

We start from here

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Abstract As James Buchanan often asserted, in constitutional design “we start from here” which is to say we design a constitution to fit the institutions, social practices and so forth that we already have. Comparison of the complicated case of the US constitution and the failed attempt at constitutionalism in contemporary Egypt suggest that many societies are not yet ready for serious constitutional design. The English civil wars were about religion; the US constitution ignores religion and thereby avoids the grim conflict of church and state.

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In constitutional debates James Buchanan often asserted, “We start from here.” He meant that we do not first design a constitution and then fit our society to it. Rather, we take our prior order into account in designing a constitutional order for now and the next generation or so. That new order will be affected by residues of the past that continue to influence our actions and policies. Many of the US historical residues as of 1787 are very unlikely to be chosen *de novo* anywhere now. For example, no one today would argue for creation of an analog of the US Electoral College, and yet it might be extremely difficult to eliminate that institution through constitutional devices. Several national presidential elections have been wrecked by this perverse

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device. If we wish to craft a constitution today, among the chief issues with which we must deal are many such residues of the variously distant past. Our past essentially is a collection of historical residues, many of which still affect what we can do and what we do. Some of these are not merely still live but remain hotly contested issues.

In Buchanan's slogan, "here" is the mass of historical residues that are de facto the base on which we will build and by which we will be constrained. For example, among the most important of these residues that the Philadelphia conventioners faced in 1787 were the states. James Madison wished to reduce the role of the states and to create a supreme national government (see, e.g., Meyers 1973/1981, 66–69; Robertson 2013, 15). His move failed and the political consequence of the division of the nation into states has been massive and sometimes destructive. The division is often anti-democratic in capricious ways.

The quintessentially English example of an important residue that is so ridiculous that it is the butt of popular satirical humor is the rotten or pocket borough. Such boroughs had lost almost all of their population, but kept their seats in Parliament. The Reform Act of 1832 disfranchised the 57 rotten boroughs and redistributed their seats to larger population centers. This was too comic for Gilbert and Sullivan not to lampoon. In *H.M.S. Pinafore* Sir Joseph Porter sings,

I grew so rich that I was sent
By a pocket borough into Parliament.
I always voted at my party's call,
And I never thought of thinking for myself at all.
Chorus: And he never thought of thinking for himself at all.
Sir Joseph: I thought so little, they rewarded me
By making me the Ruler of the Queen's Navee!

In the borough of Queen's Crawley in Thackeray's *Vanity Fair*, Colonel Dobbin lost all hope of a peerage when his two seats in Parliament were lost under the Reform Act. In one of his sharper puns, Thackeray says Dobbin was both "out of pocket and out of spirits" by that catastrophe and he soon died.

1 Two cases: the US in 1787, Egypt in 2012/14

Let us canvass where is "here" in two instructive cases of constitutional design: the US case of 1787 and the Egyptian case of 2012 and 2014. The US case involves a strong pattern of features that can be analyzed in an account of constitutionalism as a coordination problem (Hardin 2013b). The Egyptian case is an example of constitutional failure as the result of the virtual impossibility of coordination of two implacably hostile groups. Given the familiarity of the US case to most readers here, I will briefly lay out only the Egyptian experience to show its misfit to the general model of coordination on a constitution. These two cases are virtually at the extreme ranges, from the easiest, in the US, to the hardest, in Egypt. Commonplace claims for the genius of the US founders might sooner be about how easy it was to

coordinate the men of Philadelphia on a national government that was substantially restricted to management of commerce.

In Egypt, the voting population is most recently split about evenly between partisans of the Muslim Brotherhood and a collection of other groups loosely united in opposition to deposed President Mohammed Morsi and the Muslim Brotherhood. These include Sunni and Shi'ia Islamists, non-Islamists, those of other faiths, such as Coptic Christians, and secularists. In three separate elections of the president, the legislature, and the constitution, Muslims won by majority in each with very low turnouts. Less than a quarter of potential voters participated in the election of Morsi as president and his victory margin was 51.73–48.27 %. Many non-Islamists were distressed that the Brotherhood was well organized and turned out Islamist voters more successfully than non-Islamists turned out their voters. The non-Islamists believed they had the larger following, and they lost only because they failed to mobilize enough of their own supporters. The Muslim Brotherhood had been mobilizing their partisans for many decades.

Such an election result on a basic constitution is deeply divisive. The Muslim president oversaw and pushed for the hurried drafting of a constitution to replace that of 1971. His concern seems to have been to get the document finalized rather than to get it right or even practical, perhaps because he thought he would rule as he wished once he was ensconced in office. Indeed, in his brief tenure as president he took cavalierly anti-constitutional steps. Perhaps the most blatant of these was to rule that he would have final say over decisions of the Supreme Court, which he could and did arrogantly overturn. In this instance as well as others, he settled sweeping issues by diktat.

Under the new constitution, Muslims would have written initial laws. We might therefore suppose that a plurality of Muslims would follow the lead of the Brotherhood and, on every issue that divides Muslims and secularists, the constitution would be Islamist and anti-secular. Presumably, this means that the constitution, had it been allowed to govern, would itself have divided the society. Indeed, it most likely would have been the principle focus of conflict.

Complaints that deposing Morsi was undemocratic are undercut by the fact that he was autocratic and that his autocratic moves were a violation of his elected role. Consider a major range of issues: the role and status of women in the society. Under an Islamist order, women are likely to be, at best, second-class citizens. Even the criminal law will work against them. We might establish a working constitution that is vicious toward women, denying them the vote or the power to hold office. Once that constitution is in place and is working to help maintain order, the secondary status of women is very well secured against major revision to liberalize. The status of women might therefore be better if the discussions of constitutional design came later, perhaps even to have no constitution at all until there are further social changes. Historically, *this has been the common pattern*. There must be a significant degree of social order in place before constitutionalization if the constitution is to work (Hardin 2013a). Indeed, a large part of constitutionalization will likely be borrowed from the order we already have. We cannot expect that a mere constitution will substantially reorganize the society. It can, however, affirm much of the order we have achieved.

Entering debate over how to frame a constitution might push us into a series of compromises that produce an awful constitution, as in the US constitutional provisions on slavery. It might, again, be better to leave the discussions open lest they lock us into a bad future that is fairly stable with constitutionalization of Islam in its most vicious form. The implication of these constraints is failure to coordinate, which likely means constitutional failure or incapacity to constitutionalize major aspects of the social order. In the face of great stability, some sectors of the society will exploit others. De facto, we might require social change that goes well beyond the Arab Spring before we can successfully constitutionalize our social order. This does not mean anarchy or incipient disorder. We can establish bodies of law in many areas. Indeed, in societies throughout history there was strong social order with stable bodies of law long before there was successful constitutionalism. Buchanan's "here" is not an empty space.

This discussion recalls the slogan that democratic legislative choices are merely about the chaff of politics (Dahl 2006, p. 132). We can deal with choices or actions only at the margins. Similarly, a successful constitution makes a marginal change in our order. In the long run, however, the effects of constitutional stability can be enormous.

The rise or invention of liberalism in the UK and the US was initially a response to murderously violent religious conflict. Generally there was order, but occasionally order broke down, as in the English civil war (1642–49) over a religious Catholic versus Protestant division. Millions died in the era when Hobbes rightly saw life as nasty, brutish, and short. The "here" that he faced in designing a new order severely constrained his theorizing. The Arab Spring has been a similar, but far less violent era in much of the Arab world. Liberalization often seems to require destruction to clear the way for a new order, as in Joseph Schumpeter's (1942/1950) creative destruction. The Arab Spring is an astonishing break down of an ugly coercive order.

Those who do not share the values of the Muslim Brotherhood must be deeply wary of its illiberalism. A typical issue that essentially divides the Arab population is the wave of arbitrary legal trials of individuals accused of blasphemy, which takes many forms and is a capital offense in some Islamic societies. Egypt's president Sisi's has proposed to criminalize "defamation" (*Al Monitor* 16 December, 2014). There is also the looming threat more generally of the adoption of Koranic Sharia law from the sixth and seventh century of the Koran's composition in the communal organization of tribes in the Arabian Desert. Even if I am a member of the majority sect, I might prefer to have peace in the society rather than the turmoil that my own sect would provoke if it had constitutional backing.

In the constitutional era in the US, the main issue was, as stated in the directive to the conventioners of 1787, specifically *to resolve economic issues of interstate and foreign commerce*. As is often noted, for such issues compromise is commonly possible. On issues of strongly held values, such as religious belief and practice, compromise is typically not possible. For example, it is very hard to believe that Morsi or the Brotherhood had any commitment to the separation of mosque and state. On the contrary, their central concern, was to elevate Islam over the state and, more frighteningly, over the individual. In the story of the development of

liberalism and individualism in northern Europe and North America, the greatest difficulty was the separation of church and state, a monumental achievement that has rippled through civic life in most of Europe and North America. Many in the West consider this to be the greatest achievement of liberalism. In his “Letter to America,” Osama bin Laden seems to share the general view of Islamists that, on the contrary, this commitment violates the vision of the Koran, under which the state is ruled by religion.

The Western struggle lasted many centuries and led to many wars, including the English civil war (1642–49). In this development, there were both institutional and individual struggles. The Catholic Inquisition, the burning of Giordano Bruno at the stake, the Salem witch trials, the suppression of Galileo and his science, and many other notable events were incidents in the decline of religious control of thought, practice, and politics.

The current battle over mosque and state in the Middle East is similarly intense and divisive, perhaps even more so. Its intensity is exacerbated by the suddenness of the Arab Spring and the lack of a long drawn out debate. President Morsi’s push to have a national vote on adopting a draft constitution appears to have been an effort to suppress debate and to rush putting into place a partially Islamist rule of law in the heated atmosphere of his gaining power. He was foolish. Had he been more patient, he might have put the constitution to work with less hostility toward liberals and other non-Islamists.

The practical issue that drives the separation of church and state is competing authorities. With separation, the church loses power to punish in this life and secular authorities cannot dictate religious beliefs. Actually achieving separation required centuries in England, and there were serious compromises along the way. A complete *break with religion* did not happen. Rather, there was a complete *break with the Catholic Church* while a new Church of England was invented to replace it. The titular head of that church was the monarch, so that the church was clearly subordinate to secular authorities.

Here is a quick list of some of the major steps toward breaking Catholic control. In 1343 under Edward III parliament removed certain powers of the clergy and certain prerogatives of the Pope. In 1377, parliament demanded that ecclesiastics no longer be appointed to secular offices of state (Guizot 1851/2002, 411). This is the beginning of the separation of church and state by, in these early actions, requiring *the separation of the personnel of church and state*. In essence, during these decades, England moved very far toward the complete separation of church and state, although there were vestiges of the old relationship, with European monarchs sometimes formally heading the national church, as in the UK, and Sweden until recently. Henry the Eighth’s break with the church in Rome many decades later was not a sudden event but was the culmination of a millennium of struggle plus Henry’s couple of decades of personal struggle before his death in 1547. Henry ended the contest of dual authorities, secular and religious. England was the only major nation to accomplish this break so early. Once the break reached this high level, it could not be patched back together by any later Catholic monarch. Many aspects of social life grew to fit the new regime. Ideal theorists might treat this enormous transformation of church-state relations as essentially a principled move. *It was far*

more a pragmatic matter or a matter of contested power. Indeed, principle may have played no role for most of the English governors who moved against the church over several centuries.

The separation of church and state is arguably the single greatest achievement of political thought and practice in all the history of western politics and political thought. That it was achieved by a relatively mediocre collection of men unaccustomed to theoretical argument suggests just how deeply the issue cut in practical life in their time. The position of Islam on mosque and state could hardly be more opposed. As Tocqueville says, “Islam is the religion which has most completely confounded and intermixed the two powers” (quoted in Gellner 1981, 1).

As the relationship with the church stumbled slowly along toward a full rupture, “the development of representative government arose out of the electoral system of England in the fourteenth century; it was determined by no philosophical combination, by no general intention”. As Guizot says, this system arose naturally and spontaneously, out of facts (1851/2002: 328). So too English society and socioeconomic relations stumbled from a medieval world into England, as the country became urban and liberal by small piecemeal changes largely out of the control of relevant governments, which did not know enough even to oversee many of the developments before these were long underway and likely unstoppable and irreversible. The ideas and institutions of liberalism grew in tandem with these social changes. They grew by series of marginal moves that eventually coordinated society on new structures. Such coordination might commonly not be explicable in holistic or general terms.

Ironically, Egypt’s deposed dictator Hosni Mubarak was notably liberal on the biggest of these issues: the separation of mosque and state. He suppressed the Muslim Brotherhood. The bulk of the activists in Egypt’s branch of the Arab Spring seem likely to have been motivated first by civil liberties, especially freedom of speech and assembly and the rule of law. The crowd simply seized freedom of assembly by filling Tahrir Square and other public spaces from which they then could seize freedom of speech. There had been similar explosions, such as in France in 1789, Europe in 1848 and Russia in 1917, but not on the scale of the Arab Spring.

By successfully taking and exercising these rights Morsi and the Brotherhood may have wrecked the hope of firmly establishing them (NYT12-22-12, A4). A *Financial Times* editorial sharply frames the issue, “Egypt needs a statesman, not a sectarian power player.” Unfortunately, the Brotherhood had no Charles de Gaulle, George Washington, or Nelson Mandela to finesse a transition. The Brotherhood played to win, and briefly succeeded. A varied collection of other groups wanted to gain representation in the legislature. If Morsi and the Brotherhood had not gained a majority, virtually everyone might have done well. But the Brotherhood’s aggressive focus on “victory” over liberals, Coptic Christians, Alewites, and other minority groups has widely been called a power grab and has harmed all Egyptians. That move violates the coordination nature of a successful constitution. The Morsi constitution was bound to fail, perhaps disastrously or perhaps by merely being neglected, as Morsi neglected this one virtually from the outset, often justifying his moves by saying there had been mistakes in relevant constitutional provisions.

Oddly, he backed the constitution in rhetoric but disparaged and gutted it in practice, as though he faced a zerosum game.

The deep problem here is to view the constitution as a conflicted issue, with one side as the winner and the other side as the loser. A constitution should be a generally beneficial innovation, on which all can coordinate. When an election is of public officials, there is opportunity to reconsider after, say, 2, 4, or 6 years. In Egypt, Islamists won the struggle, in 2012, to establish a constitution. Mohamed Morsi and the well-organized Muslim Brotherhood appear not to have cared very much about its details but only its immediacy. They wanted only to be ensconced in power with a seeming veil of constitutional legitimacy, and they wanted it NOW.

It might be said that liberals could bide their time until the next election. But this is not a safe hope if they suppose, as surely they should, that Islamists would dedicate themselves to fixing themselves in power for the long haul while they have power. Indeed, we should view a constitution as a device for a much longer haul. It is normally open-ended with no set date for reconsideration and it might hold sway for decades to come. The US constitution has prevailed for more than two centuries with only 28 amendments, some of them merely to correct for unforeseen alterations of social practice, and a civil war.

Writings on the US constitution number thousands of pages, including a few thousand pages that are sharply focused on the events of 1787–1789 around the meaning and adoption of the document. We cannot presume to know any similar panoply of views and expectations of the Egyptian constitution that was drafted late in 2012. That constitution has provoked hostility ranging from irritation to outrage (which, alas, follows too readily and too glibly) in the evaluations of heated bloggers on the internet. There was little concern with separation of mosque and state. The Brotherhood wanted the state to be ruled by the Koran. That stance was affirmed in the initial politics under the new constitution, which harshly violated the principle of separation and shattered the newly established government.

Morsi, and the Brotherhood had a near monopoly of formal power, as constrained only by the mob democracy in Tahrir Square and other public spaces in greater Egypt, and by the military. As many have seen, democracy in the Middle East begins with the counting of votes, and it ends there too (Eldar 2013). Constitutionalism has had a similar fate when faced with power in many cases, including Egypt. Contemporary Hungary under Viktor Orban's democratically elected but anti-democratic regime ensconces Orban in autocratic rule. Many observers of Egyptian society feared essentially the same transition by legal means to a viciously anti-constitutional Islamic regime.

It is commonly asserted that Morsi and company avoided discussions and compromises with non-Islamists. They wanted immediate control of the government and a rigid commitment to the elevation of Morsi as president and to the draft constitution, all in order to set Islamist views in concrete as firmly as possible. Indeed, they drastically increased the practice of jailing anyone who committed blasphemy to Islam, the Koran, or President Morsi. Two centuries after the disgraceful Salem witch trials, they wanted a more expansive version of such trials. And they wanted this as they wanted other things: *now*.

Yasir al Burhami (2013) and other Salafist leaders of the Al-Nour Party in essence advised that *Islamists such as the Brotherhood and Morsi should wait until order was clearly re-established to enter elections*. As Muhammed Hussein of the Brotherhood said, the country was on the brink of collapse from Hosni Mubarak's reign. "We will not nominate a president for at least two presidential terms, or 12 years, and we will not nominate a prime minister for at least one term, or 5 years." This was pragmatic wisdom, not principle. Morsi and company ignored this wisdom and foolishly put themselves in office almost instantly. Also almost instantly, they brought about further massive disorder. The era of democracy as mob rule has now wrecked any hope of patient, slow, peaceful, orderly politics, especially constitutional politics for the long haul. Order is prior to ordinary as well as to constitutional politics. Mobilization of civilian support in using the mob to push agendas and to suppress popular actions is apt to be very destabilizing.

2 The political logic of the separation of church and state

In the US constitutional debate, separation of church and state was virtually necessary because the nation in 1787 was much too fractured into many religious sects, none of them dominant, virtually all of them hostile to the others. Even with emigration none of these groups could sensibly have hoped to gain ascendancy over the others. It is possible that virtually all religious groups, pushed to the wall by the logic of the case, would have preferred separation, because that would protect all of them from any push to secure one religious faith over others, and would especially block political attack on their own religious beliefs. Rather, for each group the preferred position would have been to have power over religious policy for themselves alone, but this was not possible. Next in preference, each group would want to block all groups at the cost of blocking even themselves as well.

But the logic of the case does not end here. In Egypt one might argue for separation *just because there is a very dominant religious group*, the Sunni Muslims. If religion and religious practice can enter into government policies, and into laws, then the majority religion might be coercively imposed on others. In Osama bin Laden's anathematizing of an irreligious government—explicitly the US government—the conflict over religion might become vicious and divisive. The only secure barrier to this conflict is to remove it from politics, to silence its voice in the constitution. That would mean that the constitution would not govern all aspects of life—but no constitution does. Here we would leave religion out of it so that each of us might practice a faith without coercion by some state authority.

The peculiar problem for Egyptian constitutional design is that, *for Islamists, political Islam is the main interest in organizing politics*. They ardently want Islam to govern politics. In the US in 1787 commerce was the dominant concern for a large fraction of the population, especially the elite, including most of those working for the constitution. Most participants in the US debates were willing to leave religious issues out of constitutional arrangements, letting those issues care for themselves in a sense. Several Republican candidates for their party's 2012 nomination for the US presidency insisted that religion was part of the vision of the

so-called founders of the constitution of 1787. This insistence is a distortion and debasement of the understanding of the 1787 constitutionalists who very deliberately and clearly excluded religion from the constitution. Slight wisps of religiosity—George Washington faithfully attended church—are seized upon as trumping the loud central message of the constitution. Such claims are deeply silly. There were surely people who were disappointed by the omission of religion from the constitution. The logic of the matter, however, in the face of the astonishing multiplicity of US faiths,¹ is that no particular religion could sensibly be given a constitutional power of enforcement. That would be grievously destructive. If Islamists in Egypt were given such power, the consequence would be divisive and possibly bloody conflict focused on this single issue.

The problem of Islamists who wish to constitutionalize and legalize religion is that they must surmount the antagonism of alternative Islamic visions. There is plausibly no better statement of the issue than that of James Madison in his “Memorial and Remonstrance” (1785) against “A Bill establishing a provision for teachers of the Christian Religion” in Virginia. That bill would essentially have established the Episcopal Church by dedicating public funds to its clergy. Madison argues against this bill that if enacted and “if finally armed with the sanctions of a law, will be a dangerous abuse of power.” Further,

the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation (p. 9).

Patrick Henry and other supporters of state funding for religion lost both to superior politics and superior argument. Madison’s principle of separation prevailed and later entered the Bill of Rights to the US constitution. Rick Santorum and others today have failed to trump Madison’s powerful arguments on this issue, although political Islamists strive to reject his equivalent arguments through the use of political force, not by superior argument, which they might not recognize in any case.

Madison’s argument devolves freedom of religion onto the individual citizen, not onto the state. For many centuries, the Catholic Church dominated life personally, communally, and nationally. Today many Islamists think that the Koran should similarly dominate many societies, even coercively, as the Saudi Wahabbists coercively govern all of Saudi society. This issue had been settled against religious coercion for several centuries before 1787 under the leadership of England’s Henry II and many others, as the centuries passed. If we start from here to design government in the US, we start from 1787 in general and from freedom of religion most sharply.

When groups are as deeply divided as in Egypt today, any move to a constitution must simply leave certain major areas and issues out of the constitution. Unfortunately, even this might not be successfully do-able in Egypt today for the

¹ Jon Butler (in Butler et al.) tallies no less than 27 faiths in the period between 1690 and 1770.

distressing reason that rigid Islamists insist that everything must be constitutionally included because the Koran must govern everything. The Indian constitution separates some constitutional provisions into Hindu, Muslim, and secular systems. So, for example, family law follows one of these systems, roughly at the choice of any individual. Arab Islamists might not allow an analogous policy.

A major respected national leader, perhaps similar to Nasser, might be able to unify much of Egypt, so that mob-democracy could be fairly coherently directed toward the single leader. If such a figure does not arise, it seems likely that Muslim forces will continue to fragment the society. Mobilization of civilian support in using the mob to push agendas and to suppress popular actions might be effective and important into the foreseeable future. Such mob action, however can have its potential for unity and liberalism misdirected. Protecting civil liberties is hard enough in a relatively stable society. A society that offers claims that blasphemy is a crime to be severely punished and a religious practice that is decentralized through a system of amateur imams who can prosper and even thrive on extremist claims is radically uncontrollable and likely disruptive.

It is typical that the forces mobilized against a ruler or government are likely to be quite varied, while those defending a regime or a leader are not so diverse. For example, the mass movement behind deposing Hosni Mubarak was unified in its purpose, the simple, clear goal to oust Mubarak. By comparison, the movement to create an alternative regime looks splintered and varied, with liberals and conservatives, Sunnis and Shi'ites, Salafists and Coptic Christians, all mobilized first against Mubarak and then at loggerheads over creating an alternative government. Deposing a hated ruler is virtually a game of harmony. We all want you to leave and we all give you a shove, but we might not have an agreeable alternative. Once we have dared to push you out, the real, grinding work begins.

Those responsible for removing Mubarak were not a disciplined and organized group or small number of groups. They were a relatively anarchic mob, no doubt of constantly changing membership, swelling and ebbing over the weeks of turmoil. Those working to elect Morsi in 2012 and those fighting to restore him after the military coup were far better organized and more disciplined than their opponents. The major disciplined groups were the military, remnants of the prior regime of Mubarak, and the Muslim Brotherhood. These groups were, of course, not harmoniously motivated. The Brotherhood was largely hostile to all other groups. During several mass events that brought people to the streets, all of these groups may have suffered losses of commitment and discipline.

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