Nations” and “Indian Tribes” have clearly been designated as distinct entities by the members of the Convention. Had they not meant such a “contradistinction” they would not have written it

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of the parent was to educate the child to think independently and morally and to live as such upon maturity; the child was not to be dictated to but thoughtfully guided (30-35). Fliegelman writes: “It imagined as its ideal product a man made independent of all authority but that of the introjected voice of his educated reason, moral sense, or guided inclination” (33-34). The relationship of guardian and charge was to have a particular significance in American revolutionary debate. This Fliegelman traces through a number of prominent thinkers: loyalists such as William Blackstone argued that the bond between the parent and child was permanent, like that between the individual and the Father, a scripted natural relationship. This remained even if the parent should be abusive or neglectful. The sentimental bond was accompanied by a consciousness of debt to nature. To limit this or break it, as the rebels would have America do with Britain, was considered contrary to nature, a refusal of the debt (94-95). John Locke asserted that the natural debt lay with the parent to educate the child for independence and the child to remain in dependency only whilst in nonage. Prolonging or neglecting this was unnatural and detrimental (12-15). Benjamin Franklin insisted that Britain had misrepresented the debt that America owed and abused it, thus “fraudulently invoking the laws of nature” (100). Extending Franklin’s point, Thomas Paine declared that the bond was irrevocably damaged. Trying to force a bond, once broken was contrary to nature (104).

<sup>11</sup> Justice Johnson refuses even Marshall’s acquiescence as to the status of the Cherokees: “I cannot but think that there are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as Indian tribes most generally are” (2559; emphasis in original). Although, he allows, the Cherokee nation has advanced far beyond the general condition, “we cannot recognize it as an existing state [. . .]” (2559).

<sup>12</sup> Either Supreme Court Judges are fallible or it is a transcription error: this clause actually appears in Section 8 of the first article.

thus. Hence, the Court was powerless: “If it be true that the Cherokee have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future” (2558).

Where then was the tribunal that could hear them? Certain laws and rights seem thereby to lie in a realm where it is not simply that they may be interpreted correctly or incorrectly, justly or unjustly, but where they may not even be spoken of. Unable to use the existing Constitution to judge existing circumstances, the Court turned to what it decided were original intentions. But could the Founders, whatever their intentions, have conceived of an independent, constitutional Native American nation, determined to exist “forever”? Perpetuated, it seems to me, is the inconceivability of the latter.

The Cherokee Constitution exposed what came to be regarded as a deep flaw in the general American Indian Policy. Without deliberate misinformation (though this certainly did occur), the removal advocates could not attribute this weakness directly to the efficacy of the government civilizing efforts, for this had been an evident “success”:

The attempt to settle, to civilize, and to Christianize some of these tribes [of the southeast] succeeded beyond all example. If the accounts of their previous state of barbarism are not exaggerated, the annals of the world do not, to my knowledge, present another instance of improvement so rapid, within a single generation [. . .]. (Everett 1133)

Revealed, rather, was a flaw in the organization of control, the systemizing and application of knowledge, the accountability, due to which the government had inadvertently and blindly allowed the Cherokee to realize their own progress in the form of a constitution. As Wirt argues,

We have sought to civilize and to Christianize them on the avowed *motives* of *humanity to them and safety* to the neighboring *whites*. With the Cherokees, we have so far succeeded that they have adopted our manners,

our dress, our agriculture and mechanical pursuits: they have imitated our form of Government and our laws, and Christianity it is said has made considerable progress among them. And the result now is, that we have quarrelled with our own success, and fallen out with this people for yielding to our solicitations. For how was the civilization, which we have been so long and so strenuously urging forward, to shew itself otherwise than by the very fruits it has borne, and at which we now take offense? Is it a crime or offence in them to have yielded to our own exertions to civilize them? (“On the Right of the State of Georgia,” 11-12; emphasis in original)

The “crime” (and the failure of government policy) is explained by Jackson in his First Annual Message in December 1829:

A portion [. . .] of the southern tribes, having mingled much with the whites, and made some progress in the arts of civilized life, have lately attempted to erect an independent Government within the limits of Georgia and Alabama. These States, claiming to be the only sovereigns within their territories, extended their laws over the Indians, which induced the latter to call upon the United States for protection.

Prucha describes at length the great drive between 1828 and 1834 to organize, centralize and make efficient the American Indian Policy by the proponents of removal. The latter complained of a mass of uncoordinated government laws and treaties, unaccountability, great expenditure without clear purpose or results, redundant and conflicting agencies, loose and corrupted trade laws and lack of proper policing. With the reports and recommendations of Lewis Cass and General William Clark, as well as the detailed investigations of numerous special commissioners, a new and coordinated government policy for the Native Americans appeared in the “laws of 1834” (250-56). Knowledge was demanded. Geographer Douglas C. Wilms highlights an example of the manner in which the loss of Cherokee treaty-held land under new Georgian laws required first a careful study, a mapping and recording of what was there and what had been done. He writes that,

In 1831 Georgia’s surveyors entered the Cherokee territory pursuant to a legislative act passed the previous year. Cherokee Georgia covered more

than 6000 square miles, and the Georgia surveyors divided it into four sections [. . .] Each section was, in turn, divided into a number of districts, each of which was 9 square miles. The districts, in turn, were divided into either 160-acre land lots or 40-acre gold lots [. . .] that were to be distributed among Georgia citizens in the upcoming lottery. (9)

The Cherokee improvements (in terms of buildings, property, agriculture etc.) of each lot were carefully registered (9).<sup>13</sup>

It is important to realize that this new systemization, according to Prucha, did not comprehensively discard what was already in place, but in significant ways organized it, created a more efficient way of knowing what was happening, what precisely had occurred and developed in the previous fifty years of government policy, and how greater knowledge and control could be established (261-73). In this sense the removal policy did not usurp the previous effort, but revealed it and became the authority on its results, perfected it and was made possible by it.<sup>14</sup>

### **Rethinking the Past and the Future**

It has been argued that both the removal and civilization policies were related by their common concern with the acquisition of land, as well as by a long history of transformation, organization and control of the cultural and traditional lives of its native inhabitants. A significant change, however, that emerges with the advance of the new attitudes and strategies in the 1820s and 1830s is the way in which the Native American relation to the land is fundamentally reconfigured in US political and legal thinking. Put another way, the Indian subject of US policy is re-made to suit new ends.

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<sup>13</sup> Interestingly, this survey provides knowledge even now: “The materials compiled by Georgia’s surveyors constitute the most accurate early source available for studying Cherokee settlement patterns” (Wilms 9).

<sup>14</sup> It was an instance of a practice that Michel Foucault refers to in *Discipline and Punish*: “The drawing up of ‘tables’ was one of the great problems of the scientific, political and economic technology of the eighteenth century [. . .] the table was both a technique of power and a procedure of knowledge” (148).

The civilization policy and the system of government treaties that accompanied it maintained in essence a much older practice through which the indigenous peoples were not configured as nakedly robbed, but instead understood to receive an invaluable reimbursement for land lost, even when taken by force. Justice Marshall, in the case of *Johnson and Graham's Lessee v. M'Intosh* in 1823, writes, "The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence" (2538). Purdue and Green write similarly of Washington and Knox's plan: "[The civilization policy], they believed, was the ultimate compensation they could offer Indians in return for their land" (75). This apparent "exchange" of land in return for the benefits of Western civilization assumes or necessitates that the Native Peoples in some sense "possessed," by their occupation, the land that they would be required to cede. But this was not an ownership that could be defined as an absolute sovereign right in the European sense. It was, I contend, a function of the relationship as constructed by the civilizing powers; a relationship which assumed without question the dominating rights that led naturally from discovery and conquest:

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives [ . . . ] The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles. (Marshall, *Johnson and Graham's Lessee* 2539)

As a means of "compensation," "civilization" is not that which is regarded as forever and exclusively possessed, immanent and God-given in all its immense lived and historical complexity, but select ideas and practices which it is decided might be provisionally given, taught, or forced. The compensatory "civilization," which is provided through education

and religious and philanthropic institutions, will not contain the immanent, presumptive right of ownership; that cannot be transferred and will not be taught.

Marshall, above, uses “compensation” and “in exchange for” as if these two forms of interaction between parties naturally operated together. This is to turn compensation, which does not ask for something in return, but endeavours to reimburse a loss already suffered, into something conditional (like the treaties). Is it really tenable to suppose that the content of the conquering arrangement was, “We will give you civilization *if* you give us land”? Or, even less credibly, that the indigenous were in a position to say, “we will give you land *if* you teach us your ways”? The power which requires “unlimited independence” and land in return for providing the benefits and arts of civilization, already assumes, by virtue of its unassailable position, total freedom to act, and the ultimate right to all of the land from the outset. It could not take what it effectively already had, and so exchanged nothing.

In a long and historically detailed exposition, Marshall, in *Johnson and Graham’s Lessee*, traces the sovereign right of the United States to all Native American land back to a “commission” given to the Cabots in 1496, “to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England” (2539). Limits on possession by discovery (of what must have once seemed limitless) existed only by tacit agreement (breaking into frequent conflict once physical limits became apparent) with other European powers: “Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery” (2540). A continual chain of inherited right is drawn through the various royal charters and grants, and through the wars over sovereignty between European powers of the next three



centuries, to the 1776 War of Independence, following which, sovereignty passes in its entirety from the British to the new American powers. (2538-45). It might be said that the civilizing program literally could not entertain true Native American autonomy because to do so would have subverted the “original fundamental principle,” as Marshall puts it, from which the sovereign right of the colonizers is derived:

They [the Native Peoples] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. (2538)

However, as long as this system and its historical precedent were respected and legally upheld as sacrosanct, a species of apparent Native American sovereign possession did thereby have an existence, if only as a consequence of the logic of treaty and purchase; i.e. there must be a body that can be defined as a sovereign entity in order to treat with it, or buy from it, in accordance with traditionally respected practices. Henry Storrs describes this reality succinctly: “We have not only recognised them as possessed of attributes of sovereignty, but, in some of these treaties, we have defined what these attributes are” (1056). And as Wirt reports, this sense of Indian sovereignty had begun to take on an independent life of its own: “they have, always, been respected and treated with [. . .] as a *sovereign people*, to be governed, *exclusively*, by their own laws, usages and customs, and owing no allegiance either to the State Governments, or to the Government of the United States [. . .]” (1; emphasis in original).

The violent intervention of the removal proponents, it seems to me, was to declare that this historical system of agreements had based itself on, and had dangerously engendered, an absolute falsehood: true sovereignty of the Indians was an ontological

impossibility, and had no conceivable existence even prior to discovery; this “race of hunters” (Johnson 2559) had known nothing of ownership. In this regard, Johnson provides a central tenet of removal: “They receive the territory allotted to them as a boon, from a master or conqueror [ . . . ]” (2561). As does Prucha: “since the Indians were merely tenants at will, the state could end that tenancy at any time” (232). Purchase had been merely an unfortunate, but temporary, necessity of circumstance; there was never any fundamental obligation to uphold complex processes of acquisition and compensation, as the land belonged exclusively, and had always belonged, to the already-civilized:

The practice of buying Indian lands is nothing more than the substitute of humanity and benevolence, and has been resorted to in preference to the sword, as the best means for agricultural and civilized communities entering into the enjoyment of their natural and just right to the benefits of the earth, evidently designed by Him who formed it for purposes more useful than Indian hunting grounds. (Lumpkin 1090)

The denial of inherent rights to land by those pushing for removal did more than negate existing treaties; it negated a whole history of practice, and with it the system of relations within which Native American original ownership was constructed. With the conditions of the treaty rendered impossible, the Cherokees could have nothing to give and nothing to withhold. What loomed with the abrogation and debasement of such agreements was a state of absolute vulnerability; there was nothing that could be returned to. By extension, the federal government also lost the inherited historical control that Marshall explicated above. This Lumpkin expresses quite directly to the Senate:

We [Georgia] deny your right of jurisdiction. Upon the subject of our sovereignty we fear nothing from your sentence. Our right of sovereignty will not be yielded. If you do not perform your duty, by withholding your opposition to long delayed justice [ . . . ] I would then advise you to let us alone, and leave us to manage our affairs in our own way. (1093)

It was not only Native American ownership of the land which was reconfigured by the devotees of removal, but the nature, purpose and effect of the other side of the “exchange”: “civilization.” The latter was split into that which might bring improvement and assimilation, and that which could only bring harm. Contact with and proximity to white civilization invariably damaged “the savage,” Jackson claims:

Surrounded by the whites, with their arts of civilization, which, by destroying the resources of the savage, doom him to weakness and decay, the fate of the Mohegan, the Narragansett, and the Delaware, is fast overtaking the Choctaw, the Cherokee, and the Creek. That this fate surely awaits them if they remain within the limits of the States, does not admit of a doubt. (“First Annual Message”)

But there was hope for them, according to Lumpkin, if they were moved away: “I entertain no doubt that a remnant of these people may be entirely reclaimed from their native savage habits, and be brought to enter into the full enjoyment of all the blessings of civilized society” (1071). However, “The means hitherto resorted to by the Government [. . .]” can no longer be expected to have any positive effect on the southern tribes if they remain where they are, resisting removal west, “for they will every day be brought into closer contact and conflict with the white population, and this circumstance will diminish the spirit of benevolence and philanthropy towards them which now exists” (1071). Lumpkin takes this further, railing against all the agencies and organizations who have tried to bring the benefits of civilization as akin to a biblical plague of corruption and exploitation: “do we not find an annual increase of intruders, from these philanthropic ranks, flocking in upon the poor Cherokees, like the caterpillars and locusts of Egypt, leaving a barren waste behind them?” (1086).

The claim was still that the Cherokees’ interests and preservation were what was at stake, but a deep shift in attitude towards the nature of the civilizing mission emerged. The

Cherokees, having fully adopted the practices, the laws, the institutions, and the knowledge of what was called civilization, were the very least likely to want to leave what they had built. They were also therefore the most entrenched in their proximity to white civilization, and so, extrapolating from Jackson and Lumpkin, in the greatest danger and the most serious need of help. The greater the success, the greater the peril: a neat inversion therefore of the idea that adopting “civilized” practices was the only way to survive against superior forces. To John Ross, elected Principle Chief of the Cherokees in 1828, the truth was rather different:

We cannot subscribe to the correctness of the idea, which has been so frequently recurred to by the advocates of the Indian removal, that the evils which have befallen and swept away the numerous Tribes that once inhabited the old States are to be traced to the *mere circumstances* of their contiguity to a white population; but we humbly conceive that the true causes of their extinction are to be found in the catalogue of wrongs which have been heaped upon their ignorance, & credulity by the superior policies of the whiteman when dictated by avarice and cupidity. (“To Lewis Cass” 1454-55; emphasis in original)

The Cherokee, as with other Native Americans, were re-constructed as having maintained irredeemably their “native savage habits,” as Lumpkin put it, despite all the effort; their un-civilizable nature would always be vulnerable. Great energy was put into sustaining the notion that the Cherokee were *essentially* wandering hunters, not farmers (and thus land wasters) inevitably degraded by white practices, and unable to live their natural existence. Pleas and evidence to the contrary were ignored. Samuel A. Worcester<sup>15</sup>, for example, in a letter printed in the *Cherokee Phoenix* in 1830, responds to an article by Rev. Dr. Ezra Stiles Ely in which it is argued that civilization had only reduced the

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<sup>15</sup> Samuel A. Worcester: a missionary living with the Cherokee who was given a four-year sentence “for refusing to obtain a license and take an oath of allegiance to the State of Georgia,” resulting in the Supreme Court case of *Worcester v. The State of Georgia* in 1832 (Washburn, Introduction to “Worcester” 2603).

Cherokee to a wretched state, their traditional ways grievously undermining attempts at modern methods and customs:

I do not intend to convey the impression that the Cherokees have already reached, or nearly reached a level with the white people of the United States in point of civilization [. . .] But they have already made great advances [. . .] Any theory in regard to their removal from this place, which is built upon the supposition of the impossibility of their rising where they are is opposed to fact. (“Present Condition of the Cherokees,” 75-76)

In another letter, “Worcester to Wm. S. Coodey,” Worcester also argues against the newly propagated notion that the Cherokees were still significantly non-agricultural:

Agriculture is the principle employment and support of the people. It is the dependence of almost every family. As to the wandering part of the people, who live by the chase, if they are to be found in the nation, I certainly have not found them, nor ever heard of them, except from the floor of the Congress, and other distant sources of information. (79)

Perhaps it could be said that this characterization of the American Indian was necessary to sustain the general idea that US policy and aim was a continuous, coherent force for good, always well-intended, even if often struggling against seemingly impossible odds. That violation of professed principles might be occurring thus could not be seen. Roy Harvey Pearce, in *Savagism and Civilization: A study of the Indian and the American Mind*, writes to this effect: “Civilized, Christian life did not raise up all savages as it should have. Rather it lowered some savages and destroyed others. This was the melancholy fact which Americans understood as coming inevitably in the progress of civilization over savagism” (66).

The civilizing process had to continue, but it had to continue somewhere else. Prucha, in what is offered as a mitigation of the idea that removal was solely motivated by “avarice” and a frontier “Indian-hating mentality,” writes, “The promoters of the program argued with great sincerity that only if the Indians were removed beyond contact with

whites could the slow process of education, civilization, and Christianization take place” (225). It is as if to say that “civilization,” the body of knowledge which could be, and had been, transmitted by education, example and force, must now be abstracted entirely from the social and political material reality of lived, white civilization. This purified and mobile body of knowledge had to take place in a controlled, separated location, as proximity was bound to compromise the “civilizing” experiment by destroying the subject of the experiment.<sup>16</sup> The experiment, if assiduously performed, might also reflect back upon and redeem the civilizers, re-establishing the purity and benevolence of purpose:

I suggest for your consideration the propriety of setting apart an ample district west of the Mississippi [ . . . ] There the benevolent may endeavor to teach them the arts of civilization, and, by promoting union and harmony among them, to raise up an interesting commonwealth, destined to perpetuate the race, and to attest the humanity and justice of this Government. (Jackson, “First Annual Message”)

## **Refusal**

There is a beauty to the Cherokee mode of resistance: “We have already assured you, with the utmost sincerity & truth that the great body of our people have refused and will never voluntarily consent to remove west of the Mississippi” (Ross, “To Andrew Jackson,” 1457). Although it would perhaps be misleading to call this stance a political movement of purposeful non-violence in the manner in which this will later be understood, we can certainly recognize here the significance of the use of resolute non-cooperation by an educated, political elite, with the support of the masses, to confront overwhelming force. The Cherokees were not the creators of refusal-as-resistance among Native American peoples; as Jefferson commented above, refusal to cede more land was a widespread action

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<sup>16</sup> This one might compare with the “stood back, to allow” comment of British Ambassador Edward Chaplin with regard to the Iraqi constitutional experiment, in Chapter 5. Objective distance becomes a necessary feature of the civilizing (democratizing) mission.

even in 1803, and had been “for a considerable time [. . .].” But the Cherokee Constitution and what followed might be called a politicized culmination of this tradition of thought and action.

This organized, politicized non-cooperation confounds the multi-pronged political and ideological might of the expanding New World empire. The growth and control of the latter depended on cooperation and obedience. The tradition of treaty and purchase, which carried with it the idea that the Native Americans only ceded land by choice, continued to inform the rhetoric of the removal advocates. It was still necessary, for example, for Jackson to insist, even by 1830, that, “This emigration should be voluntary: for it would be as cruel as unjust to compel the aborigines to abandon the graves of their fathers, and seek a home in a distant land” (“First Annual Address”). But how could the appearance of benevolent and enlightened argument be sustained (or rather how could it continue to mask the violence and avarice that supported it) if its subjects refused to participate? Lacking any response to organized refusal, the final answer of the violence of forced removal in 1838 (indeed “as cruel as unjust”), was essentially an admittance of defeat, of a failure of ideas.

The political strength and influence of the Cherokee leadership coalesces in the face of the real and immediate danger faced in the 1820s and 30s. But the emergence and existence of this new class of rulers were consequences of deep changes to the political and social structure in reaction to external and internal pressure that goes back to the eighteenth century. The traditional consensus system that had sustained regional autonomy, and involved no national law or government demanding universal obedience, gave way to pressure for consistent policy on relations with, and protection from, colonial forces. Concurrently, a wealthy, propertied Cherokee elite had begun to emerge, profiting from gifts, bribes, payments for military assistance and trade. The children of white traders and

Cherokee women did particularly well, gaining legitimate clan status in the traditional matrilineal manner, and inheriting the trade businesses from the fathers. The first principle chief (as opposed to regional chiefs), Little Turkey, came to power at the end of the 18<sup>th</sup> century, quickly succeeded by Black Fox (removed for his support of Jefferson's nascent removal plan), then Path Killer. 1808, under the latter, saw the first attempts at national law, essentially aimed at protecting property (Purdue, "The Conflict Within" 55-59).

The Cherokee resistance by refusal began to take on true national, political coherency in the 1820s. Purdue and Green write that centralized power prior to this had continued to be weak, and the traditional systems of government remained structurally incapable of withstanding with the hugely increased external pressure for land cessions and treaties following 1815. A state of "crisis" was generally acknowledged:

All had national councils [. . .] but the men who attended them possessed little authority to enforce laws with the villages; local autonomy was the rule. The laws of the nation were customs and history, their police and courts were the clans, and while both the Cherokees and Creeks had experimented with more direct forms, none of the tribes were set up to do political battle with the Americans. (82)

The educated, entrepreneurial (and opportunistic), literate (in English as well as the new Cherokee written language) Cherokee ruling class had as a central concern the protection of their own property and livelihoods. As leaders they enacted laws and established a "national police force" in pursuit of this end (83). This, Purdue and Green write, was "extremely significant" as it became clear that such laws could also be extended to protecting public property: "The nation, not the towns, became the arbiter of the public good, and law challenged custom and history as the definer of proper behavior [. . .] a national idea was developing" (83). It was this new class who would respond to the



pressures of the 1820s with further centralization, laws and ruling institutions and ultimately, the written Constitution of 1827.

There was, however, considerable open and organized resistance from traditionalists throughout this period, according to Purdue in “The Conflict Within.” On the eve of the constitutional convention, White Path (a former central council member expelled for “subversive activities”) fomented a rebellion peopled by a large movement of the Cherokee masses, who mainly lived as subsistence farmers (60-64). This uprising was quelled, Purdue speculates, in part by the inclusion of a pledged protection of private and individual property improvements in Section 2 of the Constitution:

The Sovereignty and Jurisdiction of this Government shall extend over the country within the boundaries above described, and the lands therein are, and shall remain the common property of the Nation; but the improvements made thereon, and in the possession of the citizens of the Nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them; Provided, That the citizens of the Nation, possessing exclusive and indefeasible right to their respective improvements, as expressed in this article, shall possess no right nor power to dispose of their improvements in any manner whatever to the United States, individual states, nor to individual citizens hereof [. . .].  
 (“Constitution of the Cherokee Nation”)

Though the Constitution protects certain privileges and gives much commercial and financial control to the elite, the new government did not actively exploit the common Cherokees, Purdue writes, and thus managed to gain their widespread support against the removal forces. The masses stayed loyal to the elite and the refusal cause to the very last minute, leaving the Cherokee middle-class movement for emigration (funded and backed by the US Government) without popular support (64-72).

The creation of national coherency as organized resistance is of course something we will see often in the revolutionary movements of non-Western peoples. The new ruling class, particularly if it now suddenly enjoys a life and erudition dramatically different from

the rest of the population, must forge a sense of unity and common purpose. It is a unity which is simultaneously a state thought to pre-exist the culturally destructive force, and only in existence as a consequence of that force. As we will see in the next chapter on the constitutions of Vietnam, for example, this unity is articulated by adoption of the constitutional and revolutionary language of the very forces which have made this new commonality, this People, a political and cultural imperative.

### **The End of Forever**

According to American historian and biographer Thurman Wilkins in *Cherokee Tragedy: The Story of the Ridge Family and the Decimation of a People*, refusal to move, or seemingly even to make any preparations, continued until the final hour. Despite the unequivocal nature of the Treaty of New Echota, the threats, degradation and abuse, and the shadow of military intervention, very few had gone west by the autumn of 1837. The great majority continued with daily life, including clearing fields and planting crops as usual the following spring. The final preparations for forced removal began in early May, 1838, under General Winfield Scott, and, three days after the deadline given by the Treaty, “on May 26 the grim work of rounding up the Cherokees began. Seven thousand soldiers took part in the operation” (307). Families were taken at bayonet point from homes and dinner tables, others from the roads and fields. Personal property was stolen, houses looted and burnt. All were forced into purpose-built military stockades, where “about five hundred deaths occurred [. . .] in that broiling hot summer” (310), until the removal west could commence. Around 2000 had been put on boats to travel the Tennessee River by early June, but drought made immediate further river travel impossible for the remaining 12,500. These remained in the proto-concentration camps through the hot summer until the

following October, when “Thirteen detachments, numbering about one thousand souls apiece, would start for the West, one after another at intervals of three or four days” (311). The exodus took on average four months through the mud and cold of that winter and approximately 4000 (“nearly one fifth of the entire Cherokee population” (304)) died<sup>17</sup> (304-15).

### **Continuing Humanity**

The continuation of autonomy and self-government (there would be another constitution in 1839) was promised to those now in the future state of Oklahoma, theoretically distant from the corrupting influences of white civilization:

they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they deem necessary for the government and protection of the persons and property within their own country belonging to their people [ . . . ] provided always that they shall not be inconsistent with the constitution of the United States [ . . . ]. (“Treaty with the Cherokees,” Article V, 2466)

But the possibility of the autonomous development of a constitutional nation founded on the declaration of a sovereign right to exist on ancient homelands, as guaranteed by solemn agreements with the United States, was eradicated. The treaties that secured the new lands ensured US monitoring, regulation, access and, crucially, the permanent right of a US military presence: “The United States shall always have the right to make and establish such posts and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same and the free use of as much land, timber, fuel and materials of all kinds for construction and support of the same as may be

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<sup>17</sup> According to Foreman, 60,000 people from the “Five Tribes” of the Cherokee, Seminole, Creek, Chickasaw, and Choctaw were removed to what would become the state of Oklahoma. (Foreman, Preface). With the inclusion of the “remnants of other southeastern Indian groups,” Russell Thornton puts the total at 100,000 (75).

necessary [. . .]” (“Treaty with the Cherokees,” Article III, 2465-66). What had occurred in the east, the unacceptable, unthinkable, emergence of states within states, established not according to some new set of revolutionary ideals, but by reflection of *the* ideals of enlightened Humanity, as they had been successfully learned from their very progenitors, would not be permitted again. The removal of the southern peoples was a manifestation of a force which potentially, ultimately, now had no necessary limit. Or, as we have seen with both the Supreme Court and Congress, the limits created somehow allowed a space of action to exist beyond those limits.

A prophesy of Everett’s came true, but did not materialize: “If we proceed on this path, if we now bring this stain on our annals, if we suffer this cold and dark eclipse to come over the bright sun of our national honor, I see not how it can ever pass off; it will be as eternal as it is total” (1165). The removal and the fate of the Cherokee and other southeastern peoples is of course well-documented and studied, but one will not find the Cherokee constitutions in the general histories of modern constitutions with their taxonomies of an inexorable global flowering of constitutionalism. The fierce tensions of the state-federal power struggle of the antebellum, the conquering of the wilderness and “manifest destiny” speak of the constitutional history of the United States, not that of Native America. Perhaps, as Hannah Arendt suggests, what occurred on the frontiers and in the distant uncivilized darkness beyond the Mississippi would have little effect upon the grand American narratives of the People:

However criminal and even beastly the deeds might have been that helped colonize the American continent, they remained acts of single men, and if they gave cause for generalization and reflection, these reflections were perhaps upon some beastly potentialities inherent in man’s nature, but hardly upon the political behaviour of organized groups, and certainly not upon a historical necessity that could progress only via crimes and criminals. (83)

Decisions had to be made regarding what aspects of the narrative were best forgotten:

No report was made of the number of Cherokee who died as result of the removal. It was as if the Government did not wish to preserve any information touching the fearful cost to the helpless Indians of that tragic enterprise, and was but little interested in that phase of the subject. (Foreman 281)

The crisis caused by the appearance of the Cherokee Constitution was not resolved. It was a manifestation of the irredeemable damage caused to the historically and divinely bequeathed right of “unlimited independence,” when faced with the question “Are we not of Humanity?” by those whose active exclusion had made universality conceivable. What occurred by way of response has been a motif of all Western constitutional history: the development of new strategies by which the dream of absolute enlightened pre-eminence and mission before all of Humanity could carry on anyway, only apparently undamaged or dishonoured (irredeemably, as Everett imagined) by contradictions. That is, the constitutional ideas of freedom and right kept safe by the dominating powers are continually constructed by the mechanisms and strategies developed in sustaining a narrative of historical consistency and progress.

If it is the case that such powers are forever engaged in writing a new language of freedom on top of (and out of) the “stain upon our annals” then is this language not somehow corrupted by what lies beneath? Or perhaps when this tainted discourse is forcibly sustained as being *the* history of enlightened constitutional ideals, then the “stain” is not just cloaked but effectively obliterated, thus leaving no possibility of atonement for past crimes performed in the name of reason. In my view there is certainly corruption, but there is not obliteration. It is to be remembered that if the crimes of removal, slavery, genocide and colonial exploitation do not appear to hinder or render impossible the Western narrative of its enlightened progress, they are not forgotten in the constitutional

narratives of the world's victims. It is necessary to speak not of a history of *the* constitutional language of freedom, but of myriad histories of a world of languages. Much will yet be said in the following chapters about the ways in which ideas of freedom, sovereignty and the People have been constructed in non-Western constitutions in reaction or relation to the gaining of cultural autonomy from oppressive powers. We will also see that constitutional ideas continually change form, purpose and realization as they are informed by differing cultural practices, traditions and history.

## Chapter 4

**Cultural Universal: The Making of the Revolutionary People of Vietnam**

Even as they strike you down  
 with a mountain of hate and violence,  
 even as they  
 step on your life and crush it  
 like a worm,  
 even as they dismember you, disembowel you,  
 remember, brothers and sisters  
 remember,  
 people are not our enemy.

(Thich Nhat Hanh, "Recommendations" 6-14)

Hundreds of brave youth met tens of thousands of British soldiers.  
 Seven bloody years passed but the struggle for freedom was never put aside.  
 Boston was destroyed into cinders;  
 New York, filled with smoke, was routed; Philadelphia became a cloud of  
 ashes.

(Phan Chu Trinh, "Rare Encounters with Beautiful Personages"  
 17-24; qtd. in Bradley 21)

What sin have our people committed to be doomed to such a wretched plight!  
 (Ho Chi Minh, "Letter to Linus Pauling" 29)

**Whose Freedom? The Visible People**

Unlike the short expressions of eternal Ideals and eternal People, such as we have seen in the Preamble to the Constitution(s) of the United States, the constitutions of nations born of anti-colonial struggle and revolution often feature long and detailed historical narratives of the trials and victories of the People, their collective, national culture, and the ideology by which their emancipation is realized. Such constitutions might, in other words, be characterized by the significant *visibility* of their narratives of liberty, by the evident and widespread need to make apparent before the nation and the world an officially sanctified narrative that places repeated emphasis on the origins, involvement, struggle and fulfilment of the People. The People are made inseparable from that which cannot be easily

questioned or undermined: beliefs, dates, battles, victories, places, leaders, ideologies, inherent differences from enemies. Such overt expressions are not a feature of the Western constitutional tradition. The becoming of the People in the latter nations is constitutionally invisible; as we have seen in Chapter 2, no clue is given as to whence the People are supposed to have emerged or to what binds them beyond a mysterious collective sense of justice, will and destiny. The People, as Humanity, are and have always been.

With respect to the contingent formation, character and rhetoric of the creation of national, cultural visibility by those subjected to the discursive, ideological and economic might of colonizing and imperial powers, I make here three general assertions that will be central to the following examination. Firstly, as we have seen in the previous chapter on the 1827 Cherokee Constitution, the national culture is likely to have emerged as a matter of existential urgency. For the majority of peoples in the modern era who have not had the historical privilege of synonymy with Humanity, visibility is forged in the face of possible cultural, historical and literal obliteration. At the same time, as we have also seen, the creation of a visible space of existence, whether by reason or force, carries the risk of violent retribution by the dominant and the acquisitive. Secondly, though constitutions such as those of Vietnam reject forces of complex global impact and manifestation – “colonialism,” “imperialism,” “capitalism” – the rejection will be constructed in terms that reflect the particular experiences, grievances and aspirations of the national culture in question. Thus the content and the argument of the national narrative are inseparable from the contingent, localized effects of global forces. Lastly, anti-colonial revolutionary constitutions have frequently had to draw together peoples of entirely distinct cultures and historically formed social positions into a common, national cause within boundaries often drawn by the very colonial powers struggled against. There has therefore had to be a



*determination* of national culture according to, and informed by, a rhetorically credible conception of common history and purpose. (Though of course, as has been the case in both Western and non-Western constitutional history, the “common” culture may in fact be that of a representative, traditionally powerful minority.)

Because the arguments for autonomy, liberty and national culture are visible in documents which are presumed to be foundational and permanent does not mean they are static or monolithic. What we will see in the Vietnamese Declaration of Independence and the successive constitutions considered in this chapter, is better described not as a repetition of a singular narrative of freedom and willed emancipation of the People, but as an accumulated telling, a layering of narratives and a re-configuring of older narratives to fit them into an apparently inexorable teleology. Jürgen Habermas writes that “Every historical example of a democratic constitution has a double temporal reference: as a historic document it recalls the foundational act that it interprets – it marks a beginning in time. At the same time its normative character means that the task of interpreting and elaborating the system of rights poses itself anew for each generation [ . . . ]” (214). This may be true of nations that have enjoyed what appears as a single constitution in existence over generations, without external or internal disruption threatening to destroy continuity. Vietnam’s constitutional history, however, in which the cataclysmic disturbances of protracted wars with France and the United States, and the division of the nation into North and South have forced the writing of new constitutions every generation, is obviously different. Here it becomes necessary not only to mark a break with the past as constitutions must inevitably do, but also to forge an ideological, cultural continuity and purpose, a connection to those earlier constitutions. That is, the older constitutions, though surpassed, cannot be diminished as to do so would undermine the revolutionary narrative of the People

that leads to the present. According to Hue-Tam Ho Tai, professor of Sino-Vietnamese history at Harvard University, in his writing on the current tensions in Vietnam between differing experiential memories and official state narrative, keeping continuity and purpose is a never-ending endeavour: “Each struggle to create a new future through revolution, war, and counterrevolution has been accompanied by attempts to redefine historical meaning and, in the process, to remake the past. The past, like the future, is an eternally unfinished project, constantly under construction and constantly being revised” (3).

### **Our Freedom: The 1945 Declaration of Independence**

The iconic texts of Western enlightened principles should be comprehended not according to an imagined singularity or fixity in time and place, but by their circulation and their myriad contexts, translations and perceptions. The productions, the performances, the movements and the appropriations of these texts must be considered. Mark Philip Bradley,<sup>1</sup> in *Imagining Vietnam & America*, provides a relevant illustration of this point in his description of a journey of the Statue of Liberty. Very shortly after its unveiling in New York Harbour in 1886, Frédéric-Auguste Bartholdi’s *Liberty Enlightening the World*, was replicated and transported to Hanoi.<sup>2</sup> It was to be the main attraction at a French colonial exhibition aimed at displaying the might, the reach and the enlightened benevolence of French power in the recently consolidated lands and cultures collectively termed “French Indochina” (3). Bradley writes: “After the exhibition closed, Liberty was moved to a more

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<sup>1</sup> Mark Philip Bradley is Professor of International History at the University of Chicago with a number of works on Southeast Asian history.

<sup>2</sup> The woman of the statue was (and is) culturally familiar and recognizable as a signifier of liberty to Western peoples with a complex representational history of her own, including of course in Eugene Delacroix’s 1830 celebration of the French July Revolution, *Liberty Leading the People*. What does she become, this giant, grim-faced, robed Western woman brandishing a torch, to the colonized non-Western observer? Given that, according to Tran Le Thuy, the statue was known locally as “*Ba Dam Xoe* or the Statue of the Open-Dress Dame” – one wonders how well its cultural signifiers, so apparently immediate to Western minds, survived the ocean crossing.

permanent installation at the nearby Place Neyret, where it anchored a figurative spatial geography of French power and authority in Vietnam” (3). Thus Liberty the universal, transcendent ideal becomes *Liberty*, the mobile icon, the reproducible, displayable symbol; universal and yet inseparable from colonial power and knowledge, industrial technology, trans-global reach, access to material resources and acquisitiveness.<sup>3</sup> Bradley comments on the fate and the ambiguity of *Liberty* in 1945, standing in the wreckage of an old world and the dawn of a new nation as Ho Chi Minh read out the Vietnamese Declaration of Independence:

As Ho's words reverberated through the crowds in Ba Dinh Square, echoed down the Avenue Puginier, and met Liberty's gaze, the imposing symbolic edifice of French colonial power that lined the avenue lay in ruins. The beaux arts offices were emptied of their French civil servants. French military forces were under house arrest in the Citadel. Hanoi's Liberty now seemed to embody an alternative set of meanings: an ironic reminder of the yawning chasm between French rhetoric and colonial realities, an astute recognition of the power of the United States to shape international order at the close of World War II, and a reverent, if somewhat inchoate, vision of the promises of postcolonial independence. (4)

Along with United States Army officials, American planes overhead and a rendition of the Star Spangled Banner (Logevall 13-14), Ho opened the Vietnamese Declaration with two more icons of revolutionary American and French enlightenment:

“All men are created equal; they are endowed by their Creator with certain unalienable Rights; among these are Life, Liberty, and the pursuit of Happiness.”

This immortal statement was made in the Declaration of Independence of the United States of America in 1776. In a broader sense, this means: All the peoples on the earth are equal from birth, all the peoples have a right to live, to be happy and free.

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<sup>3</sup> Liberty is ambiguous. As an American missionary in Indochina in 1941 illustrates, “liberty” can be undesirable or even derogatory: “To gain an idea of the habits of the tribespeople, one has but to regard the animals of the forest, which live at liberty and are dominated by the strongest. The greatest asset to the savage is his liberty” (46). Or, as he also puts it, “The savage is nothing but a big lazy child” (Smith 49).

The Declaration of the French Revolution made in 1791 on the Rights of Man and the Citizen also states: “All men are born free and with equal rights, and must always remain free and have equal rights.”

Those are undeniable truths. (“Declaration of Independence” 64)

Immediately, the argument is to claim the universality of equality, freedom and happiness as being actually universal, as “undeniable truths,” before a jubilant audience who, under the French and then the Japanese (along with the Vichy French), had long experienced universal truth precisely as denied and deniable. But the relationship between such “truths” and the presence of these iconic passages, along with what they might signify, is not at all immediate. Why are they used here? Is there a certain or definable relationship between universal truth and these texts? Do they hold “undeniable truths” immanently, as if to use them is not so much to speak the truth, as incant it? Slavoj Žižek, in his introduction to a collection of speeches and extracts by Maximilien Robespierre, asks: “Should we not affirm against [. . .] opportunist realism the simple faith in the eternal Idea of freedom which persists through all defeats, without which, as was clear to Robespierre, a revolution ‘is just a noisy crime that destroys another crime’ [. . .]” (xxxix). Perhaps, then, the French and American Declarations can be understood as primary articles of the “faith,” secular scripture, to which due respect must be shown if credibility is to be achieved?<sup>4</sup>

Whatever might be said about the seemingly irreducible historical presence of the Western revolutionary texts as the origin of the modern political and cultural expression of universal ideals, the Vietnamese Declaration is surely one whose rhetorical purpose is not

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<sup>4</sup> Is it the “eternal Idea of freedom” that ennobles, explains and justifies concerted action against an established ruling system (be it socially, economically, scientifically or religiously constructed)? If so then one might well expect the independence declaration of an anti-colonial revolutionary nation to make abundantly evident its dedication and commitment to it. To overthrow existing systems of law must inevitably, and by definition, be a “crime”; a crime perhaps said to be born of terrorism, extremism, backwardness, tribalism, anarchism and so on. Without the “eternal Idea,” are not constitutions which express avowed departure from Western hegemonic, enlightenment narratives records of crimes; their authors and adherents not the criminals of History?

reverence or deference, but the announcement of independence precisely from the domination of that presence. It is to deny the exclusive ownership of the “right to live, to be happy and free.” How should we understand these passages when they are removed from the hegemony of their historical and cultural context in order to defy that context? Their use renders the notion of an obvious or natural connection to their “origins” radically ambiguous.

The Vietnamese demand for recognition of “undeniable truths” is often characterized as if only comprehensible in relation to a fixed exterior, as if that exterior had singular meanings as stable reference points. Recent commentary on Ho’s inclusion of the US and French Declarations entails an implicit judgement as to his level of acknowledgment of, and respect for, the origins of his statements. Fredrik Logevall, who has written widely on American cold war foreign policy, particularly in relation to Vietnam, asks: “Was this a sincere homage to the first of the modern statements of national independence and individual rights, or was it a play for American support for Ho’s ambitions? No doubt some of both” (13); the relation thus being reduced to either proper respect or political deception. Political economist Melanie Beresford comments that the Vietnamese Declaration was partly “copied from the American Declaration of Independence” (21). Bradley refers to it as having “Jeffersonian echoes,” as if to say that power and meaning lies in the mysterious immanent presence of the authorial voice.

The highlighting of this commentary is not meant here as an explicit criticism of the works of these experts (indeed their studies will inform much of the historical context of this chapter), but their comments are indicative, I believe, of an enduring Western view of the democratization or constitutionalization of the developing world as being legitimate

only in so far as it is respectfully imitative<sup>5</sup> of Western models. A Western standard of cultural, political and social superiority has already been reached, and the rest of the world has either to learn and adopt wholesale, or suffer the consequences of a futile grip on antiquated traditions and practices. Yet, at the same time, no matter how ostensibly faithful the imitation, the performance often remains fundamentally dubious in Western analysis and perception as it is the sincerity, the motives, even the nature of the participants that are really under scrutiny, as much as, if not more than, the independence declarations and the constitutions themselves. A significant aspect of the issue at hand is thus not only a question of the “truths” imparted by and inherent in the French and American Declarations, but the assumption of the right to speak of them, interpret them and use them for purposes other than the furthering of Western imperialist objectives.

A related view is that the one sentence taken from the American Declaration defines the entirety of that of the Vietnamese. Vietnam war correspondent, Harrison E. Salisbury, for example, writes: “When Ho in September 1945 proclaimed the new Republic of Vietnam he modelled his declaration on the U.S. Declaration of Independence, actually requesting of the OSS [the pre-CIA Office of Strategic Services] men a copy of the Declaration in order to copy its language in his draft” (383).<sup>6</sup> Not only does this leave out the French excerpt, but avoids the fact that the remainder of Ho's speech is not at all like the

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<sup>5</sup> According to historian John A. Hawgood in 1939, imitation was more an act of compulsion than choice: “one by one the oriental despotisms found themselves losing face in contact with these [Western libertarian] states [. . .] It was only natural that this libertarian form of government, which appeared to make its exponents so irresistible against oriental rulers and peoples [. . .] should have presented itself as worthy of study, and possibly of emulation, by those who had been bruised in contact with it” (298). And, going by Administrator for the United States Agency for International Development Andrew S. Natsios’ summation of the inexorability of global democratic progress, such compulsion is certainly to be expected: “waves” of democracy, “swept over Eastern Europe, inundated Asia and penetrated into Africa” (264). (Natsios’ true message is, I think, revealed here in his choice of verbs.)

<sup>6</sup> According to Beresford, the OSS support of Ho’s Viet Minh arose during WWII as the latter were able to report on Japanese positions in Indochina. After the war it was hoped (in vain) that US support would prevent France from re-asserting colonial control (18).

American Declaration and instead provides an argument particular to time, culture and ambitions.<sup>7</sup>

What the Vietnamese Declaration reflects and is a consequence of is a period far more complex, uncertain and productive of new ideas and perceptions than a linear transferral of ideas from West to East, or a replacing of the traditional old with the modern new. Deep and irreversible changes to traditional Vietnamese social structures, hierarchies and self-conception of place in the world and history began long before the 1945 revolution. Such changes must be understood as occurring not only as the consequence of colonialism (itself obviously not a monolithic, singularly definable force), but also as the multifaceted culturally contingent reactions to it. It may be said therefore that the Vietnamese Declaration of Independence, though forever marking the beginning of postcolonial national realization, is already an organization of innumerable events, circumstances, ambitions, both planned and unforeseen. It is the forced making of a visible, pragmatic narrative of the struggle of the People for freedom in a space otherwise dominated by Western (and, historically, Chinese) narratives.

Bradley gives a detailed account of the ways in which Western ideals, history and philosophy infused and profoundly influenced the resistance discourse of early twentieth-century Vietnam, but not through any kind of direct transfer of ideas, and not by any means

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<sup>7</sup> Salisbury's perceptions of Liberty as a complete external model either gained or lost take many forms. He comments, for instance, that towards the end of his life Ho "occasionally spoke with nostalgia of the Statue of Liberty (which he had seen as a young seaman) and of the principles of the American Constitution" (384). Why would Ho be "nostalgic" for American principles? Because they were lost to him? Because they were lost in general? Because they were a dream of youth before a lifetime of war? In his writings of this time in America Ho was in fact far from uncritical, particularly of the treatment of African Americans. In a 1924 article entitled "Lynching: A Little Known Aspect of American Civilization," for example, he writes, "after 65 years of so-called emancipation, American negroes still endure atrocious moral and material sufferings, of which the most cruel and horrible is the custom of *lynching*" (20; emphasis in original). And later in the same article: "a black head, mutilated, roasted, deformed, grins horribly and seems to ask the setting sun, 'Is this civilization?'" (21).

a matter of straightforward emulation. Ideas and visions were altered, re-shaped, re-understood by different cultural and historical perspectives and purposes, producing, as one significant consequence, a conception of what he calls an “imagined America.” The anti-colonial Reform Movement of the first two decades of the twentieth century (preceding the more radical movements of the 1920s onwards, through to the formation of the Indochinese Communist Party in 1930) made the first organized, intellectual departure from the traditional, learned conception of East Asian society and history. The reformers, writes Bradley, were concerned not only with contesting French rule, but with criticism of traditional Vietnamese society. At the same time, they, like the previous generations of their class, were the beneficiaries of said society: an elite, educated in Chinese neo-Confucian morality and values, destined for the upper echelons of a rigid hierarchy, as “superior men” (11-12). Thomas Cleary in his introduction to *The Essential Confucius: The Heart of Confucius’ Teaching in Authentic I Ching Order* (one of a great many of his translations of East Asian classical texts) provides an idea of the significance of the latter title:

Confucius advocated the restoration of just government and the revivification of society through the cultivation of what he called the ideal cultured person, the exemplary individual [ . . . ] Confucius believed the virtues of the exemplary individual should especially be cultivated by the ruling class. (2)

The new generation, however, determined that “Confucian principles alone provided an inadequate response to French rule [ . . . ]”; they had “watched as the slow French enervation of Vietnamese, political and social life undermined the neo-Confucian premises that had shaped their view of the world” (Bradley 12). They turned therefore to an intense study of Western thinkers, revolutionary heroes and philosophy, history and innovation; Herbert Spencer and theories of Social Darwinism being of particular significance. This study of



course had immediate, and to some thinkers urgent, purposes. Firstly to determine why Vietnam (which, along with the rest of East Asian society, had hitherto understood itself as the centre of the moral universe) was in such a terrible plight, and therefore to make necessary modernizing change; secondly, how to defeat and be rid of European colonizing domination (12-14). Of the former of these problems, historian David G. Marr writes,

One of the most difficult tasks facing the intelligentsia was to distinguish universal insights from the particularities of either European or Vietnamese experience. The traditional Vietnamese preference had been to draw a line between cultured East Asians and the many barbarian peoples, Europeans included, who did not comprehend the way of the universe and hence behaved improperly. (9)

According to Bradley the contact with Western works was indirect:

Unable to read European or American texts themselves, Vietnamese reformers encountered Western thought and experiences in the [Chinese] writings of Liang Ch'i-ch'ao and K'ang Yu-wei, the leading intellectual advocates of self-strengthening in China, and [. . .] the reform of Japanese society under the Meiji restoration. (13)

With the Chinese texts came neo-Confucian interpretation with contemporary radical and revolutionary purpose, as well as earlier, mid-nineteenth-century idealistic constructions of American revolutionary history and heroes, used to combat and contrast with European imperialistic designs. The effects on Vietnamese revolutionary thinking and interpretation were, Bradley argues, manifold. Confucian notions of “self-strengthening,” courage, virtue, individual will and leadership allowed “rhetorical signposts” (22) by which to bring an alien revolutionary history into the milieu of Vietnamese radical thinking and ambition. Constructions of figures such as George Washington as being unique leaders whose personal courage and indomitable virtue overcame overwhelming odds and defied destiny also served to preserve the traditional understanding of the Confucian “superior men” in Vietnamese leadership (13-25). Bradley writes:

utopian narratives of the life of George Washington and the American revolution, borrowed from admiring mid-nineteenth-century Chinese images [ . . . ] But the didactic purposes they were meant to serve also reflected both the strong influence of the more recent Chinese embrace of Social Darwinism and indigenous forces such as the enduring elitism of the Vietnamese reform generation [ . . . ]. (18)

The above is but an overview, but it can be seen that what occurs is far deeper and more complex than a transfer of ideas; ideas do not survive transition and translation in any consistent or original form.

Returning to the quoted passage from the Vietnamese Declaration of Independence, the reference to “All men are created equal” in the US Declaration is qualified significantly by “In a broader sense, this means: All the peoples on the earth are equal from birth, all the peoples have a right to live, to be happy and free.” To assert that “All men are created equal” in fact “means” true universal equality is an intervention, a declaration of defiance, not a display of deference. As in the rest of the enslaved and colonized world, it had been abundantly evident that “All men” in practice had not meant universal inclusion. Nor, with the continuation of colonialism, could it have ever meant that. It could only be those historically excluded from and by the construct “All men” who might radically re-inform it and give it new content “in a broader sense.” Change did not come about because “All men” had finally begun to fully reveal its immanent truth or naturally expand.<sup>8</sup> If “All men” was to mean (Vietnamese) humanity, then it was only by forcefully creating the audible, visible space to make it so. Another thirty years of war were certainly testament to how unstable that space was, how violently “this means” was resented.

Rhetorically, American historical ideals are set in contrast to those of the French. The Declaration proceeds to denounce the French for violating enlightened principles in

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<sup>8</sup> “Democratization” and Natsios’ “waves” continue to imply that this is precisely what “All men” has done; an idea which requires the concerted and continuous retrospective re-investment of meaning.

every regard. They stand accused of negating their own professed historical values ethically, politically, morally, legally and economically. (A condemnation that would also feature in Ho's other speeches of the revolution: "They have violated the promises concerning democracy and liberty that the Allied Powers proclaimed. They have of their own accord sabotaged their fathers' principles of liberty and equality" (Ho, "Speech" 35).) In the face of aggression and oppression from Japan during World War II, the French, the Declaration asserts, had proven themselves empty of conviction and moral courage (a damning criticism from a Confucian perspective): "when the Japanese fascists violated Indochina's territory to establish new bases in their fight against the Allies, the French imperialists went down on their bended knees and handed over our country to them" (65). Thus the French become neither the keepers, nor the bearers, nor the protectors of the enlightened Word.

Rather than a civilizing or modernizing mission for Vietnamese people, the task of the French had been, according to Ho's Declaration, precisely to disrupt and destroy historical cultural unity, and to make impossible the existence of a Vietnamese People:

In the field of politics, they have deprived our people of every democratic liberty.

They have enforced inhuman laws; they have set up three distinct political regimes in the North, the Centre, and the South in order to wreck our national unity and prevent our people from being united.

They have built more prisons than schools. They have mercilessly slain our patriots; they have drowned our uprisings in rivers of blood.

They have fettered public opinion; they have practised obscurantism against our people.

To weaken our race they have forced us to use opium<sup>9</sup> and alcohol.

In the field of economics, they have fleeced us to the backbone, impoverished our people, and devastated our land.

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<sup>9</sup> According to V.G Kiernan, the colonizers too were keen on the drug: "In the 1920s three-quarters, at a guess, of the French themselves were partakers. In pipe-dreams they could still be the philosopher-kings of the Utopian colony of French official theory" (97).

They have robbed us of our rice fields, our mines, our forests, and our raw materials. (64-65)

As posited earlier, the necessary collective figure of “the People” in the national narrative of liberty, if it is to have sense and lived meaning, requires some level of cultural determination. If that basis is destroyed then there can be no “People,” except as an empty abstraction serving power. Marr points to a number of factors that caused irrevocable alteration and disruption to Vietnamese traditional and lived cultures. Localized systems of justice and redress, conciliation and obligation within recognized hierarchies were shattered by the far greater power, organization and reach of French systems. A collaborating elite gained power and money “without having to trouble themselves much about popular anger or any ethic of responsible government” (3). In a system that becomes essentially exploitative, some will do well. The wiping away of old institutions to replace them with enlightened new ones (masking the primary goal of profit-making), gave way to preserving elite institutions and exploitative classes at the expense of the people themselves. As Kiernan describes it: “Three puppet monarchies, the land-owners, and other ‘notables’, were fitted into the French framework, and tied to French rule by a bond of common interest; while the village commune, the institution of most value in the old society, disintegrated” (95).

Fundamental changes occurred in the relationship to and distribution of land, particularly in the creation of giant estates run by French rulers and the cooperative Vietnamese elite: “Communal lands – traditionally the basis of village social welfare palliatives, as well as providing modest support for local temples, schools, and routine administrative tasks – now increasingly became the property of several well-placed families, or even came under the control of non-village members” (Marr 4). And as Mike

Davis writes on the enclosure of formerly communal land by the British in India in the late nineteenth century, devastation is caused not only by the sudden lack of freely available, shared resources such as wood, dung, fodder and water. Ancient cultural practices are outlawed; expenditure is demanded where none was formerly required, inevitably resulting in division, exploitation, inequity and dependencies; contact and mobility are diminished; accumulated cultural knowledge of cultivation, ecology, resource management and the ability to withstand and prepare for shortage are, often catastrophically, impaired (326-40). But it was, according to Marr, “the penetration of the cash economy into even the most isolated hamlets of Vietnam” (4) that had the most profound effect, causing alienation, heavy tax burdens, inequity and the destruction of traditional forms of exchange and fulfilment of obligation. On this, Ho Chi Minh writes:

It is they [the peasants] who produce for the whole horde of parasites, loungers, civilizers, and others. It is they who live in poverty while their executioners live in plenty, and die of starvation when their crops fail. [ . . . ] In former times, under the Annamese regime, lands were classified into several categories according to their capacity for production. Taxes were based on this classification. Under the present colonial regime, all this has changed. When money is wanted, the French administration simply has the categories modified. [ . . . ] they have transformed poor land into fertile land, and the Annamese peasant is obliged to pay more in taxes on his fields than they can yield. (“Ho Chi Minh on the Condition of the Peasants in Vietnam (1924)” 40)

For Frantz Fanon, all of this is inherent to colonialism:

Colonial domination, because it is total and tends to oversimplify, very soon manages to disrupt in spectacular fashion the cultural life of a conquered people. This cultural obliteration is made possible by the negation of national reality, by new legal relations introduced by the occupying power, by the banishment of the natives and their customs [ . . . ]. (190)

According to Fanon, ideas, conceptions and re-constructions of tradition will perform manifold necessary and inevitable roles in the early struggles for freedom from colonial domination. There will be collective memories of past uprisings, perhaps doomed

even in their momentary successes; studies and celebrations of the (possibly very distant) pre-colonial past; intellectuals, artists and leaders will laud achievements, values and symbols. But all of this, if not carried further, Fanon argues, will fail to address an essential reality: trying to discover an existing cultural basis by which to contest colonial power misses the fact that the very processes and practices of colonialism destroy cultural unity, the lived meanings of art and ideas, the sense of collective ontological worth. “This persistence in following forms of cultures which are already condemned to extinction is already a demonstration of nationality; but it is a demonstration which is a throwback to the laws of inertia. There is no taking of the offensive and no re-defining of relationships” (191).

The unity of the People is established in the remainder of the Declaration speech, but not in a way entirely definable as a reflection of an entity already in existence, or as a resurgence of what once existed in a pre-colonial past. Rather, the indomitable Vietnamese culture and character are both illuminated and brought into fruition by revolutionary action and unified reaction to circumstance. The action and the culture become inseparable, each making the other: “The whole Vietnamese people, animated by a common purpose, are determined to fight to the bitter end against any attempt by the French colonialists to reconquer their country” (66). By the fight, it seems, a level of worthiness and deservedness has been reached: “A people who have courageously opposed French domination for more than eighty years, a people who have fought side by side with the Allies against the fascists during these last years, such a people must be free and independent” (66).

As well as being an account of how the decisiveness, leadership and action of the people have changed and must change unacceptable realities, also absorbed into the

revolutionary narrative is the effect of external circumstance. Beresford writes for example of a great catastrophe that immediately preceded the revolution:

It was the famine [. . .] the only element in this conjunction of events which the Party had not predicted or foreseen – which proved decisive in its impact on the mobilization of the urban and rural masses. The virtually universal and spontaneous uprisings throughout northern Vietnam in response to the Party’s call to storm the granaries were the engine on which it eventually rode to power. (19)

This appears in the Declaration as a consequence of the “double yoke” of the perfidy of the Japanese and the cowardice of the French: “The result was that from the end of last year to the beginning of this year, from Quang Tri Province to the North of Vietnam, more than two million of our fellow-citizens died from starvation” (65). Set in immediate contrast to this are the reason and good will of the Viet Minh League and the inherent good character and courage of the People: “Notwithstanding all this, our fellow-citizens have always manifested toward the French a tolerant and humane attitude [. . .] the Vietminh League helped many Frenchmen to cross the frontier, rescued some of them from Japanese jails, and protected French lives and property” (65).

From all of this, sense must be made, a story of the People must be told, and it must be heard, as the Declaration states: “we, members of the Provisional Government of the Democratic Republic of Vietnam, solemnly declare to the world that Vietnam has the right to be a free and independent country – and in fact it is so already” (66). To be occupied now is the recognized constitutional forum, the place for the telling; a forum where the newly constructed history of the Nation and its Freedom may be maximally seen. Which is not to say that the stories of the Vietnamese peoples were not already told; on the contrary they were undoubtedly told (and of course would continue to be) in many ways from the many cultures, perspectives, experiences and histories that would constitute the People of

Vietnam; but it is the narrative of the People which will constitutionally be seen and heard. To be heard requires the use of the time-honoured medium, along with the strictures and expectations of its form. To quote Fanon once again: “it is national liberation which leads the nation to play its part on the stage of history. It is at the heart of national consciousness that international consciousness lives and grows. And this two-fold emerging is ultimately only the source of all culture” (199). From the act of liberation forwards, the culture, in whatever living form and expression it may come to take, will be, indeed can only be, national.

### **All the People: The Constitution of 1946**

The Declaration of Independence establishes the essential narrative for the subsequent constitutions. Following a nationwide election for a National Assembly, the first Constitution of Vietnam appeared in 1946; it opens with,

The August Revolution won back the sovereignty for the country, freedom for the people and founded the republican democratic regime.

After 80 years of struggle, the Vietnamese nation has freed itself from the colonialist yoke and at the same time abolished the feudal regime.  
 (“Constitution of the Democratic”)

Not only is this a description and celebration of the successful revolutionary fight for freedom, it now constitutionalizes the People as established above: the national entity whose fundamental unifying content *is* revolutionary struggle. The destruction and degradation of the traditional social systems and hierarchy caused by colonialism, as well as the inherent inequities of that hierarchy, become melded into “After 80 years of struggle, the Vietnamese nation has freed itself from the colonialist yoke and at the same time abolished the feudal regime.” With the strength of active common purpose, emancipation and modernization occur simultaneously. The revolution sustains its dedication to the



“Idea” as Žižek put it, rather than being another “crime,” not only because it is about “freedom,” but because it is inseparable from the liberation narrative of the People and the Nation. It might be said in this context that the subject of the new constitution is not the liberated People, but the liberated-People. That is, not a community heralded as complete before and after the revolutionary struggle, as in Western mythology, but a body which comes into political and cultural being by the fight for and the act of liberation. It is by the performance of nation and national constitution writing that the very body exalted (in Western rhetoric) as imperative for legitimate constitutional nationhood achieves existence.

The People as unified in revolutionary struggle are also formed in the acts of eradicating pre-modern and colonial divisions, as Ho’s long-time revolutionary compatriot General Vo Nguyen Giap describes:

Our resistance was a people’s war, because its political aims were to smash the imperialist yoke in order to win back national independence, to overthrow the feudal landlord class in order to bring land to the peasants; in other words, to radically solve the two fundamental contradictions of Vietnamese society – the contradiction between the nation and imperialism on one hand, and the contradiction between the people, especially between the peasants and the feudal landlord class, on the other – and to pave the socialist path for the Vietnamese revolution. (101)

The “people’s war” heals the divisions, both imperial and traditional, that make a cohesive, national People impossible. The “people’s war” makes the People. Historical unity is established in the cohesiveness of common purpose: the “80 years of struggle.” Bound in this sense the Vietnamese People appear to have already been long in existence and are therefore what the revolutionary narrative is about. The People are thus simultaneously subject and object of the revolution and freedom.

The sense of purpose, unity, destiny and historical moment that is assumed to have naturally infused the People of the United States was not, to extrapolate from Giap's account, reliably present among the Vietnamese. He explains how it had to be taught:

the Party pointed out to the people the aims of the struggle: independence and democracy. It was, however, not enough to have objectives entirely in conformity with the fundamental aspirations of the people. It was also necessary to bring everything into play to enlighten the masses of the people, educate and encourage them, organize them in fighting for national salvation. The Party devoted itself entirely to this work [ . . . ]. (102)

As has been postulated previously, this is a fundamentally different conception of the People from that which is presented as if always having existed as an essential, definable and continuous community. (Even though, as we have seen in Chapter 2, the People of the United States also came into existence, of necessity, through the performance of constitution writing and were not this body prior to it.) Here we have the People as formed in the context and face of circumstance, necessity and ontological crisis; a vision of mass unity as inseparable from the establishment of the nation as a definable geo-political entity. It is also People as defined and unified in mobilization against external power. Thus there is an intertwining of the skilful use of existing or viable concepts of cultural character with a moulding of that character for new purposes and realities. According to Fanon, if such a formation takes into account existing cultural differences, needs and grievances, then it has the chance of being a creative, positive endeavour. For Fanon, there is the potential for the ultimate cultural expression:

We believe that the conscious and organised undertaking by a colonised people to re-establish the sovereignty of that nation constitutes the most complete and obvious cultural manifestation that exists [ . . . ] The struggle itself in its development and in its internal progression sends culture along different paths and traces out entirely new ones for it. (197)

Yet the advent of the Vietnamese People cannot be entirely understood as the consequence of power, cultural consciousness and decision. At the same time this is a period of deep historical shifts, occurring far beyond the control and will of the most concerted intellectual and revolutionary intervention. Eric Hobsbawm explains that aside from “those countries which looked back on a long history as political entities, the great Asian empires – China, Persia, the Ottomans [. . .]” (207) colonized peoples had little historical reason to see themselves as forming a cohesive body within definite borders ruled by a single central authority. He writes that “even where a clearly self-described or recognized ‘people’ existed, which Europeans liked to describe as a ‘tribe’, the idea that it could be territorially separated from other people with whom it coexisted and intermingled and divided functions was difficult to grasp, because it made little sense” (207). This tended to make organized, national struggle more difficult as many groups of people, though hating the colonizers, also resisted loss and compromise of their own traditional autonomy to a modernizing (and possibly exploitative) elite (208).

According to Hobsbawm, there were two main global occurrences which facilitated the rise of mass movements in the colonized world and, crucially, the identification of those masses with intellectual, modernizing, nation-building elites: “The 1930s were [. . .] a crucial decade for the Third World, not so much because the Slump led to political radicalization but rather because it established contact between the politicized minorities and the common people of their countries” (214). Second was the deep loss of status and authority caused to colonial power by World War II: “What fatally damaged the old colonialists was the proof that white men and their states could be defeated, shamefully and dishonourably, and the old colonial powers were patently too weak, even after a victorious

war, to restore their old positions” (216). (This fact is used in Ho Chi Minh’s independence speech above concerning the capitulation of the French to the Japanese.)

With the past distilled, organized and told in terms of the will of the revolutionary leadership and People, the remainder of the Preamble is divided into two statements of certainty. The first concerns the conditions, achievements and goals of the present:

The Fatherland has entered a new stage of its history.

The duty of our nation at this stage is to defend the integrity of our territory, win back total independence and rebuild the country on a democratic foundation.

Having received from the people the responsibility to draft the first Constitution of the Democratic Republic of Vietnam, the National Assembly recognizes that the Constitution of Vietnam should record the glorious achievements of the Revolution and be established on the following principles:

- The union of all the people, irrespective of race, sex, class and religion
- The guarantee of the rights of democratic freedom;

The second is the road into a glorious future. Though the revolution forms the People as an originating force, it will also be ever-present, not only as that which will continue to form and guide the People, but as that which guarantees their eternal membership in Humanity:

Fortified with the traditional spirit of unity of the struggle of the whole people and under a broad democratic regime, independent and unified Vietnam is marching forward on the path of glory and happiness, in the same rhythm as the world’s progressive movement and in accordance with humankind’s wish for peace.

### **Certainty in Uncertainty: The Constitution of 1959**

By the time of the 1959 Constitution of Vietnam (Democratic Republic), the 1945 Declaration of Independence and the 1946 Constitution had been seriously undermined as the origin and narrative of modern, unified, independent Vietnam. Despite the military defeat of France, which had begun its attempt to re-take colonial control almost immediately after WWII, the reality was internationally enforced division (by the 1954

Geneva Agreements) and the continued presence of foreign control in the South. Under the terms of the Agreements, the government of the southern Republic of Vietnam (still significantly French-run), led by the restored former emperor Bao Dai and his president, the heavily US-financed Ngo Dinh Diem, were to hold an election for re-unification by 1956. By 1955, Bao Dai was gone, as were the French, and the brutal military regime of Diem, who had “unlimited backing from the United States [. . .]” (Beresford 35), took full control. Elections, in which Ho Chi Minh may well have received wide-spread support in the South, particularly from the great many who suffered under Diem’s oppressive police state, were in neither Diem nor America’s interest and did not take place (Beresford 33-36).

It is perhaps because of this uncertainty that the new Preamble sends the People as a unified struggling entity right back into the ancient origins of their existence:

The Vietnamese people, throughout their thousands of years of history, have been an industrious working people who have struggled unremittingly and heroically to build their country and to defend the independence of their Fatherland. (“Constitution of Vietnam”)<sup>10</sup>

The true character, essential and continuous, is too deep and ancient to be disturbed by mere events. But the expression of that which was always there, the fulfilment and realization, comes with the revolution: “For the first time in their history, the Vietnamese people had founded an independent and democratic Vietnam.”

Unlike the 1946 Constitution, which begins the new age with the Viet Minh’s (operating under the leadership of the Indochinese Communist Party) victory in the 1945 revolution, this Constitution pushes the narrative back to the birth of the ICP under Ho Chi Minh in 1930. As the communists were victorious in 1945 and gained national support in the 1946 elections to the constitutional National Assembly (“the entire Vietnamese people,

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<sup>10</sup> The un-cited quotations in the following section are all from the 1959 Preamble.

from North to South, enthusiastically took part [. . .]”), so their Vietnamese origins contain this inevitable realization and the true beginnings of the unified revolutionary People:

From 1930 onwards, under the leadership of the Indochinese Communist Party – now the Lao dong Party – the Vietnamese revolution advanced into a new stage. The persistent struggle, full of hardship and heroic sacrifice, of our people against imperialist and feudal domination won great success: the August Revolution was victorious [. . .].

Needless to say this period was exceedingly more complex and uncertain than the above suggests. This is not the space for a full exposition, but suffice it to point out that from the outset, according to historian Kevin Ruane, the ICP (which followed Ho's Leninist Vietnamese Revolutionary Youth League and the Vietnamese Communist Party of the 1920s) faced ideological conflict both internally as well as externally, with the Soviet Union. Those such as Ho (actually out of the country from 1911-1941), who wanted national uprising and independence through mobilization of the peasant masses (90% of the population), clashed with the Comintern-trained, who followed the Soviet internationalist policy of revolution led by the industrial proletariat, in place since the Fifth Comintern Congress of 1924. On top of that the ICP were crushed almost out of existence through imprisonment and execution by the French authorities. And of course there was conflict with various non-communist nationalist groups (Ruane 1-7).

The long and detailed preamble continues with a recounting of the war with the French: “the French imperialists, assisted by the U.S. imperialists, again provoked an aggressive war in an attempt to seize our country and once more enslave our people.” But “our entire people, united as one, rose to fight the aggressors and save their country [. . .] The long, hard and extremely heroic war of resistance of the Vietnamese people, which enjoyed the sympathy and support of the socialist countries, of the oppressed peoples and of friends of peace throughout the world, won glorious victory.” And now, following the

Geneva Agreements: “The Vietnamese revolution has moved into a new position.” For, despite the many achievements, advances, and the inevitable progress, new difficulties have arisen: “in the South, the U.S. imperialists and their henchmen have been savagely repressing the patriotic movement of our people.” This of course is but a temporary aberration and once again, “The people throughout the country, united as one, are holding aloft the banner of peace [. . .]. The cause of the peaceful reunification of the Fatherland will certainly be victorious.”

It becomes clear I think just how vital is the constructed subject of “People”; without this figure, this collective which acts as one determined mind, the story cannot be told. The story, whatever its artificiality, distortion and power-serving rhetoric, provides an absolutely necessary function: the keeping open of visibility in a space continually threatened by externally dominating discourses and violent incursions. The faithful depiction of history with all its contingencies and accidents is not a primary aim. An “objective” historical narrative would not function. These are conscious creative interventions born of contingent necessity. Ernesto Laclau writes: “The sense of an intellectual intervention emerges only when it is possible to reconstitute the system of questions it seeks to answer. On the other hand, when these questions are taken as simply obvious, their sense is obscured if not entirely lost.” (66). In this regard (all) Constitutional narratives and Peoples may be seen as “intellectual intervention,” functional responses to particular circumstances, cultural solutions to existing problems and answers to questions.

The Preamble continues by setting out the goals, ambitions, developments and ideology of the “new Constitution”; but of course it also makes very clear the connection to the previous Constitution (and so implicitly to the Declaration of Independence.) The new is a natural, progressive continuation of the old rather than a reaction to unforeseen

emergencies: “In the new stage of the revolution, our National Assembly must amend the 1946 Constitution in order to adapt it to the new situation and tasks. The new Constitution clearly records the great revolutionary gains in the recent past, and clearly indicates the goal of the struggle of our people in the new stage.” The continuity of the narrative is paramount; the Declaration of Independence and the old Constitution become not the complete story in their own right but the earlier chapters of a much longer work. The old becomes that which makes the present and the future possible and gives them sense. And *vice versa*, the present and the future give new significance and relevance to the events of the past.

### **The Empty People: South Vietnam’s 1965 Charter**

For there to be any semblance of justice, happiness and freedom in a given society, “People” needs to have as its content, and be continually informed by, the living human beings and cultures that fall within the nation’s constitutionally demarcated legal and geopolitical boundaries. Living human beings need to believe (and I think, like Žižek’s “faith in the eternal Idea,” it is a matter of belief) that “People” means them. This must be so even though in practice “People” has never included everyone equally, in any nation. By contrast “People” can also be emptied of living content and exist as an abstraction whose primary function is only that of a weighty rhetorical figure used to preserve power (a contemporary illustration of which will be seen in the following chapter on the Iraqi Interim Constitution). The 1965 Constitutional Charter of the Republic of Vietnam (South) is, I posit, a stark illustration of “People” as an empty category:

The Armed Forces of the Republic of Vietnam, at this time of extreme danger for the defense of the right to existence of the people and for the prestige of the country, have undertaken their responsibilities before the people and before history.



In order to carry out their mission, the Armed Forces of the Republic of Vietnam do not seek demagoguery, but rather the realization of a policy of security for the population.

After so many sacrifices, the people of Vietnam continue to desire a powerful, peaceful and free nation.

The mission of the Armed Forces of the Republic of Vietnam is to fulfil this strong desire at any cost. To this end, the entire people must unite its will and its action, must direct all its efforts to the front for the repulsion and destruction of the Communist aggressors. To this end, the rear must be stabilized in order to consolidate gradually the basic organs of government so that a tradition of democracy and liberty may have the conditions favorable to its development in revolution and struggle. (“Republic of Vietnam”)

This Charter appears two years after the overthrow and assassination of Diem<sup>11</sup> and a consequent period of “struggle [. . .] among the military elite for the control of political office and the access to wealth that this brought” (Beresford 37). It coincides too with the US bombing campaign in the north and what is now called the beginning of the Vietnam War. As is stated above: “at any cost [. . .] the entire people must unite [. . .] must direct all its efforts [. . .],” but the People are given no rights in this Charter, no representation, no power, and do not appear in any of its twenty-five Articles. It is solely about the all-pervasive military, political, legal and civil power of the “Directorate,” all of whom are to be chosen by The Congress of the Armed Forces of the Republic of Vietnam. Article 7 states: “Power shall be delegated to the Directorate to exercise sovereignty and to direct all the affairs of the State. The Directorate shall be responsible to the Congress of the Armed Forces for all its decisions” (“Republic of Vietnam”).

This is “People” as divested of (or not invested with) any power or character.

Essentially it is the “People” as, constitutionally, an imaginary body with no culturally

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<sup>11</sup> Diem, by 1963, had been deemed no longer fit for US purposes, as US ambassador Henry Cabot Lodge explains: “We are launched on a course from which there is no respectable turning back: the overthrow of the Diem government [. . .] there is no turning back because there is no possibility, in my view, that the war can be won under a Diem administration, still less that Diem or any member of the family can govern the country in a way to gain the support of the *people who count*, i.e., the educated class in and out of government service [. . .].” (“Document 13”; emphasis added)

derived or legally substantive existence. The actual peoples can only obey the military dictatorship that represents the nation in its entirety. The various peoples, who do not constitute a national culture born of liberation in the way that Fanon described, can only be a tense conglomeration of disparate parts held together by force. There is no binding or formative “source” or “internal progression [that] sends culture along different paths and traces out entirely new ones for it.” In such a body there is very likely to be considerable unresolved enmity and mistrust, made ever worse by the consequent vulnerability to internal and external exploitation, the disastrous results of which we have often seen, and continue to see. (Including of course in the Algeria that Fanon principally addresses.) The following chapter on Iraq is concerned with precisely this historical reality.

### **Peace, Long-Awaited and Inevitable**

The Preamble to the 1980 Constitution of the Socialist Republic of Vietnam extends to the great length of five pages. (“Great length” that is if one regards the short passages of eighteenth- and nineteenth-century Western constitutions as an abiding standard.) It includes all that has accumulated from the Declaration of Independence and the two previous constitutions, and now of course “the barbarous war of aggression [. . .]” with, and victory over, the United States, the 1976 re-unification of the nation, the (inevitable) triumph of Ho Chi Minh’s socialist vision, and the further victory in the conflict with Cambodia and China in the late 1970s. From the vantage point of success, all of history and the narrative of the emancipation of the People now achieve a pre-written fulfilment. That said however,

Credit for the great successive victories goes to Communist Party of Vietnam which has creatively applied Marxism-Leninism, charted a correct line to lead the revolution in our country; upheld the two banners of national independence

and socialism; consolidated the worker-peasant alliance led by the working class; closely united all social strata with the national united front; built and developed the people's armed forces; constantly strengthened the revolutionary administration; combined patriotism with proletarian internationalism, linked the strength of our people to the world revolutionary movement; and coordinated the struggles on the political, military and diplomatic planes. ("Constitution of the Socialist")

The innumerable contingencies, decisions, accidents, betrayals, battles won and lost, are replaced by an inevitability, the fulfilment of an irreproachable, unstoppable destiny; a realization not only of cultural freedom, but of human progress: "Our country, formerly a colony and a semi-feudal country, has become an independent, reunified, socialist state, a member of the world socialist community."

A new change from past to future must now be established, subordinating all the previous such changes to that of the 1980 realization. As the long and bitter struggle for independence and unification has finally been achieved – "our people [. . .] have completed the people's national democratic revolution [. . .]" – what now is the purpose of the revolution? What now is the rhetorical basis of the figure of the Vietnamese People? The answer lies in the work that is yet to be done:

Our achievements have cost our people untold sacrifices and innumerable hardships. Our future is very bright, but our tasks are very difficult. Let our entire people strengthen unity and act upon the testament of our great Ho Chi Minh, and advance enthusiastically along the line charted by the Fourth Congress of the Communist Party of Vietnam [. . .].

The narrative, that upon which People and therefore freedom is fully dependent for meaning, must be kept alive, relevant and meaningful.<sup>12</sup>

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<sup>12</sup> I choose to stop here with the Constitution of 1980, but of course much has happened to further complicate the narrative since. Of particular significance were the Doi Moi economic reforms of the late 1980s. On this Hue-Tam writes: "with Doi Moi, History lost its capital *H* [. . .] The end of utopia has taken away the telos that had made possible a particular writing of Vietnamese history."

## **The Voice of the People**

As “People” is made in the building of the narrative and in the giving of retrospective consistency in the face of decisions and reactions, circumstances and accidents, it is clear that it can never have any definitive or essential content. What appears as inevitable is but one of the possible outcomes; the People are in a certain sense a product of chance with no guarantees of any direction or inherent progress. “People” is a flawed and often degraded concept, yet, it seems to me, the material realization of Žižek’s “simple faith in the eternal Idea of freedom” lies in being recognized as one of the People. What is the alternative? Is freedom in the national, political cultural sense, separable from People? Internally, the many differing cultures and peoples that comprise nations have little hope of audible voice if they are not somehow included as a part of the People and their new narrative history. Of course, the history of the People can never be understood as being the same as the histories of the peoples. What, after all, does the construction of a revolutionary unity of People tell us about the narratives of non-communists, women, the poor, the immigrants, the refugees, those physically and psychologically affected by generations of war or those born since 1980? And yet it is the People who have Freedom, are said to have fought for it, established it and lived it.

The People need an organized, visible history, but the best hope for the notion of “People,” and all those represented within it and by it is that it remain an ever-unstable and changing category. That is, it is a category which must gain its meaning and efficacy from the inside. The “People” as a fixed idea can only be forcefully maintained from above and therefore can only be destructive to any pursuit of liberty. To repeat an assertion by Chantal Mouffe used in the introduction:

It is always possible to distinguish between the just and the unjust, the legitimate and illegitimate, but this can only be done from within a given tradition, with help of standards that this tradition provides; in fact, there is no point of view external to all tradition from which one can offer a universal judgement. (37)

Cultural determination of meaning allows and depends upon the possibility of the exchange of ideas, of differing voices, traditions, questions and interpretations. The result may be a loss of ultimate foundation, a destruction of enforced concepts of a universal People, but, according to Laclau, this is part of an organic, positive and productive process:

if an ultimate ground is posited, political argument would consist in discovering the action of a reality external to the argument itself. If, however, there is no ultimate ground, political argument increases in importance because, through the conviction that it can contribute, it itself constructs, to a certain extent, the social reality. Society can then be understood as a vast argumentative texture through which people construct their own reality. (79)

## Chapter 5

### The People of the Transition

Walls could protect against foreign enemies, but almost as dangerous as they were domestic rivalry, envy, and anger. As populations increased and wealth accumulated, it became as imperative to find ways to bring order into the distribution of goods among the inhabitants as to defend them from foreigners. The domestic counterpart of the wall was the deed.

(William R. Polk 22)

Every political sect has its esoteric and its exoteric school, its abstract doctrines for the initiated, its visible symbols, its imposing forms, its mythological fables for the vulgar.

(Thomas Macaulay 53)

### Spoken For

The Preamble to the Interim Constitution of Iraq (also known as the Transition Administrative Law or TAL), in effect from March 2004 to the election of December 2005, keeps a certain distance from the Iraqi People, preferring to employ the third-person rather than a collective voice:

The people of Iraq, striving to reclaim their freedom, which was usurped by the previous tyrannical regime, rejecting violence and coercion in all their forms, and particularly when used as instruments of governance, have determined that they shall hereafter remain a free people governed under the rule of law.

These people, affirming today their respect for international law, especially having been amongst the founders of the United Nations, working to reclaim their legitimate place among nations, have endeavored at the same time to preserve the unity of their homeland in a spirit of fraternity and solidarity in order to draw the features of the future new Iraq, and to establish the mechanisms aiming, amongst other aims, to erase the effects of racist and sectarian policies and practices.

This Law is now established to govern the affairs of Iraq during the transitional period until a duly elected government, operating under a permanent and legitimate constitution achieving full democracy, shall come into being. (“Iraq – Interim”)

“These people,” though historically free, as the Preamble states, are spoken for before they may speak for themselves. The collective expression will appear in the apparent realization

of the TAL's purpose, the current Constitution of Iraq, approved by referendum in October 2005. The latter begins in the traditional style, employing the collective "We": "We are the people of the land between two rivers [. . .]" ("Full Text"). According to Michael Knights of the Washington Institute, it seems that the preparation of the "people of Iraq" to speak for themselves already assumed their existence as a voiceless body:

U.S. returnees from Iraq voice quiet confidence that free and fair voting held against a backdrop of an inclusive political campaign will result in the election of a surprising number of moderate, secular representatives. One of the primary lessons of the past year and a half is that the United States and its allies need to enable this silent majority of Iraqis to find their voice. (9)

The "silent majority" are perhaps a recent manifestation of the same expectant body that the British High Commissioner of Baghdad described in a 1925 report to Colonial Secretary L.S. Amery: "The mass of the people of Iraq were silent, showing that strange and admirable restraint with which Oriental peoples await the fulfilment of the purposes of God; but unshakeable through all had been their belief [. . .] in the generosity and high purpose of Great Britain towards weaker peoples" ("Establishing the Kingdom" 43).

The silent subjects may not remain so; they are to become those who must act, or at least be seen to act. As the occupation of Iraq from March 2003 is explained by the ending of the "previous tyrannical regime" and the bringing of democratic freedom, democracy has to be seen to happen. Obviously this requires a People who will act accordingly and positively; i.e., vote in elections and referenda and participate in the new government. As we will see in more detail below "These people," as the necessary active subjects, are written into the new constitutional narrative before the required participation, the elections and referenda; even before the invasion itself. As with "We the People of the United States," written into the US Constitution before any but the Founding Fathers at the secretive Philadelphia Convention had seen it, they are that which *will* perform the requisite

constitutional functions. Or, put another way, those actual people who do participate, regardless of their particular aspirations and motivations, become, as far as the dominating, democratising narrative is concerned, that which has already been defined as “These people.”

Stephen Zunes<sup>1</sup>, in an article otherwise highly critical of the US invasion and the “widespread irregularities” of the January 2005 elections for the National Assembly, praises the electoral turnout, which for many involved extremely dangerous circumstances, as “a remarkable testament to the Iraqi people’s desire for self-determination and for accountable government” (67). But this relatively successful democratic process (at least for many Shi‘i and Kurds<sup>2</sup>) hid within it a unified nationalist opposition which would not and could not be heard, as Zunes goes on to point out: “Exit polls indicated that the number one reason Iraqis went to the polls was in the hope that in establishing their own government, US forces would leave their country. Parties opposed to the ongoing US military presence in Iraq won the overwhelming majority of the votes” (68). Thus there are the actual people who, though divided along various lines and with differing motivations and needs, are united as a majority (as a People) by a desire for sovereignty and autonomy, which logically cannot exist under occupation. But herein lies a paradoxical conflict. If “These People” are supposed to be a sovereign, national entity (a manifestation of that historically sanctified, universally recognized category known as “The People”), then they could *only* desire the end of occupation. In this case, for there to be a correspondence

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<sup>1</sup> Stephen Zunes is a Professor of Politics and International Studies at the University of San Francisco and has written extensively on the Middle East, human rights and nonviolence.

<sup>2</sup> On this election, Gareth Stansfield, Director of the Institute of Arab and Islamic Studies at the University of Exeter, writes: “the turnout in the Kurdish and Shi‘i areas was very high – perhaps as high as 80 per cent in Shi‘i areas, and an astonishing 90 per cent in Kurdistan. Meanwhile, the turnout in the Sunni Arab areas was as impressively low. Indeed the turnout in Mosul was as low as 10 per cent, and most of those would have been Kurds” (182).



between actual people and “These people,” the Coalition would have to leave if voted against. But “These people,” as a necessary construction *of* the Coalition, obviously cannot vote for what the actual people did: the rejection of that which makes sovereignty impossible, the Coalition.

In Coalition rhetoric, to not be one of the yearning mass of the “people of Iraq” is tantamount to being one of an indeterminable force of pure negativity, as George Bush illustrates:

In great numbers, and under great risk, Iraqis have shown their commitment to democracy. By participating in free elections, the Iraqi people have firmly rejected the anti-democratic ideology of the terrorists. They have refused to be intimidated by thugs and assassins. And they have demonstrated the kind of courage that is always the foundation of self-government. (Bush)

When the Coalition needed decisions to be made, timetables met, progress seen to be occurring, the ideal “These people” had to be kept safe from the threats of the outside world. In the summer of 2005, under pressure to meet the August deadline for completion, the writers of the Constitution of Iraq were carefully protected:

Every meeting of the Committee, the National Assembly, and the Leadership Council took place behind the blast walls, barbed wire, and gun turrets of Baghdad’s International Zone. Iraqi citizens could gain entry to the International Zone only after time-consuming and dangerous queuing and multiple body searches. Phone lines and internet connections were uniformly bad. The opportunity for Iraqis to communicate, either formally or informally, with their constituent representatives was practically nil. (Morrow 18)

As we will see, demands for popular participation had by this point become a hindrance and a threat to Coalition progress in establishing its version of popular participation.

The use of the third person is also indicative of a certain kind of purposeful disengagement, as if the democratization of Iraq should be regarded from an objective distance, like a scientific study. The Iraqi People, once provided with the proper conditions

and guidance, are set in motion and observed, according to Edward Chaplin, British Ambassador to Iraq (2004-2005): “Despite popular myth, the governments of the US and the United Kingdom have not been directing negotiations from behind the scenes, but have deliberately stood back, to allow the Iraqis, with expert help from the UN, to conduct the constitutional process” (281). The action “deliberately stood back, to allow” is indicative of a pre-given position of dominance relative to the proceedings; the position of the examiner rather than the examined. Could Iraqis step back and allow? Contained in this privilege is also an implicit authority to step back in if deemed necessary. (And as we will see, it is continually deemed so.)

### **Experimental Subjects**

According to a report by the Washington Institute, entitled “Building a New Iraq,” it would appear that the achievement of further, regional aims is ultimately reliant upon the establishment of an autonomously operating Iraqi People: “America’s endeavor will succeed – with beneficial impact on U.S. interests throughout the Middle East – should U.S. efforts culminate in providing the free people their long-denied opportunity to build their future for themselves” (258). The success of the endeavour has, as Chaplin also stresses, far reaching and historically unprecedented implications: “The drafting of Iraq’s new constitution is the boldest experiment in reform which the Arab world has seen in living memory” (283). An “experiment,” a test of a time-honoured and successful system carried out on a recalcitrant subject: the “people of Iraq.” (Interestingly, this same scientific terminology was also used by British colonial secretary L.S. Amery in 1925, in praise of the R.A.F.’s achievements in Iraq: “It is due to its ceaseless vigilance that the work of political construction is able to proceed. Without its presence the novel experiment which

we are conducting in the country would have no chance whatever of success [. . .]” (qtd. in Sluglett 91).)

Such a rhetorical distancing reflects, I believe, a wider presentation of Iraq not in terms of concrete peoples and histories, but as a promising material that may be acted upon in the effort to redeem the chaotic, dangerous space of the “Middle East.” This view Knights makes evident with: “The September 11 terrorist attacks on the United States had brought the Middle East to the center of U.S. national security strategy, and now the invasion of Iraq saw the United States and its coalition allies project major armed forces to the very heart of the Middle East” (7).<sup>3</sup> If the heart is sick, then, one assumes, so will be the whole body. In the presentation of the democratization of Iraq, a compliant “people of Iraq” who live in the imaginary realm of “the very heart of the Middle East” must be sustained even in the face of the death and injury of actual people. The British Ministry of Defence report on the 2003 invasion explains:

Commanders taking targeting decisions had legal advice available to them at all times during the conflict and were aware of the need to comply with international humanitarian law [. . .] only military objectives may be attacked [. . .] no attack should be carried out if any expected incidental civilian harm (loss of life, injury or damage) would be *excessive* in relation to the concrete and direct military advantage expected from the attack.” (“Operations”; emphasis added)

A position of superior authority is surely necessary in order to credibly disseminate arguments according to which diverse peoples and histories are characterized as “These people,” sovereignty is military occupation and humanitarian law provides the acceptable parameters of civilian death. Such arguments are not the privilege of all to make. It is also

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<sup>3</sup> Going boldly to “the very heart” is perhaps a recognizably American heroic narrative, as compared to that of stalwart Britain, surrounded by enemies in the early 1920s: “from India to Egypt, the Eastern world lay in a welter of resentment against the policy of the British and their Allies, the aims of which had been everywhere industriously misrepresented by their enemies. Iraq, in the very centre of this vortex of hostile impulses, was especially affected by them” (“Establishing the Kingdom” 6).

evident in the MOD passage, as well as those of Knights, Chaplin, Bush, Amery and the TAL, that this is not an authority that may express itself merely brutally; it must also show reason and conviction. As Michael Hardt and Antonio Negri argue, such an authority is backed by far more than physical strength: “Empire is formed not on the basis of force itself but on the basis of the capacity to present force as being in the service of right and peace” (15). In Edward Said’s view, this “capacity” is founded upon an existing “cultural authority” and an increasingly comprehensive means of dissemination:

This twinning of power and legitimacy, one force obtaining in the world of direct domination, the other in the cultural sphere, is a characteristic of classical imperial hegemony. Where it differs in the American century is the quantum leap in the reach of cultural authority, thanks in large measure to the unprecedented growth in the apparatus for the diffusion and control of information. (352)

A significant measure of “the capacity to present” and “cultural authority” is, it seems to me, the power to sustain moral arguments and narratives of liberty and sovereignty directly contradicted by, or distinct from, (highly visible) reality. The period between the invasion of March 2003 and the appearance of the TAL one year later brings this out in two ways. The first lies in the ignoring and the active exclusion of the many groups of actual Iraqi people during the events that would result in the textualization of the “people of Iraq” in the TAL. The second is in the fact that the objective, scientific distance discussed above does not exist in practice. The year in question here, as we will see, can be characterized not as a plan or an experimental procedure, but as a series of reactions to crises. Neither the TAL nor the innumerable positions taken in resistance and participation are predictable points along a liberating path from Tyranny to Freedom, but consequences and products of the Coalition presence. In this respect, the assertion that United States and

Britain “deliberately stood back, to allow [ . . . ],” as Chaplin put it, is, I would argue, impossible.

### **From Invasion to Transitional Administrative Law**

The crushing of the state power structure and central, dominating authority of Saddam Hussein’s Ba’th Party in March 2003, according to an analysis by Gareth Stansfield, resulted in the immediate localization of power along regional, ethnic, tribal and religious lines: “When the regime was removed, Iraqi society shattered into pieces” (158). The Coalition, apparently convinced by former Iraqi opposition leaders, Ahmad Chalabi in particular, that a People would democratically rise in unity, had few evident schemes for the establishment of transitional governing institutions. In April, as a reaction to the growing division and resistance, the US established the Office of Reconstruction and Humanitarian Assistance (ORHA) under General Jay Garner. With policies in increasing conflict with Pentagon wishes (and Chalabi’s), and with widening disaster (this was the time of mass looting), the ORHA was finished by early May. In its wake entered Ambassador Paul Bremer III and the more militant, Pentagon-backed Coalition Provisional Authority (CPA). To foster some kind of central reconciliation, the CPA chose representatives of differing religious, ethnic and political affiliations to form a Leadership Council, otherwise known as the “Magnificent Seven.” Shi’i leader Grand Ayatollah Ali al-Sistani objected to this Council, demanding instead a democratically elected assembly that would draft a constitution. This objection was passed over and the CPA expanded the Council into the “hand-picked” Iraqi Governing Council (IGC) on July 23 2003 (Stansfield 170). The IGC was charged with drafting a constitutional law by December 15 under which a constitutional convention could be formed, followed by a constitution, a referendum, a

general election and power transferred directly from the CPA to a sovereign Iraqi government. By November, against a background of objection from all sides, growing violence, alienation and looming national disintegration, it was obvious that the plan would not work on time and was abandoned. Then it was decided that a Transitional Administrative Law (TAL) should be enacted by February 2004 under which an unelected Transitional National Assembly (TNA) might be created via a caucus system, in order to draft a permanent constitution. With Ayatollah al-Sistani arguing against the undemocratic selection process of the TNA, the Kurds “increasingly exasperated,” and the Sunni “distinctly unrepresented,” it too collapsed (Stansfield 172-73). Of this period Zunes writes: “When that plan was met in January 2004 by hundreds of thousands of Iraqis taking to the streets protesting the proposed caucus system and demanding a popular vote, only then did President Bush give in and reluctantly agree to allow direct elections to move forward” (65). In February 2004 the UN were called in – an acquiescence, Stansfield remarks, in itself indicative of the crisis in US leadership – to broker a compromise involving a “caretaker government” that would assume responsibility for drafting a constitution after a handover of power on June 30 2004 (173). By March 8 of that year the IGC meanwhile had come up with the TAL. Stansfield writes that “the TAL was more a postponement of fundamental issues rather than a result reached by compromise. As such, it was riddled with ambiguities. Even issues of fundamental importance [Islam and the political structure] were basically fudged in order to pass the document and keep the political process on track [ . . . ]” (174). Following further marginalization of UN recommendations, the Iraqi Interim Government (IIG) was put together by the CPA and the IGC. In June 2004, given operating control by UN resolution, the CPA took on an “advisory” position via the US embassy (Stansfield 158-91). “The CPA legacy to the new IIG was one in which power had

chaotically devolved to localities; where militias were the pre-eminent forces dictating social actions; and a range of insurgencies had flourished under conditions almost comparable to those of a failed state” (175).

### **Disqualifying History**

In a manner analogous to the ahistorical “People” of the US Constitution as examined in Chapter 2, “The people of Iraq” in the Preamble of the TAL are isolated in usage from change, contingency and consequence. They are presented without history, other than to be an undifferentiated body that once was free, lost that freedom, and then (by their decisive will) regained it, to keep forevermore. Despite their exclusion, they had been, according to the TAL, actively involved. To repeat the relevant section: “The people of Iraq, *striving* to reclaim their freedom, which was usurped by the previous tyrannical regime, *rejecting* violence and coercion in all their forms, and particularly when used as instruments of governance, have *determined* that they shall hereafter remain a free people [ . . .]” (“Iraq – Interim”; emphasis added). The “people of Iraq” are thus made the “hero of liberty,” as Jean-François Lyotard puts it (31), of the essential constitutional narrative: originary freedom – struggle with oppressive forces – freedom fully realized as a sovereign People of a democratic nation.

It is, I believe, the eminently recognizable sanctity of this narrative that in part enables the argument of liberation by invasion to be sustained. True freedom, democracy and equality are good; if these are the aims, then the means by which they are reached (even if they are never reached) must also be good. But that in itself would not be adequate. It is also necessary to take into account to whom the narratives of liberty are applied, as well as who is doing the telling. There is authority in the Western origination and

ownership of such narratives, in the assumed right to define them and in the vast means to disseminate interpretations. That is, there is not an equivalence in their application; differences and distances are maintained. Patrick Clawson, editor of *Middle East Quarterly*, elucidates a view of the Iraqi transformation to modern democracy that does not appear in Western conceptions of enlightened popular sovereignty:

When they look outside the family, Iraqis still have few places to turn except their primordial links, i.e. to ethnic, religious, and tribal ties. Primordial groups define politics in zero-sum terms where every gain for one group is a loss for all the others. It is hardly surprising that the transition to a participatory system is producing increased ethno-religious and tribal tensions. (301)

That is, not a People, but a pre-People; a primitive conglomeration of self-serving groups. The “tensions” that have arisen have no *cause*, but are the inevitable result of the painful “transition to a participatory system”; the vaulting of centuries in a single bound. To construct a narrative of Iraq in which it must struggle to escape a “primordial” condition is not only to suggest a failed cultural evolution that *requires* intervention and rescue, but also to remove the cohesive, wilful community central to the constitutional narrative.

Privileged, by contrast, is the natural, historical emergence and character of the European nation-state. Of the evolution of the latter, Ferdinand Tönnies writes that “the original form of a common life is the kinship group [. . .]” bound by a “common relation to the soil [. . .]” (26). Even as the human community grows into village and town, roles diversify and many become remote from the land, relationships between groups become partitioned and increasingly complex, still the sense of essential community remains (26-27). Eventually arrives “that commonwealth which later in Europe and elsewhere up to our time has bequeathed its character and name to the state (*Staat*), the mightiest of all corporate bodies” (27). The appearance of the bourgeois, capitalist *Gesellschaft*, as a ruling class which makes itself “identical with, as well as representative and advocate of, the



whole people to which it furnishes guidance,” (29) requires an existing communal bond, a People, or *Gemeinschaft*:

These social bodies and communities retain their common root in that original state of belonging together which according to our concept is the *Gemeinschaft* [ . . . ] a people (*Volk*) which feels itself bound together by a common language [ . . . ] will desire to be represented in a unity or *Volksgemeinschaft* [ . . . ]. (28)

The political, cultural and social history of Iraq, along with that of many other postcolonial nations, will not be described by the kind of account that Tönnies’ provides. Consequently, despite the promotion of global democratization as a levelling of humanity, Iraqi democratic liberation will not be regarded as an equivalent of, say, that of the United States or Britain.

Distance may be established in relation to the “people of Iraq,” who, as an invention of the Coalition, have not got any social history, but not in relation to the actual peoples, for whom understanding and interpretation of history has been of crucial importance. The concept of nation and the understanding of what constitutes the identity of the People in Iraq have emerged under vastly different circumstances from those of Western nations. At the same time, conceptions of national cohesion and common purpose which do exist are inseparable from the influence of, and reaction to, continual Western presence and intervention. According to Mohammad-Mahmoud Mohamedou,<sup>4</sup> Iraq has existed as primarily territorial rather than national; in other words, a bonding by geopolitical boundaries rather than a sense of common culture or community imagined as belonging naturally and historically to a definite space. Constructed by the British,<sup>5</sup> and thus an

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<sup>4</sup> Mohamedou was Director of Research at the International Council on Human Rights Policy (1998-2004), and Deputy Director of the Program on Humanitarian Policy and Conflict Research at Harvard University (2004-2008).

<sup>5</sup> From the *vilayets* of Baghdad and Basra in 1921; Mosul being added in 1926. (Stansfield 45-46)

externally created amalgamation of peoples, histories, religions, languages and communities, Iraq has not had the apparent continuity and contiguousness of state and society so essential to Western conceptions of historical sovereignty (73-75). State power, thus never able to be a representative class like Tönnies' *Gesellschaft*, has therefore had to continually create and sustain its legitimacy as a central authority in spite of the fact that "The family, the tribe, and the local community have often enjoyed more sacred obedience from Arabs than has their state. Harmony and correspondence between state and society in the Arab world is still an ongoing process and an unresolved matter" (75). Consequently, a particular political purpose to the use and interpretation of cultural history has developed in Iraq and other Arab nations. Eric Davies and Nicolas Gavrielides, in *Statecraft in the Middle East*, focus on the way in which the concentrated study of history and folklore in Iraq (and Kuwait) has been used "to promote a historical memory that would provide the foundation for a nationalist ideology intended to reconcile traditional social antagonisms as well as strengthen the legitimacy and authority of the central state" (116).

The necessity of linking existing rule to national cohesion and strength was, for example, essential to Saddam Hussein and Ba'athist ideology. Hussein, Davies and Gavrielides point out, ran a "Project for the Rewriting of History." Despite its Orwellian tone, they write that, "The ostensible reason is a valid one. Iraqi historians claim that Western Orientalists have attempted to reduce modern Iraqi history to a conflict between the sunni north and the shi'i south in an effort to perpetuate social and political divisiveness [ . . . ]"; the ultimate and continual motivation for Western interest of course being oil (132-133). Hussein, however, leaves no doubt as to the fact that history must have a purpose if it is to have value; in a collection of lectures entitled *On History, Heritage and Religion*, he asserts that,

History is the final outcome determined by the will of a nation itself. When a group of people living on a piece of land freely decide that they form a nation, they will eventually become a nation, because it is their will that determines whether they are a nation or not. Hence all aspects of life, including history, are used in reinforcing or weakening this will. (11)

The attempts to create a “historical memory” in Iraq, as elsewhere in the Arab world, should not be understood, Davies and Gavrielides stress, as a linear progression of thought. Rather, constructions and conceptions of the past, of the national polity and ideology, of the People, have emerged contingently in unforeseeable configurations and reactions to internal events and external pressures. And though such constructions are often appropriated by those who wish to maintain power, “Arab intellectuals constantly assert that without a historical consciousness, the Arab world cannot hope to achieve any meaningful level of development” (121).

According to Hardt and Negri, subaltern concepts of nationalism and the People have been “progressive” in two ways. The first is the construction of the nation in on-going defence against external control, imperialism, ideology and discourses of moral, political and social superiority (106). The second entails what is tantamount to an inversion of the European historical narrative: rather than an ancient community as the sovereign basis of the nation, the subaltern nation comes to serve as a unifying concept for otherwise distinct communities, “breaking down religious, ethnic, cultural and linguistic barriers” (107). For present purposes this needs to be considered in conjunction with another assertion of Stansfield’s:

the empirical evidence suggests that the weakening of state sovereignty by the forces of globalization can in fact encourage the political fragmentation of multi-ethnic states, particularly if the role of a central authority declines and groups become fearful for their physical survival in an environment characterised by heightened levels of instability. (160)

It is possible, then, that the Coalition powers, by their very presence, are instrumental in destructing an existing unity of Iraqi People. One might predict, therefore, either the disintegration of the Iraqi state, or that a new oppositional cultural unity will form; this one hitherto unseen and unpredicted in its shape: a contingent product of the occupation. Recognition of this reality is avoided by denying the historical existence and formation of an Iraqi People in the first place, and positing instead an unchanging concatenation of mutually-hostile, primitive groups. It is the imaginary latter who will undergo transformation into the compliant, ahistorical “people of Iraq.”

## **World Law**

The TAL Preamble is not about the past or contingent realities and histories; it is about adherence to a global order. In this, then, “people of Iraq” achieves its true significance; without history it can be truly owned, studied and made. The “people of Iraq” are placed into an interconnected relationship with three levels of law. The first is the rule of law: “they shall hereafter remain a free people governed under the rule of law” (“Iraq – Interim”). I think it clear in this case that the rule of law cannot be understood as the nationalist, revolutionary right that Thomas Paine so emphatically celebrates:

in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law *ought* to be King, and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, as scattered among the people whose right it is (98; emphasis in original).

The new constitutional era of Iraq is not to be characterized by revolution or nationalism as these are the unpredictable and uncontrollable realities of the postcolonial “Middle East” that the Coalition invasion, in pursuit of global order, strives to eradicate. As we have seen, nationalism and cultural unity have been inseparable from the necessity to engender a

strong state in the face of continual external encroachment. “These people” do not resist. That the rule of law is not the “immanent constituent power [. . .],” as Hardt and Negri put it (74), of the Iraqi People, becomes more evident in the next section of the Preamble and the next level of law: “These people, affirming today their respect for international law, especially having been amongst the founders of the United Nations, working to reclaim their legitimate place among nations [. . .]” (“Iraq – Interim”). The relationship to the law thus shifts from the national to one of responsibility towards international norms and expectations. To be noted first of all is that the responsibility of “respect for international law” lies directly with “These people.” On one hand this seems empowering, a democratic linking between the national and the international in that it must be the People who take it upon themselves to elect leaders who will comply with international norms and laws. The national leaders become but a body of intermediaries between irreproachable international law and the People. But on the other, this is to establish a system in which the People are emptied of their ontological power and historical right. “Respect” is a passive state not an act of decisive will; the alternative is disrespect, not resistance. In this context, Hardt and Negri argue that what we witness today is state function, autonomy and the “sphere of mediation among conflicting social forces [. . .]” as “displaced” to transnational institutions, organizations, “international bodies and functions.” They write that “The decline of any autonomous political sphere signals the decline [. . .] of any independent space where revolution could emerge in the national political regime, or where social space could be transformed using the instruments of the state” (308). Is it possible to say that international law emanates from and belongs to, in Paine’s words above, “the people whose right it is”? What is the mechanism or the historical imperative by which the “crown” can be “demolished” if abused?

The pursuit of national cohesion can only be conjoined with allegiance to the international order: “These people [. . .] working to reclaim their legitimate place among nations, have endeavored at the same time to preserve the unity of their homeland in a spirit of fraternity and solidarity in order to draw the features of the future new Iraq [. . .] to erase the effects of racist and sectarian policies and practices” (“Iraq – Interim”). Thus we have history as effaced by another duality: the legitimate path and the wayward path. The point here, it should be stressed, is not that national sovereignty should have some absolute sanctity. Countless manifestations of past and present abuse by dominant and subaltern power structures alike in the name of national identity immediately make such a view insupportable. Nor is the point that adherence to an international system is inherently and necessarily undesirable. The contention, rather, is that replacing cultural differences, histories, memories, grievances and identities with such dualities as “These people”/terrorists, primordial/participatory, internationally legitimate/illegitimate is disempowering. Without recognized differences, and without the directly accessible democratic systems of redress and expression, the argumentative position is lost, and thereby the democratic voice is indeed silent.

Then, finally, is the third level: “This Law,” appearing as “This Law is now established to govern the affairs of Iraq during the transitional period until a duly elected government, operating under a permanent and legitimate constitution achieving full democracy, shall come into being” (“Iraq – Interim”). “This Law” is ultimately premised upon two immutable conditions: its absolute supremacy during the transition period, and the timetabled demise of that supremacy with the transfer of constitutional power to the Iraqi government and People. The first condition appears in various guises throughout the TAL, but most directly in Article 3: “(A) This Law is the Supreme Law of the land and

shall be binding in all parts of Iraq without exception. [ . . . ] (B) Any legal provision that conflicts with this Law is null and void.” The basic stipulations of the second condition can be seen in Article 2: “(A) The term ‘transitional period’ shall refer to the period beginning on 30 June 2004 and lasting until the formation of an elected Iraqi government pursuant to a permanent constitution as set forth in this Law, which in any case shall be no later than 31 December 2005, unless the provisions of Article 61 are applied.” Article 3 also makes this plain: “(C) This Law shall cease to have effect upon the formation of an elected government pursuant to a permanent constitution” (“Iraq – Interim”). Thus, the transfer of constituted power is to be total; from “this Law” to the “people of Iraq.”

The supremacy and the cessation of the TAL are, I would argue, co-dependent; in fact it seems possible that the true expression or realization of the power of “this Law” *is* its unquestionable, untouchable authority to dictate the rules, the conditions and the timed circumstances upon which sovereign authority will seem to be transferred to the Iraqi People. Put another way, it is control of the manner in which “These” will be redefined as “We.” The elected National Assembly is given numerous powers by the TAL by which it may effectively govern, provided that “this Law” is never contradicted. The Assembly even has a limited possibility to amend “this Law” under strict conditions, but “no amendment may be made that could [ . . . ] extend the transitional period beyond the timeframe cited in this Law [or] delay the holding of elections to a new assembly [ . . . ]” (“Iraq – Interim”). To have control of the moment and the method of the transfer of sovereignty is to have control of the whole of the constitutional narrative. All constitutions are ultimately about this moment: the representatives of “We, the People” declare a point in time when the fundamental, inviolable laws of the land begin; previous laws, customs, traditions, dictates will no longer have authority except as subordinated to the higher totality of the new

constitution; the present and future are legally and culturally divided from the past. It is the power not only to define what the People are, but what they were. In a way, the Coalition power over the transition is that inherent, once again, in Chaplin's "stepped back, to allow": the experiment cannot be allowed to happen indefinitely; eventually it must be declared finished or moved to a new stage. The subjects do not make this decision.

Sovereign power cannot be seen to be simply given to the Iraqi People; it must be taken by collective will and decision, in a time-honoured act of reason. The forum for this act was provided by the constitutional referendum of October 2005.<sup>6</sup> This referendum was not only significant in its own right of course, but also in its visibility as a presentable, unassailable and universally recognizable act of "We the People." The TAL stipulates, however, that if popular sovereignty were not taken according to the Coalition conditions, then power would have to remain with the source. It had to be seen to be taken, but only in the approved way. The failure of the Assembly to complete the constitution by the stated deadline of August 1, 2005 (Article 61 gives the National Assembly the option of a six-month extension, but only once: "This deadline may not be extended again"), or the failure of the people to vote in favour of the draft would have resulted, according to "this Law," in a reversion to direct Coalition sovereignty; the draft constitution and the elected Assembly swept away to be begun again:

Article 61 (E): If the referendum rejects the draft permanent constitution, the National Assembly shall be dissolved. Elections for a new National Assembly shall be held not later than 15 December 2005. The new National Assembly and new Iraqi Transitional Government shall then assume office no later than 31 December 2005, and shall continue to operate under this

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<sup>6</sup> The draft constitution received the requisite approval with 9.8 million votes in favour - 78% of the 63% of eligible voters who took part ("Iraqi"). Which means, by my calculations, that over half of the eligible electorate either voted against or not at all. Of the four Sunni dominated provinces, 97% voted against in Anbar, 82% in Salaheddin, 55% in Nineveh and 51% in Diyala. The TAL rules were that if more than two-thirds of three of the eighteen provinces had voted against, the constitution would have been rejected ("Iraqi Constitution Passes").



Law, except that the final deadlines for preparing a new draft may be changed to make it possible to draft a permanent constitution within a period not to exceed one year. The new National Assembly shall be entrusted with writing another draft permanent constitution.

Article 61 (G): If the National Assembly does not complete writing the draft permanent constitution by 15 August 2005 and does not request extension of the deadline in Article 61 (D) above, the provisions of Article 61 (E), above, shall be applied. (“Iraq – Interim”)

“This Law” thus remains the permanent and ultimate power in the sense that it is both the only legitimate source and that to which all will revert in the absence of the new Constitution. Of the nature of this power, Giorgio Agamben writes:

sovereign dictatorship [. . .] aims at creating a state of affairs in which it becomes possible to impose a new constitution [. . .]. Constituent power is not, however, [and here Agamben quotes Carl Schmidt] ‘a simple question of force’; it is rather, ‘a power that, though it is not constituted in virtue of a constitution, is nevertheless connected to every existing constitution in such a way that it appears as the founding power, . . . and for this reason it cannot be negated even if the existing constitution might negate it’. (34)

The transition period, the interim constitution, treaty, mandate or other structure ostensibly designed to have legitimacy only during a transfer of authority, whilst actually sustaining that power, is of course not an invention of the Coalition. Iraq under the British is but one illustration of this; despite the end of the mandate period in 1932, and thereby nominal independence, it was not until the revolution of 1958 that Iraq could be called an independent nation (Fernea and Lewis xiii-xiv). It becomes a moment of realization or fulfilment in a narrative through which dominating powers may be seen to withdraw having completed a civilizing mission, but which often entails transferring control into another, less direct form. The TAL, in my view, is essentially no different from its predecessors in this respect. There is however a difficulty in trying to make the civilizing narratives of the current circumstances analogous to, or the equivalent of, previous occurrences. If those previous accounts made comprehensible the withdrawal or expulsion of forces, now the

same story is paradoxically used to explain going *in*: occupation as the way to establish systems and institutions by which occupation may be ended; multiple layers of external rule unaccountable to the People in order to guarantee and legitimize self-determination; the handing over of power in the very action of taking it away. It is here, I believe, that we have the true contemporary significance of “These people.” Power is ostensibly transferred from the Coalition to the latter, but as has been argued in various ways throughout this chapter, “These people” exist principally as an invention necessary to, and ever owned by the Coalition. Thus sovereignty undergoes transferral, and yet goes nowhere. If, as Bush intimated earlier, all of those resisting the occupation are “anti-democratic” terrorists, then to fight for liberty (in the nationalistic sense) is somehow simultaneously to fight against it.

If the constitutional language and narratives of liberty and sovereignty can be used to sustain and make comprehensible the loss of liberty and sovereignty, then how can they possibly be understood? This new manifestation of constitution writing as nationally adjusted rules for adherence to a supranational order thus represents a development which the traditional, modernist constitutional narratives and terms cannot adequately describe. Yet, as this is the language which is recognized and therefore rhetorically effective, it is used anyway. Is this then what we might now expect to see in the constitution writing of those “liberated” nations whose resources, land and labour are required by the rich and militarily dominant nations? Is this what the “experiment” is really all about? Perhaps, but this does not describe the totality of recent endeavours. There has also been what I will call (as it does not promote itself in this way) a counter-movement that needs attention here, as do this movement’s attempts to positively and progressively influence the Iraqi constitution-writing process.

### **“Conversational Constitutionalism” and “Lost Opportunity”**

The United States Institute of Peace (USIP), working with the United Nations Development Project (UNDP), has been running a project, described as “an 18-country study on ‘Constitution-Making, Peacebuilding and National Reconciliation,’ which explores the options and limitations of using the constitution-making process as a means of conflict resolution and peacebuilding.” (“Iraq’s Constitutional Process,” 3). Vivian Hart, as a contributor to this project, writes of what she refers to as “new constitutionalism” (and also as “participatory constitution making” or “conversational constitutionalism”):

“constitution making as a process rather than a once-and-for-all defining moment, and of democratic re-negotiation as the heart of a politics of recognition and inclusion” (5). In illustration of what this might include at a practical level, Hart writes,

prior agreement on broad principles as a first phase of constitution making; an interim constitution to create space for longer term democratic deliberation; civic education and media campaigns; the creation and guarantee of channels of communication, right down to local discussion forms; elections for constitution-making assemblies; open drafting committees aspiring to transparency of decision making; and approval by various combinations of representative legislatures, courts, and referendums. (2)

These practices are set in contrast to what are regarded as the traditional, historical methods of constitution writing by an elite group in possession of the social means, education, opportunity, technical knowledge and expertise, control of the military and dominant ideology. By this model certain values and practices, assumed to be universal (and therefore universally applicable) are set into the highest law and then set in motion. Hart is careful in this not to suggest that the new methods she advocates, with their emphasis on process and communication, should somehow replace the traditional practices, or that constitutions constructed by these procedures are no longer valid in the contemporary world

(2-3). Which is not to say that there is not resistance: “Ironically, older nations in the western liberal tradition from which such calls [for democracy as world norm] have come have not often themselves extended the idea of democratic governance to constitution making” (12). Her point, rather, is that top-down methods are increasingly inadequate in forging the re-building of trust, the reconciliations, the bringing together of communities long and bitterly divided, the establishment of new systems of equality for minorities, women, and the otherwise excluded and marginalized in postconflict, postcolonial nations. Indeed, in nations whose experience of constitutionalism has been one of abuse of constitutional power and alienation from its construction and implementation, the top down approach can be directly detrimental to the creation of a peaceful, mutually-respecting society (2-4).

Participatory constitution writing, whilst clearly a vital change in thinking and practice, should not be understood, I believe, as a kind of cutting edge of constitutionalism, or the natural evolutionary progression of democratic inclusion and history. As suggested by Hart, the very nations which regard their systems as the most sophisticated and exemplary, and which might therefore be expected to be engaged in new practices, resist in favour of preserving the veneration and powerful exportability of their own historical systems. Instead, the demand and necessity of participation is born of a *reaction* to repeated failure, degradation and exploitation that has occurred in, by and because of the traditional constitutional system. As such, the new direction depends fully upon awareness of the particularities of histories, cultures and differences. Hence, this is the very opposite of such constructions as “These people.”

The contrast between the titles of two reports on Iraq in the USIP series itself tells a story of the Iraqi constitutional process. The first, from February 2005, one month after the

election of the National Assembly, is entitled “Iraq’s Constitutional Process: Shaping a Vision for the Country’s Future.” The second, by Jonathan Morrow in November 2005, one month after the referendum, becomes “Iraq’s Constitutional Process II: An Opportunity Lost.” In the former, drawing upon their wealth of experience in post-conflict constitution writing, the USIP makes a series of recommendations to the Iraqi National Assembly and its attendant authorities. Highlighted are the great many organized civil groups, political parties and NGOs in Iraq at this time looking to cooperate with the National Assembly (3). The TAL is praised for its pledge to work with the various communities, as is stated in Article 60:

The National Assembly shall write a draft of the permanent constitution of Iraq. The Assembly shall carry out this responsibility in part by encouraging debate on the constitution through regular general public meetings in all parts and through the media, and receiving proposals from the citizens of Iraq as it writes the constitution. (“Iraq – Interim”)

But it is found to be “silent” on the processes by which this will take place. The report therefore calls for a transparent process and clear “fundamental principles” guaranteeing rights and protections during the writing period (4-5). Emphasized throughout the report is the necessity of inclusion during the entirety of the process, not simply in the voting for a finished product; systems by which voices will be heard and responded to; innovative and wide-reaching public education; proper time allowed for the process (as this is not only about the constitution but about reparations, the building of trust and peace); ways in which certain groups who absented themselves (such as the Sunni) may return significantly to later negotiations; neutral external advice and access to experience professionals; control of draft publication (preventing the not uncommon circulation of conflicting drafts); rules for, and protection of, implementation of constitutional principles after completion.

According to the second report the explanations for why none of the above came to be properly realized, why the beginnings of positive progress in many areas (including that of Sunni participation) were so often curtailed, and why there was so much confusion, alienation and “lost opportunity,” all seem to lead to one overriding factor: insufficient time exacerbated by pressure to complete the writing. (Or, as I would argue, the necessity for the completion to be *seen* as successful.)

Public and private statements of senior U.S. officials, including the Secretary of State, the Secretary of Defense, and the President himself, dramatically increased this pressure. These officials made it clear that any move to extend the constitutional deadline beyond August 15 would earn the displeasure of the U.S. and U.K. governments. (9)

The Sunni boycotted the elections to the National Assembly, but it was agreed on all sides that a Committee might be formed in which they could air their positions and provide professional expertise and experience, though they would still lack a vote in the Assembly (8-9). Promising progress was made, although the Committee processes were not made clear and “no protocol provided for Committee interaction with the Iraqi public” (11). On August 8, 2005 the Committee was disbanded under US pressure. In its place a Leadership Council, accompanied by a sudden increase in US presence, was formed, but to which there was little regular Sunni access. Outside aid in conducting negotiations became marginalized after the Committee break up. Civil organizations such as the Iraq Foundation for Development and Democracy and the Thaqalayn Research Institute hoped to influence the draft Committee but had insufficient time; the same was to be said for women’s groups, the Iraqi Women’s Network in particular. There had been broad representation on the Committee, including nine women, representatives of the Assyrian, Shabak and Yazidi communities, and the Chairman of the Council of Iraqi Minorities, Hunain Al-Qaddo. The latter had managed to get various minorities specifically named in a draft of the

constitution. However, “The demise of the Committee on August 8 dramatically reduced the ability of these groups to participate in negotiations. The ad hoc Leadership Council meetings included no women and no non-Kurdish minorities” (17). The USIP and the UN helped to establish a Committee Outreach Unit: “responsible for disseminating constitutional information to the public and for receiving and analyzing the public response” (18). But the Outreach Unit was late getting in staff, had insufficient space and no time; there had been little public education on issues so their information-gathering questionnaire was often not understood; the uneven response they did receive had no time to be compiled and submitted to the Committee (11-19). “In very precise terms, then, the National Assembly failed to meet the obligation imposed by Article 60 of the TAL of ‘receiving proposals from the citizens of Iraq as it writes the constitution’” (19). Much resentment, the report concludes, may have been caused by the fact that public participation was promoted and stressed as part of the process, but rarely carried through. In other words, the many peoples of Iraq may not have been heard, but they were not, and will not be, silent.

The “permanent” Iraq Constitution, adopted by referendum in October 2005, of course reveals none of the differences, conflicts and failures of the above. Quite the contrary, it tells a story of cohesion, unity and single-minded determination; of a People, courageous and grateful, striding forth from the darkness into modernity. The Iraqi People are unified not only by their common struggle, but by their ancient, collective past which harkens back to the dawn of civilization in the fertile plains of “the land between two rivers [ . . .].” A familiar narrative unfolds moving from original innocence and purity, to corruption, to salvation and redemption:

In the name of God, the most merciful, the most compassionate

We have honored the sons of Adam.

We are the people of the land between two rivers, the homeland of the apostles and prophets, abode of the virtuous imams, pioneers of civilization, crafters of writing and cradle of numeration. Upon our land the first law made by man was passed, the most ancient just pact for homelands policy was inscribed, and upon our soil, companions of the Prophet and saints prayed, philosophers and scientists theorized and writers and poets excelled. Acknowledging God's right over us, and in fulfillment of the call of our homeland and citizens, and in response to the call of our religious and national leaderships and the determination of our great (religious) authorities and of our leaders and reformers, and in the midst of an international support from our friends and those who love us, marched for the first time in our history toward the ballot boxes by the millions, men and women, young and old, on the thirtieth of January two thousand and five, invoking the pains of sectarian oppression sufferings inflicted by the autocratic clique and inspired by the tragedies of Iraq's martyrs, Shiite and Sunni, Arabs and Kurds and Turkmen and from all the other components of the people and recollecting the darkness of the ravage of the holy cities and the South in the Sha'abaniyya uprising and burnt by the flames of grief of the mass graves, the marshes, Al-Dujail and others and articulating the sufferings of racial oppression in the massacres of Halabcha, Barzan, Anfal and the Fayli Kurds and inspired by the ordeals of the Turkmen in Basheer and as is the case in the remaining areas of Iraq where the people of the west suffered from the assassinations of their leaders, symbols and elderly and from the displacement of their skilled individuals and from the drying out of their cultural and intellectual wells, so we sought hand in hand and shoulder to shoulder to create our new Iraq, the Iraq of the future free from sectarianism, racism, locality complex, discrimination and exclusion. Accusations of being infidels, and terrorism did not stop us from marching forward to build a nation of law. Sectarianism and racism have not stopped us from marching together to strengthen our national unity, and to follow the path of peaceful transfer of power and adopt the course of the just distribution of resources and providing equal opportunity for all.

We the people of Iraq who have just risen from our stumble, and who are looking with confidence to the future through a republican, federal, democratic, pluralistic system, have resolved with the determination of our men, women, the elderly and youth, to respect the rules of law, to establish justice and equality to cast aside the politics of aggression, and to tend to the concerns of women and their rights, and to the elderly and their concerns, and to children and their affairs and to spread a culture of diversity and defusing terrorism.

We the people of Iraq of all components and shades have taken upon ourselves to decide freely and with our choice to unite our future and to take lessons from yesterday for tomorrow, to draft, through the values and ideals of the heavenly messages and the findings of science and man's civilization, this lasting constitution. The adherence to this constitution preserves for Iraq



its free union, its people, its land and its sovereignty. (“Full Text of Iraqi Constitution”)

## Conclusion

### **Expectations of the People**

But the problem has remained, and with it a fundamental difference of opinion as before: should we continue to hold fast to the intentions of the Enlightenment, however fractured they may be, or should we rather relinquish the entire project of modernity?

(Jürgen Habermas 44)

In the interconnected, uneven, resistant-but-dynamic space of knowledge and long experience which is the history and the present of world constitutionalism, there has been (one must surely allow) historical progress in the professed commitment to certain minimum expectations of inclusive and respected political and cultural life. Universal suffrage is by far the norm; indigenous peoples are much less likely to be *constitutionally* excluded from the People than once was the case; slavery is obviously no longer an aspect of fundamental law; constitutions as a matter of course offer basic rights, and at least pledge not to exclude according to race, class, gender and ethnicity. And as we have seen towards the end of Chapter 5, there exists the potential for present and future constructive and progressive purposes for constitutions, with opportunities for participation and voice at grass-roots levels of constitution writing engendering possibilities of national conflict resolution and healing of deeply entrenched divisions.

But if a constitution may now be classed as abnormal or a “sham” because it sanctions and legitimizes iniquitous practices it is not because it somehow contradicts an historical ethos of constitutionalism, or that a mysterious force of enlightened integrity and eternal allegiance to higher ideals rejects the unjust in its midst. As I hope I have brought out in various ways throughout this work, a level of progress as to what is generally recognized as acceptable and unacceptable in constitutions was not inevitable or due to a

time-released realization of complete ideals born in full potential. The dominating powers in constitutional history clearly have not tended to voluntarily release their grip (as if responding to irresistible historical forces), gradually relenting and becoming more inclusive with the passing of time. Throughout the modern era constitutions upheld as the very embodiments of enlightened ideals have contained, as fundamental law, exclusions and injustices. And it is to be remembered that it is really only in the most recent decades of constitutional history that enlightened ideals were forcibly disentangled from their negation in the form of colonial power. The present Constitution of South Africa, after all, is a mere fourteen years old. For all the good promised by an enlightened new age, for all the pledges made in righteous earnest, for all the avowals of adherence to universal values and truths, there can be no denying that in the name of this rhetoric has been a modern world history abundant from the outset with hypocrisy, exclusion, oppression, betrayal and bloodshed.<sup>1</sup> The constitutional ethicality of power has always been relative to its contingent aims and pressures; that is to say, it has principally been about what it is possible to coherently and credibly argue in order to sustain and perpetuate the mass entity of the nation, and thereby itself, according to the dictates of its particular ruling ideology.<sup>2</sup> Great liberal thinkers and genuine idealists behind constitutional movements there certainly have been, but the practicalities of functioning national power will inevitably bring forth other considerations altogether.

However, as rhetoric, as a genre of world prose, the meanings, existences, purposes and significances of constitutions have never been encompassed, exhausted or entirely

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<sup>1</sup> In this respect it seems that one must agree with Walter Benjamin when he writes: “There is no document of civilization which is not at the same time a document of barbarism” (121).

<sup>2</sup> In this respect, it is worth repeating an assertion by Eric Hobsbawm given in the introduction: “from the point of view of ruling classes the important thing was not what ‘the masses’ believed, but that their beliefs now counted in politics” (98).

determined by powerful, authorial intent and ideology. Chaim Perelman and L. Olbrechts-Tyteca contend that “*it is in terms of an audience that an argumentation develops*” (5; emphasis in original). And, extending this assertion,

For argumentation to exist, an effective community of minds must be realized at a given moment. There must first of all be agreement, in principle, on the formation of this intellectual community, and, after that, on the fact of debating a specific question together: now this does not come about automatically. (14)

Two crucial and absolutely related factors are given in this statement. Imagining and forming a given audience for an argument is not in itself enough; a viable subject of debate must also be chosen. The latter selection process is bound by a shifting realm of possibilities that is given its reasonable parameters by the expectations and the content of the audiences in question. It might be said therefore that if the writers and the spokespersons of constitutions in general no longer argue for exclusively male suffrage, for example, it is because they can no longer form a supportive and coherent “effective community of minds” likely to consent to such an argument. If there is something we can call “progress,” it seems to me to lie in the increasing universality of what is understood to be constitutionally *arguable* as acceptable, questionable or unacceptable for human life. A practice such as slavery is now not only not constitutionally sanctioned, but has ceased even to be a debatable “question” in the above sense. The argument for the protection of slavery in a document heralded as a beacon of enlightened reason and justice, though once not only conceivable but possible, now seems unthinkable. Put another way, it has become much more difficult than previously for a national ruling power to make a constitutional argument for the disenfranchisement<sup>3</sup> or marginalization of a particular group *seem*

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<sup>3</sup> Obviously such arguments do still occur. The Vatican City for example still uses its religious reason to exclude women from both voting procedures and clerical office.

*reasonable*, fundamental and true. Now, as always, it is as manifestations of reasoned arguments that constitutions have to appear.

Once, the relationship and the correspondence between ruling powers and the intended “effective community of minds” of a constitution, the People, was a relatively straightforward matter. (“What is the Third Estate? – *Everything.*”)<sup>4</sup> Quite obviously the relationships between powers and the multifarious peoples they address have become exceedingly more complex. It is the very complexity, the multiplicity of voices, subject positions and differences, that makes constitutions what they are now expected to be. There exists, after centuries of the world circulation and interconnectedness of constitutional ideas and effects, a deeply interwoven and shared notion of what is possible, of “what should be,”<sup>5</sup> of what has been, and often continues to be, denied. It is a knowledge comprised of innumerable perspectives, interpretations, struggles and experiences. An iniquitous constitution is not definable as the peculiar expression of a self-contained sovereign nation-state, but as being in contravention of what can be called multi-sited, variously conceived and determined expectations.

At the same time it is only according to the multiplicity of histories and perspectives that we can begin to comprehend the possibilities and meanings of such “universal” notions as constitutional “freedom.” By this is not meant “freedom” as an independently existing ideal, variously experienced, or as that which is defined by power for its own purposes.<sup>6</sup> Change and meaning have come upwards, not from some commonly held perspective and

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<sup>4</sup> Emmanuel Joseph Sieyès, “What is the Third Estate?” 94. Emphasis in the original.

<sup>5</sup> See reference to Sieyès below for the context of this phrase.

<sup>6</sup> George Bush commented in his 2005 inaugural speech: “It [freedom] warms those who feel its power, it burns those who fight its progress, and one day this untamed fire of freedom will reach the darkest corners of the world [. . .] We go forward with complete confidence in the eventual triumph of freedom” (Bush). By “untamed fire” it appears as something elemental and irreducible and yet wild and wilful – one might imagine therefore that human enlightened reason would be of little consequence or hindrance to such a spirit.

desire for the light of “freedom,” but from a continuous refusal to allow the idea of freedom to be anything definite and absolute. The subjective connotations have only ever proliferated. There have been, and are, many constitutional freedoms: as property, from fear, to participate, as security, to be left alone, to be, to take, to exist, to celebrate, to move, to vote, to worship, from slavery, from oppression, to become wealthy, to eat, to rule and to work. From all of this (of course but a few of the possibilities) we might now begin to form some idea of what “freedom” can mean. The same argument may be made for such constitutional ideas as “people,” “democracy,” or “justice.” It is in the interest of power to give these terms immutable meanings; it is in the interest of the struggle for empowerment to never let that be so.

To advocates of world law and democratization the existence of a discernable global standard in constitutionalism will be understood principally as a consequence of the establishment of global legal regulations and international monitoring bodies with the ever-greater possibility of assisting the lagging and punishing the wayward. Contemporary constitutional space in this regard is better described as an interconnectedness of the power to enforce what are presented as independently existing universal ideals, rather than as a vast multiplicity of culturally informed expectations and experiences. And it will be argued, not unreasonably, that if international disapprobation and legal sanction ensures that a generally progressive movement towards more universal inclusion and protection of life and liberty occurs, then it is to be lauded.

But can world authority conceivably ensure or engender such a movement? The global regulation of constitutional law requires an imposition (by force if necessary) of a degree of uniformity, of a universal standard on constitutional space. To be an overseeing authority it must function (ostensibly) at a level external to and unaffected by the

contingencies and differences of the cultural formations of constitutions. Nevertheless, for its rhetoric and terms of engagement it is dependent upon a language of ideals which has not emerged uniformly or been derived from a single stable source, but from countless directions and interpretations. Thus it operates according to principles and expectations that have emerged through centuries of conflict and circulations of knowledge and rhetoric in constitutional space, but must appear objectively detached from those histories and differences. Contingently and historically formed constitutional ideals must be transformed into legally definable and enforceable, universally applicable abstractions.

World law, in my view, is not a natural extension, evolution or fulfilment of the constitutional law, practices and rhetoric of nations. Its modes of operation are necessarily entirely different. Global bodies that are not directly accountable to any democratic process do not need to argue their right to rule to any human community. The begrudging but strategically necessary absorption of the excluded into the People that Hobsbawm describes above ceases to be of consequence. Why empower the powerless if they present no potential threat? The argumentation and the rhetorical relationships of constitutions become impossible because there ceases to be the need to determine or imagine the “community of minds” whose general assent is theoretically sought. Cultural difference becomes irrelevant; in fact, as we have seen from Francis Fukuyama and others, it is precisely that difference that must be eradicated in pursuit of “homogeneity.” The constitutional world space that I have described as always being in motion in terms of its myriad forces, resistances and effects is not to be characterized as a mysterious process of homogenization by which the peoples of the earth all ultimately reach the same already-given universal standard. If the latter exists in any sense it is because it has been produced painfully and

haltingly over time from diversity, reversals and multi-directional, chaotic movements of ideas and aspirations.

But while it is the case that global power slips away from any apparent need to be informed in its ethical content by cultural experience, knowledge, grievance and aspiration, it is also true that the demand for recognition according to these particularities only grows more imperative. It is clear that if there is something we can call universal expectation, there is far from universal realization. Increasing numbers of people remain in states of absolute vulnerability, exclusion and powerlessness. The demand for recognition in constitutions, and thereby to have the possibility of being heard, is, for many, more urgent and uncertain than ever. The contemporary need for political and social structures that comprehend the ever-more complex relationships that constitute human communities necessitates more, not less, participatory communication.

And, it must be asked, of what value or guarantee of protection is the traditionally national construct of “the People” in the (postnational?) present and future when confronted by what Hardt and Negri term the “spectre of migration”? They write:

All the powers of the old world are allied in a merciless operation against it, but the movement is irresistible. [. . .] The legal and documented movements are dwarfed by clandestine migrations: the borders of national sovereignty are sieves, and every attempt at complete regulation runs up against violent pressure. [. . .] This mobility, however, still constitutes a spontaneous level of struggle [. . .] it most often leads today to a new rootless condition of poverty and misery. (213)

Though “the movement is irresistible,” leaving a nation unavoidably still entails entering another, and thereby quite probably “a new rootless condition.” “The People,” therefore, if it is to have any continued value as that which ostensibly ensures a protection of rights, inclusion, justice and liberty, must be radically re-informed and given possibilities and meanings in ways hitherto unseen, just as it has been forced to do throughout the multiple



sites of its history of usage. Drawing upon stark alternatives posed by Étienne Balibar, it will perhaps be necessary to disassociate “People” from its nationally bound and constructed limitations: “Either the social state and social citizenship will have to be completely dismantled, or citizenship will have to be detached from its purely national definition so that social rights with a transnational character can be guaranteed” (113).

New meanings and purposes there must be and thus we will do well to heed the words of abbé Emmanuel Joseph Sieyès at the dawn of it all. The discovery of “true social principles” (14), he writes, must not be left to those whose work it is to “observe, collect, and examine the relationship between facts” (15):

Physics can only be the knowledge of *what is*. Art, which is bolder in its horizons, aims to modify and adapt facts to meet the purposes of our needs and enjoyments. It asks *what should be* for the utility of human beings. Art has us as its object. Its speculations, combinations, and operations are for our own use. The first of all the arts must therefore be one that is concerned with arranging the disposition of human affairs by way of a plan that favors them all. (“Views of the Executive Means” 15; emphasis in original)

Determination of “what should be” requires a knowledge of what has been, of that which informs the immense complexity of the present of world constitutional space. In this regard the preceding examination might be called an argument for the re-appropriation of constitutions as documents that speak not only of national power, ideology and law, but of the countless narratives of their human subjects and presumed beneficiaries. A great wealth is presented by constitutions when they are considered as a literature of modern humanity: a vast global, historical resource of accumulated cultural knowledge and practice; a record by which a determination of human experiences in the constitutional era may be gleaned. A comparative literature of constitutions that takes the knowledge of constitutions and their practices as ever in flux and circulation, and does not disregard the contest, rejection, struggle, iniquity of power and entitlement that is the significant historical content of the

age of the societies of reason therefore must assume as its potential field of study *all* constitutions regardless of their quality, efficacy, type, longevity, their place in a taxonomic hierarchy, even their morality.

No judgement may be made as to whether the modern prose genre of fundamental law and enlightened principles has been *intrinsically* good or useful for humanity. Nor, by extension, can its global proliferation be judged as an objectively positive or negative phenomenon. The significance of the ideas and ideals of modern constitutionalism is to be discerned only in the myriad ways that they have been changed, used, interpreted, lived and given meaning in historical systems of relationships of power, community and culture. It is in the knowledge and the understanding of this that there lies a hope of better understanding and improving the present in its progress and its uncertainties. We the People are battle-scarred, but well-versed.

## Works Cited

### Introduction – The Writing of Humanity

Alexander, Larry. "Introduction." *Constitutions: Philosophical Foundations*. Ed. Larry

Alexander. Cambridge: Cambridge University Press, 1998. 1-15. Print.

Altman, Andrew. *Critical Legal Studies: A Liberal Critique*. Princeton: Princeton

University Press, 1990. Print.

Arendt, Hannah. *On Revolution*. 1963. New York: Penguin Books, 1977. Print.

Aron, Raymond. *The Dawn of Universal History*. Trans. Dorothy Pickles. London:

Weidenfeld and Nicolson, 1961. Print.

Austin, J.L. *How To Do Things With Words*. London: Oxford University Press, 1962.

Print.

Balibar, Étienne. *We, the People of Europe?: Reflections on Transnational Citizenship*.

Princeton: Princeton University Press, 2004. Print.

Barak, Aharon. "Hermeneutics and Constitutional Interpretation." *Constitutionalism,*

*Identity, Difference and Legitimacy: Theoretical Perspectives*. Ed. Michel

Rosenfeld. Durham, NC: Duke University Press, 1994. 57-83. Print.

Benjamin, Walter. "Theses in the Philosophy of History." In *Reading the Past*. Ed.

Tamsin Spargo. Basingstoke: Palgrave, 2000. 118-26. Print.

Booth, Wayne C. *The Rhetoric of Rhetoric: The Quest for Effective Communication*.

Malden, MA: Blackwell Publishing, 2004. Print.

Bonaparte, Napoleon. "To Citizen Talleyrand." *Letters and Documents of Napoleon*. Vol.

1: The Rise to Power. Selection and trans. John Eldred Howard. London: The

Cresset Press, 1961. 506. Print.

---. "Proclamation to the Citizens of Santo Domingo." *Letters and Documents of*

- Napoleon*. Vol. 1: The Rise to Power. Selection and trans. John Eldred Howard. London: The Cresset Press, 1961. 329. Print.
- Bové, Paul A. "Discourse." In *Critical Terms for Literary Study*. Ed. Frank Lentricchia and Thomas McLaughlin. Chicago: University of Chicago Press, 1995. 50-65. Print.
- Brantlinger, Patrick. *Crusoe's Footprints: Cultural Studies in Britain and America*. London: Routledge, 1990. Print.
- . *Dark Vanishings: Discourse on the Extinction of Primitive Races, 1800-1930*. Ithaca: Cornell University Press, 2003. Print.
- Burke, Kenneth. *Counter-Statement*. 2<sup>nd</sup> ed. Los Altos, California: Hermes Publications, 1953. Print.
- . *Terms for Order*. "From *Lexicon Rhetoricae* (1931)." Ed. Stanley Edgar Hyman. Bloomington: Indiana University Press, 1964. Print.
- "Cambodia Constitution." *International Constitutional Law*. Universität Wien. Ed. A. Tschentscher. Web. 5 May 2010.
- Casanova, Pascale. *The World Republic of Letters*. Trans. M.B. DeBevoise. Cambridge, Mass: Harvard University Press, 2004. Print.
- Certeau, Michel de. "Writings and Histories." *Reading the Past: Literature and History*. Ed. Tamsin Spargo. Basingstoke: Palgrave, 2000. 156-67. Print.
- Collins, Randall. *The Sociology of Philosophies*. Cambridge, Mass: Belknap Press of Harvard University Press, 1998. Print.
- "Congo-Brazzaville – Constitution." *International Constitutional Law*. Universität Wien. Ed. A. Tschentscher. Web. 24 Apr. 2010.
- "Constitution of 1801." Trans. Charmant Theodore. *The Louverture Project*. Web. 5 May

- 2010.
- “The Constitution of the Empire of Japan: 1889.” Trans. Miyoji Ito. *Hanover Historical Texts Project*. Hanover College, Indiana. Web. 10 July 2010.
- “The 1805 Constitution of Haiti.” *Early Haiti: 1804-1843*. Webster University. Web. 20 May 2010.
- “The 1945 Constitution of the Republic of Indonesia.” *Constitutionnet*. University of Texas, Austin. Web. 27 Apr. 2010.
- “1918 Constitution of the Russian Soviet Federated Socialist Republic.” *Soviet Government: Soviet History Archive*. Marxist Internet Archive. Web. 20 Jan 2011.
- Delgado, Richard and Jean Stefancic., eds. *Critical Race Theory: The Cutting Edge*. Philadelphia: Temple University Press, 2000. *Google books*. Web. 10 Feb 2011.
- Delgado, Richard and Jean Stefancic. *Critical Race Theory: An Introduction*. New York: New York University Press, 2001. *Google books*. Web. 10 Feb 2011.
- “Egypt Constitution.” Egyptian Government Services Portal. Web. 25 April, 2010.
- “Establishing the kingdom; the monarchy and the instruments of government; drafting the Constitution and the Anglo-Iraq Treaty 1921-1924.” Report from High Commissioner of Baghdad to Secretary of State for the Colonies, L.S. Amery. Aug. 6, 1925. *Records of Iraq 1914-1966*. Vol.3: 1921-1924. Ed. Alan de L. Rush. Archive Editions, 2001. 1-89. Print.
- Fish, Stanley. “Interpreting the *Variorum*.” *Critical Inquiry*. Vol 2.3 (Spring, 1976). 465-85. Print.
- Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. 1975. Trans. Alan Sheridan. London: Penguin, 1977. Print.

- Franklin, Daniel P., and Michael J. Baun. "Introduction: Political Culture and Constitutionalism." *Political Culture and Constitutionalism: A Comparative Approach*. Eds. Daniel P. Franklin and Michael J. Baun. London: M.E. Sharpe, 1995. 1-10. Print.
- "France – Constitution." *International Constitutional Law*. Universität Wien. Ed. A. Tschentscher. Web. 10 Apr. 2010.
- Fukuyama, Francis. *The End of History and the Last Man*. London: Penguin, 1992. Print.
- Gagnier, Regenia. "'The Disturbances Overseas'"; A Comparative Report on the Future of English Studies." *Victorian Literature and Culture*. (1999): 465-72. Print.
- Geertz, Clifford. *The Interpretation of Cultures*. 1973. London: Fontana Press, 1993. Print.
- Gilroy, Paul. *After Empire: Melancholia or Convivial Culture?* Abingdon: Routledge, 2004. Print.
- Grossberg, Lawrence and Della Pollock. "Editorial Statement." *Cultural Studies*. 24.4 (2010). Print.
- Hall, Stuart. "The Rediscovery of 'Ideology'; Return of the Oppressed in Media Studies." *Culture, Society and the Media*. Eds Michael Gurevitch, et al, New York: Methuen and Co. Ltd., 1982. 56-90. Print.
- Hardt, Michael and Antonio Negri. *Empire*. Cambridge, Massachusetts: Harvard University Press, 2000. Print.
- Hawgood, John A. *Modern Constitutions Since 1787*. London: MacMillan, 1939. Print.
- Hayek, F. A. *The Constitution of Liberty*. London: Routledge & Kegan Paul, 1960. Print.
- Hobsbawm, Eric. *The Age of Capital: 1848-1875*. 1975. London: Weidenfeld & Nicolson, 1995. Print.
- . Age of Extremes: The Short Twentieth Century 1914-1991. London: Michael

- Joseph, 1994. Print.
- “Iran – Constitution.” *International Constitutional Law*. Universität Wien. Ed. A. Tschentscher. Web. 10 Apr. 2010.
- “Ireland – Constitution.” *International Constitutional Law*. Universität Wien. Ed. A. Tschentscher. Web. 30 Apr. 2010.
- Lane, Jan-Eric. *Constitutions and Political Theory*. Manchester: Manchester University Press, 1996. Print.
- Maddex, Robert L. “Introduction.” *Constitutions of the World*. Ed. Robert L. Maddex. 3<sup>rd</sup> ed. Washington D.C.: CQ Press, 2008. Print.
- Michelman, Frank I. “Constitutional Authorship.” *Constitutions: Philosophical Foundations*. Ed. Larry Alexander. Cambridge: Cambridge University Press, 1998. 64-98. Print.
- Miller, Carolyn R. “Genre As Social Action.” *Quarterly Journal of Speech*. Vol. 70:2 (May 1984). 151-67. Print.
- Mitchell, Timothy. “The Stage of Modernity.” *Questions of Modernity*. Ed. Timothy Mitchell. Contradictions of Modernity, vol. 11. Minneapolis: University of Minnesota Press, 2000. Print.
- Montesquieu. *The Spirit of Laws*. In *The Tradition of Freedom*. Ed. Milton Mayer. The Fund for the Republic. New York: Oceana Publications, 1957. 33-193. Print.
- Morrison, Toni. *Playing in the Dark: Whiteness and the Literary Imagination*. Cambridge, MA: Harvard University Press, 1992. Print.
- Mouffe, Chantal. “Radical Democracy: Modern or Postmodern?” Trans. Paul Holdengräber. *Universal Abandon? The Politics of Postmodernism*. Ed. Andrew

- Ross. Minneapolis: University of Minnesota Press, 1988. 31-45. Print.
- Natsios, Andrew S. "Democratic Opportunity in the Arab and Muslim World." *Cambridge Review of International Affairs*. 19.2 (2006): 263-70. Print.
- Paine, Thomas. *Common Sense*. 1776. Ed. Issac Kramnick. Harmondsworth: Penguin Books, 1986. Print.
- Pauling, Linus. "Science and Peace." The Nobel Peace Prize Lecture, 1964. Center for the Study of Democratic Institutions, The Fund for the Republic, Inc. Print.
- Perelman, Chaim and L. Olbrechts-Tyteca. *The New Rhetoric: A Treatise on Argumentation*. 1958. Trans. John Wilkinson and Purcell Weaver. Indiana: Notre Dame University Press, 1969. Print.
- Phelan, James. "Rhetoric/Ethics." *The Cambridge Companion to Narrative*. Ed. David Herman. Cambridge: Cambridge University Press, 2007. 203-15. Print.
- "The Philippine Independence Act (Tydings-McDuffie Act)." *Chan Robles Virtual Law Library*. The ChanRobles Group. Web. 10 Jan. 2010.
- Robespierre, Maximilien. "On the Silver Mark." *Slavoj Žižek presents Robespierre: Virtue and Terror*. Ed. Jean Ducange. Trans. John Howe. London: Verso, 2007. 5-19. Print.
- Rosenfeld, Michel. "Modern Constitutionalism as Interplay Between Identity and Diversity." *Constitutionalism, Identity, Difference, and Legitimacy*. Ed. Michel Rosenfeld. Durham, NC: Duke University Press, 1994. 3-35. Print.
- Rousseau, Jean-Jacques. "The Social Contract." *Social Contract: Essays by Locke, Hume and Rousseau*. Ed. Sir Ernest Barker. London: Oxford University Press, 1960. 169-307. Print.
- Rubinfeld, Jed. "Legitimacy and Interpretation." *Constitutions: Philosophical*



- Foundations*. Ed. Larry Alexander. Cambridge: Cambridge University Press, 1998. 194-234. Print.
- “South Africa – Constitution.” *International Constitutional Law*. Universität Wien. Ed. A. Tschentscher. Web. 26 Jan 2011.
- Strong, C.F. *Modern Political Constitutions: An Introduction to the Comparative Study of their History and Existing Form*. 5<sup>th</sup> ed. London: Sidgwick & Jackson Limited, 1958. Print.
- Suberu, Rotimi T. “Institutions, Political Culture, and Constitutionalism in Nigeria.” *Political Culture and Constitutionalism: A Comparative Approach*. Eds. Daniel P. Franklin and Michael J. Baun. London: M.E. Sharpe, 1995. 197-218. Print.
- Thoreau, Henry David. *Where I Lived, and What I Lived For*. 1854 in *Walden*. Great Ideas. London: Penguin Books, 2005. Print.
- “Treaty of Lisbon.” *Official Journal of the European Union*. C 306, Vol. 50 (Dec. 2007). Eur-Lex: Access to European Union Law. Web. 5 May 2010.
- Ward, Ian. *Law and Literature: Possibilities and Perspectives*. Cambridge: Cambridge University Press, 1995. Print.
- West, Robin. *Narrative, Authority, and Law*. Michigan: University of Michigan Press, 1993. Print.
- Wheare, K.C. *Modern Constitutions*. London: Oxford University Press, 1951. Print.
- White, James Boyd. *The Legal Imagination*. Abr. ed. Chicago: University of Chicago Press, 1985. Print.
- Wiarda, Howard J. “Constitutionalism and Political Culture in Mexico: How Deep the Foundations?” *Political Culture and Constitutionalism: A Comparative Approach*.

Eds. Daniel P. Franklin and Michael J. Baun. London: M.E. Sharpe, 1995. 119-37.

Print.

Williams, Raymond. *Culture and Society: 1780-1950*. Pelican Books. Print.

Wolf-Phillips, Leslie. "Introduction: A Note on the Classifying of Constitutions."

*Constitutions of Modern States: Selected Texts*. Ed. Leslie Wolf-Phillips. London:

Pall Mall Press, 1968. Print.

## **Chapter 2 – The Spirit of the People**

Ackerman, Bruce. *We the People, Volume 1: Foundations*. Cambridge, MA: Belknap Press

of Harvard University Press, 1991. Print.

"Act to Prohibit the Importation of Slaves." *Documents of American History*. Ed. Henry

*Steele Commager*. New York: F. S. Crofts & Co, 1944. 197-98. Print.

Agamben, Giorgio. *State of Exception*. 2003. Trans. Kevin Attell. Chicago: University of

Chicago Press, 2005. Print.

Amar, Akhil Reed. "Our Forgotten Constitution: A Bicentennial Comment." *The Yale Law*

*Journal*. 97.2 (Dec.,1987): 281-98. Print.

---. "The Bill of Rights and the Fourteenth Amendment." *The Yale Law Journal*.101.6

(Apr., 1992): 1193-1284. Print.

Bellah, Robert N. "Civil Religion in America." *Daedalus*, 96.1 (Winter, 1967): 1-21. Print.

Beard, Charles A. *An Economic Interpretation of the Constitution of the United States*.

New York: The Macmillan Company, 1941. Print.

Berns, Walter. "Writing the Constitution of the United States." *Constitution Makers on*

*Constitution Making: The Experience of Eight Nations*. Eds Robert A. Goldwin and

- Art Kaufman. Washington: American Enterprise Institute for Public Policy Research, 1988. 119-83. Print.
- Blum, John M., et al. *The National Experience: A History of the United States*. 6<sup>th</sup> ed. San Diego: Harcourt Brace Jovanovich, 1985. Print.
- Bodenhamer, David J. "Barron v. Baltimore." *The Oxford Guide to United States Supreme Court Decisions*. Ed. Kermit L. Hall. Oxford: Oxford University Press, 1999. 23. Print.
- Certeau, Michel de. "Writings and Histories." *Reading the Past*. Ed. Tasmin Spargo. Basingstoke: Palgrave, 2000. 156-67. Print
- The Constitution of the United States. *The Federalist with Letters of 'Brutus,'* Ed. Terence Ball. Cambridge: Cambridge University Press, 2003. 545-65. Print.
- Corwin, Edward S. *The Constitution and What It Means Today*. Princeton: Princeton University Press, 1958. Print.
- The Declaration of Independence. *Documents of American History*. Ed. Henry Steele Commager. New York: F. S. Crofts & Co, 1944. 100-03. Print.
- Dworkin, Ronald. *Freedom's Law: The Moral Reading of the American Constitution*. Cambridge: Harvard University Press, 1966. Print.
- Ehrlich, Walter. "Scott v. Sandford." *The Oxford Guide to United States Supreme Court Decisions*. Ed. Kermit L. Hall. Oxford: Oxford University Press, 1999. 277-78. Print.
- Ellis, Richard E. "McCulloch v. Maryland." *The Oxford Guide to United States Supreme Court Decisions*. Ed. Kermit L. Hall. Oxford: Oxford University Press, 1999. 182-85. Print.

- Farrand, Max. *The Fathers of the Constitution: A Chronicle of the Establishment of the Union*. Ed. Allen Johnson. New Haven: Yale University Press, 1921. Print.
- Fenton, William N. *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy*. Norman: University of Oklahoma Press, 1998. Print.
- Foucault, Michel. "Nietzsche, Genealogy, History." 1971. *Language, Counter-Memory, Practice*. Ed. and trans. Donald F. Bouchard, trans. Sherry Simon. Ithaca, NY: Cornell University Press, 1977. 139-64. Print.
- Fritz, Christian G. *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War*. Cambridge: Cambridge University Press, 2008. Print.
- "Great Law of Peace." in *Encyclopedia of the Haudenosaunee (Iroquois Confederacy)*. Eds Bruce Elliot Johansen and Barbara Alice Mann. Westport, Connecticut: Greenwood Press, 2000. Print.
- Grey, Thomas C. "Do We Have an Unwritten Constitution?" *Stanford Law Review*. 27.3 (1975): 703-18. Print.
- Griffin, Stephen M. *American Constitutionalism: From Theory to Politics*. Princeton: Princeton University Press, 1996. Print.
- Grinde, Donald A, Jr. *The Iroquois and the Founding of the American Nation*. San Francisco: The Indian Historian Press, 1977. Print.
- Grinde, Donald A, Jr. and Bruce E. Johansen. *Exemplar of Liberty: Native America and the Evolution of Democracy*. Native American Politics Series No. 3, University of California, Los Angeles: American Indian Studies Center, 1991. Print.

- Grinde, Donald A, Jr. and Bruce E. Johansen. "Sauce for the Goose: Demand and Definitions for 'Proof' regarding the Iroquois and Democracy." *The William and Mary Quarterly*. 53.3 (1996): 621-36. Print.
- Hamilton, Alexander. "The Federalist No. 1." *The Federalist with Letters of 'Brutus.'* Ed. Terence Ball, Cambridge: Cambridge University Press, 2003. 1-4. Print.
- . "The Federalist No. 31." *The Federalist with Letters of 'Brutus.'* Ed. Terence Ball. Cambridge: Cambridge University Press, 2003. 141-45. Print.
- Johansen, Bruce E., et al. *Debating Democracy: Native American Legacy of Freedom*. Sante Fe: Clear Light Publishers, 1996. Print.
- Johnson, William (Justice). "The Cherokee Nation v. The State of Georgia 30 U.S .1 (1831)." *The American Indian and the United States: A Documentary History*. Vol. IV. Ed. Wilcomb E. Washburn. New York: Random House. 2558-66. Print.
- Joyce, Patrick. *Visions of the People: Industrial England and the Question of Class 1848-1914*. Cambridge: Cambridge University Press, 1991. Print.
- Kammen, Michael. *A Machine That Would Go of Itself*. New York: Vintage Books, 1987. Print.
- Kens, Paul. "Lochner v. New York." *The Oxford Guide to United States Supreme Court Decisions*. Ed. Kermit L. Hall. Oxford: Oxford University Press, 1999. Print. 161-63.
- Levinson, Sanford. "'The Constitution' in American Civil Religion." *The Supreme Court Review*. vol. 1979 (1979). The University of Chicago Press: 123-51. Print.
- . *Constitutional Faith*. Princeton: Princeton University Press, 1988. Print.
- Lincoln, Abraham. "The Gettysburg Address." *Documents of American History*. Ed. Henry Steele Commager. New York: F. S. Crofts & Co, 1944. 428-29. Print.

- Marshall, John (Chief Justice). *M'Culloch v. Maryland*, 17 U.S. 316(1819). *Documents of American History*. Ed. Henry Steele Commager. New York: F. S. Crofts & Co, 1944. 213-20. Print.
- Morgan, Edmund S. *Inventing the People: The Rise of Popular Sovereignty in England and America*. New York: W.W. Norton & Company, 1988. Print.
- Norton, Anne. "Transubstantiation: The Dialectic of Constitutional Authority." *The University of Chicago Law Review*. 55.2 (1988): 458-72. Print.
- Pelikan, Jaroslav. *Interpreting the Bible and the Constitution*. New Haven: Yale University Press, 2004. Print.
- "Pleroma." *The Oxford Universal Dictionary*. 3<sup>rd</sup> ed. 1973. Print.
- Plessy v. Ferguson*, 163 U.S. 537(1896). *FindLaw: For Legal Professionals*. Web. 3 Jan. 2011.
- Plumb, J. H. "America: Illusion and Reality." *Historical viewpoints: Notable Articles from American Heritage*. Ed. John A. Garraty, vol. 1: To 1877, 5<sup>th</sup> edition. New York: Harper & Row, 1987. 26-34. Print.
- Richards, I. A. *The Philosophy of Rhetoric*. 1936. London: Oxford University Press, 1976. Print.
- Rubinfeld, Jed. "Legitimacy and Interpretation." *Constitutionalism: Philosophical Foundations*. Ed. Larry Alexander. Cambridge: Cambridge University Press, 1998. 194-234. Print.
- "South Carolina Declaration of Causes of Secession." *Documents of American History*. Ed. Henry Steele Commager, New York: F. S. Crofts & Co, 1944. 372-74. Print.
- Staab, James B. *The Political Thought of Justice Antonin Scalia*. Lanham: Rowman and Littlefield Publishers, Inc., 2006. Print.

Taney, Roger B. (Chief Justice). *Dred Scott v. Sandford*, 60 U.S. 393(1856). *Documents of American History*. Ed. Henry Steele Commager, New York, F. S. Crofts & Co, 1944. 339-45. Print.

Tocqueville, Alexis de. "Democracy in America." *A Textual Introduction to Social and Political Theory*. Eds Richard Bellamy and Angus Ross. Manchester: Manchester University Press, 1996. Print.

Tushnet, Mark V. "Roe v. Wade." *The Oxford Guide to United States Supreme Court Decisions*. Ed. Kermit L. Hall. Oxford: Oxford University Press, 1999. Print. 262-65.

Ver Steeg, Clarence L. "The Preamble." *An American Primer*. Ed. Daniel J. Boorstin. Chicago: University of Chicago Press, 1966. 83-87. Print.

Warren, Earl (Chief Justice). *Bolling et al. v. Sharpe et al*, 347 U.S. 497(1954). "Some Supreme Court Decisions." *The Tradition of Freedom 3*. Ed. Milton Mayer. New York: Oceana Publications, 1957. 227-28. Print.

---. *Brown v. Board of Education*, 347 U.S. 483(1954). "Some Supreme Court Decisions." *The Tradition of Freedom 3*. Ed. Milton Mayer. New York: Oceana Publications, 1957. 219-27. Print.

### **Chapter 3 – *Imperium in Imperio?***

Adams, John Quincy. "Fourth Annual Message, Dec. 2, 1828." *The American Presidency Project*. UC Santa Barbara. Eds John Woolley, Gerhard Peters. Web. 2 Feb. 2011.

Anderson, William L. "Introduction." *Cherokee Removal: Before and After*. Ed. William L. Anderson. Athens, Georgia: Brown Thrasher Books, The University of Georgia Press, 1991. vii-xvi. Print.

Arendt, Hannah. *On Violence*. New York: Penguin Books, 1977. Print.

- Boudinot, Elias. "An Address to the Whites Delivered in the First Presbyterian Church on the 26<sup>th</sup> of May, 1826." *Digital Library of Georgia*. Galileo. Web. 1 Aug. 2010.
- . "The Cherokee Nation Vs. The State of Georgia, April 16, 1831." *Cherokee Editor: The Writings of Elias Boudinot*. Ed. Theda Purdue. Knoxville: University of Tennessee Press, 1983. 125-27. Print.
- Constitution of the Cherokee Nation (1827). *The Cherokee Phoenix*. Vol. I, No. 1. Feb. 21, 1828. *Hunter Library*. Western Carolina University. Web. June 1 2010.
- "The Constitution of the United States." *The Federalist with Letters of "Brutus."* Ed. Terence Ball. Cambridge: Cambridge University Press, 2003. 545-65. Print.
- Everett, Edward. "House Debate on the Removal of the Cherokees, February 14, 21, 1831." *The American Indian and the United States: A Documentary History- Volume II*. Ed. Wilcombe E. Washburn. New York: Random House. 1124-68. Print.
- Fliegelman, Jay. *Prodigals and Pilgrims: the American Revolution Against Patriarchal Authority, 1750-1800*. Cambridge: Cambridge University Press, 1982. Print.
- Foreman, Grant. *The Five Civilized Tribes*. University of Oklahoma Press, 1934. Print.
- Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. Trans. Alan Sheridan. London: Penguin Books, 1991. Print.
- Jackson, Andrew. "First Annual Message, Dec. 8, 1829." *The American Presidency Project*. UC Santa Barbara. Eds John Woolley, Gerhard Peters. Web. 2 Feb. 2011.
- . "Second Annual Message, Dec. 6, 1830." *A Compilation of the Messages and Papers of the Presidents, 1789-1897*. Vol. 1. Ed. James D. Richardson. Washington Government Printing Office, 1896. 520-21. Print.



- . "To the President (James Monroe), March, 1817." *Correspondence of Andrew Jackson, May 1, 1814-Dec. 31, 1819*. Vol. II. Ed. John Spencer Bassett. Washington, D.C.: Carnegie Institution of Washington, 1927. 277-82. Print.
- Jefferson, Thomas. "Confidential Message to Congress Regarding the Lewis and Clark Expedition, Jan. 18, 1803." *The American Presidency Project*. UC Santa Barbara. Eds John Woolley, Gerhard Peters. Web. 2 Feb. 2011.
- Johnson, William (Justice). "The Cherokee Nation v. The State of Georgia 30 U.S .1 (1831)." *The American Indian and the United States: A Documentary History*. Vol. IV. Ed. Wilcomb E. Washburn. New York: Random House. 2558-66. Print.
- Lumpkin, Wilson. "House Debate on the Indian Removal Question, May 15, 26, 1830." *The American Indian and the United States: A Documentary History*. Vol. II. Ed. Wilcombe E. Washburn. New York: Random House. 1070-93. Print.
- Marshall, John (Chief Justice). The Cherokee Nation v. The State of Georgia 30 U.S .1 (1831). *The American Indian and the United States: A Documentary History*. Vol. IV. Ed. Wilcomb E. Washburn. New York: Random House. 2554-602. Print.
- . Johnson and Graham's Lessee v. M'Intosh 8 Wheat. 543 (1823). *The American Indian and the United States: A Documentary History*. Vol.IV. Ed. Wilcomb E. Washburn. New York: Random House. 2537-53. Print.
- . Worcester v. The State of Georgia 315 U.S. 515 (1832). *The American Indian and the United States: A Documentary History*. Vol. IV. Ed. Wilcomb E. Washburn. New York: Random House. 2603-23. Print.
- Monroe, James. "President Monroe to Jackson, October 5, 1817." *Correspondence of Andrew Jackson, May 1, 1814-Dec. 31, 1819*. Vol. II. Ed. John Spencer Bassett. Washington, D.C.: Carnegie Institution of Washington, 1927. 329-32. Print.

- Parins, James W. "Elias Boudinot (Cherokee) c. 1802-1839." *The Heath Anthology of American Literature: Early Nineteenth Century: 1800-1865*. Fifth Edition. Eds Paul Lauter, et al. Boston: Houghton Mifflin Company, 2006. 1442-44. Print.
- Pearce, Roy Harvey. *Savagism and Civilization: A study of the Indian and the American Mind*. Berkley: University of California Press, 1988. Print.
- Perelman, Chaim and L. Olbrechts-Tyteca. *The New Rhetoric: A Treatise on Argumentation*. 1958. Trans. John Wilkinson and Purcell Weaver. Indiana: Notre Dame University Press, 1969. Print.
- Prucha, Francis Paul. *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834*. Lincoln: University of Nebraska Press, 1962. Print.
- Purdue, Theda and Michael D. Green. *The Columbia Guide to American Indians of the Southeast*. New York: Columbia University Press, 2001. Print.
- Purdue, Theda. "The Conflict Within: Cherokees and Removal." *Cherokee Removal: Before and After*. Ed. William L. Anderson. Athens, Georgia: Brown Thrasher Books, The University of Georgia Press, 1991. 55-74. Print.
- Ross, John. "To Andrew Jackson." *The Heath Anthology of American Literature: Early Nineteenth Century: 1800-1865*. Fifth Edition. Eds Paul Lauter, et al. Boston: Houghton Mifflin Company, 2006. 1457-58. Print.
- . "To Lewis Cass." *The Heath Anthology of American Literature: Early Nineteenth Century: 1800-1865*. Fifth Edition. Eds Paul Lauter, et al. Boston: Houghton Mifflin Company, 2006. 1453-56. Print.

- Storrs, Henry. "House Debate on the Indian Removal Question, May 15, 26, 1830." *The American Indian and the United States: A Documentary History*. Vol. II. Ed. Wilcombe E. Washburn. New York: Random House. 1017-70. Print.
- Thompson, Smith. *The Cherokee Nation v. The State of Georgia* 30 U.S .1 (1831). *The American Indian and the United States: A Documentary History*. Vol. IV. Ed. Wilcomb E. Washburn. New York: Random House. 2554-602. Print.
- Thornton, Russell. "The Demography of the Trail of Tears Period: A New Estimate of Cherokee Population Losses." *Cherokee Removal: Before and After*. Ed. William L. Anderson. Athens, Georgia: Brown Thrasher Books, The University of Georgia Press, 1991. 75-95. Print.
- "Treaty of Washington, Feb. 27, 1819." *Digital Library of Georgia*. Galileo. Web. 2 Feb. 2011.
- "Treaty with the Cherokees, New Echota, December 29, 1835." *The American Indian and the United States: A Documentary History*. Vol. IV. Ed. Wilcomb E. Washburn. New York: Random House. 2461-76. Print.
- Vattel, Emmerich de. 1758. *The Law of Nations or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*. Fourth Edition (Corrected). London: W. Clarke and Sons, 1811. Print.
- Washburn, Wilcombe E. Introduction to "House Debate on the Indian Removal Question, May 15, 26, 1830." *The American Indian and the United States: A Documentary History*. Vol. II. Ed. Wilcombe E. Washburn. New York: Random House. 1017. Print.
- . Introduction to "Indian Department Appropriations Act (Termination of Treaty Making Process, March 3, 1871)." *The American Indian and the United States: A*

- Documentary History*. Vol. II. Ed. Wilcombe E. Washburn. New York: Random House. 2183. Print.
- . Introduction to "Worcester v. The State of Georgia, 315 U.S. 515 (1832)." *The American Indian and the United States: A Documentary History*. Vol.IV. Ed. Wilcomb E. Washburn. New York: Random House. 2603. Print.
- Washington, George. "Third Annual Address." *A Compilation of the Messages and Papers of the Presidents, 1789-1897*. Vol. 1. Ed. James D. Richardson. Washington Government Printing Office, 1896. 103-06. Print.
- Wilkins, Thurman. *Cherokee Tragedy: The Story of the Ridge Family and the Decimation of a People*. New York: The Macmillan Company, 1970. Print.
- Wilms, Douglas C. "Cherokee Land Use in Georgia Before Removal." *Cherokee Removal: Before and After*. Ed. William L. Anderson. Athens, Georgia: Brown Thrasher Books, The University of Georgia Press, 1991. Print.
- Wirt, William. "On the right of the State of Georgia to extend her laws over the Cherokee Nation." *Cherokee Phoenix*. Vol. III, No. 16. Aug. 14, 1830. *Hunter Library*. West Carolina University. Web. 1 June 2010.
- Worcester, Samuel. "Worcester to Wm. S. Coodey." *New Echota Letters: Contributions of Samuel A. Worcester to the Cherokee Phoenix*. Ed. Jack Frederick Kilpatrick. Dallas: Southern Methodist University Press, 1968. 77-81. Print.
- . "Present Condition of the Cherokees." *New Echota Letters: Contributions of Samuel A. Worcester to the Cherokee Phoenix*. Ed. Jack Frederick Kilpatrick. Dallas: Southern Methodist University Press, 1968. 74-77. Print.

## Chapter 4 – Cultural Universal

- Beresford, Melanie. *Vietnam: Politics, Economics and Society*. London: Pinter Publishers, 1988. Print.
- Bradley, Mark Philip. *Imagining Vietnam & America: The Making of Postcolonial Vietnam, 1919-1950*. Chapel Hill and London: The University of North Carolina Press, 2000. Print.
- Cleary, Thomas. "Introduction." *The Essential Confucius: The Heart of Confucius' Teaching in Authentic I Ching Order*. Trans. Thomas Cleary. New York: HarperSanFrancisco, 1992. Print.
- "Constitution of the Democratic Republic of Vietnam 1946." *The Constitutions of Vietnam: 1946-1959-1980-1992*. Hanoi: The Gioi Publishers, 2003. 9-32. Print.
- "Constitution of the Socialist Republic of Vietnam 1980." *The Constitutions of Vietnam: 1946-1959-1980-1992*. Hanoi: The Gioi Publishers, 2003. 71-128. Print.
- "Constitution of Vietnam (Democratic Republic)." *Constitutions of Nations: Volume II – Asia, Australia and Oceania*. Ed. Amos J. Peaslee. Rev. 3<sup>rd</sup> ed. The Hague: Martinus Nijhoff, 1966. 1197-215. Print.
- Davis, Mike. *Late Victorian Holocausts: El Niño Famines and the Making of the Third World*. London: Verso, 2002. Print.
- "Declaration of Independence of the Democratic Republic of Vietnam (September 2, 1945)." *Vietnam: History, Documents, and Opinions on a Major World Crisis*. Ed. Marvin E. Gettleman. Harmondsworth: Penguin Books, 1965. 64-66. Print.
- "Document 13: US Support for the Overthrow of Diem, August 1963." In *The Origins of the Vietnam War*. Fredrik Logevall. Harlow: Pearson Education Ltd, 2001. 116-17. Print.
- Fanon, Frantz. *The Wretched of the Earth*. Trans. Constance Farrington. New York:

- Grove Press, Inc, 1963. Print.
- Giap, Vo Nguyen. "People's War, People's Army." *The Military Art of People's War: Selected Writings of General Vo Nguyen Giap*. Ed. Russell Stetler. New York: Monthly Review Press, 1970. 101-16. Print.
- Habermas, Jürgen. "The Constitutional State." *The Habermas Reader*. Ed. William Outhwaite. Cambridge: Polity Press, 1996. 214-16. Print.
- Hawgood, John A. *Modern Constitutions Since 1787*. London: Macmillan, 1939. Print.
- Hobsbawm, Eric. *Age of Extremes: The Short Twentieth Century 1914-1991*. London: Michael Joseph, 1994. Print.
- Ho, Chi Minh. "Ho Chi Minh on the Condition of the Peasants in Vietnam (1924)." *Vietnam: History, Documents, and Opinions on a Major World Crisis*. Ed. Marvin E. Gettleman. Harmondsworth: Penguin Books, 1965. 39-40. Print.
- . "Letter to Linus Pauling." *Ho Chi Minh: Selected Articles and Speeches*. Ed. Jack Woddis. London: Lawrence & Wishart Ltd, 1969. 29-30. Print.
- . "Lynching: A Little Known Aspect of American Civilization." *Ho Chi Minh: Selected Articles and Speeches*. Ed. Jack Woddis. London: Lawrence & Wishart Ltd, 1969. 20-25. Print.
- . "Speech Delivered in the First Days of the Resistance War in South Viet Nam, 1945." *Ho Chi Minh: Selected Articles and Speeches*. Ed. Jack Woddis. London: Lawrence & Wishart Ltd, 1969. 34-35. Print.
- Hue-Tam, Ho Tai. "Situating Memory." Introduction. *The Country of Memory: Remaking the Past in Late Socialist Vietnam*. Ed. Hue-Tam Ho Tai. Berkeley: University of California Press, 2001. 1-17. Print.

- Kiernan, V. G. *The Lords of Human Kind*. London: Weidenfeld and Nicolson, 1969. Print.
- Laclau, Ernesto. "Politics and the Limits of Modernity." *Universal Abandon? The Politics of Postmodernism*. Ed. Andrew Ross. Minneapolis: University of Minnesota Press, 1988. 63-82. Print.
- Logevall, Fredrik. *The Origins of the Vietnam War*. Harlow: Pearson Education Ltd, 2001. Print.
- Marr, David G. *Vietnamese Tradition on Trial, 1920-1945*. Berkeley: University of California Press, 1981. Print.
- Mouffe, Chantal. "Radical Democracy: Modern or Postmodern?" Trans. Paul Holdengräber. *Universal Abandon? The Politics of Postmodernism*. Ed. Andrew Ross. Minneapolis: University of Minnesota Press, 1988. 31-45. Print.
- Natsios, Andrew S. "Democratic Opportunity in the Arab and Muslim World." *Cambridge Review of International Affairs*. 19.2 (2006): 263-70. Print.
- "Republic of Vietnam Constitutional Charter." *Constitutions of Nations: Volume II – Asia, Australia and Oceania*. Ed. Amos J. Peaslee. Rev. 3<sup>rd</sup> ed. The Hague: Martinus Nijhoff, 1966. 1219-23. Print.
- Ruane, Kevin. *War and Revolution in Vietnam: 1930-75*. London: UCL Press, 1998. Print.
- Salisbury, Harrison E. "Image and Reality in Indochina." *Foreign Affairs*. Vol. 49, No. 3 (Apr. 1971): 381-94. Print.
- Smith, Gordon Hedderly. *The Blood Hunters: A Narrative of Pioneer Missionary Work Among the Savages of French Indo-China*. Moody Bible Institute of Chicago, 1942. Print.
- Thich, Nhat Hanh. "Recommendations." *Of Quiet Courage: Poems from Viet Nam*. Eds. Jacqui Chagnon and Don Luce. Indochina Mobile Education Project, 1974.

145-46. Print.

Tran, Le Thuy. "The Statue of the Open-Dressed Dame." *E&W*. 86, March 2007. Red River Communications. Web. 2 Feb 2011.

Žižek, Slavoj. "Introduction: Robespierre, or, the 'Divine Violence' of Terror." *Slavoj Žižek presents Robespierre: Virtue and Terror*. Ed. Jean Ducange. Trans. John Howe. London: Verso, 2007. vii-xxxix. Print.

## Chapter 5 – The People of the Transition

Agamben, Giorgio. *State of Exception*. Trans. Kevin Attell. Chicago: University of Chicago Press, 2005. Print.

"Building a New Iraq." *Operation Iraqi Freedom and the New Iraq: Insights and Forecasts*. Ed. Michael Knights. Washington DC: The Washington Institute for Near East Policy, 2004. 255-58. Print.

Bush, George. "President Congratulates Iraqis on Election." *The White House (President George W. Bush)*. Web. 4 Feb. 2011.

Chaplin, Edward. "Iraq's New Constitution: Recipe for Stability or Chaos?" *Cambridge Review of International Affairs* 19 (2006): 271-84. Print.

Clawson, Patrick. "Iraq for the Iraqis: How and When." *Operation Iraqi Freedom and the New Iraq: Insights and Forecasts*. Ed. Michael Knights. Washington DC: The Washington Institute for Near East Policy, 2004. 299-304. Print.

Davies, Eric and Nicolas Gavrielides. "Statecraft, Historical Memory, and Popular Culture in Iraq and Kuwait." *Statecraft in the Middle East: Oil, Historical Memory and Popular Culture*. Eds. Eric Davis and Nicolas Gavrielides. Miami: Florida International University Press, 1991. 116-48. Print.



- “Establishing the kingdom; the monarchy and the instruments of government; drafting the Constitution and the Anglo-Iraq Treaty 1921-1924.” Report from High Commissioner of Baghdad to Secretary of State for the Colonies, L.S. Amery. Aug. 6, 1925. *Records of Iraq 1914-1966*. Vol.3: 1921-1924. Ed. Alan de L. Rush. Archive Editions, 2001. (1-89). Print.
- Fernea, Robert A. and Wm. Roger Lewis. “Introduction.” *The Iraqi Revolution of 1958: The Old Social Class Revisited*. Eds. Robert A. Fernea and Wm. Roger Lewis. London: I.B. Tauris & Co. Ltd, 1991. xiii-xxiv. Print.
- “Full Text of Iraqi Constitution.” *The Washington Post*. 12 Oct. 2005. The Washington Post Company. Web. 2 Feb. 2011.
- Hardt, Michael and Antonio Negri. *Empire*. Cambridge, Massachusetts: Harvard University Press, 2000. Print.
- Hart, Vivian. “Democratic Constitution Making.” United States Institute of Peace. Special Report 107. July 2003. Print.
- Hussein, Saddam. *On History, Heritage and Religion*. Trans. Naji Al-hadithi. Baghdad: Translation & Foreign Languages Publishing, 1981. Print.
- “Iraq - Interim Constitution.” *International Constitutional Law*. Universität Wien. Ed. A. Tschentscher. Web. 1 Dec. 2008.
- “Iraqi Constitution Passes, Officials Say.” *CNN.com*. 26 Oct. 2005. Cable News Network. Web. 2 Feb. 2011.
- “Iraq’s Constitutional Process: Shaping a Vision for the Country’s Future.” United States Institute of Peace. Special Report 132. Feb. 2005. Print.
- Knights, Michael. “Introductory Essay.” *Operation Iraqi Freedom and the New Iraq:*

- Insights and Forecasts*. Ed. Michael Knights. Washington DC: The Washington Institute for Near East Policy, 2004. 7-9. Print.
- Liotard, Jean-François. *The Postmodern Condition: A Report on Knowledge*. Trans. Geoff Bennington, Brian Massumi. Manchester: Manchester University Press, 1979. Print.
- Macaulay, Thomas. "Hallam's Constitutional History." *Lord Macaulay's Essays and Lays of Ancient Rome*. London: Longmans, Green, and Co., 1905. 51-99. Print.
- Mohamedou, Mohammad-Mahmoud. *Iraq and the Second Gulf War: State Building and Regime Security*. San Francisco: Austin & Winfield, 1988. Print.
- Morrow, Jonathan. "Iraq's Constitutional Process II: An Opportunity Lost." United States Institute of Peace. Special Report 155. Nov. 2005. Print.
- "Operations in Iraq – First Reflections." *GlobalSecurity.Org*. Web. 28 July 2010.
- Paine, Thomas. *Common Sense*. 1776. Ed. Issac Kramnick. Harmondsworth: PenguinBooks, 1986. Print.
- Polk, William R. *Understanding Iraq: A Whistlestop Tour from Ancient Babylon to Occupied Baghdad*. London: I.B. Tauris, 2006. Print.
- Said, Edward. *Culture and Imperialism*. London: Vintage, 1994. Print.
- Sluglett, Peter. *Britain in Iraq 1914-1932*. London: Ithaca Press, 1976. Print.
- Stansfield, Gareth. *Iraq: People, History, Politics*. Cambridge: Polity Press, 2007. Print.
- Tönnies, Ferdinand. *Community and Association (Gemeinschaft und Gesellschaft)*. 1887. Trans. Charles P. Loomis. London: Routledge & Kegan Paul, 1955. Print.
- Zunes, Stephen. "The United States in Iraq: The Consequences of Occupation." *International Journal of Contemporary Iraqi Studies*. Vol 1, No. 1. 2007: 57-75. Print.

### **Conclusion – Expectations of the People**

Balibar, Étienne. *We, the People of Europe?: Reflections on Transnational Citizenship*.

Princeton: Princeton University Press, 2004. Print.

Benjamin, Walter. “Theses in the Philosophy of History.” In *Reading the Past*. Ed.

Tamsin Spargo. Basingstoke: Palgrave, 2000. 118-26. Print.

Bush, George. “Bush: ‘No Justice Without Freedom’.” 20 Jan. 2005. *CNNPolitics*. Cable

News Network. Web. 2 Feb 2010.

Habermas, Jürgen. “Modernity: an Unfinished Project.” *Postmodern Debates*. Ed. Simon

Malpas. Basingstoke: Palgrave, 2001. 37-52. Print.

Hardt, Michael and Antonio Negri. *Empire*. Cambridge, Massachusetts: Harvard

University Press, 2000. Print.

Hobsbawm, Eric. *The Age of Capital: 1848-1875*. 1975. London: Weidenfeld &

Nicolson, 1995. Print.

Perelman, Chaim and L. Olbrechts-Tyteca. *The New Rhetoric: A Treatise on*

*Argumentation*. 1958. Trans. John Wilkinson and Purcell Weaver. Indiana: Notre

Dame University Press, 1969. Print.

Sieyès, Emmanuel Joseph. “What is the Third Estate?” Representatives of France in

1789.” *Sieyès: Political Writings*. Ed. Michael Sonenscher. Indianapolis: Hackett

Publishing Company, Inc., 2003. Print.

---. “Views of the Executive Means Available to the Representatives of France in 1789”

*Sieyès: Political Writings*. Ed. Michael Sonenscher. Indianapolis: Hackett

Publishing Company, Inc., 2003. Print.