

Benchmarking Constitutional Courts

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I. Institutional Integrity

Ever the provocateur, in a concurring opinion in the 1990 case of *Cruzan v. Director, Missouri Dep't. of Health*,¹ Justice Antonin Scalia explained why, in his view, the Court was right to reject a constitutional challenge to a Missouri prohibition on the termination of life support for a person in a persistent vegetative state, absent clear and convincing evidence of the person's wishes. He wrote: "the point at which life becomes 'worthless,' and the point at which the means necessary to preserve it become 'extraordinary' or 'inappropriate,' are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory."²

Justice Scalia was not thereby suggesting that he and his colleagues should be cashiered, and a new Court selected by lot. Rather, his point was that nine lawyers have no special qualifications for deciding the sorts of profound moral questions that the Court must sometimes

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¹ 497 U.S. 261 (1990).

² *Id.* at 293 (Scalia, J., concurring).

decide under the doctrine of “substantive due process,” and that therefore, that doctrine is profoundly mistaken.

Scalia’s argument in *Cruzan* works from the institution of the Supreme Court out. As expressed in *Marbury v. Madison*, “[i]f two laws conflict with each other, the courts must decide on the operation of each,”³ and given that the Constitution is the “paramount law,”⁴ it “must be looked into by the judges.”⁵ This awesome power being justified by reference to the peculiar expertise of judges and lawyers—namely in construing legal texts—it can only be exercised where the Justices are in fact employing that expertise. Thus, Scalia concludes, any interpretation which requires the Court, without a firm textual basis, to displace the moral judgments of elected officials, cannot be justified.⁶

Whether Justice Scalia is right about doctrines like substantive due process depends on whether one thinks the rationale for judicial review provided by John Marshall in *Marbury* can be supplemented by other rationales that justify a more far-reaching practice. Some theories, like John Hart Ely’s notion of representation-reinforcement,⁷ would go beyond Scalia’s textualism,

³ 5 U.S. (1 Cranch) 137, 177 (1803).

⁴ *Id.*

⁵ *Id.* at 179.

⁶ See Antonin Scalia, *A Matter of Interpretation* 46 (1997) (“The people will be willing to leave interpretation of the Constitution to lawyers and law courts so long as the people believe that it is (like the interpretation of a statute) essentially lawyers’ work . . .”).

⁷ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 88 (1980).

while not going all the way to substantive due process. Others, like James Fleming's constitutional constructivism⁸ or Ronald Dworkin's moral reading,⁹ would go that far.

My concern here, however, is not with how best to read the U.S. Constitution or any other constitution. Instead, I want to notice that debate within the fields of constitutional law and constitutional theory takes the institutions of American government as more or less fixed, and asks how, given those institutions, courts ought to do their job. One could, however, approach the problem from the opposite direction, as Isaac Herzog does in his magisterial work, *The Dignity of Constitutional Interpretation*,¹⁰ and ask the following questions: Given that constitutional courts around the world, including the U.S. Supreme Court, perform, among other things, the task of interpreting open-ended human rights provisions so as to limit the majoritarian branches of government, how should such constitutional courts¹¹ be structured, and

⁸ James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* 6 (2006).

⁹ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 2 (1996).

¹⁰ Isaac Herzog, *The Dignity of Constitutional Interpretation* (JSD thesis, Columbia Law School).

¹¹ Herzog argues that the authoritative interpreter is best understood as quasi-court/quasi-legislature, rather than a court as such, and he is correct that in some legal systems, such as the German one, the Constitutional Court is conceptualized as distinct from the ordinary judicial branch of government. In referring in this essay to constitutional courts, I do not mean to take a position on the question of whether constitutional courts are best understood as more like courts,

what procedures should they use? Should they have life tenure or fixed terms? Should they be appointed by a super-majority vote of the legislature? How many of them should there be? Should they sit in panels or en banc? And so on.

Herzog seemingly answers these and other questions by two methodologies. For the most part, he purports to be an institutional positivist. By cataloguing the answers to such questions across democratic legal systems in which constitutional interpretation occurs outside the legislature, he locates a rough consensus that the authoritative constitutional interpreter should be “a multi-member institution—ranging in size from nine to nineteen members—deciding prime constitutional questions in plenary sessions only. The members are appointed by several governmental branches—either by a gradual process or through a supermajoritarian procedure (or both)—have legal background, serve for relatively long terms and enjoy independence while in office.”

But Herzog is not simply a positivist. Building expressly on Jeremy Waldron’s notion of the dignity of legislation, Herzog’s account is also normative. He wants to justify the consensus view in such a way as to show us that the constitutional interpreter has dignity. And because Herzog is an honest scholar, in doing so, he acknowledges that his justification does not perfectly fit the range of institutions and practices one finds throughout the world of constitutional courts. Accordingly, his account has prescriptive content,

legislatures, or something distinct that combines elements of both. I use this terminology only because it is familiar; even the Germans refer to their constitutional court as, well, a constitutional court (“Bundesverfassungsgericht” in German).

especially with respect to the procedures constitutional courts ought to employ in passing on the constitutionality of legislation. For example, for reasons tied to the legitimacy (and thus the dignity) of authoritative constitutional interpretation, Herzog argues that a constitutional court should have a decision rule under which legislation is only invalidated by a unanimous or super-majoritarian decision of its members—even though most constitutional courts actually follow a simple majority rule.

Thus, Herzog is not simply or even primarily an institutional positivist, if by that term we mean someone committed to giving a descriptive account of legal institutions. Herzog might better be termed an institutional Dworkinian. Focusing on institutions across legal systems rather than statutes, constitutional provisions, and cases within a legal system, Herzog nonetheless wants to make of his account of the authoritative constitutional interpreter in various legal systems the best account it can be. His method of establishing the dignity of constitutional interpretation is to show that it has integrity.¹²

I have put the point in that way to draw a connection that may at first sound surprising—namely, the connection between Jeremy Waldron’s work on the dignity of legislation and Ronald Dworkin’s work on constitutional interpretation and legal interpretation more broadly. Waldron and Dworkin are on opposite

¹² For example, in explaining why, contrary to an argument expounded by Akhil Amar, a popular referendum should not count as a valid method of constitutional amendment, Herzog states that “Amar’s theory does not ‘fit’ the common practice.” Chapter 2, TAN 98.

sides of the debate over judicial review of legislation. Waldron thinks it cannot be reconciled with fundamental democratic principles,¹³ whereas Dworkin thinks that it can be. Indeed, although Dworkin has professed agnosticism with respect to the question of whether, as a matter of institutional design, the final authority for constitutional interpretation ought to be housed in the legislature or a body that is insulated from politics,¹⁴ his method of constitutional interpretation so closely tracks the method he prescribes for legal interpretation by judges in other domains as to appear custom-made for judicial review rather than legislative supremacy in matters of constitutional interpretation. Thus, we can fairly state that Dworkin thinks judicial review is not merely compatible with democracy, but that it improves democracy.

Despite their differences on the question of the desirability of judicial review of legislation, Dworkin and Waldron employ essentially the same methodology, albeit to a different substrate. For Dworkin, the fundamental question is not whether judges should have the authority to review the constitutionality of legislation but how they should exercise that authority. His answer is that they should do essentially the same thing with respect to constitutional interpretation as they do with respect to

¹³ See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L. J.* 1346, passim (2006); Jeremy Waldron, *Law and Disagreement* 10-17, 211-312 (1999).

¹⁴ See Dworkin, *supra* note 9, at 34 (“The moral reading . . . is a theory about how certain clauses of some constitutions should be read It is not a theory about who must ask these questions, or about whose answer must be taken to be authoritative.”)

other sorts of cases: they should find the interpretation that best fits and justifies the law as a whole.¹⁵ For Waldron in *The Dignity of Legislation*, the question is what gives legislation its authority or, to use his language, dignity. And as for Dworkin, the answer is some combination of fit and justification. Waldron highlights key features of legislative bodies throughout the democratic world, identifies the principles they implement, and then argues that these principles are worthy of respect. As James Fleming has observed, “Waldron evidently aspires to do for legislation what Dworkin is thought to have done for adjudication.”¹⁶

The balance of this essay has two aims. First, it calls into question the applicability of the Dworkinian method to issues of institutional design. Although the idea that a constitutional court should, *ceteris paribus*, adhere to its own prior decisions, is not without its critics, the idea at least has the virtue of familiarity. Notions of inter-temporal fairness, judicial impartiality, predictability, and (encompassing these and other values) the rule of law, all give the argument for consistency across decided

¹⁵ In the Introduction to *Freedom’s Law*, Dworkin suggests that his interpretive method is derived from the open-ended language of particular clauses of the Constitution rather than his broader jurisprudential commitments, see Dworkin, *Freedom’s Law*, *supra*, note 9, at 8, but his methodology throughout that book and elsewhere belies this claim. See Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 *Colum. L. Rev.* 133, 136 (1997) (reviewing *Freedom’s Law* and Dennis Patterson, *Law and Truth* (1996)).

¹⁶ James E. Fleming, *Book Review: The Constitution Outside the Courts*, 86 *Cornell L. Rev.* 215, 248 (2000) (reviewing Mark Tushnet, *Taking the Constitution Away from the Courts* (1999)).

cases a prima facie plausibility. However, I argue in the next Part of this Essay, no similar plausibility immediately attaches to the idea that in figuring out the desiderata of a constitutional interpreter or a legislature, we would do best to find a set of rationalizing or even perfecting principles to explain the range of institutional arrangements we happen to observe throughout the democratic world at this particular historical moment. Accordingly, Part II is skeptical of Herzog's project and, to the extent that Waldron uses Dworkinian coherentism to argue for legislative supremacy in matters of constitutional interpretation, it is skeptical of Waldron's project as well.

The second aim of this Essay is to offer a partial defense of an approach to questions of institutional design that, while proceeding from a very different animating spirit from the animating spirit of what I am calling institutional Dworkinianism, also combines exhaustive survey with prescription. Borrowing a term from the literature of business organizations, I call this process "benchmarking." Whether those, like Waldron and Herzog, who approach these questions more as matters of basic principle than pragmatism, can treat my proposal as a friendly amendment, is for them to decide.

II. Should Anyone Care About Integrity in Institutional Design?

Dworkin argues that judges should decide cases, including constitutional cases, in a way that makes the result "fit best" with the law as a whole, where the notion of "best" has reference to principles of political justice. Whatever one thinks of this account of judging (in constitutional and other cases) in the United States, few,

if any, of the arguments that Dworkin and others make for it have any obvious purchase on the following seemingly very different question of institutional design: How should those responsible for fashioning the legal system in a constitutional democracy go about designing the legislature or the constitutional court, in the event that they opt for such an institution rather than locating the final authority on constitutional questions within the legislature?

The principle that like cases should be treated alike is at least *prima facie* plausible as a matter of basic equality,¹⁷ and to the extent that Dworkin's conception of fit is about treating like cases alike, it may be thought to implement core notions of equality. The argument is hardly airtight, of course, for some things invariably change between the initial case and the new one, even if the only thing that changes is the judges' perception of what the law requires, and one is then left with the question of whether the things that have changed are sufficient to make the later case sufficiently unlike the earlier one so as to take it outside the basic maxim. Here, as elsewhere, the principle of equality alone does little to settle the hard questions.¹⁸ Nonetheless, nearly all U.S. constitutional theorists and judges recognize some substantial role for precedent—or, in Dworkin's terms,

¹⁷ It was even suggested, by Justice Brandeis no less, that failure to treat like cases alike would violate the constitutional requirement of the equal protection of the laws, see *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 75 (1938), although the suggestion did not give rise to a robust line of constitutional doctrine.

¹⁸ See Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982).

“fit”—in constitutional adjudication as in other areas of law, and for at least some of these theorists and judges, notions of equality no doubt do some work.

Yet there is no comparable principle of equality at work with respect to our questions of institutional design. Does it deny equality in any real sense for persons in one legal system to have their constitutional claims decided by one set of structures and process—say, abstract review by eleven judges appointed directly by the legislature to non-renewable fifteen-year terms—while persons in another legal system have their constitutional claims decided by a different set of structures and process—say, concrete review by nine judges appointed for life by the chief executive and confirmed by the upper house of the national legislature?

Of course, we might think that one set of structures and procedures is superior to another. We might even make that judgment regardless of the structures and procedures of the rest of the legal/political system, and independent of the cultural characteristics of the society in question. We might think, for example, that the judges of a constitutional court ought always to hear cases in plenum rather than in panels. But our thinking that is not a matter of treating likes alike; it is a matter of the inherent superiority of one method of deciding constitutional issues over another.

If, for example, we came to conclude that life tenure for judges of a constitutional court was superior to fixed terms or a mandatory retirement age, it is difficult to imagine a persuasive argument for the United States nonetheless abandoning life tenure in favor of fixed terms, rooted solely in the fact that no other country in the world grants judges of its constitutional court life tenure. Accordingly, however much one think principles of

equality warrant a principle of integrity in matters of constitutional interpretation within a legal system, such principles have no clear purchase on questions of cross-legal system institutional design.

Nor does it seem that any of the other sorts of reasons for treating like cases alike within a legal system carries over to matters of institutional design. The obligation to treat like cases alike acts as a check on judicial partiality and arbitrariness, but that is hardly a concern when one is designing a legal system, for whatever role one gives to judges in matters of constitutional interpretation, constitutions are not written by judges, at least not by judges acting in their capacity as judges rather than members of a constituent assembly or other representative constitution-writing body. Precedent's role in constraining judicial discretion has no obvious role to play in matters of constitutional design.

The practice of following precedent also serves values of efficiency. It would be wholly unworkable for a constitutional or other court to treat every legal question as open each time it arises in litigation.¹⁹ In the U.S. system, for example, every constitutional case would present the opportunity to re-litigate *Marbury v. Madison*, and then everything else. No modern legal system could function this way, which is why the notion that Continental legal systems lack the principle of precedent is a fiction: In practice if not in theory, issues

¹⁹ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (“The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it.”) (citing Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921)).

are resolved in civil law countries in much the same way as in common law countries.²⁰

Questions of institutional design, however, are completely different. Whether a polity chooses to model its constitutional court on the prevailing pattern or to innovate is a one-time decision. Innovation in institutional design does not require the innovating country constantly to revisit decisions already taken in the way that running a legal system or a constitutional court without at least a system of de facto precedent would. Thus, the values of efficiency that precedent serves within a legal system are not implicated in designing a constitutional court.

Adherence to precedent within a legal system also protects reliance interests. To be sure, here, as elsewhere, the reliance argument is circular: If a court did not adhere to its past precedents, then no one could reasonably rely on the prospect that it would do so in the future. However, reliance arguments are almost always a matter of social fact rather than strict logic. Over time, we observe that in a well-functioning legal system, people in fact do order their affairs around the legal rules and principles in place, and thus any departure from those rules and principles must count as a cost the disruption that ensues.

But once again, it makes little sense to carry this idea over to the realm of institutional design. Can anyone realistically be said to make decisions on the assumption

²⁰ Mirjan R. Damaska, *The Faces of Justice and State Authority* 36-38 (1986) (discussing the role of precedent in civil law systems); George P. Fletcher, *Two Modes of Legal Thought*, 90 *Yale L.J.* 970, 994 (1981) (same).

that the constitutional court in her country will be structured along the same broad lines as courts are structured in other democratic countries? Even if somebody had such an expectation, how would she act on it? What actions does one take in the real world based on the assumption that the constitutional court sits in plenum rather than panels, or on the assumption that the judges sit for less than life terms? Merely to ask such questions is to demonstrate the inapplicability of reliance to these matters.

III. From Burke to Benchmarks

Before concluding that what I am calling institutional Dworkinianism is simply a mistake, I want to revisit a suggestion I rejected a moment ago. I said that cross-national institutional consensus does not, by itself, provide a reason for anyone to think that a legal system which rejects the consensus view must be wrong. To use the example I provided earlier, careful study of the arguments for and against life tenure for judges of a constitutional court might lead one to prefer life tenure to the alternatives, and if so, the fact that every country other than the United States rejects life tenure would count as a reason for thinking that the world is mistaken, rather than as a reason for thinking that the United States ought to change its practice to conform to the global consensus.

I want to amend that conclusion in one important particular: The democratic world's nearly universal rejection of life tenure should count as a reason why Americans might want to reconsider the institution. Perhaps the rest of the world is onto something, we Americans might think. We should ask leading

constitutional thinkers in other countries why they reject life tenure in favor of fixed terms or mandatory retirement. We should listen carefully to their answers. We might even give those arguments some epistemic deference: If nearly everybody else reaches a judgment different from our own, perhaps our judgment is wrong and, at least if the question is close, we might prefer the weight of world opinion.

In practice, I doubt that this sort of epistemic argument would do any real work in an established legal system like that of the United States, in which the process of constitutional amendment is extraordinarily difficult. Given that difficulty, it would be essentially impossible to mobilize the political will to create the super-majorities necessary to amend the Constitution for the purpose of adopting a set of arrangements that is regarded as inferior to the status quo even by its proponents, simply because the weight of world opinion leads those proponents to regard their own best judgment as fallible. Realistically, a movement for constitutional change will only arise out of comparative assessments where those assessments lead to the conclusion that the status quo is inferior to the consensus practice in the world.

Because of the impracticality of the epistemic argument for deference to the global consensus in mature legal systems, we may instead regard the argument as addressed to a quite different situation—the circumstances of a new nation, a newly democratic nation, or an existing democratic nation that, for whatever reasons, has embarked on a project of wholesale constitutional change. In these circumstances, the argument goes, as between a novel institutional form and an institutional form that has been adopted by the

overwhelming majority of democratic states, a constitution writer ought to place a thumb on the scale in favor of the consensus form.

Why might that be? The most obvious answer has much in common with one account of why courts should respect precedent. Common law judges, at least for a period in England, argued that the common law as recognized in judicial decisions was simply the juridification of custom. Judges did not choose the best rule by their own lights but adhered to the rules that society itself followed as a matter of custom.²¹ Although this notion of common law as customary law clearly waned with the advent of skepticism in law,²² one can still see its legacy in modern theories of adjudication.²³

²¹ See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 *Yale L.J.* 1651, 1655 (1994) (“[I]n the course of the seventeenth century . . . there emerge[d] among the English common lawyers the strong conviction that the primary source of the validity of law—including both its moral validity and its political validity—is its historical character, its source in the customs and traditions of the community whose law it is.”).

²² See, e.g., Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harv. L. Rev.* 457, 469 (1897) (“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”)

²³ Consider, for example, the important role that social practice plays in the theories of both positivists and Dworkinians. As Mathew Adler explains:

Dworkin and the positivists disagree about how social practices determine legal content. Dworkin insists that the function from social practice to law necessarily involves moral considerations; positivists deny that. But there has been broad agreement among Anglo-American

The normative theory that underwrites adherence to precedent as custom is, of course, to be found in Edmund Burke. Just as Burke thought that a society's customs, laws, and institutions reflected the accumulated wisdom of the ages, so one might think that the common law—whether regarded as originating in popular custom or in judicial value choice—reflects accumulated wisdom. Moreover, as Burke argued with respect to social change more broadly, so one might take a highly cautious attitude towards legal change for fear that a seemingly small adjustment disrupts a delicate equilibrium in unpredictable but generally harmful ways.²⁴ Thus, one could argue for judicial adherence to precedent in constitutional (and other) cases on Burkean grounds.²⁵

One could readily make the same move at the cross-national level of institutional design. Looking around the world, the writers of a new constitution would notice that there is a rough consensus on what a legislature should look like—large assembly; frequent elections; universal adult suffrage; etc.²⁶ They also notice

jurisprudents, starting with the Concept of Law, continuing to the present, and including Dworkin, that the practices of some canonical group play a fundamental role in generating law within a given legal system.

Mathew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 *Nw. U. L. Rev.* 719, 725-26 (2006).

²⁴ See Edmund Burke, *Reflections on the Revolution in France* 3, 74 (Frank M. Turner ed., Yale Univ. Press 2003) (1790).

²⁵ See Thomas W. Merrill, *Bork v. Burke*, 19 *Harv. J. L. & Pub. Pol'y* 509 (1995).

²⁶ See Jeremy Waldron, *The Dignity of Legislation* (1999).

a rough consensus about the authoritative constitutional interpreter—relatively small number of deliberators; long terms of office; selection method that is connected to politics but also somewhat insulated from politics; etc.²⁷ Aided by able theorists, our constitution writers can easily generate justifications for each point of consensus. Frequent elections are necessary to ensure that representatives remain faithful agents of the People; long terms of office are necessary to ensure that constitutional judges are not caught up in the passions of the day; etc. But suppose that on some matter of institutional design, the best judgment of the constitution writers contradicts the global consensus. An institutional Burkean would say that the constitution writers must be extremely confident in their own judgment before departing from the consensus.

Institutional Burkeanism is quite plausible. Suppose, for example, that our constitution writers come up with the idea of a plural executive—not in the sense of a president or queen who is head of state and a prime minister who is head of the government, an arrangement well within the global consensus, but in the quite different sense of two persons, both given the same title, who share the same executive powers equally. Perhaps the constitution writers find this idea attractive because they believe it will be a check on tyranny: needing the consensus of his fellow, each co-chief will moderate his ambition. What should our constitution writers make of the fact that this arrangement falls outside the global consensus on democratic forms of government?

An institutional Burkean would say: quite a lot. The absence of plural executives reflects the failure of

²⁷ See Herzog, *supra* note 10.

that model, most prominently under the Consuls of the Roman Republic.²⁸ Rather than ambition counteracting ambition, as in the standard view of separation of powers,²⁹ having co-executives more frequently leads to turf battles, jealousy, and even civil war.

Let us put aside the question of whether this is an accurate account of ancient Rome, which, after all, lasted as a republic for centuries and retained the Consuls even during the Imperial period. Suppose for the moment that the institutional Burkean is right that co-executives are a bad idea, and that ancient Roman history so proves. The institutional Burkean's point is that our contemporary constitution writers don't need to know any Roman history to learn its lessons. Those lessons are inscribed in the existing institutional practices that have been handed down to us. And, the institutional Burkean adds, that is likely to be true even where we cannot pinpoint the exact historical experiences that led the world to turn against some institution. Thus, to turn away from a consensus view is to cast aside the accumulated wisdom of the ages. Sometimes it should be done, but only with the utmost caution.

The Burkean argument for adherence to institutional consensus closely parallels ideas in

²⁸ See Federalist No. 70 (Hamilton) ("The Roman history records many instances of mischiefs to the republic from the dissensions between the Consuls, and between the military Tribunes, who were at times substituted for the Consuls. But it gives us no specimens of any peculiar advantages derived to the state from the circumstance of the plurality of those magistrates.").

²⁹ See Federalist No. 51 (Hamilton or Madison) ("Ambition must be made to counteract ambition.").

economics and biology. Neoclassical economics posits that the free market will generally lead to an efficient allocation of resources, because a sequence of free exchanges will leave resources in the hands of those who most value them. Accordingly, economists frequently oppose programs of regulation or redistribution on the ground that such programs will move the economy and society as a whole away from a superior status quo. Likewise, Darwinian evolution leads to the survival and flourishing of organisms well adapted to their environment because the best adapted life forms win the struggle to survive and reproduce. Although we don't usually think of evolution in public policy terms, it supplies a powerful argument for, *inter alia*, policies that avoid dramatic changes in the environment, which would lead humans as well as other animal and plant species upon which human flourishing depends, to be poorly adapted to the new environmental conditions.

The policy prescriptions of neoclassical economists and biologists frequently clash, with the former opposing much regulation, including environmental regulation, and the latter favoring it. However, here I want to call attention to a deep structural similarity:³⁰ Both economics and biology provide reasons to think that changes to the status quo are likely to be harmful rather than helpful.³¹ They are, in this sense, both Burkean sciences.

³⁰ See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 *Harv. L. Rev.* 1637, 1647 (1997) ("Economics is a body of theory closely related in both form and content to the theory of evolution").

³¹ Of course, economists recognize that changes like the invention of a new product can improve the status quo, but the standard theory considers the economy in equilibrium.

Yet, in both economics and biology, we can never be sure that the status quo is truly best, for it could reflect path dependence. Although economists disagree over which specific examples qualify as instances of path dependence, the phenomenon itself is straightforward: The dominance of some product or platform over a competitor—the QWERTY keyboard over the Dvorak keyboard, VHS over Betamax, and Microsoft Windows over the Macintosh operating system are the standard cases—does not reflect the former’s superiority but rather an initial advantage unrelated to performance that subsequently became locked in through network effects and the obstacle of high transition costs.

Biology exhibits path dependence as well. The gross similarities in skeletons of bats, whales, and horses—indeed, even the fact that they all have skeletons rather than, as in insects, exoskeletons—reveals common mammalian ancestry rather than simply adaptations to flying, swimming, and running. It would not be wrong to point to the adaptive success of mammals or the larger category of vertebrates as evidence for the excellence of bones as a means of framing an organism. But it would

Whether we observe “progress” in the biological world is a different question. Most biologists would not speak of the evolution from, say, unicellular organisms to self-conscious humans as progress rather than mere adaptation, but even if we adopt such language, dramatic change is hardly an unalloyed blessing. The sorts of dramatic environmental change that give rise to new species typically also give rise to mass extinctions, and so even if the end result is better for the species that come through the change—say, the mammals that come to occupy the niches previously occupied by dinosaurs—it is typically a catastrophe for the individual members of the species alive at the time and even for most species as a whole.

not be entirely right, either. We can't say bones are better than, say, steel, because evolution did not have any steel-based early life forms on which to work.

By contrast, we can make a claim about the excellence of wings as a means of flight, from the fact that insects, birds, and bats all evolved wings from non-winged forms. These are examples of convergent evolution, a phenomenon highly suggestive of excellent adaptation.

The parallel to economics and biology thus calls attention to a pitfall in the Burkean argument for conservatism in institutional design. How do we know whether the similarities we see among the institutional forms of modern democracies reflect convergent evolution towards the best solution to a problem, rather than mere descent from common ancestry or another kind of path dependence? Is the preference among modern democracies for large legislatures, frequent elections, and long terms for constitutional judges, more like wings or more like the QWERTY keyboard? Common descent is a highly plausible explanation for the structural similarities we observe among constitutional courts, given how recently so many democracies adopted constitutional review and the fact that many did so by consciously choosing between aspects of the "American" and the "Austrian" models.

Thus we see the core difficulty with Burkean institutionalism: In assuming that the status quo reflects the accumulated wisdom of the ages, we neglect potentially superior possibilities that were never before considered or tested because they did not lie on the path along which the existing institutions evolved. Accordingly, the challenge for those who would design public institutions is how to distinguish those aspects of the global consensus (where there is one) that reflect

convergent evolution, and thus should be emulated, from those aspects that simply reflect path-dependent common descent.

We can begin to meet that challenge through a process known in the private sector as “benchmarking.” An example well illustrates the idea. Suppose a firm designs and manufactures automobiles. Each year, the firm employs a team to improve existing designs, but working with ordinary routines risks myopia. The design team tinkers with the known elements—a more efficient engine; more aerodynamic body; more comfortable seats; etc.—but working in this way, it will likely miss numerous possible improvements that do not fit within the framework of prior models. Benchmarking is a process that looks beyond the firm’s own prior models to a much wider range of possibilities. Our automobile design team would look at all vehicles in the industry to discover what is possible along all relevant dimensions. These industry-wide benchmarks are then taken as targets for performance of the vehicle our team is designing. Benchmarking can be, and has been, applied to processes as well as products, and in the public as well as the private sector.³²

How would benchmarking work in matters of constitutional design? The framers of a new constitution would begin by looking at existing constitutions to discover the world of possibilities. If there is a global consensus on some point, that would be a possible benchmark, but even practices that are idiosyncratic could be benchmarks. Our constitution writers survey

³² See Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267, 345–48 (1998).

other constitutions to get useful ideas, and the fact that an idea has not been adopted all over the world does not rule it out as potentially best suited to the conditions in which the new constitution will operate. Benchmarking here serves principally to combat the risk of myopia.

In a deep sense, the framers of the American Constitution used just this process in their work. Most famously, in preparation for the Philadelphia Convention, James Madison made an exacting study of democratic and republican government throughout history. In proposing and debating proposals for the U.S. Constitution, he drew on the lessons of history, both positive and negative. But most importantly, Madison and his fellow Conventioneers looked to historical benchmarks to open, rather than to circumscribe, their thinking. Thus, in proposing the novel arrangement of dual sovereignty, “[t]he Framers split the atom of sovereignty,” as Justice Anthony Kennedy put the point in a 1995 case.³³ More broadly, having so recently fought a revolution, the American framers were willing to innovate.

Perhaps the chief difficulty with a benchmarking approach to constitutional design is the absence of a clear yardstick for measuring success. Improving a car’s gas mileage without adversely affecting its performance clearly counts as a net improvement. But judgments about constitutional design are likely to track deep unresolved divisions. Insulating constitutional judges from politics makes them more likely to engage in good-faith interpretation and thus less likely to reflect the popular will. Is this a good idea or a bad one? Or, more concretely, just how insulated should constitutional

³³ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

judges be from politics so that they are sufficiently independent to follow the law but not so remote as to lose touch with the values of the People? Different methods of selection and means of structuring judicial terms will trade these values off against one another in different ways. Whereas, *ceteris paribus*, everyone prefers a more fuel-efficient car to a less fuel-efficient one, the “best practice” in matters of constitutional design is much less clear.

Yet the criticism I have just sketched largely misses the point of institutional benchmarking. Just as our automobile design team’s hard work only begins after it has surveyed industry practice, so too, our constitution writers must roll up their sleeves and get to work deliberating about their values and the institutions best suited to serve those values only after surveying existing institutions to make a list of known possibilities. They must then set about deciding which among these and their own innovations to adopt, and how to combine them.

The contrast with the Burkean or the Dworkinian approach should now be clear. The institutional Dworkinian views his task as justifying existing institutions. The project is partly prescriptive, because the most attractive principle that makes the most sense of the existing institutions will not make perfect sense of all of the institutions, and thus the institutional Dworkinian will recommend that some practices be abandoned (just as Hercules will overrule some cases). But in the main, Dworkinianism is a project of rationalization.

By contrast, constitutional benchmarking is a project of deliberation and innovation. It takes the existing constitutional arrangements throughout the world as useful models. It even allows that a global consensus in favor of some structure or practice may

reflect its superiority to the alternatives that have previously been considered or tried. But the benchmarking approach also allows for the possibility that dramatic innovations could be improvements.

Written constitutionalism did not begin until the late eighteenth century, and it did not become a truly global phenomenon until the middle of the twentieth century. It would be surprising if, in that relatively short period, humankind would have found and settled upon ideal answers to the questions of institutional design that constitutional democracies face.

For last section, from Dara, Archon, Brad and Brandon:

For values: Deliberate about those too, and they can be changed by the benchmarking. That's what Madison did.

Give an example? Life tenure?

State constitutions might be a better fit for "hard benchmarking," where you really re-examine regularly, because easily changed.

Contrast that with "soft benchmarking," which is compatible with the Dworkinian stuff. You just supplement that with looking around.