THE TENSIONS OF CONSTITUTIONAL DEMOCRACY

CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER. By Walter F. Murphy.[1] The Johns Hopkins University Press. 2007. Pp. xviii–547. $55.00.

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In *The Federalist*, No. 1, Alexander Hamilton, noting that the people were "called upon to deliberate on a new Constitution for the United States of America," insisted that the "subject speaks of its own importance."[3] Hamilton would quickly cast this in sweeping terms suggesting—in a phrase I am hesitant to quote as it is called forth so frequently I fear making it trite—that in deliberating on the Constitution the people were deciding whether government could be constructed by "reflection and choice" and not simply by way of "accident and force."[4] Yet in the closing paper of *The Federalist*, No. 85, Hamilton would make some concession to accident, openly acknowledging that the Constitution came from imperfect hands under imperfect circumstances: "I am persuaded that it is the best which our political situation, habits, and opinions will admit, and superior to any the revolution has produced."[5] Here Hamilton captured the peculiar nature of modern constitution making at its birth. Modern constitutionalism is a self-consciously reasoned attempt to bring a polity into being. And yet, in doing so, a constitution must accommodate the particular people it is created for, bending here and there to their habits, opinions, and circumstances; that is to say, to accident if not force. In just this manner, a constitution may embrace universal principles, but it does so for a

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3. THE FEDERALIST, NO. 1, at 1 (Hamilton) (Clinton Rossiter ed., 1999).

4. *Id.*

5. THE FEDERALIST, NO. 85, at 491 (Hamilton) (Clinton Rossiter ed., 1999).

particular people, marking its boundaries by way of the people, even while attempting to cultivate and sustain that people's attachment to the constitution.[6]

Needless to say, this is a difficult and complex enterprise. If we take *The Federalist* seriously, looking "forward with trembling anxiety" to the completion of the American Constitution, whether our great experiment has been entirely successful is an open question.[7] It is one thing to create a constitutional democracy, no easy task, it is quite another to sustain it, as Abraham Lincoln noted on the eve of the Civil War.[8] And it is, in a sense, a perpetual endeavor. It is this fraught enterprise that Walter Murphy's *Constitutional Democracy: Creating and Maintaining a Just Political Order* sets out to capture. McCormick Professor of Jurisprudence Emeritus at Princeton University, Murphy is one of the most influential constitutional scholars of the twentieth century—Justice Samuel Alito is a former student— and a decorated Marine.[9] As if that were not enough, in the midst of his academic career, Murphy also penned several very successful novels, most notably *The Vicar of Christ*, which, as it happens, did not center on the small world of academic infighting and romance.[10] With *Constitutional Democracy* Murphy returns to more standard scholarly fare—even as he draws on his skills as a novelist in the opening half of the book—giving us a fitting capstone to such an illustrious career.

Constitutional Democracy is an extraordinarily ambitious book, taking as its model nothing less than Aristotle's *Politics* (if operating in more circumscribed terrain). In this, it brings together a blend of the theoretical and empirical that captures the sort of political science practiced by Montesquieu and Tocqueville and traced to Aristotle in its understanding of a re-

6. *See* GARY JEFFREY JACOBSOHN, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES (1993).

7. THE FEDERALIST, NO. 85, at 495.(Hamilton) (Clinton Rossiter ed., 1999).

8. Abraham Lincoln, *First Inaugural*, *in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS (Roy P. Basler ed., 2001) (hereinafter BASLER).

9. Most prominently, Murphy has given birth to the "Princeton" school in constitutional thought, leading essays of which are gathered together in CONSTITUTIONAL POLITICS (Robert P. George & Sotirios A. Barber eds., 2001) and the casebook AMERICAN CONSTITUTIONAL INTERPRETATION (Walter Murphy, et al. eds., 2003). He is also the intellectual godfather to studies of "strategic" judicial decision-making, pioneered by his WALTER MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964), and was a pioneer as well in the comparative study of law and courts, *see* WALTER MURPHY & JOSEPH TANENHAUS, COMPARATIVE CONSTITUTIONAL LAW (1977).

10. WALTER MURPHY, THE VICAR OF CHRIST (1979).

gime.[11] Murphy's general analysis seeks to illuminate how constitutional democracy is created, maintained, and changed. Yet these analytical distinctions are brought to life by an empirical and comparative analysis that is remarkable in its breadth and erudition. Murphy moves seamlessly between political philosophy and the concrete circumstances of particular regimes. We thus come to understand constitutional democracy as it is manifest in particular regimes and our understanding is deepened by comparing and contrasting these regimes. Inevitably, the overarching nature of Murphy's project marks a general path and defense of constitutional democracy, offering puzzles for us to ponder and weigh, without giving us easy answers.

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Murphy begins with the fictional nation of Nusquam, a nation just delivered from tyrannical government, as it undertakes the process of creating a new regime. In the first three-fifths of the book we follow the imaginary founders of this polity as they attempt to construct an order that is both just and possible given the not particularly fortuitous circumstances of Nusquam. The delegates debate the merits of alternative political systems, weighing issues of justice and morality against practical political concerns: what can politics realistically achieve, how should moral disagreements be dealt with, what will this particular people at this particular time be willing to accept? Murphy frames this opening section as a Socratic dialogue of sorts to let the issues speak for themselves. Yet the dialogue, in the form of the convention debate, does not exert a force of its own, ineluctably drawing us to certain questions, and entertaining us with the charm and wit of the exchange. It does not come to life in the manner of a Platonic dialogue. Indeed, the dialogue is interspersed with lectures from professors who speak to alternative political systems and, as we descend to particulars, the various elements at play within constitutional democracy.

In these debates, we hear the voices of modern thinkers—Robert Dahl, Richard Posner, John Rawls, and Robert George are a few obvious examples—brought to life by various dele-

11. ARISTOTLE, THE POLITICS (Stephen Everson ed., 1988); MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne Cohler, Basia Miller & Harold Stone eds., 1989); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield & Delba Winthrop, trans., 2000). For an insightful discussion of this sort of political science, see JAMES W. CEASER, LIBERAL DEMOCRACY AND POLITICAL SCIENCE (1990).

gates.[12] Murphy makes one professor all too real in delivering a flat lecture that requires, quite literally in the book, espressos all the way around to hold the delegates' attention. One can feel the collective discomfort of the room and is not altogether pleased to be subject to it. This is so even when those professors whose lectures are seasoned with wit and eloquence interrupt the dialogue and step to the lectern. It also captures a truth about modern constitution making: academics, most notably law professors, have been, for good or ill, a highly visible presence at recent constitutional conventions, seeking to educate would-be constitution makers by instructing them on the virtues and vices of different electoral systems, bills of rights, and judicial review, to name a few of the issues Murphy highlights.[13] This does, I suppose, cast the convention in a more realistic light. If ideal founders would be "both philosophers and statesman," this is a combination rarely seen at actual constitutional conventions. As Murphy himself says, "it is unlikely that either learned scholars or experienced statesman would look on this group as exemplary models for constitutional engineers" (p. 325).

Thus, despite the opening dialogue form, reading *Constitutional Democracy* is more like reading Aristotle than Plato. This is fitting in that Murphy's understanding of the constitutional enterprise draws deeply on Aristotle, going so far as to define a constitution as "a way of life" (p. 13). And even while Murphy thinks of constitutionalism in modern terms as a "normative political creed" that places limits on governmental power, he insists that this inevitably shapes the nature and character of a given regime—that is, its way of life. Murphy thus does not defend constitutionalism—as liberalism is at times defended—as "value neutral."[14] On the contrary, it rests squarely on substantive values, which inexorably shape the nature and character of the political community.

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The essence of constitutional democracy, according to Murphy, is that it recognizes the "equal dignity" of human beings, in-

12. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989); ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2001); JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, POLITICAL LIBERALISM (1993); RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999); ROBERT P. GEORGE, MAKING MEN MORAL (1993).

13. CASS R. SUNSTEIN, DESIGNING DEMOCRACY (2002).

14. See, for example, AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004), which builds on RAWLS, POLITICAL LIBERALISM, *supra* note 12.

cluding "a wide degree of individual liberty." Constitutionalism insists on settling some moral issues first, while democracy lets them be settled by process. This blend of constitutionalism and democracy is in tension with itself, and thus requires particular care in being nurtured. This tension, though, can be healthy: rather than settling political conflict, it channels and institutionalizes it, giving the people a stake in self-government, by making the stakes low enough to provide for stability and unity. True, at first blush, many sympathetic readers of Murphy will pause, if not groan, over the phrase "equal dignity." It need not be so. The phrase has surely been abused and often in the name of making unequal things equal in dignity. But in some sense the recognition of equal dignity is an apt characterization of a polity that attempts to empower and limit government: it is created by human beings for human beings, precisely because human beings are neither gods nor beasts. Even if human beings are not equal in all aspects of moral worth, this does not entail the claims of some to rule others.

Such an understanding threads its way through Thomas Jefferson's thought. We see it in his "Summary View of the Rights of British America," where he insists that every individual American colonist is equal to every British elector in "virtue, in understanding, and in bodily strength;" in the Declaration of Independence's "self-evident truth" that "all men are created equal;" and it may be said to culminate in Jefferson's insistence on "the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God."[15] Lincoln repeatedly turned to Jefferson's understanding in rejecting slavery and arguing for the experiment of self-government, going so far as to declare: "I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence."[16] He would point to it, again and again, in arguing for the equal dignity of blacks as he attempted to persuade his fellow Americans of the evils of slavery and the fact that it *degraded* both blacks and whites. And he cast his argu-

15. THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 435–41, at 437 (PHILIP B. Kurland & Ralph Lerner eds., 1987); Thomas Jefferson, *Declaration of Independence* (1776), *reprinted in* THE FEDERALIST PAPERS, *supra* note 3, at 528; Letter from Thomas Jefferson to Roger C. Weightman, (June 24, 1826), *in* THOMAS JEFFERSON: WRITINGS 1516–17 (Merrill D. Peterson ed., 1984).

16. Abraham Lincoln, Address in Independence Hall, Philadelphia, February 22, 1861 *in* BASLER, *supra* note 8, at 577.

ment in terms of "equal dignity," insisting that, "in the right to eat the bread, without the leave of anybody else, which his own hand earns, he [the Negro] is my equal and the equal of Judge Douglas, and the equal of every living man."[17]

For Lincoln such a right flowed from the natural rights of all human beings. Murphy hesitates, however, to found constitutional democracy on natural rights. While he insists upon limits that stem from some notion of right, he is skeptical of so-called negative constitutionalism, affirming a positive constitutional vision that poses an obligation and duty to "assist citizens in achieving good and just lives."[18] This understanding is most visible when Murphy's delegates debate abortion and the logic of a "perfectionist state." In each instance, the concern for promoting moral character and the process of "human moral improvement" is played out in terms of the value and dignity of human life. If, in this Socratic enterprise, Murphy's own understandings are never wholly clear, his discussion makes clear that recognizing the "equal dignity" of human beings does not prohibit the polity from making moral judgments.[19] It may, in fact, invite sterner judgments than one usually associates with constitutional democracy. At times it even seemed that Murphy was swept away by these "aspirational" elements of constitutional democracy to the neglect of its grounding in the limits of politics. But at these moments, Murphy usually swerved, insisting on positive constitutional aspirations, but tempering them with a prudent assessment of constitutional limits and possibilities, yielding a rough balance of aspirations and limits.[20]

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For Murphy this combination of aspirations and limits is central to understanding and interpreting a constitution—

17. Abraham Lincoln, First Joint Debate, *in* THE LINCOLN-DOUGLAS DEBATES 53 (Robert W. Johannsen ed., 1965).

18. On positive constitutionalism, *see* SOTIRIOS A. BARBER, WELFARE AND THE CONSTITUTION (2003).

19. This makes Murphy's argument for constitutional democracy rather different from RAWLS, POLITICAL LIBERALISM, *supra* note 12, or somewhat similar arguments such as RONALD DWORKIN, FREEDOM'S LAW (1996), which both begin from a notion of "equal concern" or respect.

20. See GARY J. JACOBSOHN, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION (1986), for a critique of "aspirational" accounts such as Ronald Dworkin's, which tend toward general moral aspirations, which are rooted in abstract moral theorizing about equality, and must be distinguished from *constitutional* aspirations, which inhere in the political principles the document itself rests upon. Accordingly, not all moral aspirations are equally *constitutional* aspirations.

whether or not it is written. A written constitution may be a sham that in no way captures the actual nature of the government—its real constitution—as in Stalin's Soviet Union. Alternatively, constitutional democracy does not require a formally written constitution. Not only is there Britain's unwritten Constitution, and Israel's, but the Declaration itself speaks of violations of "our constitution" prior to America having a written constitution.[21] Given this, Murphy suggests a distinction between a constitutional text and a constitutional order as they are not coterminous.

Even turning to written constitutions, putative "strict" textualists must make sense of particular provisions in light of the whole constitution, which requires them to understand more than its particular clauses. Or if we turn to original meaning as central to maintaining a written constitution, we move beyond the text to capture the true meaning of the words and how the words, situated within the whole of the constitution, apply in the circumstances before us. Interestingly, the insistence that one must never move beyond the text stems from a narrow modern legal positivist bent of mind that doubts what Hamilton called "the reasoning spirit."[22] Perhaps most prominently, Hugo Black and Robert Bork capture this furnishing of mind in insisting that whenever we depart from the letter of the text, we turn the only place we can, inward, to our own subjective desires: to what Justice Black, conflating "natural law" and "judicial will," mistakenly called a "natural law . . . excrescence on the constitution."[23]

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21. It might be said that Israel, with its series of written Basic Laws, now has a written constitution. But, even if granted, this would suggest some difference between a formal written constitution and a series of Basic Laws that might move in that direction. It would also beg the question: did Israel have a constitution prior to the passage of the Basic Laws? It would certainly be plausible to argue that it did. See, for example, JACOBSOHN, APPLE OF GOLD, *supra* note 6.

22. THE FEDERALIST PAPERS, NO. 78 (Hamilton) (Clinton Rossiter ed., 1999).

23. Adamson v. California, 332 U.S. 46, 75 (1947). *See also*, ROBERT H. BORK, THE TEMPTING OF AMERICA 139–41, 265 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). As Scalia argues, "Now the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge; perhaps no conscientious judge ever succeeds entirely." *Id.* at 863. Originalism and textualism are put forward by Bork and Scalia as the only way to obviate this problem. There are, of course, legal positivists who take a different view. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW (1961) and the famous Hart exchange with Lon Fuller, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). *See also* BRIAN Z. TAMANAHA, ON THE RULE OF LAW (2004).

This move to constitutional text divorced from its presuppositions oddly inverts the project of a written constitution: the whole of a constitution is viewed through the lens of the judiciary as if the purpose of a written constitution was to bind judges. Yes, movements beyond the text have been much abused by judges. But Bork himself commits such textual abuses in describing the ninth amendment, and the privileges and immunities clause of the fourteenth, as textual "inkblots." [24] As does Black, in whose hands the "text" of the Constitution becomes portions of the Bill of Rights to the neglect of the Constitution itself. This speaks to Murphy's longstanding insistence that we must analytically separate the question of "what" a constitution is from "who" may interpret it, as constitutions operate far beyond the courts and, hence, must be understood independently of them.[25]

We might gain a better sense of what it means to take a constitutional text seriously, even while rooting it in deeper *constitutional* principles, in thinking that the fixed principles of a constitution are to be applied in changing circumstances. In moving beyond the written constitution to the philosophical principles antecedent to it, we do not turn to an empty and unreasoned world where anything goes, but to a disciplined and reasoned enterprise that seeks to draw out principles that inhere *in* the constitution itself. And, as Murphy insists, this is not a task for the judiciary alone, as the other branches of government (and even the people themselves) interpret a constitution. In fact, many recent constitutions have provisions that are not subject to judicial interpretation. The Irish Constitution, for example, explicitly prohibits judicial enforcement of some provisions, leaving the enforcement of these provisions to the judgment of the legislature and the people. Thus, the most powerful expounders of constitutions do not always sit on the bench. Murphy is absolutely right, I think, in arguing that the most important act of constitutional interpretation in American history is Lincoln's First Inaugural, which begins from constitutional text but connects it to the very nature of the Union that the text was meant to serve.[26]

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24. *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Committee on the Judiciary*, 100th Congress, First Session 249 (1987). See also RANDY BARNETT, RESTORING THE LOST CONSTITUTION (2004).

25. Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POLITICS 41 (1986). See also GEORGE THOMAS, THE MADISONIAN CONSTITUTION (forthcoming, Johns Hopkins University Press).

26. Abraham Lincoln, First Inaugural Address, March 4, 1861 *in* BASLER, *supra* note 8, at 578–88.

Thus, while a written text may provide a means of limiting government, establishing rights, and settling some forms of disagreement, it has its foundation in being intelligible to the people and their representatives. As Murphy's Professor Deukalion of Princeton ventures, "The debates, arguments, even turmoil that proposing a constitutional charter breeds will provide superb instruction for your people. They can begin to learn to be citizens of a constitutional democracy by acting like citizens of a constitutional democracy" (p. 193). If the written constitution is not fostered by political institutions and citizens, it will become, in Madison's phrase, a mere "parchment barrier."[27]

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In taking up how to foster and maintain constitutional democracy, Murphy begins with "creating" and educating citizens, noting, following Aristotle, that "the 'excellence of the citizen must be an excellence relative to the constitution'" (p. 342). This requires the forging of a national identity that, depending on the particular regime, may also entail attempts to change the political culture, altering the habits and beliefs of individuals. Such a delicate endeavor must teach citizens how to reason and think about politics. Insofar as constitutionalism has universal aspirations, this also entails the hopeful development of human beings as such. Let me hasten to add that for Professor Murphy this does not entail turning religious believers into Rawlsian deliberative democrats. Yet he is also shrewd enough to note the value of civic *belief*, drawing on Madison's insistence that the "prejudices" of the community are beneficial in sustaining a regime.[28] Even if constitutional democracy is a reasoned endeavor, not all citizens will embrace it in such terms and not all elements of the regime will be brought about by reason.

"Accident," in Hamilton's terms, is ever present in the profoundly different forms constitutional democracy may take. Murphy's comparative political science is illuminated by Montesquieu's observation that the laws of different regimes "should relate to the degree of liberty that the constitution can sustain."[29] This depends on the conditions and culture of a particular place. Throughout the book, Murphy turns to comparative examples to illustrate how different polities have wrestled with similar problems. The liberty that each polity can sustain differs. Surely this

27. THE FEDERALIST, NO. 48. (Madison) (Clinton Rossiter ed., 1999).
28. THE FEDERALIST, NO. 49 (Madison) (Clinton Rossiter ed., 1999).
29. MONTESQUIEU, *supra* note 11, Book I, ch. 3, at 9.

is something we should understand as America attempts to construct a constitutional democracy in Iraq. What would be inappropriate and illiberal in America, may well by reasonable and just in Iraq. This is not an embrace of moral relativism. Murphy's constitutional delegates debate the issue in illuminating ways, with the relativists coming in for a drubbing by, in many cases, religious believers offering philosophical arguments. Rather, it is to recognize that the same general principles will have different applications depending on the peculiar characteristics of a nation's political culture. Knowing that principles must accommodate "accident," Murphy's insists throughout, is to recognize prudence as a driving force in politics.

This insistence leads Murphy to take up the vexing issues that new constitutional democracies wrestle with in nearly forcing people to be free, creating and rebuilding "the machinery of state," and dealing with deposed tyrants. Prudence may require that an emerging people's liberty be limited, or that the evils of the past go unpunished. At an abstract level, such decisions may be at odds with justice, but insofar as imperfect human beings are attempting to forge a just form of government in imperfect circumstances, such moves may be justified—may even be just.

Sustaining a fragile constitutional democracy may lead us to prohibit political parties and political speech that advocate the overturning of the constitutional order. Surely, many will respond, we cannot limit the rights of speech and association, which are often taken to be foundational to constitutional democracy. Murphy suggests otherwise, drawing on "Article 21 of Germany's Basic Law, which recognizes a right to form parties, . . . but . . . authorizes the Constitutional Court to hold them unconstitutional if they seek 'to impair or abolish the free democratic order or to endanger the existence'" of the nation (p. 522). Even if we would rather not restrict the political process, or prefer to allow widespread speech, it would be foolish to do so if it genuinely threatens to undermine a constitutional democracy, replacing it with tyranny. A constitutional democracy is not required to "quietly submit to assassination" (p. 524). In drawing out this elementary lesson, Murphy also rejects the notion that what binds and legitimizes government is consent by way of the democratic process. If the people elect a tyranny, it does not make a tyranny legitimate.

Casting an eye to this occurrence in Weimar Germany, we should not trust in pious maxims that "truth" will always win out in the "competition of the market."[30] An established constitutional democracy, like the United States, may let the advocates of violently overthrowing the constitutional order have their say. But such a judgment is prudential. As a matter of principle, a constitutional democracy may find it necessary to insist that political parties and political speech accord with the foundations of the constitutional order. No doubt, this should include an expanse of political understandings, but it does have very real limits—all the more so in emerging regimes where parties that actively reject the essence of constitutionalism and democracy may be prohibited.

Murphy's timely discussion of "emergency powers" might also be viewed from this angle. Since the inception of the American Constitution, which provides for the suspension of the writ of habeas corpus in times of crisis, many written constitutions have provided more elaborate textual guidance as a way of invoking and limiting emergency powers. In some sense, this may provide for "constitutional dictatorship," but attempts to keep it *constitutional*.[31] While there is the risk that extraordinary powers will be abused, there is the recognition that there are occasions when the polity truly is at risk. Lincoln, characteristically, cut to the heart of the matter: "is it possible to lose the nation, yet preserve the constitution?"[32] At the same time, as Lincoln insisted, in saving the nation, we want to keep it "worthy of the saving."[33] As Murphy puts it, "What doth it profit citizens of a constitutional democracy to preserve national security at the cost of becoming denizens of a police state?" (p. 494). Perhaps most famously, the Weimar constitution enabled the government, by way of Article 48, to authorize emergency powers that allowed for the suspension of certain constitutional provisions. The tex-

30. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). As John Milton famously argued, "And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter." JOHN MILTON, AREOGAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON 45 (1999).

31. CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP (2002). *See also* JOHN E. FINN, CONSTITUTIONS IN CRISIS (1991).

32. Abraham Lincoln, Message to Congress in Special Session, July 4, 1861 *in* BASLER, *supra* note 8, at 598.

33. Abraham Lincoln, The Repeal of the Missouri Compromise and the Propriety of its Restoration: Speech at Peoria, Illinois, October 16, 1854 *in* BASLER, *supra* note 8, at 315.

tual and historical arguments that persist in regard to the Weimar constitution, as well as the often elaborate incorporation of emergency powers in recently drafted constitutions, do not provide easy answers to such vexing questions. Article 48, it has been suggested, was used effectively in the early years of Weimar to maintain the constitutional order. Yet it is also undeniable that the frequent invocation of a "state of exception"[34] in the latter years of Weimar provided, at the least, a bridge to the dictatorship of Adolf Hitler.

While a constitutional text might explicitly command that public policies conform to "constitutionalism's basic principles," Murphy illustrates that the dilemmas of sustaining a constitutional democracy in the face of genuine threats, both internal and external, are not easily amenable to textual solutions. The trouble with the Weimar Republic may be best symbolized by Thomas Mann's quip that "it was a republic without republicans," illuminating Murphy's insistence on the centrality of creating constitutional citizens (p. 166). This also lends powerful support to Murphy's insistence that constitutional interpretation and maintenance are duties of all the branches of government: a constitution is more likely to be maintained if each branch acts to uphold it. Just as we cannot trust in a written text alone, neither can we trust that courts will preserve constitutional government for us. Thus while the particular form of the American separation of powers is not a constitutional necessity, such an understanding illustrates how some version of separated powers, refusing to repose trust in any one center, is at the root of constitutionalism.

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Such an understanding of constitutionalism also raises questions of its inherent limits, which brings me to one of the most interesting puzzles in Murphy's book: can an amendment to a constitution, even though it adheres to formal procedures, be unconstitutional? Murphy's argument, that procedurally correct amendments can still be unconstitutional, cuts to the essence of constitutional democracy. As Murphy explains, there is a

> difference between *amending* and *replacing* a constitutional text or constitutional order. The word *amend* comes from the Latin *emendere*, to correct. Thus an 'amendment' corrects or modifies a system without fundamentally changing its na-

34. CARL SCHMITT, POLITICAL THEOLOGY (1985).

> ture—that is, an amendment operates within the boundaries of the existing constitutional order. Abolishing constitutional democracy and substituting a different system would not be an amendment at all, but a re-creation, a re-forming, not simply of political structures but also of the people themselves (p. 506).

A constitutional amendment cannot swallow the constitutional order whole, as the substantive principles the constitution rests upon limit the text of the constitution and how the people may act within the confines of that order.

No doubt, those taking their bearings from legal positivism and "pure" forms of popular sovereignty will find such an argument astonishing. But if we take our bearings from constitutionalism itself, it is not an altogether remarkable argument; indeed, it seems only necessary to recognize certain principles to grasp the wisdom of Murphy's insistence. The people may, in a "revolutionary act," alter or abolish a particular constitution, but such an act takes place "outside" the confines of a particular constitution.[35]

But even here, that is, in *revolutionary* and not *constitutional* terms, the people are limited. "As the German Constitutional Court carefully explained in its very first opinion: 'That a constitutional provision itself may be null and void is not conceptually impossible . . . There are constitutional principles that are so fundamental . . . that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles'" (p. 503). Though it comes from a different angle, such an understanding is evinced by Lincoln's repeated insistence that we must understand the Constitution—particularly its textual provisions allowing for, if not approving of, slavery—in light of the Declaration of Independence's insistence that "all men are created equal." This put certain textual provisions of the Constitution at odds with the Constitution's foundational identity. It was the task of Lincoln's statesmanship to bring the textual provisions into line with the essentials of the constitutional order, which were expressed not in the written text, but in the fundamental principles underlying that text.

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35. See also CARL SCHMITT, LEGALITY AND LEGITIMACY 58 (2004): "When a constitution envisions the possibility of constitutional revisions, the constitution does not intend to provide, for example, a legal method for the elimination of its own legality, still less the legitimate means to the destruction of its legitimacy."

Lincoln insisted on a similar point outside of the formal constitution, when he insisted that slavery was not something the people should vote up or down. Liberty, rather, was the precondition to self-government. Thus, for Lincoln, even if the people are acting in "revolutionary" rather than "constitutional" terms, they are bound. Murphy's insistence on the limits of consent, even when the people are acting in "revolutionary" and not "constitutional" terms, is at the root of his understanding of constitutional democracy; indeed, it is what fundamentally distinguishes constitutional democracy from representative democracy.

And yet, even while pressing this point, Lincoln insisted that he was bound by the particular constitutional text even if it was, at root, at odds with the essence of the American constitutional order. As Murphy illustrates, this paradox threads its way through constitutional democracy as a regime that embraces such tensions in an effort to create a just political order for human beings in the here and now.

If the aims of constitutional democracy, as it has aptly been put, are low, its achievements are not. It is high praise, then, to say that Professor Murphy's *Constitutional Democracy* does justice to its subject.