Constitutional Design for Divided Societies: Integration or Accommodation?

Edited by SUJIT CHOUHDHRY
Bridging comparative politics and comparative constitutional law: Constitutional design in divided societies

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1. Introduction: Comparative constitutional law missing in action

The Human Development Report (HDR), published annually by the United Nations Development Programme, is an unlikely stimulus for reflection upon the state of the field of comparative constitutional law. Although the Human Development Reports take a broad understanding of development, constitutional law has never occupied center stage. However, the HDR 2004 is different. Entitled Cultural Liberty in Today's Diverse World, the HDR 2004 opens up by stating that “[m]anaging cultural diversity is one of the central challenges of our time.”¹ The report supports this contention by drawing on a wide range of examples, from disputes over official languages in Afghanistan and Sri Lanka, to the political representation of ethnic and religious minorities in Iraq and Fiji, to demands for asymmetric regimes of regional autonomy in Quebec and Catalonia, to the competing nationalisms of Northern Ireland, Bosnia-Herzegovina and Cyprus. The report goes further, and offers a particular diagnosis of, and set of solutions for, this phenomenon. In its view, these conflicts flow from a denial of “cultural liberty.”² As the report states, “[p]eople want the freedom to practice their religion openly, to speak their language, to celebrate their ethnic or religious heritage without fear of ridicule or punishment or diminished opportunity.”³ Among the solutions it proposes to counteract the denial of cultural liberty, constitutional

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² Id.

³ Id.
law takes center stage. Although it approves of the standard liberal constitutional instrument to protect cultural liberty, a constitutional bill of rights backed by judicial review, it also proposes the adoption of “policies that explicitly recognize cultural differences” and which reject assimilation, such as federalism, consociation, and legal pluralism.

There is much to question in both the HDR 2004’s understanding of the causes of linguistic, ethnic, religious, and cultural conflict—which we can loosely term ethnic or ethnocultural conflict—and the coherence of its particular combination of policy prescriptions. But the report is surely correct in highlighting that how societies should respond to the opportunities and challenges raised by ethnocultural divisions—and in so doing promote democracy, social justice, peace, and stability—is one of the most difficult and important questions of contemporary politics. Even the most casual review of the popular media drives the point home. In a wide range of cases, spanning several continents, in both the developed and developing world, it is arguably the central issue of political life. Consider the following examples, which are live issues as this introduction goes to press. Belgium has been unable, for nearly four months, to craft a coalition government that includes both Flemish and French speakers in compliance with the Belgian Constitution, which mandates a linguistically balanced cabinet. Nepal continues to grapple with the unanticipated rise of minority nationalism among Hindi-speakers in the southeast of the country, who have demanded the abandonment of Nepal’s unitary constitution and the restructuring of the country along federal lines. Turkey is engaged in renewed, armed conflict with Kurdish rebels who have long sought regional autonomy, official language status for Kurdish, and constitutional acknowledgement of the multinational character of Turkey. Finally, in the dénouement to the Yugoslavia civil war, the final status of Kosovo remains unclear, with Serbia offering regional autonomy, and Kosovo demanding independence and threatening to issue a unilateral declaration of independence. These examples could be supplemented by numerous others.

In this volume, we term these political communities “divided societies”. It is important to define precisely what a divided society is, by clarifying what it is not. In Democracy in Plural Societies, Arend Lijphart famously drew a contrast between two kinds of political community—culturally homogeneous political communities—which were not beset by political division—and plural societies, which were. But as Jürg Steiner pointed out soon thereafter, Lijphart had seemingly (and likely inadvertently) erred in conflating diversity with political division. As a category of political and constitutional analysis, a divided society is

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4 Id. at 2.
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analyses, a divided society is not merely a society which is ethnically, linguistically, religiously, or culturally diverse. Indeed, whether through conquest, colonization, slavery or immigration, it is hard to imagine a state today that is not diverse in one or more of these dimensions. The age of the ethnoculturally homogeneous state, if there ever was one, is long over. Rather, what marks a divided society is that these differences are politically salient—that is, they are persistent markers of political identity and bases for political mobilization. Ethnocultural diversity translates into political fragmentation. In a divided society, political claims are refracted through the lens of ethnic identity, and political conflict is synonymous with conflict among ethnocultural groups.

A lot is at stake in how divided societies respond to the challenges raised by the equation of ethnocultural identity and political interest. The extreme consequences of the failure to address these challenges adequately are well known: discrimination and exclusion, forced assimilation, civil war, ethnic cleansing, and even genocide. But even in the absence of violence, in states where the rule of law and respect for fundamental human rights prevail—consider Spain, Belgium, and Canada—failing to respond to these challenges appropriately can have a corrosive effect on ordinary politics. In the absence of trust and expectations of reciprocity across members of different ethnocultural groups, it may become impossible to reach political decisions on important questions of public policy such as the environment, health care, and the economy, especially if the burdens and benefits of those policies are—or are perceived to be—distributed unevenly along ethnic lines. If political decisions are made, they may be condemned as discriminatory. In other cases, political debates on routine policy issues can escalate quickly into political dramas of respect and recognition that are removed far from the actual interests at play, and that are out of proportion to the significance of the issue at hand. Every political issue is assessed through the lens of ethnocultural identity.

How divided societies respond to these challenges is of the highest practical importance. But it is conceptually challenging as well. As the HDR 2004 reminds us, constitutional design in divided societies bears a particularly heavy burden, because it plays multiple roles. It is useful to distinguish between two accounts of the function of a constitution in a divided society—the regulatory conception and the constitutive conception. On the regulatory conception, as Stephen Holmes has argued, constitutions both enable and disable political decision making. Constitutions enable decision making by creating the institutions government, by allocating powers to them, by setting out rules of procedure to enable these institutions to make decisions, and by defining how these institutions interact.

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Constitutions also disable decision making, by enacting procedural roadblocks to decision making (such as supermajority rules) and by setting substantive limits on political decision making (such as bills of rights). In a divided society—as in any society—a constitution must fill this regulatory role.

Yet in a divided society, a constitution must go further and constitute the very demos which governs itself under and through the constitutional regime. In divided societies, because of a history of conflict or a lack of a shared existence, the constitution is often the principal vehicle for the forging of a common political identity, which is, in turn, necessary to make that constitutional regime work. To some extent, the constitution can foster the development of a common political identity by creating the institutional spaces for shared decision making among members of different ethnocultural groups. Concrete experiences of shared decision making within a framework of the rule of law, and without recourse to force or fraud, can serve as the germ of a nascent sense of political community. For the same reason, against the backdrop of division and a lack of trust, the process of debating and negotiating a constitution can also help to create the political community on whose existence the constitutional order which results from that process depends.

But a constitution can also constitute a demos by encoding and projecting a certain vision of political community with the view of altering the very self-understanding of citizens. For example, a bill of rights can embody a conception of the polity as consisting of rights-bearing citizens of equal status irrespective of differences in race, religion, or ethnicity. This is the idea of civic citizenship, most famously presented by Ernest Renan, which can be characterized in the following way.8 A constitutional order must meet two constraints, the legitimacy constraint and the stability constraint. The legitimacy constraint is normative, while the stability constraint is sociological. The ambition of liberal constitutionalism is that a constitutional order must both be legitimate and must enjoy the allegiance of a sufficient number of its citizens to work. On the liberal conception, the conditions for the legitimate exercise of public power are the rights and institutions of representative government that one finds in a typical liberal democratic constitution. These rights and institutions are generated by a process of what Frank Michelman has termed a "contractarian constitutional justification", from the starting point of citizens assumed free and equal.9 The ambition of the civic conception of citizenship is that these same conditions also supply the necessary motivational element for those institutions to work. Additionally, the connection between legitimacy (normative) and stability (sociological) is not contingent. Rather, it is conceptual—in other words, it is the ambition of the

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civic conception of citizenship that citizens view themselves as part of the same constitutional-legal order, precisely because that order is legitimate.

Given the multiple and critical roles that constitutions must play in divided societies, it is not surprising that constitutional design would figure centrally in the HDR 2004’s policy recommendations. Moreover, these recommendations are deeply informed by comparative experience, and draw upon actual examples of constitutional provisions and practices from divided societies which appear to have responded successfully to the challenges of political mobilization on the basis of ethnocultural difference with a measure of success. The report cites examples from countries as diverse as India, Spain, Switzerland, and South Africa. In taking a comparative constitutional approach, the report tracks domestic constitutional politics in many divided societies, where comparative constitutional experience is frequently looked to as a source of lessons learned, of mistakes and dangers to be avoided, and models to be adapted and followed.

So constitutions matter, and matter centrally in the response to the challenge of divided societies. But while comparative constitutional law occupies center stage, it is striking that comparative constitutional law as a scholarly discipline has largely been missing in action. To be sure, there are exceptions. Two contributors to this volume, Yash Ghai and Stephen Tierney, have squarely addressed the question of constitutional design for divided societies in important contributions.10 Donald Horowitz, a political scientist and a legal scholar, has been a major figure in academic debates for over two decades.11 However, viewed as a whole, the field has been largely silent on the role of constitutional design in divided societies.

Proof can be found in the HDR 2004 itself. Constitutional design figures centrally in the report. Yet, of the twenty-two scholars who prepared background studies and papers for the report, not one is a legal academic. The extensive bibliography is almost entirely bereft of references to the legal literature, because there is relatively little material to cite. Instead, the experts consulted by the UNDP are prominent political theorists, political philosophers, and scholars of comparative politics. The literature cited by the report is likewise drawn from these fields. The choice made by the UNDP regarding who to consult and which materials to reference reflects the fact that the academic center of gravity for the study of divided societies lies in political science and, for the most part, outside the mainstream of legal scholarship.

Scholars of comparative constitutional law may find this claim surprising, especially because the field has never been more vibrant, and the literature is increasingly sophisticated. To understand exactly how the field is disconnected from the academic and scholarly debates surrounding constitutional design for

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10 See e.g., AUTONOMY AND ETHNICITY: NEGOTIATING COMPETING CLAIMS IN MULTI-ETHNIC STATES (Yash Ghai ed., Cambridge Univ. Press 2000); STEPHEN TIERNEY, CONSTITUTIONAL LAW AND NATIONAL PLURALISM (Oxford Univ. Press 2004).

divided societies requires a brief explanation.\textsuperscript{12} For nearly two decades, the focus of comparative constitutional law has been on comparative approaches to the protection of universal human rights within a liberal democratic constitutional order—what Michael Ignatieff has usefully termed the "rights revolution."\textsuperscript{13} To a considerable extent, the scholarly agenda for the field has been set by, and has closely tracked, constitutional practice. The resurgence of comparative constitutional law as an academic discipline accompanied the transition to democracy in many of the former communist countries of Eastern and Central Europe, the former military dictatorships of South America, and South Africa.\textsuperscript{14} The transition to democracy was usually accompanied by the adoption of rights-based constitutionalism. Moreover, well-established democracies, such as Canada, New Zealand, and the United Kingdom, also adopted judicial review and bills of rights in roughly the same time period. The shift to rights-based constitutionalism often occurred through political processes which were comparatively informed. So the field has tended to focus on those jurisdictions which have turned to rights-based constitutionalism relatively recently, as well as more established constitutional systems which have served as benchmarks for comparison. The result is a literature oriented around a standard and relatively limited set of cases: South Africa, Israel, Germany, Canada, the United Kingdom, New Zealand, the United States, and to a lesser extent, India.

In connection with these jurisdictions, the field is largely concerned with a set of closely interrelated questions:

- Should constitutions contain a justiciable bill of rights, or does a bill of rights transfer too much power to the judiciary and judicialize politics?\textsuperscript{15} Should a bill of rights be an ordinary statute, a special statute that presumptively prevails over inconsistent laws, or an entrenched part of a constitution that asserts its supremacy over ordinary law?\textsuperscript{16}

- What should the institutional arrangements surrounding the enforcement of a bill of rights be? Should countries adopt judicial supremacy or combine judicial review with legislative supremacy?\textsuperscript{17} Should rights review be the exclusive responsibility of the courts, or the joint responsibility of the executive,

\textsuperscript{12} I will develop these arguments more fully in \textit{Rethinking Comparative Constitutional Law} (work-in-progress).

\textsuperscript{13} \textit{Michael Ignatieff, The Rights Revolution} (Anati 2000).

\textsuperscript{14} \textit{Ran Hirschkorn, Towards Jurisprudence: The Origins and Consequences of the New Constitutionalism} (Harvard Univ. Press 2004).

\textsuperscript{15} Id.\textendash Jeremy Waldron, \textit{The Case Against Judicial Review}, 115 \textit{Yale L.J.} 1346 (2006);

\textsuperscript{16} \textit{Mark V. Tushnet, Taking the Constitution Away from the Courts} (Princeton Univ. Press 2001).

\textsuperscript{17} Janet L. Hiebert, \textit{Parliamentary Bills of Rights: An Alternative Model}, 69 Mod. L. Rev. 7 (2006).

For nearly two decades, the focus on comparative approaches to the liberal democratic constitutional debate has been set by the "rights revolution." To the field has been set by, and has surged of comparative constitutions, the transition to democracy Eastern and Central Europe, the United States, and South Africa. The transition to democracy and the adoption of rights-based constitutionalism is often comparatively informed. So the rights have turned to rights-based more established constitutional comparisons. The result is a limited set of cases: South Africa, New Zealand, the United States, and is largely concerned with a set of rights, or does a bill of rights judicialize politics? Should a statute that presumptively part of a constitution that asserts surrounding the enforcement of judicial supremacy or combine hould rights review be the executive, responsibility of the executive, legislative and judicial branches? Does dispersed responsibility for rights review create an interinstitutional dialogue over matters of rights protection?

- What rights should a bill of rights contain? In addition to traditional civil and political rights, should it also entrench socioeconomic rights? Should it protect rights to private property, and if so, to what extent?
- What should the scope of application of a bill of rights be? Should a bill of rights only have vertical effect to govern relations between citizens and the state, or should it also apply horizontally to private relationships?
- How should a bill of rights be interpreted? Should courts have recourse to comparative and international law in constitutional interpretation, and if so, how?

The question of how constitutional design should respond to challenges created by divided societies has not motivated this intellectual agenda. This may be a function of the fact that the terms of the scholarly debate were framed by, and in response to, the vast literature on the American constitutional experience. To be sure, some of the most important justifications of the American practice of judicial review proceed from the assumption that some groups will systematically be unable to protect their interests in the political process—so-called "discrete and insular minorities." In particular, race has undoubtedly been, and remains, a central category in American constitutional politics. But the United States is not a divided society in the specific sense defined above. While the United States is religiously, racially, and ethnically diverse, that diversity has not served as a widespread and pervasive basis for political mobilization, as it has in other societies. The unarticulated assumption embedded in

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the study of rights-based constitutionalism in the United States is that the bill of rights should not be viewed as a response to the fact of ethnocultural division. Comparative constitutional law has taken its cues from the American literature, and framed its questions around it.

This conception of the field’s academic agenda is oddly disconnected from constitutional practice. In many divided societies, racial, ethnic, religious, or linguistic status was the basis for the unjust distribution of primary social goods in the Rawlsian sense—liberty and opportunity, income and wealth, and the bases of self-respect. In some cases, the oppression occurred at the hand of majorities, as in Northern Ireland. In other cases, empowered minorities were the perpetrators of injustice, as in South Africa. Yet in other cases, both majorities and minorities had a hand in injustice, as occurred in the republics of the former Yugoslavia. Bills of rights are meant to serve as hard checks on political power to ensure that such abuses will not occur again and to provide groups with the political incentive to acquiesce and participate in the new constitutional-legal order. But as mentioned above, bills of rights have been also looked to as constitutive documents to transform the political self-understanding of citizens. A bill of rights calls upon citizens to abstract away from race, religion, ethnicity, and language, which have previously served as the grounds of political identity and political division, and instead to view themselves as citizens who are equal bearers of constitutional rights.

So reframing the study of comparative approaches to rights protection to link it to the actual constitutional agendas motivating the adoption of bills of rights is a matter of some urgency. But just as serious a mistake as the failure of the field to comprehend what functions bills of rights play in divided societies is the assumption that bills of rights are the only aspect of constitutional design worthy of comparative study. As discussed in detail below, bills of rights are but one of the tools available to constitutional designers for divided societies, and with good reason. Rights depend on the independence and impartiality of judicial institutions for their enforcement. In divided societies, the manipulation of judicial appointments can operate to undermine the ability of a bill of rights to safeguard human rights and to prevent the abuses that may give rise to ethnocultural conflict. In Sri Lanka, for example, the Sinhala-dominated Supreme Court has been viewed as being partial to Sinhalese nationalism of the Sri Lankan government. A related point is that the efficacy of bills of rights presupposes a culture of fidelity

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... especially on the part of the executive—which may have been a casualty
of ethnucultural strife. Disregard and disrespect for the orders of a court may
render a bill of rights of little practical value.

But even if these concerns could be addressed, there are limitations that
inhere in bills of rights that point to the limitations of rights-based consti-
tutionalism as the principal response to ethnucultural conflict. First, bills
of rights are a form of ex post control which can be enforced only after delay
and financial cost, and through remedies that may not adequately redress
the violation of the right, long after the damage is done. Second, bills of rights
raise questions of under-enforcement, arising from the gap between general,
abstract constitutional textual provisions and the doctrinal tests developed
by the courts to implement and enforce those guarantees.28 These gaps are a
widespread feature of constitutional interpretation, and are deliberately created
by courts for reasons of democratic legitimacy and institutional competence. The
consequence is that constitutional adjudication can rarely discipline all forms
of unequal or unfair treatment. For example, the unequal distribution of the
costs and benefits of legislation that is facially neutral on ethnucultural lines
may escape constitutional scrutiny.

Finally, and perhaps most fundamentally, bills of rights are based on the liberal
precept of neutrality as the appropriate strategy to prevent ethnucultural cleav-
ages from translating into political division. The idea was to privatize religious
belief, through protecting the right to engage in private religious practice and
by rendering the state impartial among conflicting religious doctrines. However,
while it may be possible for the state to be neutral on questions of race and eth-
nicity, it is not possible for the state to be neutral on every type of ascriptive identity.
Consider language. The state must designate a language—or a limited set of lan-
guages—as the working language of the legislature and the courts, the internal
working language of government, the language in which the state communi-
cates with its citizens, and the language of education. Neutrality is simply not an
option. Not surprisingly, conflict over official languages is a major political issue
in linguistically diverse societies. Bills of rights have little to say about how these
difficult but unavoidable choices should be made.

Bills of rights accordingly should be viewed as one, but far from the only
element of constitutional design in divided societies. Although the protection
of human rights is an important issue for constitutional politics in divided
societies, it is certainly not the only one on the table. Indeed, it is difficult to
fully comprehend the constitutional politics of rights-protection in divided

28 See, e.g., Richard H. Fallon, Jr., Implementing the Constitution (Harvard Univ.
Press 2001); Lawrence Gess, Fair Measure: The Legal Status of Underenforced Constitu-
Norms, 91 Harv. L. Rev. 1212 (1978); Richard H. Fallon, Jr., Judicially Manageable Standards and
societies without reference to other features of constitutional design with which it may be in deep tension. Consider the following example from Bosnia and Herzegovina. The Dayton Peace Accords—which are the constitution of Bosnia and Herzegovina—incorporate the European Convention on Human Rights and its protocols into domestic law. But the Dayton Accord brought peace to Bosnia and Herzegovina, in part, through the creation of a confederation between the Federation of Bosnia-Herzegovina and Republika Srpska, and presupposes that each unit is the principal home of its “constituent peoples”—Serbs for the former and Croats and Bosniaks for the latter. Bosnia and Herzegovina has structured its electoral practices to reflect the ethnic character of its confederal arrangements. For example, the Dayton Accords create a three-person presidency, consisting of a Serb, a Croat, and a Bosniak. Under electoral legislation, the Bosniak and Croat members of the presidency may be elected only by voters in the Federation of Bosnia-Herzegovina, and the Serb member only by voters in Republika Srpska. The European Commission for Democracy through Law (the Venice Commission) has recently criticized these provisions for being incompatible with Article 1 of Protocol No. 12 to the European Convention, which guarantees the right to equal enjoyment of any right protected by law, including the right to elect a President, for two reasons. First, they conflate territorial and ethnic representation, and “assume that only members of a particular ethnicity can be regarded as fully loyal citizens of the Entity capable of defending its interests”. Second, they exclude from membership in the Presidency entirely persons who are not Bosniaks, Croats, or Serbs. More generally, according to the Venice Commission, the European Convention and its protocols enshrine and encode a vision of political community “based on the civic principle” and “representation of citizens”, as opposed to “ethnic representation”. On their face, these concerns are unobjectionable. But the response to the Venice Commission is that these power-sharing arrangements, structured on the basis of ethnicity, are what made peace possible and ensure its stability. Thus, there may be an ineluctable tradeoff between peace and justice. Indeed, the European Court of Human Rights has taken pains not to disturb electoral arrangements which do not operate on an ethnically neutral basis in divided societies. So situating rights-based constitutionalism within the context of other constitutional provisions and practices sharpens our understanding of how they operate as standards for internal constitutional critique, as drivers of constitutional reform, and the sources of resistance to rights-based constitutionalism.

30 Id. at para. 44.
Because comparative constitutional law has principally focused on bills of rights, largely to the exclusion of other aspects of institutional design, it needs to turn elsewhere for guidance. Fortunately, the question of how constitutional design should respond to the problem of political mobilization around ethnocultural identities has been hotly debated in comparative politics for over two decades. The leading figures in this debate have been Arend Lijphart and Donald Horowitz. This debate is reviewed below, as Lijphart and Horowitz in many ways have defined the parameters of scholarly discussion of these issues.

What is worth noting at the outset is that in stark contrast to comparative constitutional law, bills of rights hardly figure into this debate at all. The Lijphart-Horowitz debate has instead focused on a wide range of issues, including electoral systems, the choice between parliamentary and presidential systems for structuring the relationship between the executive and legislature, as well as different forms of federal government. The debates surrounding these issues in comparative constitutional perspective have attracted minimal attention from legal scholars. The premise of this volume is that comparative constitutional law must expand its intellectual agenda to encompass issues that have hitherto been the exclusive domain of comparative politics in order to be of relevance to the most pressing problems of modern constitutionalism. In other words, there is a need to bridge comparative politics and comparative constitutional law through a genuinely interdisciplinary conversation.

The structure of the volume takes the need for interdisciplinarity seriously. The keystone of the volume is an overview chapter by three scholars of comparative politics who have written extensively on constitutional design in divided societies—John McGarry, Brendan O'Leary, and Richard Simeon (“Integration or accommodation? The enduring debate in conflict regulation”). In their chapter, McGarry, O’Leary, and Simeon describe two different families of constitutional strategies for managing ethnocultural diversity. They term these two sets of responses integration and accommodation. After describing and illustrating each set of strategies with concrete examples—and the different variations within each set—they offer a preliminary assessment of the success of each in promoting justice, stability, and democracy.

The volume as a whole is structured as a series of responses to the overview chapter. One set of responses is theoretical in nature, and addresses the questions of whether the dichotomy between integration and accommodation is the correct way to understand the choice in constitutional design for divided societies, and if so, whether one or the other strategy is the preferable one. In addition, these contributions also turn their mind to the practice of the migration of constitutional models for managing ethnocultural diversity, and ask what implications this practice has for our understanding of the debate over constitutional design.
for divided societies. To foster an interdisciplinary conversation, the contributors to this section come from outside comparative politics. Alan Patten ("Beyond the dichotomy of universalism and difference: Four responses to cultural diversity") and Will Kymlicka ("The internationalization of minority rights") are political theorists; Sujit Choudhry ("Does the world need more Canada? The politics of the Canadian model in constitutional politics and political theory") and Richard Pildes ("Ethnic identity and democratic institutions: A dynamic perspective") are constitutional theorists.

The second set of chapters explores the integration-accommodation debate through a series of case studies. The use of concrete examples serves important functions. It helps to clarify and sharpen our understanding of the sometimes abstract debate between integrationists and accommodationists. In addition, by exploring how these competing constitutional strategies play out in practice, it is possible to get a handle on the costs and benefits associated with each one. Finally, sustained and theoretically informed reflection on constitutional practice may force us to reconsider the cogency of the theories themselves. As some of the chapters suggest, the dichotomy between accommodation and integration may be insufficiently nuanced to accurately describe the function of numerous constitutional provisions in divided societies.

The chapters containing case-studies have been prepared by contributors who work in comparative politics and comparative constitutional law. In comparative constitutional law, there are chapters from Anver Emon ("The limits of constitutionalism in the Muslim world: History and identity in Islamic law"), Yash Ghai and Jill Cottrell ("A tale of three constitutions: Ethnicity and politics in Fiji") and Stephen Tierney ("Giving with one hand: Scottish devolution within a unitary state"). In comparative politics, there are chapters from Jacques Bertrand ("Indonesia's quasi-federalist approach: Accommodation amid strong integrationist tendencies"), Boye Ejebowah ("Integrationist and accommodationist measures in Nigeria's constitutional engineering: Successes and failures"), Michael Keating ("Rival nationalisms in a plurinational state: Spain, Catalonia and the Basque Country"), and two chapters from John McGarry and Brendan O'Leary ("Iraq's Constitution of 2005: Liberal consociation as political prescription" and "Consociation and its critics: Northern Ireland after the Belfast Agreement"). Finally, Richard Simeon (comparative politics) and Christina Murray (comparative constitutional law) co-author a chapter on South Africa ("Recognition without empowerment: Minorities in a democratic South Africa").

The next three sections of this introduction address the following issues: the debate between Arend Lijphart and Donald Horowitz which has defined the approach of comparative politics to constitutional design for divided societies (section 2); the relationship between the overview chapter by McGarry, O'Leary, and Simeon and that debate (section 3); and the contributions of the remaining
chapters to the choice between integration and accommodation set up by the overview chapter (section 4).

2. The Lijphart-Horowitz debate

Since a central goal of this volume is to bridge the divide between the hitherto disconnected literatures in comparative politics and comparative constitutional law on constitutional design for divided societies, it is important to get a handle on the state of the debate in comparative politics. The leading figures are Arend Lijphart and Donald Horowitz. Their debate, which has consisted of numerous published exchanges over more than two decades, continues to define the field.22

Both Lijphart and Horowitz write against the backdrop of pluralist accounts of democratic politics put forward by American scholars such as Seymour Lipset.\cite{Lipset}

Democracies, such as the United States, are characterized by sharp disagreements over the direction of public policy. The question posed by Lipset is why political actors who lose within democratic institutions do not respond to those losses by turning on the system itself and attempting to undermine it. The pluralist response is the theory of crosscutting cleavages, such as the phenomenon that "individuals belong to a number of different interests and outlooks".\cite{Lijphart}

Crosscutting cleavages have two moderating effects. First, as a consequence of membership in multiple social groups, individuals will come into contact with a multiplicity of perspectives, and will possess a complex set of interests, which will tend to moderate their political attitudes. Second, in the absence of sharp partisan division among individuals, political elites will likewise be subject to the pressure to moderate their political positions. Through these two mechanisms, crosscutting cleavages promote political moderation and blunt partisan division.


\cite{Lipset}
\cite{Lijphart}
This account of the nature of political cleavages is closely tied to the case for a competitive model of democratic politics. On the pluralist view, politics is characterized by shifting coalitions and majorities, which change from issue to issue. Political parties compete for the median voters at the center of the political spectrum, and electoral competition creates pressures toward moderation. In institutional terms, the paradigm assumed by Lijphart and Horowitz is a majoritarian democracy modeled on the Westminster system, with elections on the basis of single member plurality voting (first past the post, or FPTP), and with the governing party commanding the confidence of the majority of the legislature and an official opposition, and with a unitary constitution in which there are no alternative centers of political power. Cabinet is formed on a winner-take-all basis, with the opposition party focusing on providing parliamentary opposition from outside the government. The assumption is that parties will cycle in and out of government, as they assemble shifting coalitions of voters in their competition for the political center. Since there is no permanent exclusion of any segment of society from political power, the losers under a regime of competitive politics accept this loss in the hope that they will win another day. Political competition does not threaten political stability.

The competitive paradigm of democratic politics depends on two assumptions—that opposition parties will eventually share power and that, because of the shifting nature of majority coalitions, governing parties will not abuse their power. But as Lijphart famously argued in Democracy in Plural Societies, these assumptions do not hold in deeply divided societies. In divided societies, cleavages are mutually reinforcing, not crossing. The result is a system of “segmental cleavages”, where political divisions map onto “lines of objective social differentiation”, such as race, language, culture and ethnicity. If crossing cleavages produce moderation, segmental cleavages produce immoderation. Political mobilization occurs on the basis of segmental identities, and political parties respond by organizing themselves on this basis.

The existence of segmental cleavages challenges the assumptions of competitive politics. Under these conditions, democracy would not actually lead to competition for median voters. Rather, the dominant characteristic of divided societies is the ethnic political party, with individuals casting votes for parties of their own ethnicity. As Horowitz writes, “[t]his is not an election at all, but a census”. There is no political competition across ethnic divides. The political consequences of the institutions of majoritarian democracy in divided societies will depend on the precise demography of the policy in question. If there is a clear ethnic majority, the result is not a temporary minority which will eventually cycle into power, but a persistent minority which will permanently be in opposition and excluded from political office. The twin assumptions of competitive
politics—that minorities will eventually cycle into power, and a majority will not abuse its power—do not hold. The danger is a “majority dictatorship”, with no political restraints on the potential, inherent in Westminster democracy, for the winning party to discriminate in public expenditure and the distribution of public offices in favor of its supporters. As Horowitz argues, “the results could be brought about under conditions perfectly consistent with the procedural assumptions of democracy. The results are an artifact of the interaction of demography with the rules of the game”. In other cases, where there is no clear majority, coalitions of minorities can produce the same effect. Minorities that are persistent losers with no prospect of wielding power lack the incentive to compromise or negotiate, because there is no reward for doing so. They may eventually step outside of politics and turn to violence. If the minority is a minority nation, it may attempt to secede. In any case, the result will be political fragmentation.

Thus, both Lijphart and Horowitz trade on an image of political pathology. A democracy in which crosscutting cleavages interact with the institutions of competitive politics to moderate political behaviour is a centripetal democracy; a democracy in which the institutions of competitive politics interact with segmental cleavages is a centrifugal democracy that will literally fly apart. They also proceed from a shared assumption that “[p]urely procedural conceptions of democracy are thus inadequate for ethnically divided polities, for the procedure can be impeccable and the exclusion complete”. Nonetheless, they propose radically different solutions to this problem.

Lijphart’s proposal is consociational democracy. While “[t]he essence of the Westminster model is the concentration of political power in the hands of the majority”, Lijphart argues that the basic impulse behind the consociational model “is to share, diffuse, separate, divide, decentralize, and limit power”. Lijphart has set out two iterations of the institutional details of the consociational model. In its original formulation, it consisted of four elements: A grand coalition cabinet encompassing representatives of the major ethnic segments; proportionality in legislative representation, representation in cabinets, civil service, police, military, and public expenditure; mutual vetoes on vital interests, since notwithstanding participation in grand coalition cabinets, the representatives of ethnic groups may nonetheless be outvoted; and segmental autonomy, either consisting of federalism (where territorial boundaries follow ethnic boundaries) or non-territorial federalism with respect to policy areas closely linked to ethnic identity (such as schools). More recently, Lijphart has simplified the model. The two
primary elements are: Power sharing, consisting of the participation of major ethnic groups in political decision making, especially the executive; and group autonomy, especially over education and culture. Proportionality and the minority veto are now secondary characteristics that reinforce the first two.

Consiociational democracy is designed to work differently than a majoritarian democracy in a divided society. The fragmentation of political representation through proportional representation allows for legislative representation of territorially dispersed minorities who may be outvoted under FPTP in single member districts. The fragmented nature of the legislature creates incentives for political leaders to cooperate across ethnic lines. Leaders of ethnic minorities can leverage their legislative power to secure executive power sharing, through the formation of a grand coalition cabinet. The possibility of sharing power gives all parties a stake in the survival of the constitutional system, in contrast to a situation where minorities are perpetual outsiders. Similarly, mutual vetoes and segmental autonomy provide additional incentives for leaders of ethnic leaders to participate within politics, because they can rest secure that their fundamental interests will be protected.

The consiociational model has generated an enormous literature. An important issue is how rigid Lijphart's institutional criteria are. Lijphart has stated that each of the institutional requirements can be implemented in different ways, tailored to the specific circumstances of each society. Thus, a consiociational framework can be spelled out in a formal legal text or be found in unwritten rules of political practice. Minorities can be overrepresented or on a proportional basis. The scope of segmental autonomy and the veto will vary by context. Likewise, whether segmental autonomy takes the form of territorial or nonterritorial autonomy (or both) will depend on the geographic distribution of ethnic communities. An important choice to be made is between executive power sharing which is expressly stated to be on an ethnic basis, and whether power sharing should be framed on the basis of ethnically neutral criteria, such as passing a threshold of popular support in legislative elections. Lijphart describes the former as predetermined, and the latter as self-determination. The advantage of the latter is that it allows individuals to voluntarily associate with ethnic parties or with non-ethnic parties, and can self-adjust for changes in relative population. The benefit of the latter is that it ensures the inclusion of ethnic minorities in government.

In subsequent work, Lijphart has also expanded the repertoire of consiociational devices. Thus, he has included bicameralism and legal pluralism as
additional forms of power sharing and segmental autonomy, respectively. For Provincial consent to constitutional amendments can be a mechanism to protect both power sharing and segmental autonomy. In addition, although a grand coalition cabinet assumes a parliamentary system, he also included presidential and semi-presidential systems within the family of consociational democracies. As a consequence, there are two ways to read Lijphart. On one reading, the consociational model is less of a specific constitutional package than a set of general principles of institutional design which are consistent with a broad set of constitutional packages. This is the best explanation for his controversial categorization of India as a consociational democracy although it lacks minority vetoes, on the basis that the Congress Party was a grand coalition. On a second reading, Lijphart is still committed to specific constitutional choices. Thus, he has a clear preference for parliamentary government over presidential government, because the former is more likely to be ethnically inclusive than the latter, since a president will be drawn from a single ethnic group and presidential elections are majoritarian in nature.

Horowitz has been highly critical of the consociational model, and his own proposals grow out of these criticisms. The major shortcoming of the consociational model, according to Horowitz, is that it is "motivationally inadequate" because it does not offer a coherent account of why leaders of ethnic groups would have an incentive to cooperate and enter into a power-sharing arrangement in the first place. While the incentives for minority leaders are clear, the incentives for majority leaders are much less so, if sharing power is not necessary to control the state. As a consequence, consociation is more likely where there is no clear majority. And even there, the likely outcome is not a grand coalition in the specific sense in which Lijphart defines it, a coalition of all major ethnic groups. Depending on how the rules governing coalitions are structured, and the underlying demographic facts, what may occur is a coalition that includes some ethnic groups while excluding others as long as it commands a majority of the legislature.

Legislative elections held under proportional representation (PR) would only compound the problem. Lijphart supports PR because it would enable the

48 For bicameralism, see Lijphart, Consociation and Federation, supra note 32, at 506. For legal pluralism, see Lijphart, The Puzzle of Indian Democracy, supra note 32.
49 Lijphart, Consociation and Federation, supra note 32.
50 Lijphart, Consociational Democracy, supra note 32.
51 Id. This is how one can read Lijphart's first statement of the consociational model in his 1969 article in World Politics.
52 Lijphart, The Puzzle of Indian Democracy, supra note 32.
53 Lijphart, Constitutional Choices, supra note 32.
54 For a recent summary of these criticisms, see Horowitz, Constitutional Design, supra note 32, at 15.
55 Id. at 20.
56 To be fair, Lijphart agreed from outset that incentives to form a consociation were weak in this kind of situation. See Lijphart, Consociational Democracy, supra note 32, at 217–218.
l segmental autonomy, respectively.\textsuperscript{48} Dismantlement can be a mechanism to protect
ethnicity.\textsuperscript{49} In addition, although a grand
system, he also included presidential
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\textsuperscript{17} see \cite{17}.
\textsuperscript{17} of the consociational model in his 1969
\textsuperscript{17} itz, \textit{Constitutional Design}, supra note 32,
to form a consociation were weak in
\textsuperscript{17} see \cite{17}, at 217–218.
election of representatives from ethnic parties who would otherwise not secure
seats in the legislature. But PR would also facilitate intraethnic competition,
reducing the probability of dominant parties within each ethnic segment. This
has a number of consequences. The most serious is that ethnic parties which
attempt to adopt moderate policies to bridge ethnic divides come under attack
from extremist parties in a process of ethnic outbidding. Instead of competition for
the moderate center for median voters (in a majoritarian system with cross-
cutting cleavages), there is competition on the extremes.

Ethnic parties will respond to the extremes, because there is no possibility of
being rewarded for moderate policies by members of other ethnic groups. As a
consequence, there are electoral penalties on, as opposed to incentives for, mod-
erate political behaviour and cooperation across ethnic lines, which undermines
the stability of interethnic coalitions. Given these electoral dynamics, Horowitz
suggests that successful consociations are the result of crosscutting cleavages or
resolved ethnic conflict, as opposed to successful solutions to ethnic strife.

Horowitz’s criticisms proceed from the assumption that if there is a clash
between statesmanship and electoral self-interest, the latter will always prevail.
Similarly, even if consociational arrangements are constitutionally entrenched to
render them less vulnerable to electoral calculations, Horowitz’s view is that those
arrangements are unstable because they will not be supported by ongoing moti-
vations of self-interest. As a consequence, he proposes a set of electoral arrange-
ments that creates the political incentive toward ethnic moderation that Lijphart’s
allegedly lacks.\textsuperscript{57} The key is to “make moderation pay”\textsuperscript{58} by rewarding ethnic
parties electorally who appeal across ethnic lines to members of ethnic groups
outside their own. The basic calculation is that the possibility of crossethnic sup-
port should offset electoral losses from intraethnic competition on the extremes.
But crossethnic support will only be forthcoming if ethnic parties moderate their
platforms and moderate their conduct while in office.

Thus, ethnic moderation depends on vote transfers across ethnic lines—or
what Horowitz refers to as “vote pooling”. The key mechanism is the alterna-
tive vote (AV). Alternative voting electoral systems require winning candidates
to secure a majority of the votes cast. Voters rank candidates in order of prefer-
ence. If no candidate is successful after first preferences have been counted, the
bottom candidate is dropped from the ballot and votes cast for that candidate
distributed according to the second preferences. The theory behind the alterna-
tive vote is that it creates the incentive for parties representing a majority ethnic
group to appeal across ethnic boundaries in order to secure an absolute majority
through second preferences. The possibility of interethnic vote transfers creates

\textsuperscript{57} The clearest account is set out in Horowitz, \textit{Constitutional Design: An Ozymoroni;} supra
note 32.
\textsuperscript{58} Donald L. Horowitz, \textit{Making Moderation Pay: The Comparative Politics of Ethnic Conflict
Management, in Conflict and Peacemaking in Multietnic Societies}, supra note 32,
at 451.
the incentives for moderation by protecting the moderate middle from electoral competition on the extremes.

This difference in electoral system—proportional representation for Lijphart, alternative vote for Horowitz—would have important implications for the respective roles of political elites and voters. Lijphart advocates the pooling of seats in post-electoral coalitions, through negotiations among political elites. Ethnic parties still only communicate with, and appeal to, members of their own ethnic group. By contrast, Horowitz envisions direct appeals by ethnic parties to voters of other ethnic groups during election campaigns, who must decide to provide their electoral support. The net effect is to shift power away from ethnic elites toward voters, who would make their decisions on the basis of party platforms during elections. However, ethnic parties still play an important role. Horowitz envisions pre-electoral, interethnic coalitions of parties who would enter into reciprocal arrangements to exchange the votes of supporters in different constituencies. Indeed, there could conceivably be competing interethnic coalitions. Yet voters themselves would play a much more important role in moderating ethnic conflict than they would under consociation, where party leaders are the most important actors. The net result is to create a second best for pluralist politics in divided societies, by designing electoral incentives to encourage crosstheptic political appeals that are a substitute for crosscutting cleavages.

Horowitz supports the use of AV for legislative elections. Because of the potential of AV to foster interethnic cooperation, contrary to Lijphart, he also advocates a presidential form of government. A presidential election would provide another opportunity for vote pooling across ethnic divides, if the electoral system were designed correctly—for example, through the use of AV, or a requirement of obtaining a minimum level of support in different regions of the country as a proxy for support from different ethnic groups. Indeed, because the country as a whole is more heterogeneous than individual legislative districts, the prospects for vote pooling are greater. A single president, although from one ethnic group, could legitimately lay claim to support from more than one ethnic group, and could rise above ethnic politics. By contrast, a power-sharing cabinet does not possess the capacity to transcend ethnicity. Horowitz terms his approach the "incentives" approach.

Although their arguments are at times framed at a high level of abstraction, for Lijphart and Horowitz, theirs has never been a strictly academic debate. Rather, they have set out competing proposals for constitutional design for divided societies with a view toward contemporary, real-time application. Both Lijphart and Horowitz wrote against the backdrop of the "third wave" of democratization, which began with the transition to civilian rule in Portugal in 1974. Lijphart

59 Horowitz also supports federalism as a device for reducing ethnic conflict. See Horowitz, supra note 11, at 601–628. However, since the focus of the Lijphart-Horowitz debate has been on AV and presidentialism, I will not discuss it here.
argues that the third wave was largely successful until the early 1990s, when democratization spread to the ethnically divided societies of Eastern and Central Europe.\(^{50}\) Democratization foundered because constitutional design had not properly accounted for ethnic division. Horowitz shares the same view, arguing that "[i]n many countries...a major reason for the failure of democratization is ethnic conflict."\(^{61}\)

Given the ultimately practical motivation underlying the literature, it is not surprising that the debate between Lijphart and Horowitz revolved around case studies. Both scholars traded in examples. Thus, they offered competing dissections of past constitutional experiments. According to Horowitz, the first Nigerian constitution (discussed by Ejobowah in this volume) failed because it granted the largest ethnic group, the Hausa, a single province—a form of segmental autonomy under consociational theory—from which they dominated the country.\(^{62}\) By contrast, Lijphart claims that the constitution failed because it was not consociational enough.\(^{63}\)

Likewise, they disagree on the legacy of the failed experiment in consociational power sharing in Northern Ireland between 1973 and 1974. Horowitz argues the lesson is that Northern Ireland should have opted for AV instead of the single transferable vote, which had operated to polarize the electorate and not reward ethnic moderation.\(^{64}\) Lijphart was originally skeptical regarding the prospects of consociation working in Northern Ireland, in particular because of the lack of a clear balance of power.\(^{65}\) The fact of a seemingly permanent Protestant majority and Catholic minority, where the former could dominate the latter, made consociation unstable. Partition, Lijphart argued, was a better alternative. But now Lijphart holds that there is no alternative to power sharing, since the majoritarian rule of any kind in Northern Ireland has always been a Protestant dictatorship. The adoption of a consociational arrangement in the Good Friday Agreement (also known as the Belfast Agreement, discussed in this volume by McGarry and O’Leary) is proof of the inevitability of consociation.\(^{66}\)

Lijphart and Horowitz also offer differing assessments of the adoption of the AV in Fiji in 1997 (discussed in this volume by Ghai and Cottrell). Lijphart states that Fiji is the only divided society to have adopted the AV as a method of resolving ethnic conflict, and that the collapse of this constitutional regime in 2000 pointed to the inability of the AV to moderate ethnic politics.\(^{67}\) Horowitz counters that the 1997 electoral system consisted of a mix of open seats elected by AV,

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\(^{50}\) Lijphart, *The Wave of Power-Sharing Democracy*, supra note 32.

\(^{61}\) Horowitz, *Democracy in Divided Societies*, supra note 32.


\(^{63}\) Lijphart, *Review Article*, supra note 32.


and a larger number reserved seats allocated on an ethnic basis, which undercut the ability of AV to create incentives for moderation. Thus, the problem was not with AV, but rather, that Fiji did not go far enough in adopting AV.

Without a doubt, the most famous debate between Lijphart and Horowitz occurred with respect to South Africa (as discussed in this volume by Simeon and Murray). Several years before the negotiated transition to democracy, Lijphart set out a specific set of proposals for a consociational constitution for post-apartheid South Africa. The key proposals were elections based on proportional representation at the municipal, provincial and national level, executive power sharing at the both the national and provincial level (with a rotating chair at the national level), proportionality in the civil service, armed forces, policy and judiciary, a mixture of territorial federalism (with units as ethnically homogeneous as possible) and nonterritorial federalism (for culture and education), and a mixture of absolute and suspensive vetoes. Given the use of racial classifications as a tool of racial discrimination, Lijphart argued for self-determination over predetermination of segments. Horowitz responded by proposing the AV and a strong executive president also elected by AV, as well as a federalism based on heterogeneous units. Not surprisingly, Lijphart was deeply critical of Horowitz.

The debate between the two scholars over their competing proposals for South Africa, as well as their subsequent exchanges, highlights a series of critical issues, some of which have yet to be resolved. The relative costs and benefits of intraethnic competition and interethnic political cooperation is at the heart of the Horowitz-Lijphart debate. A major issue is the vote pooling potential of the AV. The question in each case will be the balance between the votes lost from intraethnic competition and the votes gained from interethnic cooperation. As Benjamin Reilly has shown, this is dependent on the existence of ethnically heterogeneous constituencies. The larger the number of ethnic groups and the greater the degree to which ethnic groups are dispersed, the greater the potential for vote pooling. For this reason, Reilly argues that vote pooling has much greater potential in Asia than in Africa, including South Africa, because

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69 For the ongoing debate over alternative voting (AV) and the lessons to be drawn from Fiji, see Jon Fraenkel & Bernard Grofman, A Neo-Dowsonian Model of the Alternative Vote as a Mechanism for Mitigating Ethnic Conflicts in Plural Societies, 121 PUB. CHOICE 487 (2004); Jon Fraenkel & Bernard Grofman, Does the Alternative Vote Foster Moderation in Ethnically Divided Societies?: The Case of Fiji, 39 COMP. POL. STUD. 663 (2006); Horowitz, The Alternative Vote, supra note 32; Horowitz, Strategy Takes a Holiday, supra note 32.  
70 Lijphart, supra note 32.  
71 Horowitz, A Democratic South Africa, supra note 32.  
73 Benjamin Reilly, Democracy in Divided Societies: Electoral Engineering for Conflict Management (Cambridge Univ. Press 2001).
of "the demographic legacy of apartheid which deliberately segregated different races." And even if the demographic preconditions for the success of AV may be present, particular histories of interethnic conflict may prevent its success. The introduction of the AV for presidential elections in Sri Lanka was followed by the commencement of the civil war and the withdrawal from electoral politics of significant elements in the Tamil community, which has blunted the moderating potential of AV. In contexts where the demography is lacking, or the political culture unsupportive, AV may be unable to yield ethnic moderation, and proportional representation may be the better alternative.

Another issue in the Horowitz-Lijphart debate is a fundamental normative disagreement over the mechanisms of interethnic cooperation. Put simply, the choice for ethnic minorities is between two theories of representation. Under the consociational model, minorities protect their interests through holding important offices. Power sharing guarantees that ethnic minorities will sit in the legislature and the executive, in proportion to their share of the population. As well, proportionality will ensure minority representation in the civil service, police, military, and judiciary. Representation is conceived of as representation by members of the same ethnic group—such as descriptive representation. Under the incentives approach, representation is conceived of in terms of electoral influence. Vote pooling is designed to foster the election of members of the ethnic majority with the votes of the ethnic minority within a constituency. This means that members of one ethnicity will be represented by members of another ethnicity, which will, at the very least, come at the cost of minority representation in the legislature and executive. If ethnic moderation is more likely under vote pooling, then it comes at the cost of descriptive representation. There is an unavoidable trade-off between the two.

This leads us to the final issue—the practical question of whether the incentives approach or the consociational model is more likely to be adopted. Lijphart argues that it is naïve to expect ethnic minorities to sacrifice office holding for influence, especially as part of a post-conflict constitutional agreement. The incentives approach asks ethnic minorities to put their trust in members of a majority. But that same majority may have abused its power under the previous regime, which in turn may have led to ethnic conflict and violence. After interethnic conflict has occurred, the trust necessary for vote pooling may simply be absent. Lijphart suggests that a minority will instead seek credible commitments of security and protection from abuse. By way of illustration, Lijphart suggests that vote pooling in Iraq would produce a government dominated by the Shia but supported by Sunni and Kurds, and that "it is... hard to imagine that Kurdish and Sunni members of a broadly representative constituent assembly would ever agree to a constitution that would set up such a system." On this point, Horowitz appears

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74 Id. at 192.  
75 Lijphart, Constitutional Design for Divided Societies, supra note 32.  
76 Id. at 98.
to agree with Lijphart. Moreover, in response to Horowitz's point that majorities have no incentive to enter into consociation with minorities, Lijphart suggests that the threat of future violence may be sufficient.

By contrast, it is much harder to tell a story of how the incentives approach would get off the ground. Even Horowitz, who clearly favors the incentives approach, argues that it will be unattractive to both political leaders from ethnic majorities and minorities, since it opens up their respective electorates to interethnic competition, from which they are insulated under the consociational model. Since Horowitz is of the view that, once up and running, the incentives approach produces more stable politics because there is a greater likelihood of ethnic moderation, there is a disjoint between which constitutional arrangement is likely to be adopted and which arrangement, in his view, is likely to be stable.77

3. Integration versus accommodation

There are several striking differences between the Lijphart-Horowitz debate, and the integration versus accommodation debate as set out by McGarry, O'Leary, and Simeon ("Integration or accommodation? The enduring debate in conflict regulation").

Lijphart and Horowitz both take the durability of political mobilization on the basis of ethnic identities to be a given and construct their theories of constitutional design around them. Although neither claims that it is inevitable that this should occur—in other words, that difference should translate into political division—they both assume that once no mobilization has occurred on this basis, it is very hard to undo, especially if it eventually leads to, and is in turn fed by, violent conflict and civil war. As a consequence, they both rule out strategies for the resolution of ethnic conflict that involves the elimination of ethnic differences. Not only would such methods be ineffective, they may make ethnic conflict worse. So Lijphart writes:

Although the replacement of segmental loyalties by a common national allegiance appears to be a logical answer to the problems posed by a plural society, it is extremely dangerous to attempt it. Because of the tenacity of primordial loyalties, any effort to eradicate them not only is quite unlikely to succeed, especially in the short run, but may well be counterproductive and may stimulate segmental cohesion and intersegmental violence rather than national cohesion.78

Horowitz similarly dismisses the expectation that ethnic political division, once mobilized will disappear, as naïve. Where they disagree is how to institutionally respond to this basic set of facts about political life.

77 Horowitz, Constitutional Design: An Oxymoron?, supra note 32.
78 LJPHART, supra note 5, at 24.
Horowitz's point that majorities think minorities, Lijphart suggests that how the incentives approach clearly favors the incentives of political leaders from ethnic respective electorates to interethno- under the consociational model. In the incentives approach, the likelihood of ethnic mod- eration is likely to be stable.77

But as McGarry, O'Leary, and Simeon note, this is a set of assumptions that do not underlie every set of constitutional strategies on how to respond to the facts of a divided society. The overview chapter distinguishes between two general approaches to this issue. Each proceeds from a different set of assumptions about the durability and depth of ethnic political divisions. On the one hand, there are "accommodationists", who "insist that in certain contexts, national, ethnic, religious and linguistic divisions and identities are resilient, durable and hard". Notwithstanding their different policy prescriptions, McGarry, O'Leary, and Simeon place both Lijphart and Horowitz into this camp. But on the other hand, there are "integrationists", who are less willing to accept the equation of ethnic identity and political interest. Integrationists reject the idea that ethnic difference should necessarily translate into political differences. They argue for the possibility of a common public identity, even in the midst of considerable ethnocultural diversity. As McGarry, O'Leary, and Simeon note, they hold to this position even when ethnicity has served as the basis of political mobilization, because "ethnic identities are seldom as longstanding or as deep as supporters of accommodation suggest". Political identities are malleable, and crosscutting cleavages, even if absent, can be fostered.

These fundamentally different assumptions over the durability of politically mobilized ethnocultural identities reframe the debate over constitutional design for divided societies. In particular, it translates into a much broader set of policy options than the Lijphart-Horowitz debate has generated. In general terms, accommodation commends "dual or multiple public identities", and "minimally requires the recognition of more than one ethnic, linguistic, national or religious community in the state". Integrationists, by contrast, "believe political instability and conflict result from group based partisanship in political institutions", and therefore, "turns a blind eye to difference for public purposes". In this connection, McGarry, O'Leary, and Simeon draw a useful distinction between integrationists and assimilationists, which tracks the public and private divide. Assimilationists argue that the most secure foundation for public, political integration is ethnocultural assimilation, rendering impossible political mobilization around ethnic difference. As a consequence, they argue in favor of a range of public policies that would forcibly eradicate or provide strong incentives for the elimination of ethnocultural differences. Integration, by contrast, supports constitutional strategies that would promote a common public identity without demanding ethnocultural uniformity in private and associational life.

A specific example of how an integrationist and an accommodationist would differ is in their treatment of political parties. Despite important differences between them, Lijphart and Horowitz proceed from the shared starting point that in a divided society, ethnic political parties are inevitable, that attempts to suppress them are futile and easy to circumvent, that broad-based parties which purport to be non-ethnic in nature in fact are controlled by members of the majority ethnic group, and that denying democratic space to ethnic political parties would
drive them out of political institutions and into the streets. Integrationists, on the other hand, are vigorously opposed to ethnic parties, and instead favor aggregative political parties which bring together individuals of different ethnicities. As a matter of constitutional design, some integrationists may even argue for bans on parties which are organized on an ethnic or regional basis.

Moreover, there are varieties within each school of thought, generating an ever broader scope for constitutional choice than the Lipphart-Horowitz debate has generated. McGarry, O'Leary, and Simeon distinguish among three schools of integrationists: Republicans, liberals, and socialists. Republicans are champions of the civic nation, and "veer toward integral nationalism", with its emphasis on shared bonds of political identity among the citizenry. Liberals "promote the liberal values of choice and freedom", in contrast to "the strong community of republicans". Socialists "regard social classes as the key component of social thought and practice, and regard the promotion of distributive justice as the appropriate public priority". These different versions of integrationism generate disagreement on constitutional particulars. For example, McGarry, O'Leary, and Simeon note a difference of opinion between republican and liberal integrationists on federalism. Republican integrationists—they use France and Turkey as examples—are opposed to political decentralization, on the basis of the constitutional theory that federalism undermines the sovereignty and indivisibility of the nation. Liberal integrationists support federalism, not in order to accommodate minority nationalism, but in order to protect liberty and expand the opportunities for democratic citizenship.

Similarly, McGarry, O'Leary, and Simeon differentiate among four varieties of accommodation: Cenripetalism, multiculturalism, consociation, and territorial pluralism. However, upon closer examination, it is apparent that these categories overlap to a considerable extent. The clearest contrast is between cenripetalism and consociation, with Horowitz and Lijphart offered as the leading examples. Multiculturalism, according to McGarry, O'Leary, and Simeon, calls for "a group's self-government in matters the group defines as important"—such as a nonterritorial version of segmental autonomy, which is a primary feature of consociation. Pluralist federation, defined as a federalism "which respects historic nationalities, languages or religions", is a territorial version of segmental autonomy. So within the accommodationist camp, the principal contrast remains between Lijphart and Horowitz, although McGarry, O'Leary, and Simeon rightly emphasize that the consociational package can in fact be disaggregated into its constituent components.

McGarry, O'Leary, and Simeon introduce important elaborations on the consociational model. In particular, McGarry, O'Leary, and Simeon distinguish between three varieties of executive power sharing—the grand coalition or "complete" consociations (such as Bosnia-Herzegovina's collective presidency), "concurrent" consociations in which a representative of the majority of each group is represented, and "plurality" consociations, in which a plurality of
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ations, in which a plurality of
each group's representatives participates in the government (for example, like
the Northern Ireland power-sharing executive). In addition, McGarry, O'Leary,
and Simeon place the various accommodationist responses on a spectrum, with
some regarded as stronger forms of accommodation while others are much
closer to integration. McGarry, O'Leary, and Simeon rightly place Horowitz on
the integrationist end of the accommodationist spectrum. Indeed, at times it is
hard to distinguish Horowitz's institutional prescriptions from the ones that an
integrationist would propose. For example, republican integrationists support a
strong executive president as "a unifying figure capable of standing above group
and faction"; Horowitz is also a strong supporter of a presidential system in the
hope that it would promote "a trans-ethnic identity". Nonetheless, because of
his belief that once differences have been mobilized, they are hard to unwind,
Horowitz clearly falls into the accommodationist camp.

McGarry, O'Leary, and Simeon then offer a preliminary assessment of each
family of responses along the dimensions of stability, justice and democracy. To a
considerable extent, this assessment turns on the prior question of the durability
or malleability of ethnic identities. Thus, with respect to stability, integrationists
argue that accommodation will fuel instability and deepen divisions, because it
empowers elites who have a vested interest in maintaining these divisions. They
also point to the failure of consociations (such as Cyprus in 1963, Lebanon in 1975),
and pluralist federations (such as the former communist federations of Eastern
and Central Europe) as proof that accommodation does not work. Integration
is a realistic alternative, precisely because crosscutting identities exist and can be
fostered. Accommodationists counter that integrationist policies do not work in
divided societies because segmental divisions are real. Promoting integration in
this context "creates at best an unstable equilibrium" that leads to assimilation,
accommodation, or secession. In conclusion, McGarry, O'Leary, and Simeon
believe that the success of integration or accommodation is a product of dem-
ography. Integration is more likely to succeed with respect to dispersed ethnic
groups, whereas accommodation will be necessary when groups exist "powerful
enough to resist assimilation but not strong or united enough to achieve secession".

The integration-accommodation debate, as set out by McGarry, O'Leary, and
Simeon, clearly provides a different framework within which to debate the issue
of constitutional design for divided societies than the framework provided by the
numerous exchanges between Lijphart and Horowitz. But is it a better frame-
work? It is, for at least three reasons.

First, it is more historically informed. Lijphart and Horowitz take the fact that
ethnic differences have been politically mobilized as their starting point, and
are focused on how constitutional design should respond today. But rarely do
Lijphart and Horowitz turn to the historical causes of present-day ethnic con-
lict. In *Democracy in Plural Societies*, Lijphart rarely describes what ethnic con-
lict is or has been over. By contrast, Horowitz devotes considerable attention
to this issue in *Ethnic Groups in Conflict*. But he rarely deploys this analysis in
his contemporary assessment of constitutional options. For both, history figures mostly as a source of historical case-studies of successful and unsuccessful experiments in constitutional design.

By contrast, the various integrationist approaches remind us, as Will Kymlicka argues, that ethnic conflict is very often part and parcel of nation building, which is designed to produce a degree of common national identity across the entire territory of the state, to be shared by all of its citizens.\textsuperscript{79} The means employed include policies centered on language, history and culture, and the centralization of legal and political power.\textsuperscript{80} Constitutions have played a central role in this process, both in the regulative sense of creating institutions with state-wide authority to permit the creation and enforcement of these policies, and in the constitutive sense of projecting an image of political community meant to be internalized by citizens. The goals of nation building are diverse. David Miller has suggested that one reason for nation building is to provide the necessary motivational element missing from liberal accounts of political legitimacy.\textsuperscript{81} A sense of identification with a particular set of liberal democratic institutions and laws moves individuals to make those institutions work, and to accept their demands. Ernest Gellner argued that linguistic homogenization is a tool of economic integration and the enhancement of economic opportunity, since it permits citizens to become members of a mobile and flexible workforce across the entire state.\textsuperscript{82} The use of nation building as a tool of political consolidation originated in Western Europe, and spread with the rise of nationalism to Eastern and Central Europe, and with decolonization to Asia and Africa. Ethnic conflict has arisen when ethnic minorities resist nation building efforts. For example, minority nations, whose members formed complete, functioning societies on their territory, with a large degree of self-rule, prior to their incorporation into the larger state resist nation-building efforts, and engage in minority nation building as a defensive response.

The history of nation-building reminds us where ethnic conflict often comes from. But it also reminds us that integrationist policies have historically been important—if not entirely successful—tools for the political consolidation of an ethnically diverse population into the unified citizenry of a single state. This leads us to the second benefit of the integration-accommodation framework to conflict regulation—it sharpens our understanding of the contemporary politics of conflict regulation. In the debate over conflict regulation, proponents of accommodation often claim to have a more realistic understanding of the intractability of ethnically based political divisions, and can lay claim to a more pragmatic set

\textsuperscript{79} Will Kymlicka, Multicultural ODYSSEY: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY (Oxford Univ. Press 2007).
\textsuperscript{81} David Miller, On Nationality (Oxford Univ. Press 1995).
\textsuperscript{82} Ernest Gellner, Nations and Nationalism (Cornell Univ. Press 1983).
of responses to those divisions. Integrationists are depicted as naïve and lacking a sense of history. However, integrationists draw on historical antecedents that serve as powerful normative benchmarks for contemporary debates. The integrationist approach to political consolidation exerts a powerful hold over the political imagination. Even if integrationists are overly optimistic, it is important to understand where that optimism comes from.

Third, framing the debate between integrationists and accommodationists as turning on an underlying debate on the durability or malleability of ethnic identities brings to the fore that prior question. Since Horowitz and Lüphart dominate the literature, and the view that politically mobilized ethnic identities are given to be accommodated, this issue is not at the heart of comparative politics. However, this premise merits interrogation. As Richard Pildes (“Ethnic identity and democratic institutions: A dynamic perspective”) usefully points out, the dominant assumption in the literature may be a function of the fact that ethnic claims appear at “critical political moments,” such as the formation of states or the immediate aftermath of armed conflict. Pildes does more than argue that the political salience of ethnic identities is fluid. In addition, he suggests that the structure of political competition can create the incentive for political entrepreneurs and elites to mobilize ethnic identities politically. Pildes supports this point by drawing on examples from India, Africa, and the United States. As a consequence, rather than static conceptions of ethnic identity driving constitutional design, constitutional arrangements should be deployed to create crosscutting cleavages.

But other contributions to the volume are much more sanguine than Pildes about how malleable politically mobilized ethnic identities are. In their chapter on Iraq, McGarry and O’Leary (“Iraq’s Constitution of 2005: Liberal consociation as political prescription”) begin by noting that proponents of integrationist constitutional arrangements for Iraq “see Iraq’s current problems as based on sectarianism and ethnocentrism, usually of recent rather than rooted in established or age-old hatreds”. Their defence of Iraq’s constitution as an example of liberal consociation proceeds from the assumption that integrationist accounts of the phenomenology of ethnic identities in Iraq are incorrect. Pointing to “the current civil war, and recent election and referendum results”, McGarry and O’Leary conclude that “Iraq is deeply divided, with a divided past”, and that “these divisions cannot be overcome easily in the near future”. Their chapter on Northern Ireland (“Consociation and its critics: Northern Ireland after the Belfast Agreement”) likewise treats the static or dynamic nature of politically mobilized ethnic identities as the fundamental issue on which constitutional design depends. They argue that “[f]or over a century, historic Ulster, and the Northern Ireland that was carved from it, had been divided electorally into two rival ethnonational blocs”. The strength of this cleavage is reflected in the minimal and declining levels of electoral support received by nonethnic parties, a reality “that will not be easily transformed by changes in the electoral system”.

[1995].

Investigating the New International Modernization of Rural France,
4. Lessons for the integration-accommodation debate

What other lessons do the remaining chapters offer for the integration-accommodation debate?

First, although McGarry and O'Leary do not say so explicitly, it is implicit that each variety of integration and accommodation amounts to a comprehensive and mutually exclusive constitutional strategy. Each perspective favors certain options over others across a number of different dimensions of constitutional design, ranging from symbolic issues (such as the wording of preambles) to the choice of official languages; the existence and character of internal political boundaries; the nature of the electoral system used to elect the legislature; the selection process, composition and powers of the political executive, the bureaucracy, and the judiciary; the rules governing the formation of political parties; and the relationship between religious institutions and the state.

However, as a number of the chapters demonstrate, actual constitutions—including those which are closely identified with one of these two perspectives—contain a mixture of integrationist and accommodationist elements. Tierney ("Giving with one hand: Scottish devolution within a unitary state") explores the system of asymmetric federalism established in Scotland through the Scotland Act 1998. Tierney argues that the devolution settlement is accommodationist in some respects, but "[i]n other ways...the settlement embodies strong centralizing or integrative tendencies". So on the one hand, the Scotland Act confers considerable regional autonomy on Scotland of a highly asymmetric nature (given that no such autonomy is conferred on England and much less autonomy on Wales), which is acknowledgment of Scotland's claims to nationhood within the United Kingdom, alongside explicit symbolic recognition of its national status. But on the other, civil servants in Scotland and the entire United Kingdom "operate within one employment and promotion system". The central government retains control over taxation, and central institutions such as the House of Lords and the new Supreme Court do not reflect the United Kingdom's plurinational nature in their composition or manner of appointment.

Choudhry's ("Does the world need more Canada? The politics of the Canadian model in constitutional politics and political theory") discussion of the "Canadian model" of multinational federalism leads to a similar conclusion. Choudhry argues that although the Canadian model has been presented as a paradigmatic instance of accommodation, on careful examination, it consists of a mixture of accommodationist and integrationist strategies that extend far beyond multinational federalism. The Canadian constitution creates a federation in which the boundaries of the province of Quebec were drawn so that francophones constitute a majority and are not outvoted by Canada's anglophone majority. In addition, Quebec has jurisdiction over policy areas to ensure the survival of a French-speaking society, including language and education. But since
provinces have limited jurisdiction, important decisions of interest to the citizens of Quebec lie within federal jurisdiction, such as immigration policy, income taxation, foreign policy, and defence. Citizens of Quebec must participate in the institutions of the common state in order to shape important political decisions which directly affect them. In addition, institutions of shared rule at the federal level, although they display some accommodationist elements, are largely integrationist—the House of Commons is directly elected by the citizenry; the federal House of Commons and Senate pass bills by simple majority vote, with no formal role for the Quebec government, or Quebec members of Parliament or Senators in the federal legislative process; and the constitutional conventions of responsible government for a Westminster democracy apply without any modification for the fact that Canada is a multinational state.

Bertrand ("Indonesia's quasi-federalist approach: Accommodation amid strong integrationist tendencies") tells a similar story. From early independence, the Indonesian state emphasized the building of a strong nation with a unitary constitution, and rejected proposals for a federal Indonesia put forth by Dutch colonial authorities. The inspiration was republican integrationism. This integrationist approach worked for the most part; where it did not, as in Aceh and Papua, resistance was harshly repressed. Since 1998, however, Indonesia has adopted a more accommodationist strategy in dealing with ethnonationalist groups. Thus, legislation has been enacted, which on paper, grants Aceh and Papua significant degrees of autonomy. However, the rest of Indonesia is still organized on unitary grounds. Moreover, Bertrand claims that there are "powerful behavioral norms that pull the Indonesian political elite persistently in the direction of supporting strong measures to preserve national unity rather than accommodating diversity". To Bertrand, this constitutional mindset explains why Indonesia's recent institutional experiment in autonomy has not been implemented.

Ejobowah ("Integrationist and accommodationist measures in Nigeria's constitutional engineering: Successes and failures") likewise argues that Nigeria has combined integration with accommodation. The principal institution of accommodation has been federalism, which "has enabled territorially concentrated groups to have their own self-governing units and preserved the country by fragmenting groups and undermining their coherence". The effect of this accommodation has been to quarantine some political conflicts at the state level by multiplying the centers of power subject to political contestation. The principal integrationist elements have been central control over oil revenue, which is largely generated by activity in the Niger Delta, and which is redistributed to the regions; and a presidential system of government with an electoral system which requires widespread support from across the country (a proxy for ethnicity). For Ejobowah, the integrationist elements have been the principal sources of constitutional failure, for two reasons. First, it failed "to free the presidency from the control of the most powerful groups", because politicians from large ethnic groups enjoy a competitive advantage, since they can count on the support of
several states. Second, central control over oil revenues "confers great economic importance on executive offices" which distribute oil wealth. This has spawned "a destructive patronage system" in which office holders offer "political clients licences to sell" oil, and has generated often violent conflict.

The fact that actual constitutions contain a mixture of integrationist and accommodationist elements raises the question of why this is the case. Choudhry suggests although multinational federalism has as its goal the preservation of the territorial integrity and political unity of the state, it could instead perversely fuel secession. Integrationist constitutional instruments offset this danger, by binding the federal subunit to the state, for example, by requiring its citizens to participate in shared institutions. Choudhry also notes that integrationist and accommodationist approaches can be combined in different ways. In a multinational federation, one strategy is to limit the scope of accommodation, for example, by forcing certain decisions to be made in common institutions in which a national subunit does not have a veto. Another is to balance an accommodationist strategy in one area of constitutional design against an integrationist strategy in another. He suggests that in Canada, multinational federalism has been counterbalanced by the nation-building aspects of the Canadian Charter of Rights and Freedoms.

If the combination of integrationist and accommodationist elements is deliberate, the next question is whether such a combination is in fact stable. Choudhry suggests it is not. He argues that the Canadian constitutional crisis of the mid 1990s—during which Quebec nearly seceded from Canada—was traceable to the competing constitutional logics flowing from the intertwining and mutual reinforcement of constitutional text and constitutional politics. Combining integrationist and accommodationist elements within the same constitutional system fuels further demands and rounds of constitutional politics to perfect the constitutional text. For example, the accommodation of Quebec (reflected in the federal nature of Canada) and the Charter (which embodies a notion of Canada of equal citizens who bear identical constitutional rights irrespective of province of residence) came into conflict over proposals to constitutionally recognize Quebec as a distinct society. If such recognition would allow Quebec to justifiably limit Charter rights to enable it to preserve and promote its linguistic identity, it collides with the idea of the Charter as the spine of equal citizenship.

The Canadian debates over the recognition of Quebec's distinctiveness constitutionally—recently recapitulated in the debate in the fall of 2006 over whether Quebec should be recognized as a nation—suggest that an important topic for comparative study should be the constitutional dynamics created by the inclusion of integrationist and accommodationist elements within the same constitutional document. Canada illustrates the impact of a hybrid constitution on the politics of constitutional amendment. As Pildes recounts in his chapter, Bosnia and Herzegovina furnishes an example of the impact of constitutional adjudication. The Dayton Peace Accords—which are the constitution of Bosnia and
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Herzegovina—combine two sets of conflicting elements. On the one hand, it sets up a confederation between the Republika Srpska and the Federation of Bosnia-Herzegovina, and presupposes that each unit is the principal home of its "constituent peoples"—Serbs for the former and Croats and Bosniaks for the latter. But the Dayton Peace Accords also incorporate the European Convention of Human Rights into domestic law. As a consequence, a range of policies adopted by each constituent unit to define itself in ethnically specific terms—such as describing the Republika Srpska as "a State of Serb People" and terming "Bosniaks and Croats as constituent peoples" of the Federation of Bosnia-Herzegovina, the renaming of cities to connotes that they are exclusively Serbian, and the adoption of ethnically specific official coats of arms—was held by the Constitutional Court of Bosnia-Herzegovina to be an unconstitutional form of discrimination.

Emon ("The limits of constitutionalism in the Muslim world: History and identity in Islamic law") also points to the problem of competing constitutional logics embedded in the same constitutional text. Emon argues that the contemporary constitutions of Islamic states are beset by an internal contradiction on precisely the issue of accommodation versus integration. On the one hand, they take the integrationist line on religious freedom, and the rights of religious minorities in particular. But on the other hand, they are accommodationist with respect to the status of Islamic law. They recognize and institutionalize difference, as opposed to adopting a stance of neutrality with respect to the religious identity of the majority. The problem is that the two sets of constitutional commitments are in deep tension with each other. The challenge for Islamic constitutionalism is how to resolve this tension. Emon argues that "resort to theories of accommodation or integration, by themselves...does not adequately address the roots of the tension or offer constructive modes of resolution". Rather, the answer is to historically situate and contextualize the rules of Islamic law, which were framed centuries ago and today "are applied in settings marked by profound institutional, political, and social alterations".

Second, several chapters argue that the dichotomy between integration and accommodation—even taking into account the variations within each—may require further refinement. Patten ("Beyond the dichotomy of universalism and difference: Four responses to cultural diversity") suggests "the dichotomous way of thinking...is too simple to do justice the problems being considered", and is a "simplification" which "leads to a serious distortion of the possible solutions to the problems raised by diversity, the normative grounds available on behalf of those solutions, and the ways that real-world conflicts should be understood". Instead of two families of responses, there are four: Disestablishment (where the

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state gives no recognition to any cultural identity), nation building (where the state promotes one cultural identity for all of its citizens), cultural preservation (where the state promotes the survival of distinct cultures), and equality of status (where the state accords cultures equal public status, but does not guarantee their survival). The first two are different and mutually inconsistent interpretations of integrationism, whereas the last two are different and mutually exclusive interpretations of accommodationism. Patten explores each of these different principles by reference to language policy.

Tierney also challenges the idea that integration and accommodation capture the full range of ways in which states can respond to ethnic political mobilization. He does so in two related ways, both in the context of substate nationalism. First, Tierney challenges the use of the term accommodation to describe the constitutional demands of substate nations. To Tierney, the term accommodation implies a hierarchical relationship with "the entity doing the accommodating...and the entity being accommodated". It is precisely this hierarchical relationship that substate nations challenge. Thus, "substate national societies call for partnership with the dominant society rather than accommodation by it". This reframing of the demands of substate nations leads Tierney to distinguish between two different ways in which a substate society participates in political decision by the large polity—what he terms "partnership integration" and "assimilationist integration". Whereas the former "provides for the equal engagement of the state's national societies", the latter consists of "the subjection of substate national societies to decisions by the center in...which the substate units have only minimally or inadequately participated". In Tierney's opinion, Scottish devolution is more the latter than the former, which means that the United Kingdom has not yet fully embraced plurinational federalism.

Choudhry likewise seeks to challenge the binary framework established by McGarry, O'Leary, and Simeon, in context of his reflections on the Canadian case. He distinguishes between two ways to accommodate minority nationalism—"accommodation as institutional separateness" and "accommodation designed to facilitate participation in common institutions". In the context of minority nationalism, McGarry, O'Leary, and Simeon, appear to comprehend accommodation as the former, not the latter. The principal example of accommodation as institutional separateness is ethnofederalism—the creation of a federal subunit in which an ethnic minority constitutes a majority, and where the subunit has jurisdiction over matters crucial to the survival of the ethnic minority. But in the Canadian case, an equally important method of accommodation has been to facilitate the participation of francophones in common federal institutions, without being asked to use English. Thus, the constitution declares both English and French to be the official languages of Canada, permits both languages to be used in parliamentary debates, provides that statutes must be enacted in both languages, and gives francophones the right to use French in court proceedings and to communicate with and receive services in French where there is sufficient demand.
Simeon and Murray also seek to supplement the taxonomy established by McGarry, O'Leary, and Simeon by describing a constitutional strategy they term “recognition without empowerment”. In their view, this is the best way to make sense of the South African case. The South African constitution gives strong recognition to diversity and difference in “cultural and social life” while seeking to the greatest extent possible to prevent ethnocultural differences from entering the design of the political system. Thus, the constitution grants the right to receive education in the official language of one's choice; there are eleven official languages in total. But the South African constitution rejects any form of executive power sharing, opting instead for a modified Westminster model of government and opposition with competitive party politics. In their view, this strategy has been a success, because it prevented linguistic and ethnic differences among black South Africans from becoming bases of political division by relegating them to the private sphere and removing them as topics of political debate.

Third, the chapters also suggest that accommodation may be deployed as a transitional stage toward integration. Accommodation may be the only practical option at important moments in the lifecycle of a constitutional order, such as the transition to democratic rule. But once the order is operational, and members of ethnic groups develop reciprocal bonds of trust, it may be possible to move to a more integrationist set of political institutions. Simeon and Murray describe the South African constitutional transition in these terms. The apartheid regime and the African National Congress (ANC) negotiated an interim constitution (which came into force in 1993) in which any party winning 20 percent of the seats in the National Assembly (elections are held on the basis of proportional representation) would be entitled to a deputy president, and any party winning at least 5 percent to representation in the cabinet. The result was a government of national unity led by the ANC which included the National Party and the Inkatha Freedom Party. The goal was to ensure the success of the transition by giving major parties a stake in its survival. The 1996 constitution, by contrast, opted for a majoritarian political system on the Westminster model with no executive power sharing.

Fourth, the chapters extend the scope of traditional debates over constitutional design for divided societies, by broadening the spheres with respect to which the choice between integration and accommodation must be made. One way of understanding the South African transition (described by Simeon and Murray) is in the following way: The grand bargain between the apartheid regime and the African National Congress was to agree to a liberal democratic constitutional order with limited and transitional arrangements for power sharing (which were intended and had the effect of including the National Party in a government of national unity) while leaving the pattern of white ownership in the economy largely untouched, at least for an initial period. In other words, integration in the political order was agreed to in exchange for accommodation in the economic order. To focus on the constitution to the exclusion of the economy would
arguably miss the actual choices and trade-offs that made the transition to democracy possible in the context of deep racial divisions.

Ghai and Cottrell’s analysis of Fiji also makes clear the link between the constitutional and the economic orders in divided societies. The two major ethnic groups in Fiji are indigenous Fijians and Indians. Ghai and Cottrell read Fijian history, in large part, as a conflict between Fijians, who wished to preserve their traditional land holdings, and the demands of the market, which required land for sugar plantations that were heavily dependent on imported Indian labor. The political economy of ethnic conflict in Fiji has shaped constitutional politics and constitutional design, with Indians and Fijians on opposite sides of a debate over the alienability of land, in addition to a debate over the structure of political institutions on racial or nonracial lines. A major goal for Fijians has been to use the constitution to protect their land holdings. As a consequence, there is a constitutional prohibition on the alienation of their land holdings to non-Fijians.

Keating ("Rival nationalisms in a plurinational state: Spain, Catalonia and the Basque Country") appears to suggest that the literature has been too focused on formal constitutional design as a mechanism for accommodating minority nationalism, and has therefore ignored subconstitutional and informal mechanisms of accommodation which may be equally, if not more, important. He makes this point through his discussion of the Spanish case, where political parties and statutes have played an important role in the accommodation of Catalan nationalism. The leading Catalan political party—the Convergència i Unió—has been an important political player at the national level, because it has fielded parliamentary candidates. For most of the time since 1993, Spanish governments from across the political spectrum were dependent on CIU support to maintain power, although the CIU did not join the government. The CIU used its political power to secure considerable autonomy for Catalonia through statute. By contrast, although the constitution provided the framework within which debates over Catalan autonomy took place proclaiming at once “the indissoluble unity of the Spanish nation” as a whole, while recognizing within the Spanish nation and under the constitution the right to autonomy of the nationalities—the relevant provisions of the constitution have remained unaltered since 1978.

McGarry and O’Leary ("Consociation and its critics: Northern Ireland after the Belfast Agreement") bring home the importance of security issues in crafting constitutional arrangements for divided societies. They argue that the focus of consociational theory has been "on the design of and need for agreement on political institutions", but that minimal attention "has been paid to a number of crucial sectors in violently divided places, such as the design of the police and security forces", and policies toward paramilitary forces (including their integration into the police and security forces), disarmament, and so on. They argue that disagreement on security issues was much greater than disagreement on the design of the political system. The fact that the Belfast Agreement was silent on these issues, in their view, undermined the effectiveness of the consociational
arrangements which it set up. They conclude that "had the security issues been better managed from the start, it was not inevitable that the institutions would have been unstable".

Finally, the chapters highlight the growing international role in crafting constitutional structures for divided societies. Kymlicka notes the growing role of the international community in "endorsing some models of integration and accommodation while discouraging others", and the use of economic, technical and military incentives to back up those recommendations. Kymlicka challenges the view set out in the overview chapters that integration is promoted by the international community. Instead, Kymlicka argues that within the United Nations, there appears to be a division between the treatment accorded to "indigenous peoples" and "minorities". Indigenous peoples are entitled to self-government, whereas minorities are only entitled to the traditional liberal freedoms and the right to non-discrimination. Kymlicka also examines the attempt within the Council of Europe to develop a distinct set of norms for "national minorities", which would have encompassed a right to regional autonomy. However, this effort failed, raising serious questions about the potential of international law to advance the claims of national minorities. At most, there is "a political practice of case-specific interventions" supportive of autonomy, which appears to be "rewarding belligerence".

Choudhry argues that Kymlicka has played a major role in encouraging the adoption of multinational federalism as a constitutional device to accommodate the claims of national minorities for over a decade. Moreover, although in recent work he has become more skeptical regarding the possible transplantation of this model outside North America and Western Europe, he is still arguing that it has been successful in those regions. Choudhry argues that Kymlicka's model of multinational federalism is largely based on Canada's constitutional arrangements, and so is, in fact, the Canadian model. He then seeks to contextualize the rise of the Canadian model in political theory, by observing that it coincided with a severe constitutional crisis within Canada that nearly led to the breakup of the country. Choudhry argues that the rise of the Canadian model and its promotion internationally was also an intervention in domestic constitutional politics, designed to shore up support for the Canadian model at home. He further argues that the true lesson of the model is the limited ability of rules governing constitutional amendment to regulate existential moments of constitutional politics in multinational politics, such as secession.

O'Leary and McGarry also discuss the central role of international involvement in facilitating the consociational arrangements in place in Northern Ireland. A critical factor, in their view, was the decision of the United Kingdom to directly involve the Irish government in the resolution of the Northern Ireland conflict. Another factor was the role played by the United States to encourage a political settlement. O'Leary and McGarry generalize from the Northern Ireland experience to paint a different picture of international involvement than Kymlicka. In
their view, there has been extensive "benign exogenous action" which has "facilitated power-sharing settlements elsewhere, not just in Northern Ireland" but also "in Bosnia and Herzegovina, Macedonia, Iraq, and Afghanistan". In their view, far from being an unprincipled and ad hoc practice, international involvement "can play positive roles and can tip the balance in favor of negotiated or induced agreements".