[Beyond providing institutional design, a constitution may also deal in “inspiration,” by seeking to create a demos and thus resolve foundational conflict. This project explores the ways in which the broader judicial system might effectuate or frustrate those latter goals, in both the “First Period” and afterwards. I have identified possible examples to explore but would appreciate hearing other ideas. The following is a draft outline with incomplete footnotes; please do not cite or circulate. I very much look forward to your comments.]

Introduction

Transformative constitutions can arise out of a variety of contexts—from societies in conflict seeking new ways to interrelate or to co-exist to major political and social realignments within existing states, including the emergence of democracy or resurgence of division. These constitutions will likely seek to exhibit a core duality, fulfilling both “the regulative conception” and “the constitutive conception.” In other words, a constitution will both create the institutions of society and provide the inspiration for a political collectivity—the demos. And, as Neil Walker writes, the two aspects are intertwined: political authority necessarily shapes political community, and it is the political community that “lends legitimacy to the authority system.” The link is mutual, ongoing, and reflexive.3

Constructing a constitution to achieve these dual elements presents real challenges. In divided societies, for example, the design focus is likely to be about controlling and channeling conflict, and fashioning the right institutions to do so.3 Constructing the demos raises additional questions about integration, accommodation, and the art of the possible. Integrationists seek a “common public identity without demanding ethnocultural uniformity in private and associational life,” whereas accommodationists “insist[] that in certain contexts, national, ethic, religious and linguistic divisions and identities are resilient, durable and hard.” In these latter contexts, the constitution cannot reflect a pre-existing consensus, nor can it provide a “‘thin’ consensus around a shared liberal political culture.” The art of the possible thus seeks to understand “constitution-making in the absence of consensus on shared norms or values underpinning the state.”6

3 See, e.g., DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT (2d ed. 2000); Donald L. Horowitz, Constitutional Design: An Oxymoron?, in designing Democratic Institutions (Ian Shapiro & Stephen Macedo eds., 2000); Arend Lijphart, Constitutional Design for Divided Societies, 15 J. DEMOCRACY 96 (2004); etc.
4 Choudhry.
5 McGarry, O’Leary, Simeon
Though some have argued that certain types of dissensus are different in kind, leading to different types of constitutional (or quasi-constitutional) solutions, all constitutions are the result of some amount of compromise, and that compromise may be thin. The desire for a second bite at the apple—the chance to continue to negotiate and re-negotiate core constitutional decisions—can both motivate and/or be effected through institutional design.

The stability of constitutional agreements and their effective implementation rests on the manner in which conflict is channeled in the broader system. Many scholars focus on the possibility for new forms of politics and the institutions that might enable them. For example, how likely is it that the rules of the democratic game will allow for/ or foster ongoing societal conflict? Through manipulation of the political process, losers in the constitutional drafting process may be able to make some gains ex post. What are the expectations for electoral politics, the mechanisms of party organization, districting and redistricting, how federal legislatures are constructed, and who votes.

Lawyers, in contrast, tend to focus on the role of apex courts. As a creation of the constitution, this “C”-court might be intentionally empowered as an insurance mechanism or as a democratic hedging device. Or, because of high levels of ambiguity or conflict included in the constitutional project, its power might be a byproduct of an increased need for interpretation. In light of these arguments, it seems likely that in systems with societal divisions, whether instantiated institutionally through federalism or through an incrementalist approach to constitutionalism, the judiciary will be faced with ongoing questions about the nature or extent of the core political community. It is therefore somewhat unusual that there has not been more focus on broader institutional design questions about the judiciary itself and whether it, as a whole, is constructed in a manner that fosters or inhibits constitutional implementation (or transformation).

Beyond the role of the apex court, the broader structure of the judicial system receives less attention. Towering figures in the field of constitutional design, such as Horowitz and Lijphardt, fail to engage with the judiciary. Most federal scholars similarly ignore judicial design. Leading

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7 In their work on religiously divided societies, Asli Bali and Hanna Lerner explore the nature of religious schisms and suggest the constitutional conflicts that arise from religious diversity are different in kind from other types of deep-seated disagreements, resulting in a different approach to constitutionalism that sits outside the liberal constitutionalist paradigm. See Bali & Lerner, supra. It may be true; or foundational constitutional conflict that threatens the constitutional project may be better conceived of as a contextual matter, with certain types of conflict seated on a continuum from the least threatening (or most easily resolved) such as distributional questions, through to greater challenges, typified by classic primordial ties. See Stephen Ellicott Cornell & Douglas Hartmann, Ethnicity and Race: Making Identities in a Changing World, at 51 (citing Harold Isaacs, Idols of the Tribe (1975))

8 Bali and Lerner argue that religiously divided societies will use strategies of incrementalism—including deferral, ambiguity, intentionally conflicting provisions, and non-justiciability—to keep “contentious questions [in] the arena of ordinary politics.” In these contexts, “constitutionalism itself is deferred.” Bali & Lerner, supra, at 293. Or, in the language of this conference, there is no attempt at a constitutional “transformation” or “new beginning.”

9 Horowitz, Rainer Bauböck, Why Stay Together? A Pluralist Approach to Secession and Federation, citation (representation at the federal level); add cites.

10 Tom & Ros (citations cited therein), Issacharoff.

11 See Bali/Lerner @296. See also Lerner on JR.

12 Add cites.

13 See Appleby & Delaney, Valuing Integrity and Diversity in Federal Judicial Design, and sources cited therein. See also Sujit Choudhry, Classical and post-conflict federalism: Implications for Asia, in COMPARATIVE CONSTITUTIONAL LAW IN ASIA (Tom Ginsburg & Ros Dixon eds., 2014) (noting that “judicial federalism has attracted less comparative attention” than other areas of constitutional design).
constitutional consultants have provided only a thin guide to the problem, and often constitutional drafters themselves leave many details to be worked out after the fact.

In this paper, I begin from the premise that in divided societies there will be contestation about the demos and its construction and that the judiciary will likely be engaged with those questions. (I will leave to the side the normative issue of whether it is the best, or even an acceptable, institution to address such foundational questions.) I recognize that judicial independence and the role of the apex courts will influence and be influenced by the broader judicial architecture of the system, but for my purposes here, I want to focus more specifically on the institutional design of the lower judiciary. If the judiciary becomes a site of contestation, does the structure of that system foster constitutional transition or inhibit it? (Note that one of Hitler’s early actions was to shift the federal, dual system of courts under Weimar to a unitary and integrated system.) How does the creation of political community—or the divided nature of the same—play out through these institutions? How does a (generally ignored) institutional structure impact the conditions under which constitutions can be effective and can serve as instruments of social or political transformation?

The Judiciary in Constitutional Design

As noted above, the literature on the “judiciary” is mostly focused on the “C”-court. Theorists have developed factors facilitating delegation of powers to the judiciary, and certain lived constitutional processes, most obviously that of South Africa, have highlighted the potential for apex courts to play critical roles in creating stability and transformation at a foundational moment. In addition, the vast literature discussing the methods of and justifications for various modes of constitutional interpretation serves to highlight the power of and limits to court resolution of ongoing constitutional or societal conflict. And through interpretation, apex courts can have their own effect on the evolution of the constitutional system.

In other work, I have argued that courts can serve a transformational role on their own when presented with functional opportunities to reinforce their institutional status or relevance. In this telling, constitutional change, not intended to be transformative, may become so over time. In the United Kingdom, for example, Parliament enacted legislation protecting human rights and devolving power to the regions; the legislation did make meaningful change but it was not intended to challenge the fundamental principle of parliamentary sovereignty on which the British constitution rests. Nevertheless, due to the increase in boundary disputes and heightened pressures for uniformity that these changes wrought, the U.K. Supreme Court had opportunities to exercise its authority in ways that are moving the United Kingdom towards a legal constitutionalism, with external constraints on Parliament. To understand the opportunities presented to the Supreme Court, it was necessary to go well beyond the legislation and to explore in some detail the relationship between the Supreme Court and the other courts in the broader U.K. judicial system, including the reorganization and

14 International IDEA discussion paper.
15 Appleby & Delaney (US & Australia).
16 Cites.
19 See Delaney, Judiciary Rising.
relationship between the former Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council, the jurisdiction of the High Court of Justiciary of Scotland, and even the jurisdiction and processes of the supranational European Court of Human Rights.  

But such attention to the design of a constitutional system’s broader judicial architecture has been somewhat limited. Even in the federal literature, both empirics and theory are thin. The most sustained assessment of comparative judicial architecture has been done by the Forum of Federations in a volume on legislative, executive, and judicial governance in federal countries. The judiciary rarely received top billing in any individual chapter, but Cheryl Saunders outlines a useful system of classification in the volume’s conclusion.

In federal systems, judiciaries are largely categorized as “dual” or integrated.” And Saunders explains that a dual system is one that “involves largely separate and parallel court hierarchies for each sphere of government, exercising the jurisdiction assigned to the respective spheres.” An integrated system, in contrast, “involves a single court hierarchy, authority over which is likely to be divided between the national government and the constituent units,” although “[it] may be assigned to the national government alone.” These descriptive poles leave a wide variety of systems along the connecting continuum, and more fine-grained details—mechanisms for allocating cases among courts with shared jurisdiction or control over appointments, for example—are omitted. In addition, this internal-to-the-state dual/integrated dichotomy overlooks the variety of judicial systems structured outside the liberal political space—such as religious courts or indigenous courts—or those outside the nation state itself, such as supranational courts.

To provide a rough attempt to generalize, and taking into view the broader set of possible judicial systems in complex/divided states, it is first important to note that courts with authority/capacity to enforce or influence constitutional implementation can be both internal and external to the emerging constitutional order. These courts can reflect a myriad of jurisdictional divisions that could complicate implementation (or transformation): Divisions may be structured by level or order of government, as in state vs federal, but with central appointments (Canada), or with separate control over appointments and subnational constitutionalism (U.S.); or some mixture of the two (Germany). Jurisdictional division may be done by substantive area, as in systems with specified and supranational human rights courts (member states of the European Convention on Human Rights), or in systems that support

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20 In a similar vein, judicial supremacy in the American system cannot be fully grasped without a close knowledge of the U.S Supreme Court’s relationships with the lower federal courts and the state courts. See Friedman & Delaney, supra.


22 Cheryl Saunders, Legislative, Executive, and Judicial Institutions: A Synthesis, in, LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES 344, 365 (Katy Le Roy and Cheryl Saunders eds., 2006).

23 The International IDEA publication adopts similar language, using “separate” or “integrated.” See MARKUS BÖCKENFÖRDE, A PRACTICAL GUIDE TO CONSTITUTION BUILDING: DECENTRALIZED FORMS OF GOVERNMENT 31–32 (2011).

24 Saunders, at 365.

25 Saunders, supra, at 365.

26 See Gabrielle Appleby & Erin F. Delaney, Federalism, Judicial Systems, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW 288 (Rainer Grote, Frauke Lachenmann & Rüdiger Wolfrum eds., 2017); see also Appleby & Delaney, Valuing Integrity and Diversity, figure 1.

27 For an effort to engage in this kind of “comparative federal courts” analysis, see Delaney Rethinking Judicial Federalism (draft on file with author) (comparing the US and Canada); Appleby & Delaney, Comparing Rights and Structure in Federal Judicial Design (draft on file with author) (comparing the US and Australia).
both religious/personal status courts and secular courts (Malaysia, Egypt, etc.), or by *ethnic grouping*, as in systems with tribal courts (South Africa, etc.).

With multiple courts and divided jurisdiction, (in whatever manner it is divided), there is opportunity for ongoing contestation within the judiciary itself. And, thus, the judiciary’s institutional structure will construct—perhaps limiting, perhaps expanding—the opportunities for the apex court to engage with foundational issues about political community. It will also affect the “C”-court’s ability to serve as a mediator of societal tension. This paper seeks to explore how different structures may facilitate constitutional implementation at different stages of a constitutional project/transformation.

**Judicial Design in the “First Period”: Preventing or Assisting Political Transformation?**

The ability of apex courts to assist in constitutional transformation may be compromised from the outset. Apex courts are theorized as serving as an “insurance” mechanism to protect political elites, for a variety of risks, including personal risk, a risk of the loss of political power, or a risk of the loss of policy influence. These different reasons for requiring “insurance” will impact the design of apex courts’ structure and jurisdiction, including size, appointment, and access. It might, therefore, be assumed that an apex court would merely instantiate the version of the constitution advocated by the political elites.

But, as Dixon and Ginsburg have recently argued, apex courts may themselves “adopt a jurisprudence that is . . . not overly aligned with a prior political majority, or deliver some . . . benefit” to conflicting social groups—a “two-sided” jurisprudence that may serve to limit efforts to renegotiate core constitutional bargains. And the broader judicial system will affect this story in a variety of ways: both in terms of the effectiveness of an apex-court as insurance mechanism at all, and in terms of an apex court’s ability to prevent political renegotiation of constitutional bargains and to effect constitutional implementation. In short, the broader judicial system in a divided society will often create opportunities for ongoing contestation of foundational principles; it is an open question (and likely a contingent one) on whether that contestation serves to draw the sting from political renegotiation or to foster political tensions.

**The United States**

In the early United States, the question of constitutional interpretation was multi-layered—at once a debate among the branches of the federal level as well as between the federal government and the states. Part of this debate was the core question of whether the constitution created a compact to which the states were parties (confederation) or whether it created a unified polity (federation). Notwithstanding the Supreme Court’s efforts to claim *for itself* (and *against* everyone else) the authority to say what the law is, state political figures and state courts projected an alternative view. And the dual judicial system and its organizing structure served to exacerbate political tensions, providing political focal points around which to organize and to seek to renegotiate (or in this case relitigate) core constitutional questions. Ultimately, the robustness of the state courts gave additional voice to

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28 Cite tom & ros and citations therein.
29 Marbury v. Madison.
30 Note: plenty of other ways, as demonstrated by Kentucky & Virginia Resolutions, Hartford Convention, etc.
the multiple *demoi* in the system, undermining Supreme Court efforts to give form to the transformational idea of one sovereign people.  

- The ability of state parties to go to state judges (chosen by state) to get “authoritative” constitutional interpretations to bolster state power. For example, in the constitutional crisis surrounding the War of 1812, Northern states sought ways to avoid supporting the federal war effort. Governor Strong of Massachusetts, however, asked the judges of the Supreme Judicial Court of Massachusetts for their opinion on whether he was obligated to call out the state militia. They responded in a letter asserting their view that, under the federal and state constitutions, the Governor had the right to determine the validity of the President’s request for militia. As an advisory opinion delivered by letter, the opinion was insulated from Supreme Court review. It provided, internally to Massachusetts, a legitimizing function for the Governor’s actions.

- Section 25 of the Judiciary Act and the Court’s mandatory jurisdiction over such suits gave control to *litigants* to appeal certain adverse decisions by state supreme courts to the U.S. Supreme Court. This was a mechanism of uniformity and a platform for the Supreme Court to state its understanding of constitutional meaning, but it was also an opportunity for ongoing and politicized contestation over which the Court had little control. (See litigation over Supreme Court’s appellate jurisdiction over the high court of Virginia, and resulting debate in Congress, focusing on the repeal of Section 25 of the Judiciary Act and the revamping of the entire judicial system.) And ongoing recalcitrance from states put enforcement into question (*United States v. Peters*). For example, even after one of the most celebrated cases outlining national power, *McCulloch v. Maryland*, the state of Ohio continued to tax its own Branch of the Bank. In a challenge to that tax, the issue of federal jurisdiction arose and, notwithstanding the Supreme Court’s conclusion in favor of federal courts, the General Assembly of Ohio responded that “the committee are aware of the doctrine, that the Federal Courts are exclusively vested with jurisdiction to declare, in the last resort, the true interpretation of the Constitution of the United States. To this doctrine, in the latitude contended for they never can give their assent.” Perhaps in part because of the robustness of state courts and this particular mechanism of review, the Marshall Court shifted in its approach to state power in the 1830s—shifting to a “two-sided” interpretive approach.

31 Of course, the state legislatures were as/even more important in this regard.
32 See *McCulloch*.
33 See ‘A letter from the Governor of the Commonwealth of Massachusetts, to the Justices of the Supreme Judicial Court, with the Answer of the Justices’ 8 Mass. 548 (1812)
34 Hunter v. Fairfax’s Devisee, 1 Munf. (Va) 218 (1813); Fairfax’s Devisee v. Hunter’s Lessee, 11 U.S. (7 Cranch) 603 (1813); Hunter v. Martin, 4 Munf. (Va) 1 (1814); Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 305 (1816).
The early European Community is perhaps a questionable example of a “First Period” in constitutional implementation, but it presents a nice contrast with the U.S. system for the purposes of discussion. (Other suggestions to research would be appreciated!) In the early decades of integration, the then European Court of Justice (ECJ) (now Court of Justice of the European Union) “constitutionalized” the treaties, vesting certain European laws with direct effect within Member States and supremacy over competing national legislation. The judicial architecture of the Community relied on national courts—lower and ultimate courts—to apply European law. The mechanism of oversight by the ECJ was through a reference mechanism—engaged (largely) at the discretion of the national courts. The architecture of the judicial system both required cooperation between the ECJ and national courts but also allowed for dissensus in ways that avoided broader politicization. The flexibility in the system allowed the ECJ to re-enforce the transformational nature of the EC, and, by developing the direct relationship of European law to the individual through the national courts, to transform the “international” aspects of the Community into a supranational legal order.

- Because of the reference mechanism, the ECJ had to encourage national courts to make referrals in various ways, including by encouraging lower national courts to refer (and thus playing to some extent with incentives within the national judicial hierarchy) and by expanding the jurisdiction of national courts. It also took on an “evangelical mission,” organizing visits to the Court for national judges and lawyers. And even when at odds with national governments, it worked to maintain positive relationships with the national courts. This allowed for a cooperative relationship, and heightened the likelihood that the national courts would apply the law as defined by the ECJ. (National court compliance during this initial period was much higher in the EU than it was in the early US.)

- At the same time, national courts do not have to refer questions to the ECJ. If they so choose, they can make decisions in some tension with the ECJ’s constitutional philosophy. In the “First Period,” the ECJ could not always protect its interests. But this situation has also allowed divergent (or incommensurable) understandings of the foundational nature of the European integration project to coexist, without forcing the dissolution of the project. Core questions of sovereignty and demos have been left open, allowing for constitutional “tolerance,” in the words of Joseph Weiler. In other words, the relationship that has been forged between national courts and the ECJ has allowed for problem areas to be “skirted” through “tacit mutual accommodations.” A national court may choose to protect its claim to sovereignty by not referring a question to the ECJ, and judicial interpretation in a context of cooperation has resulted in “serious conflicts [being] generally avoided.”

41 Stein 1981
42 Granger 2004?
43 Goldstein 2001. See also Pfander, Member State Liability.
44 Weiler 2002.
45 Richard Bellamy & Dario Castiglione, Legitimizing the Euro-‘Polity’ and its ‘Regime’, 2 EUR. J. POL. THEORY 7, 23 (Date).
Judicial Design as a question of “Continuity”: The Problem of Institutional Stability

As noted above, the judiciary serves as an important site of contestation in an emerging constitutional society, and its broader structure will impact how politicized or polarizing that contestation may become. A related issue is, of course, how stable is the judicial architecture itself? As with constitutional design more generally, achieving the appropriate level of stability and flexibility in institutional design can be more alchemy than science. But what levers might political actors have—either to direct or redirect challenges to prevent tension and allow for constitutional transformation, or to create new opportunities for contestation and political gamesmanship or to impose new constitutional meaning?

Malaysia

Malaysia presents a complicated example in which alterations made to the broader judicial system were both created by and have fostered the relitigation of core constitutional compromises. The tenuous truce constructed in the 1957 Constitution between Islamism and secularism was instantiated in a carefully crafted Article 3, which states that “Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation.” This provision was part of an elaborate constitutional compromise, closely connected to the role of the states in the Federation, and to efforts to protect the Malay ethnic grouping (slightly less than 50% of the population just before independence). As Kristen Stilt argues, the protection of Islam was designed to provide insurance to the Malay that other constitutional protections protecting them would be taken seriously.

A vestige of British rule, the judicial system was largely constitutionalized in the 1957 Constitution. At the state level, there were state-level Muslim courts, now known as shariah courts, with jurisdiction over Muslims in personal status and some criminal law. The Federal civil courts addressed commercial, criminal, and administrative law, as well as personal status law for non-Muslims. There is the Federal (apex) Court, the Court of Appeal, and two co-equal High Courts (one for “Malaya,” or the 11 peninsular Malaysian states, and one for “Sabah and Sarawak); the constitution also permits the federal legislature to create lower level federal courts. (The Article 121 Judiciary.) High Courts have “jurisdiction to try ‘all civil proceedings’ and ‘all offences’ arising within its local jurisdiction, giving the Article 212 superior courts their basic plenary federal and state jurisdiction.”

A constitutional amendment, 121(1A) altered the jurisdictional allocations, stripping the High Courts of the Federation of jurisdiction “in any respect of any matter within the jurisdiction of the Shariah courts.” Tamir Moustafa argues that this Amendment was introduced as part of a broader religious revival connected to party politics, but it is impossible to disassociate it from the ethnic

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48 Stilt.
49 Provided by the State List
prioritization ("demographic anxiety") of the Malay.⁵³ Critically, Moustafa argues that there was little evidence of tensions within the court system itself. In fact, the birfurcated system was not a core site of contestation: "civil courts rarely overturned shariah court rulings, and in cases where they had, the rulings were not covered extensively by the press."⁵⁴ And the debate in Parliament was limited and received "no popular awareness outside a small number of lawmakers, legal scholars and practitioners."⁵⁵

In application, by Parliament’s effort to delineate jurisdiction, parties were left harmed but without remedy: a non-Muslim seeking to gain custody over her children (whom the father had had converted to Islam) had “no remedy in the civil courts, nor did she have legal standing in the shariah courts.”⁵⁶ The courts were no longer to thread these needles of personal jurisdiction and family law, and as the High Court judge concluded, it is “for Parliament to provide the remedy.”⁵⁷

The jurisdictional shift, therefore, while it may have been part of a broader attempt to reflect a political commitment to Islam, was not driven by preexisting politicization of the judiciary. Its ultimate effect, however, was precisely that: the dramatic politicization of run-of-the-mill personal disputes. Thus, the shift served to heighten ethnic and religious tension and call into question the delicate balance the constitution had wrought. And the complexities of the legal system were not understood to be the problem; for the Indian and Chinese Malaysians the cases are part of a “broader trend of institutional discrimination against non-Muslims,” and for the ethnic Malays, the cases demonstrate “an attack on Islam and the jurisdiction of the shariah courts.”⁵⁸

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⁵³ Stilt
⁵⁴ Moustafa 779.
⁵⁵ Moustafa.
⁵⁶ Moustafa 780.
⁵⁷ Moustafa 781
⁵⁸ Moustafa 787.