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# COMMAND OR MEDIATE? TOWARD A NEW CONSTITUTIONAL TYPOLOGY

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## I. INTRODUCTION

Constitutional typologies come in many forms,[1] focusing on significantly different points of distinction, among them: mode of instantiation (written v. unwritten[2]); specificity of outcome dictated by the text (flexible v. rigid[3]); distribution of powers (presidential v.

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1. The classic being Aristotle's form from *The Politics*, focusing on the question of who (people, aristocracy, or single man) rules. *See*, ARISTOTLE, THE POLITICS AND THE CONSTITUTION OF ATHENS 1279a23–1279b10 (Stephen Everson trans., Cambridge Univ. Press 2d ed. 2017).

2. 1 JAMES BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 148–50 (Oxford: Clarendon Press 1901). *See also*, Dieter Grimm, *Types of Constitution*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 105–06 (Michel Rosenfeld & Andras Sajo eds., 2012).

3. BRYCE, s*upra* note 2, at 145–54.

parliamentary[4]); geographical focus (national v. federal[5]); extent of political participation (democratic v. non-democratic[6]); and economic reach (liberal v. welfare state v. socialist[7]). The last two typologies, regarding participation and economic reach, are related in two important ways. First, both focus on the extent to which the government follows the will of the people, whether the issue is narrowly political or relates to distributing material goods in accordance with majority preferences. Second, both focus on establishing a specific distribution of power, especially political and economic rights.

The concern with majority rule and economic distribution through constitutional means raises difficult issues concerning the relationship between individual rights (e.g. control over one's property) and maintenance of a specific societal structure (e.g. political or economic equality). Cass Sunstein addresses this problem by arguing that constitutions must "create the preconditions for a well-functioning democratic order."[8] That is, democracy for him is not merely a procedure but itself a substantive outcome embodied in a variety of institutions. Constitutions will achieve this substantive goal, Sunstein argues, by transforming society in accordance with an "anticaste principle" and restructuring various opinion-forming groups to ensure diversity of rational viewpoints.[9] A crucial assumption underlying Sunstein's argument is that constitutions exist as means by which to, in Louis Michael Seidman's words, "command[] outcomes," that is, to take preconceived notions of what makes for good societies and turn them into political reality.[10] According to Seidman, a constitutional lawgiver first decides "what sort of country" it desires to live in, then determines "what sort of constitutional design would create such a country."[11]

Such claims point to a further typology—one differentiating substantive from procedural constitutions. Michael Oakeshott stated this distinction as one between a constitution that marshals the energies of its

4. Grimm, *supra* note 2, at 99.
5. *Id*.
6. *Id*. at 116–24.
7. *Id*. at 124–29.
8. CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 6 (Oxford Univ. Press 2001).
9. *Id*. at 155.
10. Louis Michael Seidman, *Should We Have a Liberal Constitution?*, 27 CONST. COMMENT. 541, 541 (2011).
11. *Id*.

people and resources toward some common end (telocracy) and one designed to serve as "custodian of a system of legal rights and duties" enabling people to pursue their own ends while remaining within the same association (nomocracy).[12] Unfortunately, Oakeshott's strict distinction between substance and procedure cannot hold. As shown by his recognition of the need for the national state to act as a unit to protect the nation's integrity and sovereignty in the international arena, substantive goals are inescapable in common life—procedures both rely on substantive circumstances and are themselves ways of achieving goals, however defined. Moreover, the role of a "custodian of a system of legal rights and duties" indicates the constitution's essential role as that of maintaining a substantive state of being for the people and society; as Sunstein seeks to establish a democratic order, Oakeshott seeks a kind of libertarian order in which individuals pursue their own chosen ends.[13]

Constitutions do more than maintain rules. At the most basic level, they are rules for making rules;[14] and those rules make lawmaking harder or easier in certain or all areas, thus favoring differing kinds and extents of action, affecting the society in different ways.[15] Moreover, Oakeshott references the nation as an "association" made up of a variety of lesser associations, "both voluntary and involuntary," that limit the choices of individual persons: "families, schools, labor unions, and the church."[16] For the constitution to relate merely to individuals and their choices, it will have to restructure, if not destroy, sub-national associations. Thus, as with

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12. Michael Oakeshott, *The Office of Government (2)*, *in* LECTURES IN THE HISTORY OF POLITICAL THOUGHT 504, 504 (Imprint Academic 2006).

13. BRUCE P. FROHNEN & GEORGE W. CAREY, CONSTITUTIONAL MORALITY AND THE RISE OF QUASI-LAW 52–54 (2016).

14. *Id.* at 51.

15. For example, Sanford Levinson faults the United States Constitution for the "undemocratic" nature of the Senate in giving too much power to smaller states. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 51 (2006). Charles Beard famously hypothesized that the Constitution was written to entrench economic interests. CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 165–68 (Transaction Publishers 1998) (New York: MacMillan Co. 1913). Finally, James MacGregor Burns theorized that Madison, not trusting a democratic majority, "call[ed] for barricade after barricade against the thrust of a popular majority—and the ultimate and impassable barricade was a system of checks and balances that would use man's essential human nature—his interests, his passions, his ambitions—to control itself." James MacGregor Burns, THE DEADLOCK OF DEMOCRACY 20 (1963).

16. Rockne M. McCarthy, POLITICAL ORDER AND THE PLURAL STRUCTURE OF SOCIETY 4 (James W. Skillen & Rockne M. McCarthy eds., Scholar's Press 1991).

Sunstein, the goal of Oakeshott's supposedly procedural (nomocratic) constitution is in important ways substantive. Does this mean, then, that all constitutions, as Seidman argues, fundamentally shape the character of the nation—its distribution of property, the nature of its political life, the extent and character of its private sphere, and the legal rights and procedures to be respected by its citizens?[17]

I think not. A vast array of constitutions have foresworn any attempt to command a specific form of society from the top down but rather to mediate among more local associations. The distinction goes deeper than a constitution's attitude toward the people and their pre-existing institutions—whether the constitution seeks to transform society (and, potentially the people themselves) or to maintain the status quo ante. This typology (in essence *progressive v. conservative*) would be flawed because it would rest solely on the policy question of transformation/preservation, ignoring questions of how (and how much) the nation state is specifically empowered by the constitution to act. This Article examines a distinction that seems to go unrecognized, namely, whether the society itself is seen as a single entity the constitution should shape and maintain or as a collection of associations whose relations the constitution should mediate rather than command.

### *A. A New Typology: Command v. Mediate*

The dichotomy between commanding and mediating constitutions is fundamental in that it goes to underlying assumptions regarding the nature of society and the functions of government. A central reason for the lack of attention to the command/mediate typology is the prevalence of the view espoused by Seidman and Sunstein, namely that constitutions by their very nature structure the entire society they govern.[18] But there is a different constitutional model, which can be seen in the ancient Roman constitution and in various medieval constitutions.[19] This model also characterizes the original U.S. Constitution.[20] Indeed, the command/mediate typology is interesting in significant measure because of the legal battles that have raged for decades between an older mediating

17. Seidman, *supra* note 10, at 543–44.

18. FROHNEN & CAREY, *supra* note 13, at 73–75 (noting the prevalence of recent constitutions to grant long lists of rights, only to completely fail in guaranteeing them).

19. *See infra* Part VII.

20. *See infra* Part VII.

and newer commanding vision of the U.S. Constitution.[21]

Commanding constitutions are not all alike. The type of society they command may differ in its shape and character. But this constitutional type is rooted in the determination to *command* the societies where the constitution exists. Commanding constitutions are by their nature political programs intended to shape the conduct of individuals, groups, and political actors to produce a society that has a specific character, whether that character be democratic, fascist, or theocratic.

A mediating constitution aims not at molding a society from its own rules but at fitting itself to the society as it is, as a suit of clothes is made to fit the wearer.[22] The goal of a mediating constitution is to maintain peace, stability, and the rule of law within society so that the groups making up its way of life may flourish—in essence leaving the work of maintaining, changing, or otherwise shaping society to these more basic associations.[23] A mediating constitution is concerned primarily with establishing a structure of government and binding those in positions of power to that structure; that is, it aims to establish and enforce the rule of law against the rulers.[24] The difference between mediating and commanding structures is not directly a matter of political program. As with commanding constitutions, the mediating type may exist within vastly differing societies—for example, monarchical or democratic. Moreover, here, the claim that mediating constitutions (or their commanding rivals) necessarily better serve *justice* or any other external good is not being made.[25] The distinction does not rest on what norms one wishes a society to serve. Rather, the distinction rests on what role one believes a constitution can or should play in shaping that society.[26]

21. *See* FROHNEN & CAREY *supra* note 13, 73–75.

22. BRYCE, *supra* note 2, at 379. Bryce notes that Hamilton agreed with Montesquieu "that a nation's form of government ought to be fitted to it as a suit of clothes is fitted to its wearer." *Id.*

23. *See* FROHNEN & CAREY, *supra* note 13, at 55–56.

24. *Id.*

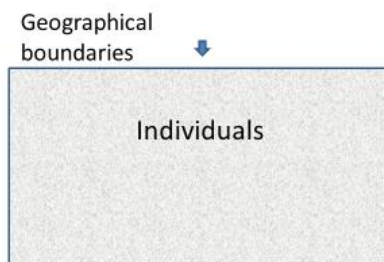
25. For example, in Roman colonies, Roman citizens received special protections, including from torture. One of the most famous examples of this is St. Paul's avoidance of torture by revealing that he was a Roman Citizen. *Acts* 22:28–29. It is worth noting, though, that non-citizen colonists were not deprived of all rights and retained their own courts where their own law was applied. *See* WOLFANG KUNKEL, AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY 77–78 (J. M. Kelly trans., Clarendon Press 2d ed. 1973).

26. *See* VINCENT OSTROM, THE INTELLECTUAL CRISIS IN AMERICAN PUBLIC ADMINISTRATION 23–25 (Montgomery: Univ. of Alabama Press 1973).

Here, the Article begins by laying out the crucial elements of each model, outlining their differing conceptions of society, the state, and the structure and purpose of the constitution, and then addressing the protection of rights. In presenting the elements of each model, historical examples of each are mentioned, not in an attempt to provide a full analysis of various constitutions but rather to support the logic of a new typology and show its relevance and worth. I conclude with a brief outline of each model's strengths and weaknesses.

## II. NATURE OF SOCIETY I: THE COMMANDING VISION

**Figure 1.**

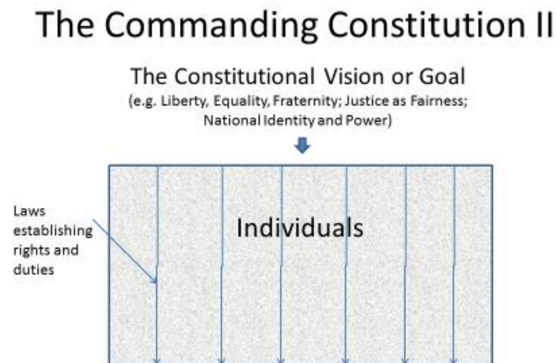



The commanding constitution rests on a vision of society as a collection of individuals.[27] This is not to say that this vision denies the existence or even the importance of institutions such as families, churches, unions, various social and economic clubs, or local political or ethnic groups. But the fundamental and primary political relationship is that between the national government, established by the constitution, and the individual persons making up the nation. This means that the commanding constitution treats the nation as a collection of more or less fully-formed individuals whose associations have no separate legitimacy beyond their service to those individuals and/or the national state.[28] Each of these

27. FROHNEN & CAREY, *supra* note 13, at 227.
28. Luke C. Sheahan, *The First Amendment Dyad and Christian Legal Society v.*

associations, then, is the proper subject of regulation and control from the center to ensure that it abides by and instills appropriate values as instantiated in the constitution.

**Figure 2.**




In the commanding view, *society* is constituted by its government. It is, in essence, that geographical unit and associated population under the rule of a specific government. Thus, the government's duty, in addition to protecting the national unit from outside forces, is to arrange individuals and groups in a manner best suited to further the lawgiver's predetermined ends.[29] That is, the structure of society is set and maintained by principles and actions established by the constitutional lawgiver. As Seidman argues, the constitution is structured in such a way as to create the kind of society desired by the lawgiver.[30] The kind of society desired (and the lawgiver) may, of course, be egalitarian and democratic or inegalitarian and hierarchical. In either case, the rights and duties of all persons will be laid out according to criteria established in the constitution, such as in a substantive preamble or other constitutional statements of national

*Martinez: Getting Past "State" and "Individual" to Help the Court "See" Associations*, 27 KAN. J.L. & PUB. POL'Y 223, 225–26 (2018).

29. This is not to deny that the commanding constitution might be devoted to the flourishing of a specific racial or ethnic group, or to the expansion of that group beyond current borders. The point is that the state and nation are identified closely with one another, such that subsidiary groups have no independent status.

30. Seidman, *supra* note 10, at 541.

character and goals.

For example, the constitution of India states in its preamble:

We, The People of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens: Justice, social, economic, and political; Liberty of thought, expression, belief, faith, and worship; Equality of status and of opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation.[31]

These terms need not be seen as particularly *commanding*, provided one sees the preamble to the U.S. Constitution in a mediating light. One might argue, here, that the U.S. preamble provides highly general goals regarding establishment of justice, domestic tranquility, and the general welfare—giving rise to no causes of action and providing no independent constitutional justification for governmental action until well into the twentieth century.[32] The distinction from India's constitution shows not merely in the language of the preamble itself but in the remaining provisions of the constitution. India's constitution contains a series of "directive principles" intended to guide the government in its conduct toward the ends stated in its preamble.[33] Thus, it presents a model of a commanding constitution establishing rights and duties from which flow laws that structure individuals' relationships with one another and with the national state itself.

Of course, the commanding power may be exercised directly and coercively or more indirectly and subtly. Stark and direct examples are available from ancient Greek constitutions intent on promoting internal solidarity and strength. In Sparta, the constitution decreed that all citizens should eat the same food at common tables so that they would not seek private distinctions and advantages to the detriment of public service.[34] In *democratic* Athens, one set of constitutional reforms decreed that citizens would no longer be called by family names to combat familial loyalties and distinctions, which was seen as taking away from loyalty to the society as a whole.[35] Another example, this time aimed at furthering individual autonomy, is provided by the French revolutionary regime; that regime's

31. INDIA CONST. pmbl.
32. U.S. CONST. pmbl.
33. INDIA CONST. pt. IV.
34. PLUTARCH, THE PLUTARCH'S LIVES 56 (John Dryden trans., Modern Library 1914).
35. ARISTOTLE, *supra* note 1, at 4. One reason for the starkness of the ancient Greek examples is the lack of separation between state and society in these "city-communities." *See* FROHNEN & CAREY, *supra* note 13, at 63–68.

founding document, the Declaration of the Rights of Man and of the Citizen, decreed an end to feudalism with its many distinctions of class in the distribution of rights and duties.[36]

Sometimes the commanding constitution may directly empower a specific group or institution to further its vision, as in the Iranian constitution's Guardian Council whose members are to be experts in Islamic law appointed by the supreme leader and invested with the power to reject legislation and electoral candidates in the interests of "Islam and the [c]onstitution."[37] Less directly, and somewhat more controversially,[38] in the contemporary United States, the Constitution points to the source of an apparatus of protections for individuals within the society from various aggregations of power, whether rooted in race, class, ethnicity, sex, sexual orientation, family structure, or wealth; in this last instance, both private lawsuits and public regulations based in twentieth and twenty-first century Supreme Court interpretations of the Constitution are used to enforce the *anticaste* principle.[39] More specifically, the constitution of South Africa bans discrimination by the state or individuals on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth by its text.[40] These are commanding requirements because they decree that private relations and associations conform to a constitutional standard of equal treatment.

It is important to keep in mind that no constitution is purely commanding or mediating—there exists a spectrum of command as of democracy, socialism, or any other criteria. There may well be debates on the horizons established by a commanding constitution concerning how much power the national state should have to reconstruct associations to make them more open to various types of individuals (and their choices) and how to limit associations' capacity to take collective action in the

36. DECLARATION OF THE RIGHT OF MAN AND OF THE CITIZEN, 1789. Notice one claim not being made, here, namely that all constitutions must be contained within the four corners of a single document. *See also* 1958 CONST. pmbl. (Fr.) (proclaiming "attachment" to all rights as they are defined in the Declaration of Rights of Man and Citizen and the Preamble of the 1946 constitution).

37. Islahat Va Taqyyrati Va Tatmimah Qanuni Assassi [Amendment to the Constitution] 1368 [1989] (Iran) art. 94.

38. See *id.* and accompanying text for discussion of the debate over whether the U.S. Constitution's transformation from mediating to commanding is legal and proper.

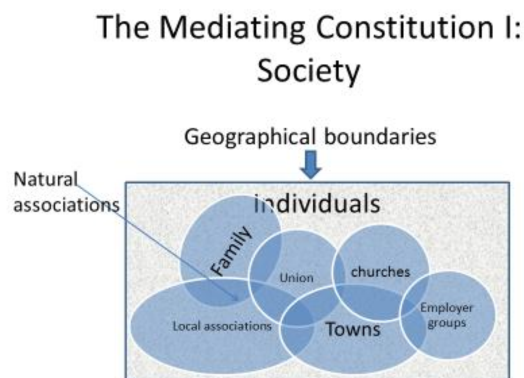
39. SUNSTEIN, *supra* note 8, at 174–80 (describing application of the anticaste principle through the judicial system).

40. S. AFR. CONST., ch. 9, 1996.

public square. Such debates themselves are not purely a matter of placement on the left or right of the political spectrum in contemporary terms. An example on the *left* would be policies aimed at establishing minimum levels of minority representation in academic admissions as a means of transforming those institutions.[41] An example on the *right*, would be the construction of national markets—in large measure by striking down state and local customs and regulations—by the late-eighteenth century *laissez-faire* court.[42] Yet, whether on the left or right end of the political spectrum, both sets of actors involved on these issues share a vision of the central government as shaper of other institutions in service to constitutional values.

## III. NATURE OF SOCIETY II: THE MEDIATING VISION

**Figure 3.**

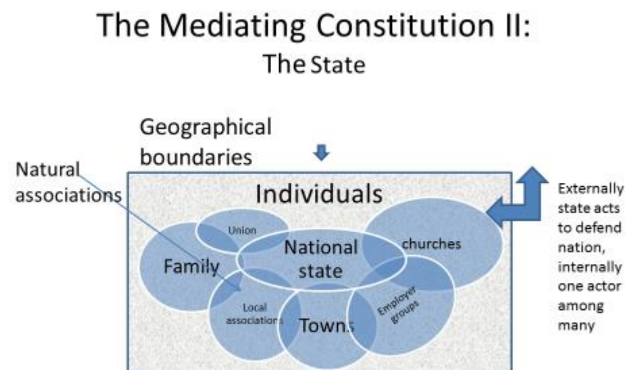



The mediating constitution rests on a vision of society vastly different from that of the commanding constitution. As illustrated in this figure, this mediating vision sees society as a community of communities, made up of a variety of overlapping associations. As shown in figure 3, these associations are based on a number of different factors and commonalities; they range from family ties to union membership, geographically based local communities, and a variety of organizations from employer groups

41. Grutter v. Bollinger, 539 U.S. 306, 340–41 (2003).
42. *See generally* Lochner v. New York, 198 U.S. 45 (1905).

to churches. Figure 3 does not indicate that there are large numbers of individuals existing outside associations—outlying individuals may exist but are so few and scattered that their numbers are insignificant in relation to those persons belonging to a variety of overlapping associations. These associations are viewed as natural in that they are seen as having their own legitimacy and purpose. That is, associations are properly seen as objects of protection and even empowerment under the constitution, rather than being material on which the constitution is to exert legal power in shaping society.

**Figure 4.**




A mediating constitution is not primarily didactic; as shown by figure 4, such a constitution does not impose any set of strictures on individuals or the groups they naturally form, which are aimed at particular substantive ends beyond peace, stability, and the flourishing of those associations themselves. Figure 4 indicates the national state established by the constitution retains the same external purpose as in a commanding constitution—that of protecting the territorial and sovereign integrity of the nation. However, the state under the mediating constitution lacks the commanding purpose and the commanding position of its rival. The national state—like less encompassing more local forms of government—is one actor among many. It may act independently (e.g. purchasing goods in the marketplace and maintaining internal discipline among its employees) but does not itself structure the social order. Its laws act on

other associations only in specific ways and for specified, instrumental purposes set forth in the constitution.

Contemporary examples of mediating constitutions are uncommon, but history is replete with them. Often dismissed as insufficiently legal on account of its basis in custom and generalized social forms, medieval constitutionalism was deeply mediating in form and substance.[43] Feudal society was a web of interlocking and often contradictory rights and duties that established the status of various groups from kings to local landholders and serfs.[44] The national state itself could be said not to even exist, yet there was a kind of *constitution of the realm* that defined rights within a given territory. And this constitution put severe limits on the rights of the (national) monarch. For example, in France, constitutional understandings buttressed by coronation oaths and other customary and political standards severely restricted the right of the king to legislate; for centuries the French king could make laws only during or in preparation for war and then only with reasonable cause, for the benefit of the commonweal, and in accordance with the law of God.[45] In England, common law itself was merely the king's more-or-less national law and had to compete with merchant, ecclesiastical, and other laws with which it overlapped in jurisdiction.[46]

43. Brian Tamanaha notes that through coronation oaths monarchs "confirmed, time and again, that they were bound by the law, whether customary, positive, natural, or divine, not just admitting but enforcing the proposition that fidelity to the law was an appropriate standard against which to evaluate regal conduct. This routine helped render a self-imposed obligation into a settled general expectation." Brian Tamanaha, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 22 (Cambridge Univ. Press 2004). For the restrictions placed on a king through consent and custom, see KENNETH PENNINGTON, THE PRINCE AND THE LAW, 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION 92 (Univ. of California Press 1993) and Brian Tierney, *Hierarchy, Consent, and Tradition*, 15 POL. THEORY 646, 649 (1987).

44. Perry Anderson noted that "[t]he consequence of such a system was that political sovereignty was never focused in a single center. The functions of the state were disintegrated in a vertical allocation downwards, at each level of which political and economic relations were, on the other hand, integrated." Perry Anderson, PASSAGES FROM ANTIQUITY TO FEUDALISM 148 (2013).

45. PENNINGTON, *supra* note 43, at 92.

46. The royal courts did not take cases relating to merchant law until the centralizing administration of the Tudors. MUNROE SMITH, A GENERAL VIEW OF EUROPEAN LEGAL HISTORY AND OTHER PAPERS 23–24 (1927). The Church's jurisdiction over clerics and ecclesiastical affairs was protected through the demand that royal courts not judge a crime on which the ecclesial courts had already passed judgment; this early form of a prohibition against double jeopardy was "derived from the right ordering of society . . . ." R. H. HELMHOLZ, THE SPIRIT OF CLASSICAL CANON LAW 307 (University of Georgia Press 1996).

Mediating constitutions may be much more precise than medieval constitutionalism in both form and function. For example, the U. S. Constitution as originally drafted was considered unique in its time for its preservation of state powers.[47] Federalism is far from the total of the mediating vision, but the primacy of states as associations (as opposed to mere administrative units within the nation) is an important element in the United States' mediating constitution. The importance of the structure is attested to by the specific structure of constitutional provisions. The key here is Article I, Section 10, wherein states are barred from a number of specific activities (e.g., entering into treaties, imposing revenue producing duties on imports, impairing obligations of contract, or keeping ships of war or troops during peacetime) that would put states at odds with one another in either military or economic matters.[48] The list of specific prohibitions could be expanded to include those in Article IV, protecting citizens of one state in their dealings with and within other states.[49] The point is that by their nature these perforations of state sovereignty aim at maintaining peaceful and smooth relations among states rather than at reconstituting states in some form suitable to a larger, substantive national purpose.[50] The obvious commanding counter example would be the determination of the French Revolutionary regime to redraw the lines of its provinces or *departments*, intentionally eliminating historical and geographical borders that once established local commonalities of interest and custom.[51]

47. *See Federalism*, STAN. ENCYCLOPEDIA PHIL., (June 7, 2018), https://plato.stanford.edu/entries/federalism/ [] (noting that "[t]he discussions surrounding the U.S. Constitutional Convention of 1787 marks a clear development in federal thought[]" and listing the U.S. Constitution as its first example of a federal state).

48. U.S. CONST. art. 1, § 10.

49. *See* U.S. CONST. art. IV.

50. Exceptions here might be found in the guarantee of a republican form of government and prohibitions on ex post facto laws and bills of attainder. However, it is important to note that these provisions may be said themselves to aim not at dictating a given structure to the states but at maintaining that level of commonality of form and rights necessary to the maintenance of a peaceful, flourishing union. For example, the guarantee of republican government has never been seen as actionably violated. The mediating nature of these provisions is further emphasized by the 10th amendment, reserving powers not specifically granted by the Constitution to the various states and/or people, showing the limited intentions of those powers and the further intention of maintaining the integrity of the states. *See* FROHNEN & CAREY, *supra* note 13, at 92.

51. "Uniformity and decentralization were the keynotes of the administrative organization undertaken by the Constituent Assembly. All the old provinces, generalities, principalities, and municipalities, in all their rich and limitless variety, were swept away.

## IV. CONSTITUTIONAL PURPOSE I: THE COMMANDING VISION

**Figure 5.**

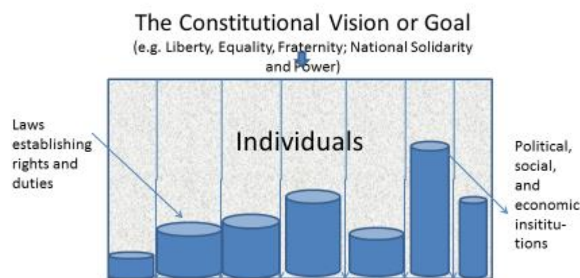



Figure 5 builds on figures 1 and 2, emphasizing the commanding vision's perception that associations among individuals are not natural in the full sense of having their own independent status and integrity. On this view, associations beneath the level of the national state are in fact creatures of that state and its law. Of course, there is ample historical evidence for the claim, within the Anglo-American tradition in particular, that corporations are literally creations of the state, utterly dependent on grants from the government for their existence.[52] But the commanding view goes beyond mere licensing of a particular organizational form and the granting of tax benefits to it and its members. The commanding constitution oversees and instantiates the laws that in turn shape all kinds of associations according to values and standards settled on through the

They were replaced by eighty-three departments, roughly equal in size, population, and wealth." WILLIAM DOYLE, THE OXFORD HISTORY OF THE FRENCH REVOLUTION (Oxford Univ. Press 2d ed. 2002).

52. The roots of this view may be found in the Roman Law doctrine of concession, according to which all associations are granted status and rights as concessions from the state. However, the history of this idea is complex and often associated with the rise, rather than the restriction, of associational rights. 1 JOHN P. DAVIS, CORPORATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND OF THEIR RELATION TO THE AUTHORITY OF THE STATE 36–37 (1905); 3 JOSEPH R. STRAYER, DICTIONARY OF THE MIDDLE AGES 606 (1984).

national government.

As shown in figure 5, a commanding constitution may be seen as a device for instantiating a specific vision of the good society. Principles such as liberty, equality, fraternity, or national solidarity and power are the guiding force in shaping the constitution itself and the laws; these laws then structure individuals' relationships with one another and, from that, the kinds of associations and social, economic, and political institutions in which they conduct their lives. Economic structures, then, will be socialist, capitalist, or of some other form specifically dictated by the constitution. Communities, whether of worship, geographical location, work, or familial ties, will be formed and conducted according to constitutionally mandated rules governing their internal relations and structures. Sunstein's *anticaste* principle provides one example of how such associations might be structured by law, imposing a requirement for equal treatment regardless of various categorizations (e.g. race, class, sexual orientation) to avoid legal sanction.[53]

Such calculations, like forms of constitution, may change over time. One prominent recent example is marriage in the United States under its more recent commanding vision. The Supreme Court having found an individual right to marry that transcends previously existing legal definitions of that institution in the Constitution, all states are now required to issue marriage licenses to same sex couples.[54] So the familial association was redefined to make it conform to contours in keeping with the primacy of individual desires and motivations seen by the Court as central to the Constitution itself; for the *Obergefell* Court, constitutional values command reshaping the family.[55]

Any government may find itself decreeing various requirements for recognition of the legality of a given association, or even deciding to ban a particular association or associations on account of perceived danger to the regime itself. Such might be the case for governments banning specific parties (e.g. Nazi or Communist) deemed inimical to that government. Obviously, the wisdom of such decisions is open to question, as is the commitment they indicate toward liberal values.[56] However, it is important to recognize that not all societies are liberal or fully liberal, whether they

53. SUNSTEIN, *supra* note 8, at 151.
54. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).
55. *Id*. Whether this is in fact an accurate reading of the constitutional text or its character and intentions is a different matter.
56. ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE 67–69 (1992).

have commanding or mediating constitutions. Determinations whether to ban a particular organization become relevant to the command/mediate dichotomy only when they are established, not merely for the purpose of regime survival but as a means of propagating and enforcing a common vision for the nation. The regime's reasons may be shams, of course, but there is a great difference between banning a party committed to the overthrow of the regime (again, whether for good or ill) and banning an association deemed offensive to regime values because of its character or goals.[57] Relevant here is the Iranian constitution's empowerment of its General Council to determine the fitness of electoral candidates in relation to their reading of the requirements of Islam and the Islamic constitution.[58]

One issue going to the fundamental nature of various social institutions and associations is the status of property. One obvious commanding example is the 1977 constitution of the USSR, which declares in Article 10 that "[t]he foundation of the economic system of the USSR is socialist ownership of the means of production in the form of state property (belonging to all the people), and collective farm-and-co-operative property."[59] This constitutional article is clearly a command dictating the form of property allowable under the stated (socialist) values of the Soviet constitution. Is the opposite true, then, that a market-oriented economic system also must be the result of commands from the center? The American experience with the *laissez-faire* court may seem to so indicate. But one should be careful to focus not on the decisions of a specific court during a specific time period but on the constitutional system and its empowerment or stifling of governmental action in this area. For example, it would be difficult to characterize medieval Europe as dominated by either commanding constitutions or *laissez-faire* economics.

57. Curious complications may occur, especially when the lines between commanding and mediating constitutions seem blurred. For example, in the contemporary United States, white supremacist organizations like the Ku Klux Klan (KKK) are not officially barred, in part because it would seem "undemocratic" or at least undermining of the freedom of association or speech deemed central to American constitutional values. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 360–63 (2003). However, the KKK is subject to heightened surveillance by various state actors on account of the danger it is seen to pose to the American regime and individuals' civil rights central to that regime. Increased scrutiny of organizations on the right or the left is circumscribed as well as extended to an extent and in a fashion deemed consistent with overall national values such as protection against violence and privacy rights.

58. Islahat Va Taqyyrati Va Tatmimah Qanuni Assassi [Amendment to the Constitution] 1368 [1989] (Iran) art. 76, 91, 96, 99.

59. KONSTITUTSIIA SSSR (1977) [KONST. SSSR] [USSR CONSTITUTION] art. 10.

Individual persons were subject to a bewildering variety of taxes, regulations, and charges emanating from a plethora of authorities including not just the crown but various guilds, lords, and communes.[60] The constitution of the realm did not command this arrangement, instead only protecting the existing multiplicity of authorities in the highly limited sense that it protected each of the associations named in their right and ability to impose such duties.[61]

60. The history of the Middle Ages abounds in examples of such a bewildering overlap of jurisdictions. For example, in Laon, "[t]he superior feudal jurisdiction of the Bishop of Laon was recognized, and he continued to appoint local judges (. . .*chevins*); but the mayor and 'jurors' (*jurati*, *jur. . .s*, or oath takers . . .) also had jurisdiction to enforce the customs of the city and to supply justice when the bishop's justice failed." HAROLD BERMAN, LAW AND REVOLUTION 368 (1983).

61. Susan Reynolds outlines the various ways that members of medieval communities (whether they be manors, guilds, cities, or kingdoms) existed less in a struggle between classes but in what one might call layers of *mediating* polities. For example, despite the growth of a unified vision of a kingdom, "[m]any Englishmen must, of course, have felt other loyalties in addition to regnal ones. Locality, lordship, and law all offered opportunities for feelings of community, but they did not always conflict with regnal loyalties." SUSAN REYNOLDS, KINGDOMS AND COMMUNITIES IN WESTERN EUROPE 900–1300 266 (2d ed. 1997). Reynolds also mentions that the "view of the supremacy of law and of the layers of authority under it created practical problems rather like those which the modern concept of sovereignty creates for federal states, but neither practicing nor academic lawyers seem to have addressed themselves to the underlying contradictions." *Id.* at 324. Berman notes that, while this constitution certainly encouraged conflict between different jurisdictions, "the opportunity to appeal to one law against another enhances freedom." BERMAN, *supra* note 60, at 269.

## V. CONSTITUTIONAL PURPOSE II: THE MEDIATING VISION

**Figure 6.**

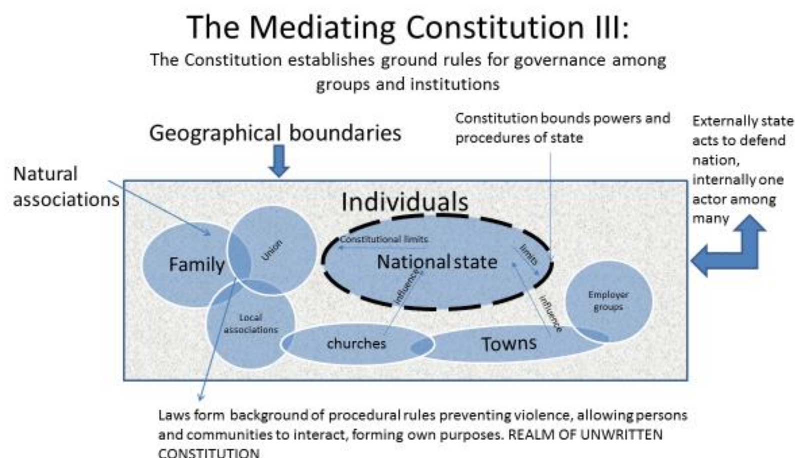



Figure 6 builds on figures 3 and 4, focusing on the forces influencing and limiting the national state. While the state is open to influences from various associations, whether in the form of formal lobbying or through their influence on public opinion, it is limited on account of its own formal constitutional provisions. Thus, the mediating state is recognized as properly shaped by cultural forces, while being limited in its right to shape those forces in its turn. The mediating state's sovereignty is derivative and limited.

The key to the distinction between commanding and mediating constitutions is the mediating constitution's fundamental assumption that societies are self-ordering. On this view, persons naturally form associations, and these associations naturally interact with one another to produce political, economic, religious, and cultural life.[62] It is thus a choice whether to subject these associations to the command of a national state that engages in centralized planning or to form a state with the much less

62. Those seeking philosophical grounding for this vision may look to a diverse array of thinkers from a variety of intellectual backgrounds. *See, e.g.*, JOHANNES ALTHUSIUS, POLITICA (Frederick S. Carney trans. Ed., Liberty Fund 1995); HEINRICH ROMMEN, THE STATE IN CATHOLIC THOUGHT: A TREATISE ON POLITICAL THOUGHT (Cluny Media 2016); FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY (Ronald Hamowy ed., Univ. of Chicago Press 2011).

intrusive goal of maintaining peace among these associations while protecting the nation as a whole from outside forces. The commanding vision rejects any understanding of society as a natural outgrowth of human sociability, instead positing a human nature that requires rules and laws backed by force in order to push individuals into (*proper*) associations, whereas the mediating vision builds on a theory of natural sociability a society that itself is a set of relationships among primary, natural associations.

This is not to say that mediating constitutions will be simply libertarian (or *nomocratic*) whereas commanding constitutions will be of a socialist (or *telocratic*) variety. The distinction concerns the attitude of the lawgiver to political action, that is, whether it will be aimed at achieving a specific set of goals for the nation as a whole or at maintaining relations within the nation among its more primary groups. The mediating nature of this structure may be overlooked due to the fact that a government under such a constitution often will act in ways supporting whatever structures happened to be dominant at the time of its establishment, in effect supporting associations with the power to themselves shape society in important ways.

For example, because the U.S. Constitution supported property rights (e.g. in the Fifth Amendment's forbidding the taking of private property for public use without compensation), observers following Charles Beard have characterized the entire system as one designed to serve propertied interests.[63] The command/mediate question does not hinge on whether policies, laws, and even constitutional provisions benefit one set of interests above others but whether the constitutional order guides or merely seeks to maintain peace among such interests. Thus, it may well be true that a constitution serves one particular interest, but so long as it does not seek to structure society in accordance with that interest (or its ideological moorings) it will remain mediating. The American *laissez-faire* court sought to restructure society, or at least state and local economic arrangements, in accordance with the interests of some industrialists and a particular form of ideology, but this commanding vision did not hold.[64] A closer question concerns the attitude of earlier courts toward unions. Holding such combinations illegal as "restraints of

63. *See, e.g.,* Seidman, *supra* note 10, at 544.

64. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) (noting that post *Lochner* "[t]here is no absolute freedom to do as one wills or to contract as one chooses").

trade"[65] may have made sense in terms of property and contract rights important to businesses large and small and to a mobile labor force seeking maximum freedom of movement in an expanding nation and economy but went against generations of experience and legal protections for various associations, especially guilds with roots in medieval England.[66]

A prototypical mediating constitution may be found in medieval Iceland. Here, the central government consisted of a powerful chieftain who held an annual congregation, the *thing* at which disputes among local clan leaders were to be settled.[67] Disputes often centered on non-payment of *wergild* (compensatory payment to a murder victim's relatives).[68] The laws were read by the *Lögsögumaðr*,[69] and the decisions were reached (often in trial by combat) with the witches and some other criminals being punished.[70] Clan leaders were left with all other powers (including absolute power over slaves) intact.[71]

A more recent (and benign) example can be found in Botswana. That nation's constitution, which includes a House of Chiefs whose membership includes hereditary chiefs from the largest tribes along with other elected and appointed figures, serves only an advisory function in regard to legislation affecting customary courts, customary law, tribal organization, and tribal property.[72] But even this advisory role maintains the status of House members and the loyalty of (particularly rural) communities within the constitutional structure.

A crucial basis for the command/mediate distinction may be seen in the existence and influence of a common-law background. Where a

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65. C. McA. S. *Contracts in Restraint of Trade – Labor Unions*, 62 U. PENN. L. REV. & AM. L. REG. 130, 132 (1913); *Legality of Trade Unions at Common Law*, 25 HARV. L. REV. 465, 466–67 (1912).

66. For the development of guilds as charitable, sociable, and economic societies, see *Fraternities and Guilds* in REYNOLDS, *supra* note 61, at 67–78.

67. BRYCE, *supra* note 2, at 318–20, 325.

68. *Id.* at 320–21.

69. *Id.* at 327–28. Compare the council in which a king of Aragon was appointed, during which the nobles of Aragon would "lead in a man whom they name 'the Law of Aragon', and by a decree of the people declare him to be greater and more powerful than the king." FRANÇOIS HOTMAN, FRANCOGALLIA 307 (J. H. M. Salmon trans., Cambridge Univ. Press 1972). The role of the Aragonese official was much more judicial, but it does seem that both Aragon and Iceland did make use of an official acting as the personification of the law to enforce a mediating constitutional structure.

70. BRYCE, *supra* note 2, at 330–31.

71. *Id.* at 332–33.

72. CONST. OF BOTSWANA, 1966, art. 85 (Bots.).

mediating constitution accepts and seeks to preserve customary rules seeing justice itself as in significant measure the vindication of the reasonable, historically-based expectations of the parties, a commanding constitution sees law as statutory by nature —as commands emanating from the lawmaker. This distinction is given more weight, rather than less, by the increasing reliance of common-law countries on statutory codes, for it has coincided with an increase in commanding constitutionalism, including within common-law countries like the United States.[73] Even *textualists* have increasingly abandoned common-law reasoning on the grounds that it is too loosely tied to clear texts that can command specific outcomes.[74]

The fundamental point has less to do with theoretical distinctions than with the approach taken to preexisting norms. Common-law systems have historically seen legal norms as arising from preexisting customs, relations, and the application of reason.[75] These customs and relations may or may not be just, egalitarian, or supportive of national unity and strength; but a mediating constitution is one in which they these are seen as the law, the background to any statutes or policies emanating from the national state. In common-law fashion, customs and relations change on their own and give rise to modified customary rules.[76] For example, it may be possible for a mediating constitution to become so dominated by a commanding vision, with changes in its legal structures and norms as well as interpretations of that constitution itself, that it in effect becomes a commanding constitution.[77]

73. On the spread of "mixed" common/civil law systems, see William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 678, 678-80 (2000).

74. Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION 4 (Princeton Univ. Press 2d ed. 2018).

75. "[O]nly this incident inseparable every custom must have, viz. that it be consonant to reason; for how long soever it hath continued, if it be against reason, it is of no force in the law." EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, OR, A COMMENTARY ON LITTLETON, part 62a (F. Hargrave and C. Butler ed., 19th ed., London 1832).

76. It may be worthwhile to note here the plethora of customary courts and laws given official status in a variety of constitutions, such as that of India. Such provisions may be seen as taking away from their commanding character and may also be seen as concessions to local circumstances and the limited legitimacy of the national state in some areas.

77. *See, e.g.*, FROHNEN & CAREY, *supra* note 13, at 175 (arguing in particular that a *commanding* executive has replaced the legislature as the most powerful branch).

## VI. THE COMMANDING STATE STRUCTURE

The commanding vision of constitutionalism insists on effective and efficient lawmaking and law execution. Sanford Levinson, for example, has criticized the U.S. Constitution for failing to instantiate changes in majority will as represented by shifting majorities in elections.[78] The delaying effect and requirement for near consensus before substantial changes in law can be made are serious flaws in the constitutional structure for him.[79] Quick and direct action, based on the majority will of the moment, is Sunstein's goal. What makes Levinson's statement more powerful is his assumption that majorities will be right, have a right to rule, and will be represented in electoral politics. This is the democratic form of the commanding constitution. Obviously, a less benign picture can be painted of direct majoritarianism.[80] Still, it would be wrong to identify structures of direct rule as necessarily in keeping with the commanding constitution. The British constitution, for example, seems to place all its power within a single majoritarian body yet is constrained in its power by a variety of structures and customs constituting an *unwritten constitution* binding on the rulers even after the demise of any real power in king or lords.[81]

A more clearly commanding constitution is visible in the French Fifth Republic. Here, one sees the logic of command set forth in structural terms. Determined to end the seeming inability of the previous French regime to rule on account of internal bickering in the legislature, Charles de Gaulle insisted on, and got, a constitution that strictly limited the ability of the legislature to interfere with the regulation of French life from the executive.[82] The realm of legislative competency was reduced to the

78. "Still, the American system, for better and for worse, continues to subordinate any simple notion of majority rule to the difficult political tasks of achieving primacy in two quite different legislative houses plus the presidency, not to mention the need for assuring as well the acquiescence of yet a third branch, the judiciary." LEVINSON, *supra* note 15, at 33.

79. *Id.*

80. A democratic majority's tendency to pursue whatever the majority will is, as opposed to the common good of the polis, is why Aristotle named it one of his "perversions" of constitutional forms. ARISTOTLE, *supra* note 1, at 1279b4–10.

81. Maitland, for example, notes that the concurrence of the House of Lords and the king was necessary for a statute to pass, creating a basic limit on what the House of Commons can legislate. FREDERICK MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 380–81 (1961).

82. SOPHIE BOYRON, THE CONSTITUTION OF FRANCE: A CONTEXTUAL ANALYSIS 52–53

"fixing of rules concerning citizens' civil and criminal rights, "nationality, marriage and inheritance," electoral laws, the penal code, "and the expropriation of private property" and creation of state-owned enterprises.[83] All other areas of laws and any action either raising public expenditures or decreasing public funds are specifically reserved for executive action.[84] A constitutional review board with the power to amend or repeal legislation, the conseil constitutionnel, was further created to police the boundaries of executive and legislative competency.[85] Moreover, this logic of command of intending to make the national government as effective as possible is furthered in electoral laws that add a second round of voting to weed out marginal candidates who might undermine party coherence in the legislature.[86]

## VII. THE MEDIATING STATE STRUCTURE

Mediating constitutions assume the bulk of society is not a system of rules but rather an overlapping and even conflicting set of customs and practices centered in a variety of associations with often overlapping membership. Thus, they presume a more limited position for the national state. This does not necessarily mean severe, formal restrictions on the national government of the type found in the original U.S. Constitution's system of enumerated powers reinforced by the Tenth Amendment's restrictive language. Rather, what the vision requires is the balancing of interests, which is to say an emphasis on seeing to it that various important groups are included in legislative decision making, such that groups are able to defend their interests in the process of policymaking.

One can see this logic throughout history in various constitutions that sought to balance political forces. The British example of King, Lords, and Commons representing the one, the few, and the many, is well known, but the case of Rome may provide greater insight. The Roman system of "tribes" (in fact non-familial combinations, here sorted by wealth) was set up to determine which groups would receive how much representation in

(2012) (detailing the dramatic success of de Gaulle's reformation of the French Constitution to obtain a popularly elected president).

83. STONE, *supra* note 56, at 47.

84. *Id*.

85. *Id*. at 46.

86. For an outline of the process to elect the French president, including the two rounds of voting see BOYRON, *supra* note 82, at 65.

the plebeian general assembly.[87] This more-or-less popular assembly, while having the power to pass laws, elect magistrates, and try numerous cases, had to contend with an aristocratic Senate that controlled the treasury and had jurisdiction over all crimes requiring public investigation within Italy.[88] The Senate was further empowered through its right to make appointments to positions having to do with "rivers, harbours, orchards, mines, and farms," all of which belonged directly to the Roman commonwealth.[89] Monarchical authority was held by two Consuls elected for limited terms and holding vast military and "almost unlimited" executive power; election to these positions was an object of contention, opened to plebeians fairly early in the Republic.[90] The Consuls were held in check by the requirement that they submit to an audit of their performance conducted by the people at the end of each one year term, to which they could not immediately succeed themselves.[91] The tribunes balanced the power of the Senate and protected the plebeians from which class they came and returned and from persecution according to settled procedures.[92] The role of the tribunes was "[t]o lend aid to the individual citizen and to protect him against oppression and injustice."[93]

The Roman republic's mixed constitution contained elements of monarchy, aristocracy, and democracy but was clearly weighted toward the interests of the aristocracy. Still, the Roman historian Polybius insisted the democratic element was real, especially in the people's control of rewards and punishments, including cases in which the accused held the highest offices or where the penalty was death, and held the appointment power for various high offices.[94] In addition, the people could "decide whether or not to go to war; and they also either ratify or abrogate alliances, truces, and treaties."[95] The people exercised three checks specifically on the power of the Senate: they had to validate any decrees for the Senate's most important trials that carried the death penalty; they

87. KUNKEL, *supra* note 25, at 11, 13.

88. Such crimes included "treachery, conspiracy, mass poisoning, and gang murder." POLYBIUS, THE HISTORIES 381 (Robin Waterfield trans., Oxford Univ. Press 2010).

89. *Id.* at 384.

90. *Id.* at 380–81.

91. *Id.* at 382–83.

92. CICERO, THE REPUBLIC, *in* THE REPUBLIC AND THE LAWS 2.59 (Niall Rudd trans., Oxford Univ. Press 2008).

93. KUNKEL, *supra* note 25, at 21.

94. POLYBIUS, *supra* note 88, at 382.

95. *Id.*

decided "whether or not to pass into law any proposal that would, for example, deprive the Senate of some of its traditional authority, or abolish senatorial privileges such as the right to the best seats in the theatres, or reduce their incomes"; and, finally, the tribunes, the agents of the people, could veto decisions of the Senate.[96]

Clearly, complicated constitutions aimed at checking and balancing power do not determine precisely how that power will be used or for what end. But they do make power more difficult for any one group to obtain and use, allowing various associations the ability to defend their interests, come to compromises, or simply forestall action. On this point one may wish to consider the constitution of the medieval city state of Venice. The Venetian constitution decreed a dizzying array of electoral and administrative rules not just cabining but dividing and limiting power such that no one person or group was able to govern.[97] The claim might be made that this complex structure was maintained as a means of protecting the preexisting interests, especially of the oligarchical class[98]—something that may well have been true but does not take away from the mediating character of a state that actively prevented the accretion of centralized power.[99]

## VIII. The Issue of Rights

The issue of rights is relevant to the command/mediate distinction by dint of the manner in which the rights are formulated and/or enforced through constitutional means. Thus, merely because a constitutional document is phrased in terms of the protection of rights—that is, seems to command that the government will see to it that rights will be protected—

96. *Id.* at 383.

97. John Julius Norwich, A History of Venice 119 (New York: Vintage Books 1989).

98. *Id.* at 184 (describing the origins of the *Libro d'Oro*, which included the names of those Venetian families eligible for election).

99. The logic of the original U.S. Constitution also is enlightening: Publius in the *Federalist Papers* asserted that the rise of factions would in effect cause self-interested parties to multiply, leaving sufficient legislative power in the hands of more enlightened parties—or, more likely, parties whose interests were not affected by a particular proposal—to hold the balance of power and wield it for the public interest. James Madison, *Federalist No. 10*, *in* The Federalist (George W. Carey & James McClelland ed., Indianapolis, Liberty Fund 2001). The assumption was that this power normally would be wielded in a restraining fashion, preventing bad legislation from being made into law. *See also* George W. Carey, *Federalist Nos. 31–32, in* The Federalist (1994).

does not mean necessarily that the constitution is of the commanding variety. Again, the key to the command/mediate distinction is one of approach, phrasing, and structural attitude.

A defining distinction is that between positive and negative rights—*freedom to* against *freedom from*.[100] Negative rights protecting persons from governmental actions are merely restrictions on the national state. They may limit the power of the government rather than empower it to command particular outcomes. This distinction becomes muddied and may even collapse when the rights are read as guarantees against other individuals or groups as well as the national government. Thus, the seeming transformation of the U.S. Constitution from one of the mediating to one of the commanding variety.

The issue of command versus mediate can also seem somewhat complicated in the case of positive rights. Positive rights lend themselves to a commanding interpretation by nature. As guarantees of particular things, whether equality or health care, constitutionally enshrined positive rights command action. Yet some constitutions list positive rights while specifically precluding their justiciability.[101] This may be taken as an attempt by the constitution's drafters to publicize aspirations without commanding their achievement through any particular, let alone specifically, legal or governmental means. Even under such circumstances, however, the unwritten constitution of the people is being pushed toward a given set of values and their instantiation throughout society.[102]

The French revolutionary constitution of 1793 guaranteed "equality, liberty, security, property, public debt, freedom of worship, public schooling, public relief, unrestricted freedom of the press," the right of assembly, "and the enjoyment of all the rights of man."[103] Those "rights of man" were laid out in a previous constitutional document, the Declaration of the Rights of Man and of the Citizen (Declaration), which made clear its commanding aspirations by revoking feudalism and also by declaring that "no body or individual may exercise any authority which does not

100. *See generally* ISAIAH BERLIN, *Two Concepts of Liberty, in* FOUR ESSAYS ON LIBERTY 118-172 (Oxford Univ. Press 1969).
101. *See* CONST. OF THE FEDERAL REPUBLIC OF NIGERIA, 1999, arts. 6(6)(b), 33–44.
102. This conflict between a set of values encouraged by lists of rights brings about the problem of unmet expectations and crisis of legitimacy.
103. THOMAS GOLD FROST, THE FRENCH CONSTITUTION OF 1793 (New York: A.E. Chasmar 1888).

proceed directly from the nation."[104] Further, law itself in the Declaration was declared to be "the expression of the general will."[105] The result was a centralization of power within the hands of the revolutionary regime; the destruction of counterweights to that regime's power in the form of local governments, social orders, the established Catholic Church, and an independent judiciary; and eventually the fixation of the revolution in the hands of the sovereign—a position claimed at one point by the singular person Napoleon.[106]

More recently, a spate of constitutions in former European colonies and captive nations have declared adherence to a long list of positive rights. Ethiopia's constitution of 1995 guarantees the right to a clean and healthy environment, improved living standards, and "sustainable development."[107] Uganda's constitution guarantees equitable development, food security, medical services, and gender balancing.[108] In both cases, the relevant regimes have committed severe human rights violations and carried on campaigns against dissenting political parties and actors.[109] The relative frequency of coups and counter-coups among such countries is extremely high.[110] In the Eastern European context, Steven Roper has concluded that "less repressive [regimes] have less-enumerated rights"; it seems that freer governments tend not to provide detailed lists of the people's rights, having demurred from taking on such potentially catastrophic responsibilities.[111]

104. *Declaration of the Rights of Man and of the Citizen*, *in* THE CONSTITUTION AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE, 1789-1907, 59–61 (Frank Maloy Anderson ed., New York: Russell and Russell 1908).

105. *Id.* at 59.

106. *See generally* FROHNEN & CAREY, *supra* note 13, at 71–72.

107. CONST. OF THE FEDERAL REPUBLIC OF ETHIOPIA, 1995, art. 43.

108. *See* CONST. OF THE REPUBLIC OF UGANDA, 1995, ch. 4.

109. *Ethiopia 'using aid as weapon of oppression'*, BBC NEWS (Aug. 5, 2011), http://news.bbc.co.uk/2/hi/programmes/newsnight/9556288.stm [https://perma.cc/4ZDA-3JEQ]; Paul Collier & Anke Hoeffler, *Coup Traps: Why Does Africa Have so Many Coups d'. . .tat?* 11 (paper presented at the annual meeting of the American Political Science Association, Centre for the Study of African Economies), Oxford University (August 2005),
https://pdfs.semanticscholar.org/b635/e1df8a93082954af5f76a8f9706096c700d1.pdf [https://perma.cc/C78J-MAQY].

110. Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*," 16 IND. J. GLOBAL LEGAL STUD. 621, 623 (2009).

111. Steven D. Roper, A Comparison of East European Constitutional Rights, 5 INT'L J. HUM. RTS. 30, 30 (2001).

## IX. COSTS AND BENEFITS, OPPORTUNITIES AND DANGERS

As indicated in the discussion of rights, the central problem presented by commanding constitutions is one of overreach. Much of the problem with coups and repression in states in which a commanding constitution is present may be rooted in dishonesty—the constitution itself being a sham. Yet there is a further, more relevant, issue presented by the demands imposed on society and on the central state by commitment to remaking society in accordance with any ideal or ideology.

This is not to say that mediating constitutions will always succeed where commanding constitutions fail. Indeed, one reason the field has been all but taken by commanding constitutions in recent decades is a general impatience with mediating constitutions' way of working; that is, their design to act only in ways and on issues where something close to consensus exists. Such an approach, quite obviously, allows for the existence and even perpetuation of significant injustice. The question which must await further inquiry, then, is whether constitutions (and, more generally, laws) are capable of defeating or stamping out such injustices without consensus—and without so empowering those at the helm of governmental power as to foment violence on a grand scale akin to that of the French revolutionary Reign of Terror or its even more deadly counterparts.