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CONSTITUTIONAL DESIGN IN THE ANCIENT WORLD

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This paper identifies two distinctive features of ancient constitutional design that have largely disappeared from the modern world: constitution-making by single individuals and constitution-making by foreigners. We consider the virtues and vices of these features, and argue that under plausible conditions single founders and outsider founders offer advantages over constitution-making by representative bodies of citizens, even in the modern world. We also discuss the implications of adding single founders and outsider founders to the constitutional toolkit by describing how constitutional legitimacy would work, and how constitutional interpretation would be conducted, under constitutions that display either or both of the distinctive features of ancient constitutional design.

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INTRODUCTION

The literature on constitutional design swells by the day. In law, political theory and political science, economics, and history, scholars consider the political and economic effects of constitutional structures and institutions, the optimal design of constitutional arrangements, and the microfeatures of constitution-making assemblies. Comparative politics and economics supply most of the examples and data.

Amidst all this work, however, a major resource for the theory of constitutional design has gone largely unexploited: the ancient world. Contemporary scholars occasionally discuss the Roman Republic, but mostly in the context of emergency powers, and with a focus on the Roman dictatorship.[1] There is also some recent and important work on the virtues of the classical Athenian constitution.[2] By and large, however, the ancient world is terra incognita for the theory of constitutional design. Even historically inflected work in the area often goes back no farther than the eighteenth century, focusing on constitutional design in recognizably liberal-democratic polities after 1789.

As it turns out, however, the ancient world had a rich tradition of constitutional design. Athens and Rome hardly exhaust the topic; as we will see, many city-states of the ancient world, particularly the Greek world, experimented with novel forms and procedures of constitutional design. Even as to Athens,

1. *See, e.g.*, John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 211-13 (2004).

2. *See, e.g.*, JOSIAH OBER, DEMOCRACY AND KNOWLEDGE: INNOVATION AND LEARNING IN CLASSICAL ATHENS 6-7 (2008).

the recent work says little about the striking process by which the classical Athenian constitution came into being.

Our most general aim, then, is to exploit the intellectual resources the ancient world offers. That world, we suggest, provides a form of comparative political history that is optimally different from our own world: sufficiently close to be useful, sufficiently alien to supply unfamiliar institutional forms that can enrich the repertoire of modern polities designing or redesigning their constitutions. Of course, the bare fact that such institutional forms worked in ancient polities does not show that they would work in very different modern ones; background political and institutional differences must be taken into account. However, the ancient world suggests institutional possibilities that have been neglected by the modern world, and offers some evidence about the conditions under which those possibilities might prove useful.

Our more specific aim is to explore two distinctive features of ancient constitutional design that have largely disappeared from the modern world, yet are potentially useful even under modern conditions. These two distinctive features could appear either separately or in combination. First, many ancient constitutions were produced by *single founders*. Solon of Athens is the most famous, and the best-documented, but single-founder constitutionalism is attested for a number of city-states.

On this dimension, the contrast with the modern world is striking. The French Constitution of 1791 was written by an assembly of no less than 1200 people.[3] One of the smaller groups on record was the one that assembled in Philadelphia in 1789 to write the American Constitution; the group numbered fifty-five, of which thirty-nine signed the eventual product.[4] These two extremes represent roughly the upper and lower bounds in modern polities;[5] there are no Solons to be found. Monarchs in various countries have handed down so-called "octroyed" constitutions from the throne, most famously in Prussia in 1848,[6] but formal participation in democratic constitution-making has become almost exclusively the province of multiple founders. In the bout of constitution-making after 1989, for example, the number of formally designated constitutional drafters reached multiple hundreds in a number of cases. The institution of single-founder constitutionalism in recognizably democratic states died with the ancient world and was more or less forgotten. We will consider its virtues and vices, and claim that under plausible conditions, it could still make sense today.

3. *See* Jon Elster, The Optimal Design of a Constituent Assembly 13 (May 2008) (unpublished manuscript), *available at* http://streamer2.cerimes.fr/canalu/documents/cerimes/UPL55488_Elster.pdf.

4. *Id.*; *see also* U.S. CONST., *available at* http://www.archives.gov/exhibits/charters/constitution_transcript.html (listing signatories).

5. Elster, *supra* note 3, at 13.

6. *See id.* at 2.

The second unfamiliar feature of ancient constitutional design is constitution-making by *outsiders*—by individuals not citizens of the polity the constitution regulates. Although the modern world occasionally sees constitutions forcibly imposed by an outside power, citizens of particular polities in the ancient world would sometimes voluntarily and collectively delegate constitution-making to an outsider. That practice has largely disappeared.[7] In the modern world, at least since 1789, foreign constitutional advisers are legion, but formal power to vote on or propose a constitution is usually restricted to citizens of the relevant polity. The possibility of outsider founders has virtues as well as vices, and belongs in the repertoire of modern constitutional design under plausible conditions.

We show that in some respects single founders and outsider founders offer several advantages over representative bodies of citizens. Individuals are more apt to produce an internally consistent document and to avoid the incoherent bargains and poorly considered compromises that plague constitutions produced through group decisionmaking. Single founders are also more directly accountable for their work. Finally, using a single founder provides speed in the case of crisis, and avoids the risk that a representative body will reach an impasse and fail to produce a constitution. On the other hand, using a single founder involves another sort of risk, since individuals are likely to display greater variance than a large group. The most serious objection to a single founder is that the interests of the society's various social, political, and economic groups are not represented in the constitution-making process. The lack of representation is a nontrivial objection, but it should not be overstated. The compromises worked out in committee, and the conflicts visible within a voting group, may cause individual citizens to feel as though their interests are less well represented in a committee-made constitution than in a constitution produced by a well-respected individual whom they trust to consider all points of view. Paradoxically, a single individual who embodies all relevant views and interests can be more representative than a group composed of conflicting parties.

Foreign founders offer an additional measure of impartiality because they are not affiliated with any of the contending factions within the state. One might object that a foreigner would not have enough information about the

7. There do exist scattered counterexamples. The initial draft of the Kenyan Constitution of 2010 was proposed by a seven-member "committee of experts," of whom three were required to be noncitizens. *See* The Constitution of Kenya Review Act, (2009) Cap. 3A § 8(4)(a). In Fiji in 1997, ethnic conflict between Indian immigrants and native Fijians was temporarily settled by a three-member Constitution Review Commission, composed of one Indian, one Fijian, and one outsider—Sir Paul Reeves, former governor-general of New Zealand—who held the deciding vote. *See* Brij V. Lal, *Towards a United Future: Report of the Fiji Constitution Review Commission*, 32 J. PAC. HIST. 71, 71-72 (1997). The difference between the modern world and the ancient world, at least the world of the Greek city-states, is that in the latter, constitution-making by outsiders or single founders or both were widespread, systematic practices.

society for which he is writing a constitution, but this defect could be easily remedied by gathering information from informal advisers. Additionally, foreigners may pose even more of a problem from the standpoint of representation than single founders, though this vice may be lessened by the requirement that any proposed constitution must win ratification, and thus consent, from the people. It is not our contention that the use of a single or outsider founder is preferable in all, or even most, situations, but simply that there are plausible conditions under which the advantages of these forms of ancient constitutionalism outweigh the disadvantages.

Even if the use of a single or an outsider founder is theoretically preferable in some situations, is it imaginable that the citizens of a modern democracy would hand over the writing of their constitution, and would accept the founder's product as legitimate? We explore how and why citizens might agree to appoint an individual, and perhaps even a foreigner, to write their constitution. Particularly where there are sharp divisions in the society, different factions might agree to an individual mediator either because they believe him to be truly impartial, or because both sides plausibly believe that the founder will favor their interests. Once the founder has proposed a constitution, the process of popular ratification would be critical to ensuring that the constitution is accepted by the citizens as legitimate. Although the constitution's legitimacy would be grounded in popular ratification, such a constitution's origin as a document written by a single founder would have profound ramifications on how it is interpreted. In particular, originalism in the sense of attempting to discover the founder's intent would become less practically problematic; coherentist interpretation—that is, reading individual clauses in light of the whole document—would have more to recommend it; and consulting foreign law would seem more natural.

Part I describes the process of constitution-making in the ancient world, and lays out the two distinctive features of ancient constitutional design. Part II considers the virtues and vices of both single-founder constitution-making and constitution-making by outsiders. We then draw together the threads of this analysis by considering some variables that make single-founder constitution-making and constitution-making by outsiders more or less attractive. Part III turns to implications and an agenda for future research. We try to understand how constitutional legitimacy would work, and how constitutional interpretation might be conducted, under constitutions that display either or both of the distinctive features of ancient constitution-making. A brief conclusion follows.

I. HISTORY

Between roughly 650 and 550 B.C., several Greek city-states enacted constitutions.[8] Although the details surrounding each lawgiver's reforms are often

8. *See* MICHAEL GAGARIN, EARLY GREEK LAW 51-52 (1986).

uncertain, we can glean a basic outline of how constitution-making tended to proceed from similarities in the ancient literary accounts of the various early lawgivers. We trace these common elements of ancient constitution-making below, with particular attention to the lawgiver about whom the most evidence survives: Solon of Athens. We then delineate two unique features of ancient constitutional design: (1) the use of single founders, present in every city-state about which we have evidence; and (2) the appointment of an outsider to formally draft and put forward the new constitution, present in many city-states. These two features might be combined and sometimes were, but they need not be; they are conceptually separate and each is a distinctive feature of ancient constitution-making in its own right.

Before we begin, two caveats are in order, one terminological and one methodological. First, when describing the work of the early lawgivers, we use the term "constitution" only in a broad sense. In addition to fundamental issues such as the composition of political institutions, the wave of lawmaking in the archaic period included detailed regulations concerning religious, family, criminal, and economic law. Solon, for example, is credited not only with reforms readily recognizable to a modern audience as "constitutional"—creating a new legislative institution (the Council of 400), establishing the right to appeal to a jury court, and replacing birth with property requirements for holding office and voting in the assembly[9]—but also with such minutiae as a specific penalty for stealing cow dung and a requirement that anyone living more than a certain distance from a public well dig his own.[10] Although the lawgivers' enactments were not complete, comprehensive statements of the city-states' institutional arrangements or fundamental governing principles, they were in many cases the first systematic attempt to set forth in writing the community's norms and institutional structure, and were viewed by later generations as the "founding" of their legal and political order.[11] In this sense, all the early lawgivers can be

9. *See* 1 PLUTARCH, *Solon*, *in* PLUTARCH'S LIVES 403, 453 (Bernadotte Perrin trans., 1914) [Plu. *Sol.* 18.2] (asserting that Solon allowed an appeal to jury court); *id.* at 455 [Plu. *Sol.* 19.1-.2] (describing the Council of 400); *id.* at 457 [Plu. *Sol.* 19.1-.4] (discussing the Council of the Areiopagus); Aristotle, *The Constitution of Athens*, *in* ARISTOTLE AND XENOPHON ON DEMOCRACY AND OLIGARCHY 139, 151-53 (J.M. Moore trans., 1986) [*Ath. Pol.* 7-8] (describing the establishment of property classes); *id.* at 153 [*Ath. Pol.* 9.1] (noting the right to appeal to court as a popular feature of Solon's constitution).

10. 1 PLUTARCH, *supra* note 9, at 469 [Plu. *Sol.* 23.5] (regarding wells); EBERHARD RUSCHENBUSCH, SOLONOS NOMOI F.64 (1966) (regarding cow dung); *see also* GAGARIN, *supra* note 8, at 65, 70.

11. *See* GAGARIN, *supra* note 8, at 51-52 (associating the work of the lawgivers with the first written laws); JOHN DAVID LEWIS, EARLY GREEK LAWGIVERS 41-42 (2007) ("According to such traditions, an early lawgiver establishes a common form of justice, and a common code of rules, that are applicable to all, and that stand with an authority above any particular person or group of persons. . . . The *polis* passes from rule by men, to rule under laws.").

seen as engaged in a project of constitution-making.[12] Note also that many modern constitutions do include the sort of substantive, first-order rules of the sort Solon proposed; the current constitution of Brazil, for example, specifies that its federal government must spend at least eighteen percent of annual tax revenues on education.[13] Neither in the ancient nor the modern world is it the case that designed "constitutions" confine themselves to the basic structure of the polity.

The second caveat concerns the nature of our sources. Even by the standards of ancient history, our evidence for the early Greek lawgivers is sparse and unreliable. With the exception of fragments of Solon's poetry, nearly all of our evidence comes from a century or more (sometimes significantly more) after the events in question.[14] Much of the evidence we do have is fragmentary and contradictory. Moreover, the very status of the lawgivers as "founders" of their respective city-states makes the accounts of their reforms susceptible to manipulation by later authors pursuing their own agenda. We know, for example, of cases where Athenian litigants falsely attributed recent laws to Solon in an effort to give them greater credibility.[15] But despite uncertainty regarding the historicity of some specific reforms and lawgivers, the two distinctive features of ancient constitutional design that we are concerned with—the use of single founders and the prevalence of outsider founders—are beyond doubt.[16] Moreover, for our purposes, what is most important is the Greek conception of the process of constitution-making, as embodied in the legends of the Greek lawgivers, rather than the actual practice.

12. In *The Politics*, Aristotle distinguishes between those who establish "constitutions" (*politeiai*) and mere lawgivers (*nomothetai*), describing Solon of Athens and Lycurgus of Sparta as constitution-makers. ARISTOTLE, THE POLITICS 98 (T.A. Sinclair trans., 1962) [Ar. *Pol.* 2.12]. This distinction is not found elsewhere, and the theme that the lawgiver delivers the city from a state of *anomia* to *eunomia* (roughly, "anarchy" to "good order"), common to many of the lawgiver stories, suggests that the lawgivers were largely viewed as something akin to "founders" of their respective city-states. *See* LEWIS, *supra* note 11, at 41-42; Andrew Szegedy-Maszak, *Legends of the Greek Lawgivers*, 19 GREEK, ROMAN & BYZANTINE STUD. 199, 201 (1978).

13. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 212.

14. GAGARIN, *supra* note 8, at 52.

15. *See* LEWIS, *supra* note 11, at 21-25; *see also* Rosalind Thomas, *Law and the Lawgiver in the Athenian Democracy*, *in* RITUAL, FINANCE, POLITICS: ATHENIAN DEMOCRATIC ACCOUNTS PRESENTED TO DAVID LEWIS 119, 121-23 (Robin Osborne & Simon Hornblower eds., 1994).

16. Adcock, for example, distinguished between a primary literary tradition that includes credible historical information about lawgivers' biography and laws, and a secondary tradition that is primarily mythical. F.E. Adcock, *Literary Tradition and Early Greek Code-Makers*, 2 CAMBRIDGE HIST. J. 95, 95 (1927). Some scholars doubt the existence of Lycurgus of Sparta, but there is sufficiently solid evidence for the others. *See* GAGARIN, *supra* note 8, at 59 n.29.

A. *The Greek Lawgivers*

Many of the literary accounts of early Greek constitutional moments share some common elements.[17] In response to civil unrest, the city-state chooses an individual to write new laws. The lawgiver is not affiliated with either of the competing factions, and in many cases is not even a citizen of the city. The founder's status as an outsider is critical both to his appointment and to the quality of his constitution. The citizens take an oath to obey the new laws, a step that can be seen as a form of popular ratification. Although constitutional entrenchment in the modern sense did not exist in the archaic period, several cities instituted mechanisms to discourage changes to the new constitution. We describe the typical steps in the ancient Greek constitutional process in more detail below.

In many cases, the impetus for legal reform was civil discord. Several sources report that Solon's appointment was preceded by conflict between creditors and debtors.[18] Rapid population growth and rigid inheritance laws caused small landowners' holdings to be divided, driving many of them into debt.[19] According to the author of *The Constitution of Athens*,[20] the widening gulf between rich and poor in Athens resulted in the concentration of all the land in the hands of a few, leaving the majority of the population enslaved in debt bondage.[21] The fighting between the two groups reached such a pitch that both sides agreed to appoint Solon as a mediator.[22] In Sparta, Lycurgus's reforms were similarly said to have been initiated because of inequality between the rich and poor.[23] Many scholars believe that the legal reforms of Draco (an Athenian lawgiver who preceded Solon by about twenty-five years) were also a response to fighting between local elite factions.[24] Other examples of cities which enacted constitutions in response to a civic crisis include Mytilene and Cyrene.[25]

17. These elements are recounted in several secondary sources, including GAGARIN, *supra* note 8, at 58-62; and Szegedy-Maszak, *supra* note 12.

18. 1 PLUTARCH, *supra* note 9, at 431, 435 [Plu. *Sol.* 12.2, 13.2]; Aristotle, *supra* note 9, at 150 [*Ath. Pol.* 5.2].

19. MOGENS HERMAN HANSEN, THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES 28-29 (J.A. Crook trans., 1991).

20. *The Constitution of Athens* is not an actual constitution, but a history of Athenian political institutions followed by a description of those institutions at the time of Aristotle. Although ascribed to Aristotle, it may have been written by his students. *See* J.M. Moore, *Introduction* to *The Constitution of Athens*, *in* ARISTOTLE AND XENOPHON ON DEMOCRACY AND OLIGARCHY, *supra* note 9, at 143, 143-44.

21. Aristotle, *supra* note 9, at 149-50 [*Ath. Pol.* 4.5-5.2].

22. *Id.*

23. 1 PLUTARCH, *Lycurgus*, *in* PLUTARCH'S LIVES, *supra* note 9, at 203, 227 [Plu. *Lyc.* 8.1].

24. *See* GAGARIN, *supra* note 8, at 59 n.25.

25. *Id.* at 59 & nn.26-27.

One element common to all our cases is the appointment of an individual to draft new laws. The appointment of a single lawgiver may have been a natural extension of the archaic practice of settling disputes through the appointment of a single mediator or arbitrator chosen by the parties because of his reputation for wisdom and fairness.[26] The position of lawgiver was an extraordinary one. The lawgivers typically held no political office and operated outside the existing government apparatus.[27] Though their proposed constitution was in most cases subject to popular ratification, they were given carte blanche to propose whatever institutional and legal reforms they wished. Plutarch states, for example, that the Athenians placed "no restrictions whatever upon [Solon], but put[] everything into his hands, magistracies, assemblies, courts-of-law, and councils. He was to fix the property qualification for each of these, their numbers, and their times of meeting, abrogating and maintaining existing institutions at his pleasure."[28]

Perhaps the most striking feature of ancient constitutionalism is the use of outsiders—that is, men who were not citizens of the city—to draft the constitution. In several cases, foreigners of high reputation were called in to write laws for another city.[29] The story of Zaleucus, the earliest lawgiver, offers an interesting variant on the outsider theme: according to Aristotle, Zaleucus was a slave shepherd who proposed such excellent laws that the people freed him and appointed him as lawgiver.[30] Even founders who wrote constitutions for their own cities tended to be "internal outsiders," in the sense that they were not members of either of the competing factions.[31] For example, Aristotle states in *The Politics* that many lawgivers, including Solon, Lycurgus, and Charondas, were members of the "middle class,"[32] and therefore did not have a personal interest in the conflict between rich and poor.

In most cases, there is no information about how or why a particular lawgiver was chosen, but it stands to reason that outsiders (both foreigners and internal outsiders) were often chosen because they were seen as having no personal stake in the conflict that had prompted the constitutional drafting. Solon's appointment in Athens bears this out. It is clear that his status as a political outsider to the conflict was critical to his appointment. Plutarch reports that the "wisest" of the Athenians chose Solon because "he was the one man least implicated in the errors of the time; . . . he was neither associated with the rich in

26. *Id.* at 19-50.

27. *Id.* at 59.

28. 1 PLUTARCH, *supra* note 9, at 449 [Plu. *Sol.* 16.3].

29. For example, Demonax from Mantinea wrote laws for Cyrene, Andromadas of Rhegium was the lawgiver for Thracian Chalcis, and Philolaus the Corinthian was the lawgiver for Thebes. GAGARIN, *supra* note 8, at 60.

30. *Id.* at 58-59.

31. *See id.* at 59.

32. ARISTOTLE, *supra* note 12, at 268 [Ar. *Pol.* 4.11]; *see also* PLUTARCH, *supra* note 9, at 407-13 [Plu. *Sol.* 2-3]; Aristotle, *supra* note 9, at 150 [*Ath. Pol.* 5.3].

their injustice, nor involved in the necessities of the poor."[33] A more cynical account which also emphasizes Solon's outsider status suggests that both sides agreed to his appointment as lawgiver not because they perceived him to be impartial, but because each side (mistakenly, as it turned out) believed that his constitution would favor its interests. The author of *The Constitution of Athens* reports that both sides were unhappy with Solon's reforms because the "common people had expected him to redivide all property, while the wealthy had expected him to restore them to their traditional position, or at most only to make minor alterations to it."[34]

Despite both factions' initial disappointment, Solon's constitution was revered over the long term because it was considered a fair compromise between the rich and the poor. He abolished enslavement for debt but stopped short of land redistribution; he created the right of appeal from magistrates' decisions to a people's court, and expanded legal access to the poor by providing for generalized standing, but at the same time established property requirements for holding office.[35] Both Solon in his poetry and later authors emphasize that Solon was able to construct a superior constitution, one that provided justice for all, in large part because he was as an outsider.[36] The author of *The Constitution of Athens*, for example, remarks that Solon "could have made himself tyrant by joining whichever side he chose, [but] had preferred to be hated by both while saving his country and giving it the best constitution possible."[37]

It is worth noting that most of the early Greek constitutions were perceived to be the product of human reason, not divine intervention. Several scholars have pointed out that stories attributing divine inspiration to the laws are relatively rare, and tend to be found in aristocratic rather than democratic city-states.[38] The individual Greek founder is not a Moses-like conduit of divine

33. 1 PLUTARCH, *supra* note 9, at 437 [Plu. *Sol.* 14.1]. Of course, Solon's reputation was also an important factor. Aristotle, *supra* note 9, at 150 [*Ath. Pol.* 5.3] (noting that Solon was one of the leading men in reputation).

34. Aristotle, *supra* note 9, at 154 [*Ath. Pol.* 11.2]; *see also* 1 PLUTARCH, *supra* note 9, at 437-39 [Plu. *Sol.* 14.1-.3], which presents but casts doubt on a tradition that prior to his appointment Solon secretly promised each side that he would defend its interests.

35. *See* HANSEN, *supra* note 19, at 30-31.

36. *E.g.*, 1 PLUTARCH, *supra* note 9, at 453 [Plu. *Sol.* 18.4] (quoting Solon's poem: "[T]o the common people I gave so much power as is sufficient, [n]either robbing them of dignity, nor giving them too much; [a]nd those who had power, and were marvellously rich, [e]ven for these I contrived that they suffered no harm. I stood with a mighty shield in front of both classes, [a]nd suffered neither of them to prevail unjustly"); Aristotle, *supra* note 9, at 151 [*Ath. Pol.* 6.3-.4] (describing Solon as "moderate and impartial," having "chose[n] to incur the hostility of both sides," and "preferr[ing] what was right and the salvation of the city to his own advantage"); *id.* at 154-56 [*Ath. Pol.* 12] (quoting verses of Solon describing how he did not favor either party).

37. Aristotle, *supra* note 9, at 154 [*Ath. Pol.* 11.2].

38. The two most prominent cases of divine origin are Zaleucus and Lycurgus. *See* GAGARIN, *supra* note 8, at 60. While Zaleucus and Lycurgus are well-known lawgivers, they are outnumbered by lesser lawgivers whose laws were not attributed to divine origin. *See id.* at 60-61 (noting that the claim of divine or semi-divine origin for the laws is not widespread); Szegedy-Maszak, *supra* note 12, at 208 (stating that for the Greeks law was a human endeavor, and that divine inspiration was not the most important source of law).

knowledge. Rather, it is the individual lawgiver's wisdom, experience, and position as an outsider that permits him to propose a just constitution.

How did the lawgiver's proposed constitution become binding on the citizens? Once again, our evidence on this question comes almost entirely from the Athenian case. Plutarch notes that Solon's reforms were limited by what he could persuade the people to accept.[39] Although the precise details are unclear, it appears that Solon's proposed constitution underwent a form of popular ratification. *The Constitution of Athens* states that all the citizens took an oath to observe Solon's laws; Plutarch states that the Council took a collective oath to ratify the laws; and Herodotus reports that the Athenians solemnly swore to give Solon's laws a ten-year trial.[40] It seems likely that other city-states which appointed outsiders to write a new constitution used an oath or a similar process to signify the people's acceptance of the proposed laws as binding on the community.

The founding stories of several city-states include an attempt to preserve the new constitution. These informal "entrenchment" measures took a variety of forms. The Athenians agreed not to change the new laws for a period of time (one hundred years according to *The Constitution of Athens* and Plutarch; ten years according to Herodotus).[41] Lycurgus similarly exacted an oath from the Spartans not to change his laws.[42] Both Draco and Solon provided that anyone who attempted to alter the constitution would be deprived of his citizenship rights.[43] Zaleucus of Locri went so far as to require that anyone who wanted to change his laws must present his argument to the Council with a noose around his neck, and must be hanged if his proposal was not accepted.[44] In several cases, the single founder deliberately exits the scene by traveling abroad, or, more dramatically, by committing suicide, to avoid being asked to interpret or

39. 1 PLUTARCH, *supra* note 9, at 447-49 [Plu. *Sol.* 16.2]. Plutarch contrasts Solon to Lycurgus, who used "force rather than persuasion" to implement his reforms. Lycurgus's case is likely to be the outlier because he was a member of the ruling family, rather than an outsider appointed to mediate. *Id.* at 447 [Plu. *Sol.* 16.1].

40. HERODOTUS, THE HISTORIES 13 (Aubrey de Sélincourt trans., further rev. ed. 2003) [Hdt. 1.29]; 1 PLUTARCH, *supra* note 9, at 473 [Plu. *Sol.* 25.2]; Aristotle, *supra* note 9, at 151 [*Ath. Pol.* 7.1].

41. HERODOTUS, *supra* note 40, at 13 [Hdt. 1.29]; 1 PLUTARCH, *supra* note 9, at 473 [Plu. *Sol.* 25.1]; Aristotle, *supra* note 9, at 151 [*Ath. Pol.* 7.2].

42. 1 PLUTARCH, *supra* note 23, at 293-95 [Plu. *Lyc.* 29.1-.3].

43. GAGARIN, *supra* note 8, at 76; *see also* DEMOSTHENES, *Against Aristocrates*, *in* AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON 215, 255 (J.H. Vince trans., 1935) [Dem. 23.62].

44. Szegedy-Mazak, *supra* note 12, at 207; *see also* DEMOSTHENES, *Against Timocrates*, *in* AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON, *supra* note 43, at 373, 463-65 [Dem. 24.139-.142].

change his laws.[45] The processes of ratification and entrenchment transform the outside lawgiver's proposed laws into a binding constitution for the city-state. Our sources suggest that the lawgivers about whom we know the most—Solon, Lycurgus, and Zaleucus—all succeeded in creating constitutions that survived with few changes for centuries.[46]

B. *Distinctive Features of Ancient Constitutional Design*

To a modern scholar reading the stories of the Greek lawgivers, two features of constitution-making in the ancient world stand out: the use of single founders, and the appointment of outsider founders. It may be helpful to briefly define each of these two tools of ancient constitutional design before we evaluate their vices and virtues in the context of the modern world.

First, when we refer to "single founders," we have in mind a situation similar to Solon's appointment in Athens: the citizens voluntarily agree to give an individual sole authority to propose a constitution, which must then be ratified by the people before it becomes binding. The single founder is likely to be lobbied by politicians and interest groups, and may receive advice from academics and constitutional advisers, but the individual founder has sole formal responsibility for the drafting and proposing of the constitution. The ratification process involves approval or disapproval of the constitution as a whole; we do not envision an opportunity for the public to suggest revisions to the proposed constitution.

Second, by "outsider founder," we mean individuals who are not citizens or residents of the polity the constitution regulates. "Internal outsiders" like Solon present an intermediate category, but it is not difficult to imagine how the vices and virtues of outsider founders discussed below might be modified to apply to internal outsiders. Finally, it is important to emphasize that we are not considering cases of constitutions involuntarily imposed on a polity by a foreign power; we have in mind only situations in which citizens voluntarily invite a foreigner to draft their constitution for them. For similar reasons we exclude cases in which a colonial power grants a constitution to a colony, typically in the form of a charter—for example, the Constitution Act, 1867,[47] enacted for Canada by the Parliament of the United Kingdom.

45. Thus Solon travels for ten years, 1 PLUTARCH, *supra* note 9, at 475-77 [Plu. *Sol.* 25.4-.5]; Aristotle, *supra* note 9, at 154 [*Ath. Pol.* 11.1], and Lycurgus and Charondas are said to have killed themselves, 1 PLUTARCH, *supra* note 23, at 295 [Plu. *Lyc.* 29.4]; Szegedy-Mazak, *supra* note 12, at 207-08 & n.44.

46. *See* DEMOSTHENES, *supra* note 44, at 463-65 [Dem. 24.141] (addressing Solon and Zaleucus); 1 PLUTARCH, *supra* note 23, at 297 [Plu. *Lyc.* 29.6] (addressing Lycurgus). It is important to note that although Solon's institutional changes were successful in the long term, his reforms did not end the internal conflict in Athens. *See* ARISTOTLE, *supra* note 12, at 98-99 [Ar. *Pol.* 2.12]. In fact, Athens succumbed to tyranny in 561 B.C., although Solon's constitution remained unaltered. *See* HANSEN, *supra* note 19, at 32.

47. Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.).

In both cases, we believe, the locus of *formal* authority matters. To be sure, a large constituent assembly might informally delegate constitution-writing power to a single individual, while conversely a single individual might draw upon the advice of many informal advisers. Whatever the size of the constituent assembly, informal advisers might themselves be foreigners, as was often true in constitution-making after 1989.[48] Yet vesting formal authority in outsiders or in a single individual, or in a single outsider, would be a different and consequential step. However many advisers there may be, the need for approval by a single (foreign) individual creates a kind of bottleneck, ensuring that the draft constitution must pass muster in light of that individual's preferences and beliefs. Where formal authority is lodged in a large assembly of domestic citizens, no such bottleneck exists.

Conversely, in a typical modern constitution-making assembly the large number of voters with formal approval power makes a difference, even if only a small subset of those voters effectively sets the agenda and drafts proposals for the assembly. It is a mistake to think that passive voters in the assembly have no political influence, even if they can be observed to do little beyond voting for or against a draft constitution proposed by a subset of the assembly (with the draft constitution in turn subject to ratification by voters in the wider society). The active subset of the assembly will, by the law of anticipated reactions, be constrained by the preferences of the large number of passive voters; the former will only propose something that the latter will approve. The number of participants with formal voting power thus indirectly shapes and constrains outcomes, even if the influence of the mass of passive participants cannot directly be observed in actual cases.

In general, no one would be surprised at the claim that formal participation matters in subconstitutional assemblies, such as legislatures. However many staff members or informal advisers Congress does or does not have, the composition of the de jure voting body will affect outcomes, both in terms of the size of that body and in terms of eligibility to occupy seats. We assume only that the same is true for the constitution-making body.

II. VIRTUES AND VICES OF ANCIENT CONSTITUTION-MAKING

In this Part, we consider the virtues and vices, or the costs and benefits, of the distinctive features of constitutional design in the ancient world. The point is not to advocate these distinctive features as global solutions for modern constitutional polities, but merely to specify the conditions under which they might make sense, and to suggest that those conditions are sometimes met in the

48. *See* Philipp Dann & Zaid Al-Ali, *The Internationalized* Pouvoir Constituant—*Constitution-Making Under External Influence in Iraq, Sudan and East Timor*, 10 MAX PLANCK Y.B.U.N.L. 423, 429 (2006); *see also id. passim*.

modern world. If so, then these two features of ancient constitution-making belong in the toolkit of modern constitutional design.

A. *Single Founders*

1. *Virtues*

Modern scholars rarely discuss the possibility of a single founder at all. When they do touch upon it, they do so only to dismiss it out of hand. Yet this dismissal is too hasty. The issue is the optimal size of the constitution-making group, and there are distinctive benefits to constitutional design conducted by small groups or even, in the extreme case, by a single individual. Of course there are costs as well; we will examine both the benefits and costs in turn.

a. *Coherence and workability*

Machiavelli argued that republics should be founded by "one alone" because "many are not capable of ordering a thing because they do not know its good, which is because of the diverse opinions among them."[49] This can be interpreted to mean that the crucial issue about a large constitutional assembly is neither the "wisdom of crowds" nor the "madness of crowds," but the incoherence of crowds. Perhaps a single mind or small group might be more able to produce an internally consistent document. As Jon Elster puts it:

> A good constitution is a complex piece of machinery, a set of interlocking parts that are finely adjusted to each other. A priori, one might think that the task of writing it is best entrusted to a single individual who can weigh all the relevant considerations without having to accept the compromises that are inevitable in any collective decision-making process. In stylized form, whereas both [A, B] and [A', B'] might be viable combinations, the committee compromise [(A + A')/2, (B + B')/2] might not be.[50]

If a camel is a horse designed by a committee, a constitution designed by the sort of large committees that typically make constitutions in the modern world may end up being a monstrosity. Group decisionmaking can produce ill-considered or incoherent compromises—not the sort of compromises that make a constitution viable in the face of disagreement or conflicts of interest, but the sort that establish causal and institutional relationships that are self-defeating or otherwise unworkable.

Incoherence of this damaging sort can arise either through judgment aggregation, where the assembly members have common fundamental preferences but different judgments on particular issues, or through preference aggregation,

49. NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY 29 (Harvey C. Mansfield & Nathan Tarcov trans., 1996).

50. Elster, *supra* note 3, at 1.

where there are bedrock conflicts. In a standard judgment aggregation model, issue-by-issue votes by shifting majorities can produce an incoherent set of judgments, even if all members vote in a fashion that is individually consistent.[51] Under preference aggregation, individually transitive votes by three or more voters over three or more options can produce intransitive outcomes at the group level, such that option *A* is preferred to option *B* is preferred to option *C* is preferred to option *A*.[52] If the resulting indeterminacy in the group's choice is papered over by putting all of the provisions *A*, *B*, and *C* into the constitutional document, the combination may turn out to be incoherent.

Whatever the voting rules, bargaining and vote trading within the assembly can produce similar results. Bargains can make all parties to the bargain better off, at least in a short-run sense. However, vote trading between two groups or assembly members can inflict externalities on other groups or members that reduce group welfare overall—the logrolling problem.[53] Moreover, difference splitting may produce constitutional rules and institutions that later turn out to be unjustified by any coherent causal theory. Imagine a constitutional convention bargaining over whether officials should be guaranteed a high salary, or should instead be given no salary at all. One camp argues for high salaries, on the ground that high salaries will make government service attractive to talented individuals who lack independent means. The other camp argues for no salaries, on the ground that high salaries will attract venal rather than public-spirited candidates for office. If the two sides split the difference and give officials a low salary, the regime may end up in the worst of all possible worlds. The officials may be neither public-spirited nor talented, but instead individuals who are both venal and mediocre, and who apply for government service only because their next-best opportunities in the marketplace are even less attractive.

The history of constitutional design is rife with ill-considered compromises. At the American Constitutional Convention of 1787, large states and small states reached an agreement over the structure and procedures of the legislative branch by combining state-based representation in the Senate with the Origination Clause,[54] which gives the House the sole power to originate revenue bills. The former provision was intended to benefit small states, while the latter was intended to benefit large ones. As James Wilson presciently warned the con-

51. *See* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 2-3 (1993); Christian List & Philip Pettit, *Aggregating Sets of Judgments: An Impossibility Result*, 18 ECON. & PHIL. 89, 92-96 (2002); Philip Pettit, *Deliberative Democracy and the Discursive Dilemma*, 11 PHIL. ISSUES 268, 271-76 (2001).

52. For a recent overview of the massive literature, see WILLIAM V. GEHRLEIN & DOMINIQUE LEPELLEY, VOTING PARADOXES AND GROUP COHERENCE: THE CONDORCET EFFICIENCY OF VOTING RULES (2011).

53. *See* Thomas Stratmann, *Logrolling*, *in* PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 322, 324 (Dennis C. Mueller ed., 1997).

54. U.S. CONST. art I, § 7, cl. 1.

vention, however, the power of origination is of dubious value in a bicameral legislature:

> [I]t was to be observed that the purse [i.e. federal revenue and appropriation] was to have two strings, one of which was in the hands of the H[ouse] of Rep[resentatives] the other in those of the Senate. *Both houses must concur in untying, and of what importance could it be which untied first, which last.*[55]

Fulfilling Wilson's apprehensions, the Senate evolved a practice of striking out everything but the enacting clause of House-originated revenue measures and then adding a new bill in the guise of "amendment."[56] The Origination Clause became largely a dead letter. The result is a constitutional scheme that gives small states tremendous power by virtue of their equal representation in the Senate, but that contains few countervailing powers for large states.[57]

For a comparative example, consider the interaction between two choices that face constitutional framers in the modern world: (1) the choice between a presidential system (1A) and a parliamentary system (1B), and (2) the choice between an electoral system with proportional representation (2A) and a first-past-the-post system (2B). (Of course, these are highly stylized contrasts; we suppress variants and intermediate systems in order to develop our point cleanly). As it turns out, the combination of 1A with 2A may be extremely toxic. There is evidence from comparative politics that 2A tends to produce multiple political parties;[58] when combined with 1A, the risk is that fragmented competing parties will be too weak to counterbalance the executive, who may go on to assume dictatorial powers.[59] By contrast, the combination of 1B and 2B, as in classical Westminster systems, avoids this toxic combination of circumstances, as does the combination of 1B with 2A observed in many European polities. Likewise the combination of 1A and 2B, as in the United States, is workable, because the first-past-the-post system has some tendency to encourage the formation of two major parties, at least one of which may to some degree counterbalance the executive at any given time. A single founder, given this information, is likely to choose one of the workable options, whereas an assembly divided between proponents of a European model and an American model might vote by shifting majorities or might split the difference, and thereby end up adopting both presidentialism and proportional representation, risking disastrous results. In this type of example, each side externalizes part of this risk

55. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 275 (Max Farrand ed., 1966) (emphasis added).

56. *See* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 423-24 (2004).

57. This is a major theme of SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006).

58. GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES 10 (2d ed. 1997).

59. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 644-48 (2000).

onto (the constituents of) the other, whereas a unitary constitutional designer would account for the whole expected cost.

Constitutional design by a single founder avoids the sort of bargaining that occurs with multiple founders representing different constituencies. It is possible, however, that the shadow of ratification may cause single founders to place into the constitution provisions calculated to please or appease the main economic, political, social, or ethnic groups. Anticipating that each of these groups will effectively hold a veto over ratification, especially if ratification requires a supermajority (de jure or de facto), the single founder may propose a document with something for everybody—in effect replicating the sort of unworkable compromises that would arise through bargaining among multiple founders.

Although this possibility cannot be ruled out in the abstract, we doubt it entirely vitiates the coherence benefit of single founders. The single founder need only propose a constitution that the main groups prefer to the status quo that will prevail if no new constitution is ratified. That will typically be an undemanding requirement. In situations where the design or redesign of a constitution becomes necessary, the status quo is often quite unattractive, implying that the single founder has wide scope to propose a coherent package. Within the set of constitutional designs that are superior to the status quo for all concerned—in other words, the set of constitutional designs that all politically significant groups would accept—some designs will be causally coherent and workable, and some will be incoherent. Plausibly, a process of bargaining among multiple founders is more likely to reach one of the incoherent outcomes, within the set of politically feasible outcomes, than is a draft produced by a single founder acting with the help of technical advisers.

b. *Accountability*

A second benefit of a single founder is accountability. In America, founders inveighed against the blurring of accountability that occurs when multiple actors are jointly responsible for promulgating laws. As to legislatures, Madison observed that "respect for character"—the lawmaker's desire to maintain a good reputation—"is not found sufficient to restrain individuals from injustice, *and loses its efficacy in proportion to the number which is to divide the praise or the blame*."[60] As to the executive, Hamilton observed:

> The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be

60. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 THE PAPERS OF JAMES MADISON 205, 213 (Robert A. Rutland et al. eds., 1977) (emphasis added).

> impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.[61]

Neither seems to have noticed that exactly the same points might apply to the constitution-making assembly itself. Unless the assembly acts transparently, votes on each provision separately, and uses a unanimity rule, so that each delegate can be seen to be responsible for everything the assembly does, it will be difficult for the citizenry at large to make the causal attributions necessary to tie individual founders to the overall constitution those founders produce, or to its individual features. The failure of accountability licenses irresponsible action by the founders.

Accountability here need not mean electoral accountability. In the cases of single-founder constitutionalism in the ancient world that we have examined, single founders did not typically stand for election after completing their tasks; of course, in the classical Greek city-states, many public positions were filled by lot rather than election anyway.[62] Moreover, when the single founder also happens to be an outsider, accountability is further attenuated. Still, single founders have reputational incentives to draft constitutions that are perceived to be good ones; and their singleness prevents the dilution of that incentive that arises with a group of constitutional founders and drafters numbering in the hundreds (as is typical in modern polities).

c. *Speed: opportunity costs and decision costs*

Addressing the optimal number of representatives to be seated in the legislature created by the constitution, Madison wrote:

> [I]n all cases a certain number at least seems to be necessary to secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes; as, on the other hand, the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude.[63]

We will elaborate the first part of Madison's tradeoff, positing benefits to increasing assembly size, when we discuss the vices of single-founder constitutionalism. Here we will focus upon the second part of the tradeoff, which emphasizes the "confusion and intemperance" of larger groups.

There are several ways of interpreting this claim. One is that "confusion" refers to the risk that larger groups will be more likely to produce an incoherent product, a point we addressed above. A somewhat different interpretation, however, focuses on the costs of obtaining any agreement at all as the size of

61. THE FEDERALIST NO. 70, at 428 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

62. *See* ARISTOTLE, *supra* note 12, at 237 [Ar. *Pol.* 6.2] (listing selection of magistrates by lot as one of the distinctive characteristics of democracy); HANSEN, *supra* note 19, at 230 ("The vast majority of magistrates were selected by lot . . . .").

63. THE FEDERALIST NO. 55 (James Madison), *supra* note 61, at 342.

the constitutional assembly grows larger. Although Madison was discussing legislative assemblies, his point generalizes to any lawmaking group.

In the spirit of this second interpretation, the political economy literature has emphasized that as assembly size increases, the transaction costs of reaching an outcome increase exponentially.[64] This presents two risks. The first is that the assembly will reach an impasse and thus become collectively indecisive, issuing no document at all. The second risk is that the constitutional assembly will reach agreement, but will do so slowly, perhaps too slowly from the standpoint of the broader citizenry. Constitution-making tends to occur in times of crisis, in which all political groups will benefit from coordinating on some constitution or other, even if different political groups would prefer different possible constitutional arrangements.[65] The speed with which political groups can coordinate on a constitution may matter as much as the content of the eventual arrangements.

In light of these tradeoffs, a major virtue of a single founder is that the decision costs of producing a draft constitution, and the opportunity costs of delay until the draft constitution is proposed for ratification, are at a minimum. The single founder need not engage in the elaborate bargaining and argument with dozens or hundreds of participants that characterizes constitutional design in large assemblies. Especially where constitutions are drafted under conditions of political or economic crisis, an advantage of single founders is that they can short-circuit the delay and wheel-spinning that is a structural drawback of large constitutional assemblies.

2. *Vices*

Drafting a constitution for any reasonably complex polity is obviously a daunting task. David Hume thought it so challenging that no single individual was up to the task: "To balance a large state or society, whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgments of many must unite in this work . . . ."[66] Hume's view draws implicitly from a critique of single-founder constitutionalism that goes back at least as far as Cicero, who explicitly rejected the Solonian model:

> Cato used to say that our constitution was superior to others, because in their case there had usually been one individual who had equipped his state with laws and institutions [for example, Solon and Lycurgus] . . . . *Our own*

64. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 68 (1962) (noting that transaction costs increase as the size of the group required to agree increases); *see also id.* at 63-91.

65. *See* RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 90-113 (1999) (noting the importance of pressure to coordinate).

66. DAVID HUME, *Of the Rise and Progress of the Arts and Sciences*, *in* ESSAYS: MORAL, POLITICAL, AND LITERARY 111, 124 (Eugene F. Miller ed., 1985).

> *constitution, on the other hand, had been established not by one man's ability but by that of many, not in the course of one man's life but over several ages and generations*. He used to say that no genius of such magnitude had ever existed that he could be sure of overlooking nothing; and that no collection of able people at a single point of time could have sufficient foresight to take account of everything; there had to be practical experience over a long period of history.[67]

What exactly are the arguments that Cicero and Hume offer? Why might it be undesirable, for the polity, to entrust the formal power to propose a draft constitution to a single individual?

a. *Selection and variance*

Perhaps the most obvious question about a single founder is who that founder will be. A large constitutional assembly can be more representative than any single individual, and can aggregate information that is widely distributed in the society, including information distributed so widely that no single individual can acquire or process it. We take up these twin problems of representation and information shortly.

Even apart from those points, however, the single founder is difficult to select because the founder's competence or quality is uncertain.[68] A single founder may be more likely to be either very good or very bad, whereas a large founding assembly may be more likely to produce a solid but mediocre product. Single founders, plausibly, display higher variance than a large founding assembly.

Under certain conditions, polities will find it desirable to reduce the variance of the constitutional product. If the constitution is made under conditions of severe political or economic crisis, such that there is in essence only one shot at the matter, then all else being equal, reducing variance is desirable. A risk-averse polity will want to minimize the downside risk—the risk that a single founder will produce an unacceptable product—even if the price is reducing the upside chance that a single founder will produce a superb constitution.

67. MARCUS TULLIUS CICERO, *The Republic*, *in* THE REPUBLIC AND THE LAWS 1, 35 (Jonathan Powell & Niall Rudd eds., Niall Rudd trans., 1998) [Cic. *Rep.* 2.2] (emphasis added) (endnote omitted).

68. It is possible that the smaller size of ancient polities reduced this uncertainty somewhat, but the differences between ancient and modern polities in this respect should not be overstated. While a greater percentage of citizens in an ancient polis were likely to have firsthand knowledge of the founder, these were not face-to-face societies; even conservative estimates suggest that the citizen population numbered in the tens of thousands. *See, e.g.*, ROBIN OSBORNE, GREECE IN THE MAKING, 1200-479 BC, at 302 (1996). Most ancient citizens must have relied on the general reputation of the founder, which was a less systematic and detailed source of information, though not necessarily a less reliable one, than modern media coverage of contemporary public figures.

There are two qualifications to this point. First, as we have seen, a single founder can plausibly produce any constitution at all more quickly than a large assembly. Even under conditions of crisis, therefore, the polity at large must trade off two different risks. One risk is that a single founder will produce something very poor that must nonetheless be accepted, if there is no time for a second round of drafting. The second, countervailing risk, however, is that a large assembly will bog down in interminable debate, negotiation, bluffing, and posturing—perhaps resulting in no draft at all, or a draft that comes too late.

The second qualification follows from the first. Suppose that political conditions allow time for a second round of drafting if the product of the first attempt is rejected at the ratification stage. Where this is so, the costs of a high-variance procedure are reduced. Assuming the polity can assess the quality of the draft constitution that a single founder produces, the polity will gain the upside benefit when the single founder produces an excellent, highly coherent constitution—a more likely outcome with a single founder than with a large-number constitutional assembly—but the polity can reject the draft constitution when it is extremely poor, and thus avoid the downside loss. With a large-number assembly, the filtering effect of the ratification procedure cannot contribute much to improving the assembly's product, which will tend to be mediocre in any event. Where political conditions allow time for multiple rounds of drafting and ratification, then, the high variance of a single founder is transformed from a liability into a positive asset.

b. *Representation: political and epistemic*

Representation has both political and epistemic components; a large constitutional assembly may do better on either or both counts than a single founder, or so the argument runs. But we will register some doubts and caveats as well. We will take up political and epistemic representation in turn.

c. *Political representation*

The importance of political representation in constitution-making elicits an almost instinctive objection to the notion of a single founder. Recall Madison's claim that "in all cases a certain number [of lawmakers] at least seems to be necessary to secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes."[69] Although Madison was speaking of legislative assemblies created by the constitution, rather than the constituent assembly that drafts the constitution itself, his point can be applied to the latter setting as well.[70] Perhaps no single founder can be all things to all people. On a Madisonian view, the larger and more heterogeneous

69. THE FEDERALIST NO. 55 (James Madison), *supra* note 61, at 342.

70. *See* Elster, *supra* note 3, at 14-15.

the society, the larger the assembly must be to represent a broad range of political, economic, and social interests, ensuring that every nontrivial social or political group has at least one representative whose views are not unacceptably distant from the group's most preferred set of constitutional arrangements (its "ideal point").

But closer examination reveals some grounds for skepticism about the political benefits of representation in the sort of large constitution-making assembly observable in the modern world. First, the political benefits of representation are themselves qualified by a systematic tradeoff. The larger the assembly, the larger the coalition necessary to approve a draft constitution for ratification must be. This implies that although any given group in the polity may be able to vote for an assembly member whose preferences are close to the group's ideal point, that member can only succeed in enacting those preferences by entering into a coalition with many other members, whose preferences may be far from the group's. The representational benefits of assembly size are thus themselves diluted by another effect of assembly size.

This tradeoff is akin to a well-known dilemma inherent in the choice between first-past-the-post electoral systems and proportional representation. Under the latter, each voter will more likely be able to vote for a party representative close to his preferences; but when the parliament assembles, that party representative will have to cooperate with other, quite different parties to get anything done. The pain of inadequate representation is then just postponed, from election day to the post-election process of parliamentary bargaining.[71] Likewise, in the constitutional setting, the benefit of representation in a large constituent assembly is diluted by the need to assemble a large coalition to enact a constitution.

Second, we suggest that representation of all affected interests and all relevant views by a single individual might even be *more* appealing to social, political, and economic groups than representation by a subset of a committee or assembly. Under imaginable circumstances, a single individual might provide first-best rather than second-best representation of competing positions. How could this possibly be? To compare apples with apples, let us compare the best possible case for each mode of representation. We will compare, in other words, a group fairly composed of faithful representatives of all affected groups, on the one hand, with a single individual who is widely believed to sincerely internalize, and weigh, competing interests and views. The group will display visible conflict, perhaps voting by narrow majorities to adopt one position or another, and representatives of each position will put their arguments in a one-sided manner, trusting to the group's aggregation rule to make good choices overall (however "good" is defined). By contrast, the single individual

71. *See* DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 130 (1996) (arguing two-party systems induce compromises "during the electoral campaign," whereas proportional representation induces compromises "after the election").

who internalizes all affected interests and views will give each position its due weight, exercising a sort of synoptic political judgment rather than using an aggregation procedure.

It seems possible that affected groups might think themselves better represented under, and be better satisfied with, the latter rather than the former procedure. Of course, they may not, but all we mean to suggest is that it is sometimes plausible that they will do so. If they do, it will be because the latter pro-procedure is less adversarial and, in a sense, more respectful to all concerned than is the former. With a single founder, no one's views or interests will be defeated by an impersonal aggregation procedure that merely counts noses; instead, views will be rejected and interests set aside only after the single founder has balanced all relevant considerations. Under the aggregative approach to representation, there may be no single individual who fairly considers all affected interests, even if the group as a whole can be said to do so.[72]

Finally, even stipulating that political representation is a real virtue of a larger constitutional assembly, it is also true that *uncertainty* about the true preferences of the single founder can serve as a kind of second-best substitute for the broadly representative character of a constitutional assembly. Although no single individual can represent all the groups in a heterogeneous society, uncertainty can cause a broad cross-section of groups to converge on the selection of a particular individual to be the single founder, with each group hoping that the founder's preferences will tilt toward its own. When the constitution is drafted and proposed for ratification, the veil of uncertainty will be lifted and the single founder's preferences revealed, but at that point the founder need only have proposed a constitution that a minimum winning coalition of groups necessary for ratification finds slightly superior to the status quo. As we mentioned in Part I, this sequence plausibly describes the genesis of Solon's Athenian constitution.

d. *Epistemic representation*

Let us now bracket the political function of representation and turn to its epistemic or informational function. The larger and more heterogeneous the society, the more widely distributed information will be. Central governments in large polities notoriously find it difficult to gain truthful information about local conditions.[73] The same point holds for constitutional assemblies; diverse representation ensures that for any of the myriad problems that might become

72. The potential for an adversarial procedure in which representatives take a partisan stance also undercuts the argument that the collective process of constitution-making will necessarily foster a common sense of allegiance to codrafters or commitment to the resulting constitution that might help insure its success.

73. *See generally* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED (1998); F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

relevant to constitutional drafting, some member will hold relevant information. By contrast, Cicero's main critique of single founders, and Hume's, is that no one individual can hold all the relevant information in mind.

Given the epistemic dimension of representation, it is possible to press the Condorcet Jury Theorem into service as an analytic tool. The basic conditions of the Theorem are sincere voting; a binary choice with one of the choices exogenously defined as correct, by reference to the shared fundamental preferences of the group; and at least some positive correlation between members' votes and the truth, meaning that the members of the group are on average at least slightly more likely than not to choose the right answer.[74] (Although these conditions can be relaxed or extended in various ways, the basic version suffices for the points we offer here.) Perhaps the most controversial condition of the Theorem is the assumption of a correct answer, but the condition is less demanding than many loose accounts can be read to suggest. All the condition requires is that the group share common aims or fundamental preferences on the relevant question; members may of course have different information or beliefs, and thus different derived preferences over policy choices.[75] The Theorem, in essence, models a case in which group members have the same ultimate goals, but have different beliefs about which means will best achieve those goals.

Given these basic conditions, the Theorem shows that the group's chance of being correct under a majority voting rule will necessarily exceed the members' average competence, and can exceed the competence of the best member. Moreover, the group's competence will converge to certainty as the size of the group increases.[76] All this implies that the epistemic argument for a large constitution-making assembly is quite distinct from the variance-reduction argument we examined above. Whereas the latter argument suggests that a large assembly will tend to produce a mediocre product, the Condorcetian model suggests that a large assembly will be more likely than any individual to produce an epistemically accurate product, subject to some crucial qualifications we examine shortly. The informational argument for a large assembly, then, is simply that under conditions of dispersed information, the larger the constitutional assembly, the more likely it will be to produce a document that gets things right and that advances the groups' shared fundamental goals, their differing beliefs notwithstanding.

So much for the affirmative epistemic benefits of large numbers. There are also some grounds for skepticism. The Condorcet Jury Theorem does not necessarily imply that a larger assembly is better. In its simplest version, the Theorem assumes that the members' information is exogenously defined. But if acquiring and processing information is costly, then information is a public good within the group and members have an incentive to free ride on each others' epistemic contributions. The result is a quantity-versus-quality tradeoff: higher numbers produce more votes, but each vote is of lower epistemic quality.[77] With endogenous information, the Theorem supports only the rather general observation that there is plausibly some interior optimum, such that the group's epistemic performance improves and then declines as numbers increase. The location of this optimum is unclear and highly contingent; in a given polity and in given circumstances, it may be much closer to a single founder than to the very large numbers typically observed in recent bouts of constitution-making. If epistemic free riding is substantial with even a small handful of constitutional drafters, the optimum will fall toward the limiting case of one.

Moreover, the very conditions that make dispersed information most valuable to the constitution-makers also tend to undermine the applicability of the Condorcet Jury Theorem. The Theorem supposes that there is an exogenously defined correct answer, where correctness is defined according to the group's shared fundamental preferences. Suppose that the relevant polity is large and heterogeneous, so that there are many groups with conflicting interests on a range of issues. Under such conditions, the common fundamental preferences necessary for the Theorem to apply are most likely to be lacking. The same heterogeneity and complexity that create the widely dispersed information necessary also tend to produce true conflicts of interest, not reducible to differences of belief.

The point is not that epistemic considerations are irrelevant under conditions of true conflicts of interest, just that the Theorem does not apply. There are other epistemic models that may prove useful here, such as models of perspectival aggregation;[78] however, these models are as yet much less developed than the massive literature on the Theorem, and the conditions for their application are as yet unclear. There is also a nonepistemic analogue of the Theorem; it has been shown that as the size of the voting group increases, the majority is less likely to be mistaken about where its interests lie (even if there is a conflict of interest between majority and minority).[79] This latter result, however, raises

74. *See* ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 28 (2009).

75. *See* Christian List & Adrian Vermeule, Independence and Interdependence: Lessons from the Hive 4-5 (Nov. 12, 2010) (unpublished manuscript), *available at* http://personal.lse.ac.uk/list/PDF-files/ListVermeule12Nov2010.pdf.

76. Drora Karotkin & Jacob Paroush, *Optimum Committee Size: Quality-Versus-Quantity Dilemma*, 20 SOC. CHOICE & WELFARE 429, 429 (2003).

77. *See generally id. passim*. For legal applications of this point, see Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1464-68 (2011); Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 26-31 (2009).

78. *See, e.g.*, SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES 175-96 (2007).

79. *See* Nicholas R. Miller, *Information, Electorates, and Democracy: Some Extensions and Interpretations of the Condorcet Jury Theorem*, *in* INFORMATION POOLING AND GROUP DECISION MAKING 173, 187-90 (Bernard Grofman & Guillermo Owen eds., 2d ed. 1983).

the sort of issues we have discussed under the heading of political rather than epistemic theories of the benefits of representation.

We conclude that although the representational objection to single founders is a real one, the issues are more complex than they first appear. The attenuated benefits of political representation in a large assembly, and the difficulties that afflict epistemic theories of optimal assembly size under the conditions of modern constitution-making, make the representational benefits of a large constitution-making body less impressive than they would otherwise be. It is even imaginable that representation by a single individual who in some way embodies all relevant interests, and who is widely thought to take all relevant views into account, might be more appealing to a range of groups than representation by a subset of a voting group that is visibly rent by political conflict. Finally, uncertainty about the single founder's true preferences can mimic, in a second-best fashion, the benefits of representation.

B. *Outsiders as Founders*

We now turn to the possibility that the founders might be outsiders who are neither citizens nor residents of the polity the constitution will govern. To modern eyes, this practice seems bizarre, excluding cases of coercive imposition of constitutions under the shadow of military domination and cases in which a colonial power grants a constitution to its colony. After 1989, legal scholars and other advisers from the U.S. and elsewhere spent a great deal of time helping polities in Eastern Europe draft new constitutions, yet in every modern case of which we are aware, the formal power to propose a constitution was limited to a group of citizens of the relevant polity. With isolated exceptions,[80] modern states do not voluntarily invite an outsider or group of outsiders to become the formal creators of their constitutions.[81] What could such an idea possibly have to recommend it? What are its demerits?

1. *Virtues*

a. *Impartiality*

The main benefit of outsider founders must be impartiality. Their very distance from the conflicts that divide the polity is their best qualification for the

80. *See supra* note 7 (describing the short-lived constitution of Fiji in 1997).

81. Rousseau noted that Italian city-states and the Republic of Geneva had called upon outsiders to frame laws. *See* ROUSSEAU, *The Social Contract* (1762), *in* POLITICAL WRITINGS 1, 43 (Frederick Watkins ed. and trans., 1953). And Rousseau's ideal lawgiver appears to be an outsider whose impartiality stems in part from his outsider status. *See id.* at 42-43. However, Rousseau otherwise appeals to the same Greek practices we discuss, and Rousseau's lawgiver does not describe the practice of constitutional design in the world after 1789. *See id.*

task. When political outsiders were entrusted with political power in the ancient world, it was typically because internal conflicts between subgroup *A* and subgroup *B* prevented *A* and *B* from agreeing to hand power to a member of either *A* or *B*. One solution might be a large constitution-making assembly of citizens representing both *A*-members and *B*-members. That solution is characteristically modern, however. A different solution, equally plausible on its face, is that *A* and *B* agree to hand power instead to *C*, an outsider who is a member of neither of the contending factions. As we have seen in Part I, constitution-making in the ancient Greek city-states was often entrusted to outsiders, plausibly in circumstances where elites and masses could not agree to entrust it to a body dominated by either.

None of this is to say that the impartiality benefit of outsiders is never observed in the modern world, just that it is not observed in the process of constitution-making. In other political settings, the idea is alive and well. At the Church of the Holy Sepulchre in Jerusalem, Christian sects who were unable to resolve their differences over the management of the site handed custody to a Muslim organization.[82] Moreover, in the modern world the impartial-outsider idea can be used as a tool *by* constitutional designers *within* the constitutions they design. In the United States, the chronic conflict of interest between large states and small states determined the composition of the Senate and its voting rules,[83] but left an open problem: would the presiding officer be a senator from a large or a small state? Either solution would provoke the distrust of the other faction. In Justice Joseph Story's account, the constitutional solution was a third way: the Framers gave the power to preside in the Senate to the Vice President, an outside officer not selected by the legislature of any state.[84]

Several special cases of the impartiality argument must be noted. First, there may be internal outsiders whose genuine impartiality is apparent to all the contending forces within the polity. In one account, Solon was appointed because "he was the one man least implicated in the errors of the time; . . . he was neither associated with the rich in their injustice, nor involved in the necessities of the poor."[85] Second, and related to a point we explored above, uncertainty can mimic impartiality under certain conditions.[86] An insider founder not clearly associated with either camp, and whose basic preferences and loyalties are thus unclear, may have the same lack of apparent partiality as an outsider who is known to have no stake in the issues. On this model, an insider may be

82. *See* SIMON SEBAG MONTEFIORE, JERUSALEM 274 (2011) (recounting the twelfth-century appointment of a Muslim custodian for the Church of the Holy Sepulchre—a role his descendants, the Nusseibeh family, continue to perform to this day).

83. *See* U.S. CONST. art. I, § 3, cl. 1.

84. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 737-738 (3d ed. 1858).

85. 1 PLUTARCH, *supra* note 9, at 437 [Plu. *Sol.* 14].

86. *Cf.* Jon Elster, *Mimicking Impartiality*, *in* JUSTICE AND DEMOCRACY: ESSAYS FOR BRIAN BARRY 112 (Keith Dowding et al. eds., 2004).

selected not because he is known to be impartial, but because the two competing sides each believe he will favor their interests. The two sides may have different fundamental preferences, but also different beliefs about the biases of the insider; the opposing preferences and beliefs then cancel each other out, causing both sides to agree on the same candidate. In a variant of the Solon story, he was appointed due to "both parties [having] high hopes," with "the rich accepting him readily because he was well-to-do, the poor because he was honest."[87] According to this version, Solon was chosen because "[t]he common people had expected him to redivide all property, while the wealthy had expected him to restore them to their traditional position, or at most only to make minor alterations to it."[88]

2. *Vices*

a. *Information*

If the main virtue of the outsider founder is impartiality, the main vice must be that an outsider will lack adequate information about the polity for which he is to design a constitution. An outsider is impartial precisely because he lacks a stake in the disputes internal to the relevant polity, but that very lack of a stake may reduce the outsider's incentive to acquire relevant knowledge. In general, there is a tradeoff between bias and information: across many institutional settings, the price of impartiality is ignorance.[89] So too with constitutional designers. The constitution-maker who lacks specific ties to a given polity will be less invested in the success or failure of any of its internal political or economic groups, yet by virtue of that very fact will know less and have less incentive to learn what she does not know.

In the ancient world, this tradeoff may have skewed more favorably toward outsider founders. In the world of smallish Greek city-states in particular, the circumstances of one polity may have been sufficiently well known to its neighbors, and the underlying culture and material circumstances of neighboring cities may have been sufficiently similar anyway, that an outsider from the region would have possessed the requisite information or been able to acquire it at low cost. It is thus tempting to conclude that the costs of appointing an outsider founder were much lower in the ancient world than they would be today. One might even assume that there must be some sort of evolutionary logic to the near-total disappearance of outsider founders in the modern world.

However, we believe this conclusion is far too hasty. On other margins, the costs of acquiring information tend to be much lower in the modern world than

87. 1 PLUTARCH, *supra* note 9, at 437-39 [Plu. *Sol.* 14.2-.3].

88. Aristotle, *supra* note 9, at 154 [*Ath. Pol.* 11.2].

89. *See* Saul Levmore, *Efficiency and Conspiracy: Conflicts of Interest, Anti-Nepotism Rules, and Separation Strategies*, 66 FORDHAM L. REV. 2099 (1998).

in the ancient one. Consider that most modern polities possess far more information about themselves—basic statistics about population, demography, the economy, and other matters—than any ancient city-state possessed. Moreover, in modern polities the information that does exist is systematically more transparent than in the ancient world. Plausibly, despite the smaller scale of ancient polities, the overall costs of acquiring the sort of generalized demographic and economic information relevant to constitutional design may well be lower for outsider founders today than they were in the ancient world.

b. *Political representation and burden-sharing*

Another apparent vice of an outsider founder is lack of political representation. Where a noncitizen chooses, even subject to an up-or-down ratification, the basic ground rules of political life, citizens may object on the ground that only those who share the common venture should shape its contours. Related to this point is that the outsider will not, at least in the typical case, be subjected to the burdens that the new constitution will impose. With regard to legislatures, Alexander Hamilton argued that a key safeguard for citizens under the new Federal Constitution would be that legislators would have to live under the laws they themselves made.[90] The same argument might be thought to have even more force in the case of constitutional design.

Here too, however, the issues are more complex than they initially appear. We assume throughout that the outsider founder is chosen through a voluntary collective process; thus we exclude constitutions imposed by force or threat of force from the outside. If such a voluntary process occurs, citizens can be perfectly well represented in the collective decision to select an outsider founder, and in the collective decision about who that outsider founder should be. With respect to those crucial choices, citizens will have as much influence as they ever have over collective decisions; the only difference is that their representation is one step further removed from the final constitutional product. Furthermore, we are supposing throughout that citizens have the collective right to reject the proposed constitution at the ratification stage, and this ameliorates the problem as well. It is not as though citizens lack any say in whether constitution-making will be entrusted to an outsider founder, who the founder will be, or whether the founder's proposal will enter into force.

The burden-sharing argument is politically a romantic dream, despite Hamilton's passing endorsement. By statute, many generally applicable laws are waived or modified in their application to Congress and to its individual members.[91] The American electorate does not seem to punish legislators for exempting themselves from generally applicable laws, or at least such punishment is

90. THE FEDERALIST No. 57 (Alexander Hamilton), *supra* note 61, at 352-53.

91. *See* 2 J. COMM. ON THE ORG. OF CONGRESS, ORGANIZATION OF THE CONGRESS, H.R. REP. NO. 103-413, S. REP. NO. 103-215, at 141-46 (1993).

episodic rather than systematic. Moreover, American courts do not enforce a constitutional rule that enacted laws must apply to the legislature or to the legislators themselves. The fact is that legislators are, for many purposes, differently situated than ordinary citizens simply because they are legislators, and the law takes account of that fact in a realistic way. So too with constitutional designers. There is no reason to think that the elites who tend to design constitutions in modern polities typically share all or most of the burdens their choices impose on the polity at large, and so no reason to impose more demanding requirements on outsider founders.

C. *Comparative Statics*

Above, we have reviewed many tradeoffs along many different margins, both as to single founders and as to outsider founders. There is no simple answer either to the question of what the optimal size of the constitution-making assembly should be, or to the question of whether it is a good or bad idea to entrust constitution-making to a noncitizen. Everything depends upon the conditions of the relevant polity, and the political circumstances in which the constitution is made. Here we will attempt to draw together some of these considerations, indicating the conditions under which either of the two distinctive features of ancient constitutional design might prove most or least plausible in the modern world.

1. *The best case*

We begin by describing, at a medium level of abstraction, a plausible modern scenario in which *both* features of ancient constitutional design might prove attractive simultaneously (the "best case"). We will then turn to a plausible modern scenario in which *neither* feature is attractive (the "worst case"). These scenarios define the extremes, for the sake of clarity; we then comment on some intermediate cases.

The best-case scenario for reviving the distinctive strategies of ancient constitutional design would arise roughly as follows. Suppose a small polity that is homogeneous on many socioeconomic dimensions, but that is riven by sharp internal conflict on one dimension in particular—perhaps ideology, class, religion, language, or ethnicity. Whatever the source of conflict, the contending forces have political parties with militant wings that plunge into a cycle of extremism and brinksmanship, perhaps producing episodes of violent conflict. The two sides realize that they are in a downward spiral, making themselves worse off over time, but they cannot directly negotiate a solution. They also realize that time is of the essence, as the status quo situation is deteriorating rapidly; a full-blown civil war may be imminent.

Under conditions of this sort, the two sides come to believe that a new constitution might enable cooperation for mutual advantage on the issues where the

two sides have common interests, while protecting each side from exploitation by the other. The trick, however, is to decide by what process such a constitution might be made. Appointing a large representative assembly to make the constitution would carry several risks. First, the assembly might just replicate the divisions that plague the polity itself. Representatives from each party might simply urge the same entrenched positions that have mired the polity in intractable disagreement and imminent violence. Second, and relatedly, such an assembly might well get bogged down in interminable wrangling that results in no constitution at all. Under these conditions, adequate representation of the contending groups and deep engagement with the views and grievances of the competing parties are themselves problems, not solutions.

Given these circumstances, the contenders might do best to find a Solon from abroad. Who would the Solon be? Most probably, a figure of international reputation widely liked and trusted in different political and economic camps—a Nelson Mandela figure. Such figures are few and far between; but under the Solon model, only one is necessary. This figure would have the impartiality—the lack of specific ties to particular groups—needed to make him or her a trusted arbiter of internal conflicts. By the same token, the Solon would be better able than a large assembly to draft and propose a constitution around which the competing groups might coordinate for mutual advantage, before the situation deteriorates any further. The outsider constitution-maker could draw upon the advice of experts in comparative politics and constitutional design, and would have access to all publicly available demographic and economic information about the polity in question. Yet the outsider constitution-maker would have no need to engage in protracted bargaining, or to appease obdurate delegates with provisions that, taken together, render the overall document causally incoherent or unworkable. All the constitution-maker has to do is offer the competing sides a set of arrangements that makes each side better off than the status quo, which by hypothesis is bad and rapidly getting worse.

The history of Ceylon (currently Sri Lanka) provides a possible example of this best-case scenario. In 1948, the former colonial possession became an autonomous dominion within the British Commonwealth, under a new constitution drafted in part by Sir Ivor Jennings, serving as an informal adviser to the first prime minister.[92] (Although this was not an example of constitution-making *formally* vested in an outsider, our point is that it could easily have been.) An agent of the former colonial power possessed both the local knowledge and the impartiality as between local groups to help create a relatively stable framework for the new government. Despite simmering tensions between the majority Sinhalese and the minority Tamils, the 1948 constitution

92. *See* K.M. DE SILVA, A HISTORY OF SRI LANKA 454 n.7 (1981) (describing Jennings as the "principal adviser" to the first minister on constitutional affairs); A.W. Bradley, *Sir William Ivor Jennings: A Centennial Paper*, 67 MOD. L. REV. 716, 728 (2004).

lasted until it was peacefully replaced in 1972,[93] longer than average for world constitutions.[94] Not until 1983 did ethnic tensions explode into civil war.[95] Plausibly, the 1948 constitution, made de facto by a single outsider, helped to produce a generation of peace and stability in a severely divided society.[96]

2. *The worst case*

At the opposite pole, we might imagine a very different sort of polity. This polity is large and heterogeneous; its citizens subdivide into a myriad of groups with overlapping cleavages on a myriad of dimensions. The polity is a hodgepodge of religions, ethnicities, regions, languages, and classes. The polity's constitution has been serviceable for several generations, quite a decent run as constitutions go,[97] but has slowly obsolesced in ways that have caused increasing strains. The political elites differ on many matters, but are also capable of cooperation for mutual advantage on many large issues. Furthermore, though the elites are broadly convinced that it would be better to reform the constitution sooner rather than later, there is no hot crisis at hand. If the former Ceylon is a plausible example for our best case, a plausible example in the other direction is neighboring India, with an enormous and enormously diverse population, composed of "an amazing kaleidoscope of castes, religions, languages, and economic and social backgrounds."[98]

In such circumstances, appointing a Solon from abroad would have little to recommend it. The opportunity costs of protracted deliberation and bargaining among elites representing various political, social, and economic groups would be low, so speed is not at a premium. The great heterogeneity and complexity of this polity imply that broad representation of competing viewpoints and affected interests is most likely to produce a process seen as legitimate, and is most likely to supply the localized information necessary for epistemically successful constitutional design. Although the bargaining process will make the resulting constitution less coherent than it might otherwise be, there is sufficient elite consensus in the polity that the final product is unlikely to contain

93. *See* DE SILVA, *supra* note 92, at 545-46.

94. *See* ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 1-2 (2009).

95. Richard Gombrich, *Is the Sri Lankan War a Buddhist Fundamentalism?*, *in* BUDDHISM, CONFLICT AND VIOLENCE IN MODERN SRI LANKA 22, 22 (Mahinda Deegalle ed., 2006).

96. *But cf.* Donald L. Horowitz, *Incentives and Behaviour in the Ethnic Politics of Sri Lanka and Malaysia*, THIRD WORLD Q., Oct. 1989, at 18, 18-20 (suggesting that the British underestimated ethnic tensions and thus rebuffed stronger provisions for the protection of ethnic minorities).

97. *See* ELKINS ET AL., *supra* note 94, at 1-2 (2009).

98. Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 413, 417 (1998).

crippling contradictions. Under conditions of this sort, the sort of large constitutional assembly typically seen in modern episodes of constitutional design will work to its best advantage. The Constitution of India,[99] in effect since 1950, was drafted by a constituent assembly whose membership reached 389 members;[100] it has succeeded in welding together an unimaginably diverse polity for some sixty years, albeit with a high rate of amendment.[101]

3. *Some intermediate cases*

In intermediate cases, some but not all of the relevant variables will tilt in favor of either an outsider constitution-maker, or a single constitution-maker—but not necessarily both at once. In some cases, for example, time is of the essence for a given polity, implying that a single constitution-maker might be superior to a large assembly. However, the polity's core problem may not be pervasive distrust between opposing groups, so appointing an outsider may be less advantageous. Conversely, where impartiality is at a premium but there is no hot crisis, a polity might conceivably appoint a multimember assembly or panel of outsiders to draft a constitution.

There is little that can be said about such cases in general, or in the abstract. For our purposes, however, little need be said. Our prescriptive aim is merely to suggest, and try to show, that even in the modern world there exist plausible conditions under which either or both of the distinctive features of ancient constitutional design would be useful. So long as such conditions exist, it is no objection that there also exist a range of conditions, perhaps even a broader range of conditions, in which large constitutional assemblies do better. We claim only that the modern world has discarded ancient techniques that deserve a place in the toolkit of constitutional design.

III. IMPLICATIONS

So far we have outlined the distinctive features of ancient constitutional design, and given some reasons to think that there are plausible conditions under which those features might provide a useful template for constitutional design in the modern world. We can also go further, to elicit some implications for perennial questions of constitutional theory and practice.

Given a constitution made through a process that employs one or both of the distinctive features we have identified, what follows? Would a constitution

99. *See* INDIA CONST.

100. After a separate constitutional assembly was organized for Pakistan, the number of members was reduced to 299. *See Some Facts of Constituent Assembly*, PARLIAMENT INDIA, http://parliamentofindia.nic.in/ls/debates/facts.htm (last visited Apr. 13, 2012).

101. *See* 1 INT'L BUS. PUBL'NS, INDIA: FOREIGN POLICY AND GOVERNMENT GUIDE 31 (2011) ("[T]hrough June 1995, the constitution had been amended seventy-seven times, a rate of almost two amendments per year since 1950.").

drafted by a single founder or an outsider prove legitimate, in any of the senses of that protean word? How would such a constitution operate differently than a constitution drafted without a single founder and without outsider founders? How might it be interpreted, and how should it be interpreted?

A. *Symbolism and Legitimacy*

At first glance, the idea of either a single founder or an outsider founder may seem incompatible with the commitment to self-government central to democratic ideology. How could a constitution written by a single person or an outsider ever be considered legitimate in a democracy? And yet, the most direct, participatory democracy the world has ever known celebrated and emphasized the role of Solon as its constitution's founder. In this Subpart we explore the notion of legitimacy—by which we mean whether a constitution is sincerely accepted by the population—in the context of constitutions written by single and/or outsider founders.[102] Single and outsider founders raise similar legitimacy concerns based on a lack of representation, and perhaps also a lack of knowledge, though the latter problem is most serious in the case of outsider founders. Because the concerns in each case are similar, we treat the problem of legitimacy of single and outsider founders together. We first explore how constitutional legitimacy was achieved in Athens, with particular attention to the implications of the Athenian case study. We then note one significant difference in how constitutional legitimacy might work today: contemporary states would likely place much greater emphasis on the process of popular ratification.

It is important to note at the outset that the history of the American Founding may create undue skepticism about the possibility for single or outsider founders in a modern constitutional democracy. A single or outsider founder would have been unacceptable in the narrative of the American Founding. The Revolutionary War, fought to escape foreign despotism and to establish independent self-rule, imposed limitations both on the form of government adopted and on the process of constitution-making. James Madison recognized that the commitment to self-government arising from the Revolution effectively limited the American Founders to a republican form of government.[103] For the same reasons, the notion of a constitution that emerged not from "the people" but from an individual or, even worse, a foreigner, is close to unthinkable in the American context. Moreover, the American Constitution is probably (after the

102. This is sometimes referred to as "sociological legitimacy," as opposed to "legal" or "moral" legitimacy. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1789-1801 (2005) (defining the three types of constitutional legitimacy).

103. THE FEDERALIST No. 39 (James Madison), *supra* note 61, at 240; *see* Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 466 (1989) (discussing how Madison "suggests that practical options are limited . . . [because the] revolutionary war called forth values of 'self-government'").

Declaration of Independence) the most celebrated document in American culture. Yet the evidence we have suggests that legitimacy was not a problem for single-founder or outsider-founder constitutions in the ancient world, particularly in Athens. Exploring why this was so may shed some light on the circumstances that might be conducive in our day to popular acceptance of single-founder and outsider-founder constitutions.

We have seen that several democratic Greek city-states venerated individuals, including foreign individuals, as founding lawgivers.[104] In Athens, our sources allow us to explore this in at least some detail. Although we know from *The Constitution of Athens* and Plutarch that Solon's proposed constitution was subject to popular ratification, Athenians in the classical period uniformly attribute the constitution directly to Solon, without mentioning the ratification process.[105] Solon's involvement enhanced a law's legitimacy, so much so that later litigants regularly (and spuriously) ascribed laws to Solon to lend them added weight.[106]

At first glance, Solon's legitimacy is hard to square with everything else we know about classical Athens. Athens was a direct, participatory democracy that generally disdained expertise. For example, the citizen assembly deliberated and voted on most laws,[107] and most officials were selected by lot. How do we reconcile the Athenians' commitment to popular sovereignty with the veneration of a single founder?

Several hypotheses could explain this paradox, and all of them can be used to suggest circumstances that might help reduce, if not eliminate, the legitimacy problems a single-founder constitution might face today. The first hypothesis is that Solon was not seen as a threat to self-rule because it was so easy for Athenians to amend the constitution—it could be done by the assembly and the jury courts, without a supermajority.[108] Such a radically empowered political pro-

104. Some examples of Athenian orators referring to Solon as the founder of the democracy: AESCHINES, *Against Ctesiphon*, *in* AESCHINES 250 (Chris Carey trans., 2000) [Aesch. 3.257]; DEMOSTHENES, *Against Androtion*, *in* DEMOSTHENES, SPEECHES 181-82 (Edward M. Harris trans., 2008) [Dem. 22.30-.31]; DEMOSTHENES, *Against Eubulides*, *in* DEMOSTHENES, SPEECHES 50-59, at 117 (Victor Bers trans., 2003) [Dem. 57.31-.32].

105. Orators, for example, typically refer to "Solon's law." *See* Thomas, *supra* note 15, at 122-23.

106. *See id.* at 121-22.

107. In the fifth century B.C., the assembly passed all laws. In the fourth century B.C., a distinction was drawn between decrees, which were passed directly in the assembly, and laws, which required a two-step process to change: first a vote in the assembly, and then a full-day hearing somewhat akin to a jury trial. Because juries were drawn largely from the same population as the assembly, this lawmaking procedure added some delay, but did not, in our view, fundamentally limit the people's ultimate power over the law. For discussion of the process of lawmaking in the fourth century B.C., see HANSEN, *supra* note 19, at 165-75.

108. As discussed above, *see supra* note 107, in the fourth century B.C. laws (as opposed to decrees) required a two-stage process to change; the second step was similar to a popular jury trial. But even in this two-step process, the decision was left to a large body of ordinary citizens, voting by simple majority.

cess would be too unstable for a modern state. But we can make an observation from this: legitimacy may be more easily won if the constitution takes on fewer controversies and leaves more substantive issues open to resolution by ordinary political processes.[109]

Another reason the Athenians might have embraced Solon's constitution is that they were intensely aware of, and uneasy about, the potential pitfalls of mob rule. This was particularly true after the assembly made a number of decisions that arguably contributed to Athens' defeat in the Peloponnesian War.[110] Americans tend to worry that our representatives won't act as we wish them to, either because they are captured by the rich or special interests or because politicians are not sufficiently representative of ordinary Americans. Perhaps for this reason, it may seem self-evident to most Americans that some group representing the people should write the constitution, rather than an outside expert. But the history of Athens shows that political anxieties can run in the other direction, toward a lack of self-confidence and an openness to outside help. (Indeed, now that fewer states are ruled by foreign empires—for example, since the fall of colonial regimes in Africa and the end of the Soviet Union—most societies in need of a new constitution will probably be in that situation not because of a war of national liberation, but because of some catastrophic failure of indigenous government.) This may be especially true when the issue is the jurisdictional allocation that is the meat of any constitution. That outside help can be welcome in some societies is seen in the number of foreign advisers who helped write constitutions for post-Soviet states.

Solon demonstrates another important and related point, which is that an individual author can lend charisma to a constitution that no constitutional convention or outside advisory group can match. In Solon's time, and throughout the classical period, negotiating the tensions produced by socioeconomic inequality was the central problem in Athenian society.[111] We have seen that Solon was an "internal outsider"; he was not representative of the people, by design, in part because "the people" were rent by class conflict. He was also viewed as outstandingly wise. Some of this reputation may be attributable to the ancient tendency to believe that political problems had objective solutions available to any sufficiently clear thinker. We have less confidence in political science now than in the time of Aristotle. But even in a relativistic world, it can be easier to believe in the substantive fairness meted out by a charismatic individual than in the procedural fairness of a settlement worked out by a committee—particularly given the colorless quality of committee work product, and

109. *But cf.* ELKINS ET AL., *supra* note 97, at 78 (finding that longer and more detailed constitutions are more likely to endure).

110. *See* John David Lewis, *Constitution and Fundamental Law: The Lesson of Classical Athens*, 28 SOC. PHIL. & POL'Y 25, 30-31 (2011).

111. *See generally* JOSIAH OBER, MASS AND ELITE IN DEMOCRATIC ATHENS (1989).

the tendency of committees to produce dissents, minority reports, walkouts, and so forth.

There is one important difference between the Athenian case and how constitutional legitimacy would work today. We have seen that in Athens the notion of a single founder was easy to reconcile with self-government in part because the people retained the power to reject the founder's constitution at any point. Because modern constitutions severely constrain future majorities, the people's consent to be governed by the constitution would be critical to the legitimacy of any constitution written by a single or outsider founder. For this reason, much more emphasis would be placed on the ratification process as a source of legitimacy. The ratification process would likely play as prominent a role as the wisdom of the founder in the symbolism surrounding such constitutions. One can imagine that the founding narrative would emphasize not only the virtues of the founder, but also the people's restraint in laying aside their differences to appoint a single founder and their wisdom in agreeing to a constitution that established justice for all rather than simply advancing the interests of any one faction.

All this is not to say that modern constitutions written by individuals or outsiders would always be accepted as legitimate. In particular, constitutions written by foreigners as part of the establishment of independence from a foreign power, such as in postcolonial states, are least likely to gain legitimacy. But the Athenian case study suggests that it is possible to imagine a single-founder constitution being broadly accepted by a democratic society, particularly if the constitution is not particularly ambitious or constricting, if the founder is an individual of known integrity, and if the founding narrative emphasizes the people's consent to the constitution through the process of ratification.

B. *Constitutional Interpretation*

We now turn to implications for constitutional interpretation. In American constitutional theory, and to some extent in the general theory of constitutionalism common to liberal democracies, there are a variety of stock debates about how judges and other officials should interpret written constitutions. The debates are multifarious; for our purposes, three strands are most relevant.

The first strand is a debate about the relative merits of two different versions of "originalism"; one camp of originalists hold that the constitution should be interpreted in accord with the founders' intentions,[112] while another and larger camp holds that the constitution should be interpreted in accordance with the public meaning of the text at the time of enactment, which presumably

112. RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 10 (1987); Larry Alexander, *Simple-Minded Originalism*, *in* THE CHALLENGE OF ORIGINALISM 87, 87 (Grant Huscroft & Bradley Miller eds., 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1235722.

reflects the understandings of the ratifiers.[113] We are not originalists, but the distinctive features of ancient constitutionalism have clear implications for these intramural debates about how exactly originalism should be specified.

The second strand is a debate about coherentist interpretation versus clause-bound interpretation. Here the coherentists hold that the constitution should be interpreted as a whole, with extensive "intratextualist" comparisons and reciprocal adjustment of its components.[114] By contrast, clause-bound interpreters suggest that interpreters with limited capacities will do well to read particular provisions for their particular meanings,[115] and that it is treacherous to impute a coherent set of global principles to a document shaped by bargained-for compromises among different views and interests represented at the constitutional convention.[116]

Third and finally, there is a robust debate about the extent to which foreign law is an admissible source in constitutional interpretation. On one view, foreign law merely supplies a helpful source of comparative information, and considering it poses no problem so long as it is not given authoritative status as binding law in its own right. On another view, drawing upon foreign law to interpret the Constitution is deeply inconsistent with the constitutional enterprise, which embodies self-government by "We the People" and the people's agents.[117] In an originalist version of this critique, the Founding generation were Americans who designed the Constitution for Americans.[118]

We will take up these issues in turn. Our aim is not to offer yet another view on the merits of the debates. Instead we ask a comparative question: how would the debates change if the relevant constitution were made by a single founder, by an outsider founder, or by both? We pick out only the aspects of these issues on which one or the other feature would make a relevant difference; accordingly, our treatment is deliberately selective. Our conclusions are that the debates over originalism and coherentism must proceed very differently if the constitution-maker is a single founder rather than a multimember constitutional assembly, while the debate over using foreign law in constitutional interpretation must proceed very differently if the founder or founders happen to be foreigners.

113. *See* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 703 (2009).

114. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

115. Adrian Vermeule & Ernest A. Young, *Hercules, Herbert and Amar: The Trouble with* Intratextualism, 113 HARV. L. REV. 730, 732 (2000).

116. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1978-79 (2011); Vermeule & Young, *supra* note 115, at 731.

117. *See* RICHARD A. POSNER, HOW JUDGES THINK 353 (2008).

118. *See* Norman Dorsen, *A Conversation Between U.S. Supreme Court Justices*, 3 INT'L J. CONST. L. 519, 525 (2005) (presenting Justice Scalia's argument that foreign law is irrelevant to the original public meaning of the American Constitution and should be disregarded, except for old English law which served as a backdrop of the Framing of the Constitution).

1. *Originalism*

The currently dominant version of originalism looks to the original public meaning of the document's text.[119] Yet this is merely one species within the broader genus of originalist views. An older species looked, not to the original public meaning of the constitutions' text, but instead to the intentions of the constitution's framers. That version still has adherents,[120] but by and large it has withered under a variety of attacks, one of which was that a collective group of founders may often have no well-defined intention.[121] Familiar problems of bargaining, preference cycling, and agreements to disagree mean that a lawmaking group can produce a text that need not reflect a single, well-defined intention of all the members, or even of a majority of members.

With a single founder, however, that sort of argument against the original-intentions version of originalism largely goes away, whatever the merits of other arguments pro and con. There are models of belief formation and preference formation within individuals that posit multiple selves, and that even describe something like preference cycling within individuals.[122] Still, over the relatively short time frames at issue in most episodes of constitutional design, single founders can be assumed to have stable preferences and beliefs. With a single founder, there is simply no analogue to the spectacle of multiple founders expressing different views about what they meant when the constitution was drafted.

There is an analytically separate question here, about whether the founders' intentions should even be legally relevant, assuming them to be well defined and discoverable. Madison concealed his notes of the Philadelphia Convention,[123] an act that was entirely consistent with the English legal culture of the day, which forbade the use of legislative history to construe statutes[124] and which was generally externalist and objective. In a related vein, the originalist might hold the view that only the understandings of the ratifiers are relevant, and that the single founder's intentions matter only to the extent that the ratifiers themselves took those intentions into account in understanding the meaning of the terms the single founder chose. Most generally, the difference between a single founder and a multimember founding assembly makes no difference if one believes that the founder's (or founders') intentions are categori-

119. *See* Kay, *supra* note 113, at 703.

120. *See, e.g.*, Alexander, *supra* note 112.

121. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 245 (1988).

122. *See generally* THE MULTIPLE SELF (Jon Elster ed., 1986).

123. *See* JETHRO K. LIEBERMAN, A PRACTICAL COMPANION TO THE CONSTITUTION: HOW THE SUPREME COURT HAS RULED ON ISSUES FROM ABORTION TO ZONING 294 (Univ. of Cal. Press updated & expanded ed. 1999) (explaining that Madison's notes on the Philadelphia Convention only became available to the public after Madison's death).

124. Millar v. Taylor, (1769) 98 Eng. Rep. 201 (K.B.) 217; 4 Burr. 2303, 2332 (Eng.).

cally irrelevant. But the difference does matter a great deal if one believes that the main objection to original-intentions originalism is not that the founders' intentions are irrelevant, but that they are undiscoverable or indeterminate (either because groups as such have no intentions,[125] or because the intentions of a group are usually too difficult to reconstruct centuries later). Under a constitution drafted by a Solon, that argument loses its force.

2. *Coherentism*

With respect to a constitution drafted by a typical modern multimember assembly, coherentist interpretation faces an uphill struggle. Here a major objection is that holistic interpretation, which seeks coherence of principles across clauses, goes wrong by misconstruing the nature of constitutional texts that emerge from a multimember constitutional assembly. On this view, such assemblies tend to produce—and the Philadelphia Convention did in fact produce—texts that embody bargained-for compromises. There are no general principles inherent in such texts, or rather there are many competing principles, none of which is taken to the limits of its logic. Principles like "the separation of powers" or "federalism," as such, are nowhere to be found in the Constitution; rather there are just particular clauses that represent detailed, localized compromises between competing camps with competing visions of how constitutional arrangements should be structured.[126]

The core of this objection is that the Constitution cannot sensibly be read as a unified, integrated whole, one that might have been produced by a single mind. With a single founder, however, such an objection loses a great deal of its force. To be sure, a single founder might mistakenly put together constitutional provisions that turn out to be unworkable in operation, or mistakenly put together constitutional provisions that are patently inconsistent even when written. Furthermore, if the founder wants to write a constitution that will survive the ratification process, the founder may have to insert provisions that favor or appease each of several different political or economic groups in the polity. As we argued in Part II, however, there are structural reasons to expect that constitutions drafted by single founders will systematically be more coherent, integrated and unified than constitutions drafted by multimember assemblies. Notwithstanding the cadre of informal advisers who will assist the single founder, ultimate decisions about what will go in or out of the draft constitution will have to be funneled through a single mind.

125. This is of course a much-debated issue in philosophy. For an overview, see Nicholas Bardsley, *On Collective Intentions: Collective Action in Economics and Philosophy*, 157 SYNTHESE 141 (2007). We take no position on the merits of the issue, but merely point out that a skeptic about the existence of group-level intentions would have no such reasons for skepticism about whether single founders have intentions.

126. Manning, *supra* note 116, at 1944-45.

Here too there may be other, entirely independent reasons to eschew coherentist interpretation, reasons that will not be affected one way or another by the presence of a single founder. A different sort of argument against coherentism, for example, is that it is simply too demanding for constitutional interpreters (including judges) with limited time, information, and institutional capacities.[127] Such interpreters may do better by approaching constitutional interpretation in a clause-bound fashion, even if the document would be read in a deeply coherent, principled fashion by an interpreter with godlike capabilities. Whatever the merits of this argument, the singleness of the founder does not affect it. This is just to say, however, that the switch to a single founder does not obviate all the objections to coherentism. It remains true nonetheless that a switch to a single founder would obviate a major class of objections.

3. *Foreign law*

The debate over consulting foreign law in constitutional interpretation takes on a radically different character if there is an outsider founder (whether single or multiple). In the standard debate, nonoriginalist critics argue, inter alia, that consulting foreign law as precedent (rather than as nonbinding information) is "undemocratic," because foreign lawmakers are neither democratically elected by the American people nor appointed by the people's agents.[128] Originalist critics argue that foreign law, with the exception of English law and perhaps to some degree Roman law, was unknown to the Founding generation, and thus cannot form part of the original public meaning of the terms.[129] Consulting foreign law in effect retroactively delegates constitution-making power to foreigners, and thus cannot be squared with the representative process by which the Constitution was enacted.

But what if the founders were themselves foreigners? Then foreign law could in principle be a relevant legal source, even on the critics' premises. For nonoriginalist critics, if a foreigner were a crucial legal actor in the very process by which the populace adopted the Constitution, it would be more difficult to argue that consulting foreign law is inconsistent with the deep premises of our democracy. As to the originalist critics, the arguments turn on how originalism is specified. On the original-intentions version of originalism, the state of foreign law could be probative to show how outsider founders understood the meaning of legal terms, or to uncover their unstated assumptions about how constitutions work. If, say, the Marquis de Lafayette had drafted a constitution for the United States that used the phrase "executive power," that phrase would have had a different background and history than if the same phrase were used by an Englishman or a colonial American. Even under the

127. Vermeule & Young, *supra* note 115.

128. POSNER, *supra* note 117, at 353.

129. Dorsen, *supra* note 118, at 525 (presenting Justice Scalia's argument).

original-public-meaning version of originalism, foreign law might be relevant contextual information for determining how the ratifying public would themselves have understood the words, given that the ratifying public would be assumed to know that those words were drafted by a foreigner or foreigners. Whatever the details of the theory, the originalist critique of foreign law is premised on the assumption that the founders on the one hand and foreigners on the other are two separate classes. If the two merge, the critique collapses.

4. *Interpreting the mind of the foreign founder?*

We may draw together the foregoing points by supposing that the polity's constitution has been drafted by a single outsider founder—the case that combines both the distinctive features of ancient constitutional design. In such a polity, constitutional interpretation might take on a very different cast than in a typical modern polity whose constitutional designers, at least officially, are a large group of citizens. The polity with a single outsider founder would have better grounds to interpret its constitution in a more coherentist, intentionalist, and comparative fashion than would otherwise be defensible. Some, even a great deal, of constitutional interpretation would involve figuring out the coherent logic of the single founder's design, in part by examining the single founder's own political and legal background to understand the founder's premises and assumptions. It is a large and difficult question whether a constitutional and interpretive culture of this sort would be better than the sort of constitutional and interpretive culture that tends to develop in polities that lack single founders or outsider founders (or both). Yet there is no doubt that the constitutional culture we imagine would be highly distinctive. For good or for ill, a constitution-making process that incorporates the institutional modes of the ancient world would have large implications for subsequent constitutional interpretation.

CONCLUSION

The typical modern method of making a constitution is by committee. For lack of an alternative, apparently, it is seldom considered how unsatisfactory these committees can be. They are apt to be slow and unaccountable, and are capable of producing incoherent compromises on matters of fundamental importance. By contrast, an individual author, particularly a foreign author, can be impartial, accountable, and more apt to produce a principled and coherent constitution, and to produce it quickly. The most serious objection to such individuals is that they are less representative of the polity. Yet in practice this may not be so: settlements worked out in committee can seem like unrepresentative sellouts, even to citizens nominally represented by someone on the committee. A single arbiter, if he or she is charismatic, can inspire more trust than the backroom deals typical of a constitutional convention. Americans like to be

able to say that "we" wrote the Constitution ourselves, and a representative drafting committee is a nice way of sustaining that fiction. This is the core reason a single- or outsider-founder constitution may at first seem unthinkable. But written constitutions are exercises in institutional design, not religious texts or national anthems. There is some evidence from the ancient world and from common sense that, at least in some situations, one author is preferable to many, and a foreign founder preferable to a representative body. These features of ancient constitutionalism deserve to be part of the modern constitutional toolkit.