Reticence and Fundamental Constitutional Compromise

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I find much to agree with in Professor Webber's paper; the stress on the organic nature of society and the rejection of contractarianism, in particular. I also agree that in drafting Constitutions we must avoid the mistake of assuming that we are wiser than our descendants and must avoid constitutionalising too many ordinary political issues. However, I do have some disagreements with the paper, in particular with the metaphor of politics as conversation which informs it and which hides the extent to which politics is about the use and abuse of state power.

Webber's discussion of the dangers of contractarianism in constitution making focuses very much on a Rousseauan version of the social contract, one in which the contract is seen as embodying the general will. He argues that many constitution makers proceed on the assumption that to have a real country, the citizens must agree on a set of fundamental values that ought to be settled once and for all in a constitution. He makes some powerful criticisms of the attempt to define the general will in a constitutional document. In particular, he points out that attempts to define national values in a constitution can freeze those values at a point in time and end debate about their content. He suggests that the metaphor of conversation rather than contract is a better metaphor for political society because it captures better than contract the idea that our values are provisional and our conclusions tentative and the subject of continued debate. Although we must make decisions so that we can act, we can never expect and should not attempt to end all disagreements about questions of value.

The metaphor of the contract, on the other hand, suggests that we can reach final agreement about these questions and put that agreement in a canonical form. Webber argues that such attempts are misguided because they freeze the debate at a particular point in time and may exclude those who cannot accept the canonical formulation of the values from their place in society. If a constitution is based on certain values, those who reject those values may feel excluded from politics and from real citizenship.

Webber draws a number of conclusions from this analysis. Constitutions should be based on an ethic of reticence and should not attempt to foreclose debate about substantive values by embodying canonical definitions of those values in the constitution. Instead, we should trust in politics and in debates in legislatures to refine our understanding of these values. He points out that embodying canonical

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definitions of values in a constitution does not end all debate about those values but is likely to move the debate from the legislature and from politics into the courts. He argues that this is undesirable because it excludes most of the citizens from the debate and gives the impression that the answers can be found by techniques of rational legal argument.

Webber is not against constitutionalising important values at all times and in all places. He recognises that in some situations there are good reasons for constitutionalising values. For example, there are good arguments for strong bills of rights in societies where such rights have long been denied, such as Post Communist Eastern Europe and South Africa after Apartheid, or in societies where there is a well defined minority who are effectively disenfranchised by a cohesive majority.

It is easy to agree with Webber that societies that do not face these problems should adopt an ethic of constitutional reticence. An attempt to embody Rousseau's general will, with its totalitarian overtones, in the Constitution does not appear to be an attractive basis for a liberal democracy. Given that this is the case, it is surprising that so many countries are going in the opposite direction to that advocated by Webber and are adding to their constitutions. For example, in recent years Canada has adopted the Charter of Rights, the United Kingdom is in the midst of major constitutional change and Australia has been considering adopting a Bill of Rights for some time.

I do not think that it is possible to explain this bout of constitution making in well established societies solely in terms of defining the national general will or recommitting the nation to some general values. Clearly, this can be important for the new constitution makers. For example, the push for an Australian republic and for a new preamble are easily explained as attempts to embody some broadly held community values into the Constitution. However, much of the new constitution making owes more to Hobbes and Madison rather than to Rousseau. It is designed to protect fundamental interests, including private interests, from invasion rather than to state the basic values of the nation.

It seems to me that Webber largely ignores the Madisonian tradition in constitution making. He does support constitution making to ensure that the political process is protected from corruption and that individual citizens have access to it. However, he does not consider the desirability of placing Madisonian checks and balances in a constitution. When he discusses judicial review, it is an alternative to politics as a way of defining fundamental values and the general will rather than as a check on politics designed to protect private and sectional interests from invasion in the name of the general will. This is surprising given his scepticism about the general will as Madison was similarly sceptical, his checks and balances being designed to make it difficult for any will, including the general will, to establish tyranny.

Although Webber does not explicitly consider constitutional checks and balances, it appears to me that he is not much in favour of them because his scepticism about the general will is of a different ilk from that of Madison. Webber

is sceptical about the general will in that he argues, rightly, that fundamental disagreement about political values is the norm and should be accepted and celebrated rather than viewed with disfavour as a necessary departure from the ideal. But he agrees with theorists of the general will that citizens are capable of disinterested discussion of the issues involved and that effective institutions depend upon a measure of engagement and support from the citizenry. He rejects the more totalitarian strands in general will theory in that he allows disagreement and does not require that citizens give their total support to the state. However, he favours majoritarian politics as the best way of involving citizens in public debates and of arriving at tentative answers to the big issues of justice that every community faces.

It is clear that Madison's scepticism of the general will was more fundamental in that he doubted whether people could be relied on to be disinterested in their attitudes to politics. Instead, he feared that people would convert the political arena into a battle for power and wealth. As a result, Webber is more optimistic about politics than Madison was. Madison feared that the political system would be captured by faction or would be used by unscrupulous politicians for selfish ends, including the establishment of tyranny in the name of the people and of a mythical general will, and argued that checks and balances in the constitution should be used to guard against that.

Webber's ethic of constitutional reticence is in many ways, a consequence of his optimism about politics. That optimism is largely unargued but is assumed in the metaphor of politics as a conversation in which we debate about important political issues and values. The metaphor is useful in that it enables Webber to emphasise that our conclusions on these issues can never be more than tentative and need to be subject to continual revision. However, like all metaphors, it can hide as well as illumine. The aspect of politics that it hides is that of power.

Political decisions are decisions about how state power is to be exercised to redistribute scarce resources. As a result, every political decision produces winners and losers. This adds a particular urgency to political conversations. They are not just attempts to define important values but are attempts to justify decisions about the use of state power which have important effects on the lives of individuals. Political decisions can destroy peoples' lives and threaten their most fundamental interests. Therefore political debate is likely to be tainted by arguments based on self-interest and may be short circuited by the use of power in the defence of those interests.

We cannot expect people to behave in a disinterested way when they see their fundamental interests threatened. Therefore, reasoned debate about politics will only be possible if we have structures in place which convince most people that they will not be continual losers in the political process and that some limits will be placed on the possible extent of their loss. Constitutions establish structures, processes and guarantees that are designed to reassure people that the political process will not threaten their most fundamental interests to an unlimited extent or in an arbitrary way.

Webber is not totally opposed to constitutional provisions designed to

protect the fundamental interests of individuals. In particular, he favours constitutional provisions designed to ensure that the political processes are fair and allow access to all. However, he does not seem to favour entrenched bills of rights enforced by the courts except in special circumstances such as in countries where there is a need to build up a political culture of debate and tolerance of the views of others or there is a minority who would otherwise be excluded from all political influence.

People in countries with a long history of tolerant political debate may want similar guarantees. It is not unreasonable for people to want some protection for their fundamental interests from the uncertainties of politics and to want that protection to take the form of a bill of rights enforced by the judiciary.[1] To have a bill of rights is not costless. It can weaken the political process and can freeze debate on important principles at a particular point in time. However, it also has benefits that may outweigh the costs for individuals who fear that their fundamental interests may be threatened by the political process. The political process deals with general rules for the community. It is difficult for an individual to have the political process consider the impact of such rules on his or her case alone. Courts consider the individual case. Therefore an individual concerned with a threat to his or her fundamental interests may be wise to prefer that the case is heard by a court rather than decided by the legislature.

Webber rejects the constitutionalisation of bills of rights in countries that have a tradition of political debate and tolerance. His position is based on a judgment that society will be better and democracy healthier and more vibrant if the losers in political debate have no recourse other than to the political processes in which they have already been defeated.

There are good reasons for taking this view. First, the losers in the political debate may have lost because their case was weak. Their arguments may have been based on narrow self-interest or on a view of the general interest that was clearly rejected by a majority of the population. Why should they be allowed to challenge the result in another forum? Besides, it would be wrong to assume that the losers are always the weak and powerless. They may be the rich and powerful. Judicial review based on a bill of rights may be used to defend an unjust status quo as well as to challenge existing injustice. Hence, any defence of a bill of rights must take into account that it will be used by the powerful as well as the powerless and that it will be used in attempts to defend injustice as well as to establish justice. Besides, there is no guarantee that courts will come up with better solutions than legislatures.

In the circumstances, a compromise in which a bill of rights is given special legislative status without being constitutionalised may, as Webber suggests be the better solution as it gives a degree of protection to fundament interests without

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1 Among modern writers, both Dworkin and Rawls have argued that individuals have certain fundamental interests which could be protected as rights; Dworkin, *Taking Rights Seriously* (London: Duckworth 1977) 231-8; J Rawls, *A Theory of Justice* (London: Oxford University Press 1971).

entrenching one particular view of what constitutes our fundamental rights.

There is a strong argument for an ethic of constitutional reticence that Webber does not explore because of his optimism about politics. Constitutional debate is a form of political debate so it is as much determined by self-interest as any other political debate and is as likely to be captured by factions and other self-interested groups as any other political process. When drafting constitutions individuals and sectional interests may seek to protect their own interests in perpetuity as a condition of signing on to a constitution. An ethic of constitutional minimalism may help to restrain such self-interested constitution making. Madison may have argued that the representation of a large number of interest groups in the process would also help by preventing one group from gaining enough dominance to be able to gain constitutional protection for its own interests.

At the end of the day, such self interested constitution making may pose enormous problems especially for courts charged with implementing the constitution as it may result in provisions which originated as a compromise between particular interest groups. These compromises are contractual, but they are not attempts to define the general will as was the social contract of Rousseau. Instead, they are compromises of private interests and therefore more similar to Hobbes's contract.

The dilemma for the courts which such contractual terms pose is that they are intended to freeze the status quo at the time the constitution was drafted and to provide special protection for the interests of powerful groups who existed at that time. To honour the contracts can freeze the constitutional structure of the country in favour of particular private interests rather than in favour of a particular view of fundamental values. That may be debilitating in its impact. Yet a refusal to enforce them may be a fundamental breach of faith in that the compromise may have been the only way to gain agreement to the constitution. Without that agreement, the country in question may not have come into existence. There is no doubt that parties who are able to impose such compromises have more political power while the constitution is being drafted than at any time after it is adopted because they then have a power of veto which they give up on entering into the new constitutional arrangements.

How should the courts treat such constitutional compromises? Much depends on the nature of the compromise, some of which, such as the federal compromises in the Australian Constitution, are benign and pose few ethical problems, while others, such as the slavery compromise in the original Constitution of the United States of America, were immoral and posed difficult ethical dilemmas for the courts. In practice, the courts have tended to enforce such compromises. For example, the Indian Supreme Court enforced the compromise in which the Indian rulers gave up their powers and allowed their States to join newly independent India in return for a guarantee of their titles and privy purses[2] and the United States

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2 *Madhav Rao Scindia v Union* All India Reports (58) 1971 Supreme Court 530, discussed by Seervai 'The Privy Purse Case: A Criticism' (1972) 74 *Bombay Law Review* 37-49.

judiciary scrupulously enforced the slavery compromise before the American Civil War, although many of the judges involved favoured abolition.[3]

The entrenchment of such political compromises in a constitution raises difficult moral issues.[4] A common view of constitutions is that they should commit the societies that adopt them to fundamental principles of justice and other important moral values. However, far from reflecting important values, such constitutional compromises may be seen as immoral by some or all of the parties to them. They may be constitutionalised for no other reason than that they are seen as immoral by a large segment of the population. Their constitutionalisation can be seen as a promise by that sector of the population which views them as immoral that they will not pursue their moral doubts through the normal political processes because to do so would undermine the compromise which enables the society to live together.[5]

I suggest that an answer to the moral dilemmas posed by such compromises may be found in Dworkin's notion of integrity developed in *Law's Empire*.[6] According to that principle, the state should be considered as a moral person that is expected to act with integrity over time. Integrity requires that a person act over time in accordance with a set of consistent moral principles. Judges and other officials acting as agents of the state in its dealings with its citizens must ask what does integrity require of the state in a particular situation, given the principles it has acted on in the past in its dealings with its citizens.

The first acts of a state may be the deals its founders broker with its new citizens in establishing it. Given that the state entered those deals to persuade certain of its citizens to agree to its establishment, what does integrity require of the state's later representatives? They should honour the compromises if they can regardless of their own views as to their wisdom or morality because to fail to do so damages the integrity of the state. However, integrity is only one moral principle and others are clearly relevant. For example, the compromises may have been so unjust that no moral system of government could be based on them. In such cases, the judges' duty may have been to refuse to enforce them because it may be better that the state fractures rather than continues to exist on immoral foundations.

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3 R Cover, *Justice Accused: Antislavery and the Judicial Process* (Newhaven: Yale University Press 1975).

4 For the moral dilemmas that such compromises could present judges see R Cover, ibid.

5 For example, the slavery compromise in the original United States Constitution was a promise by the north to the South that they would compromise on the issue of slavery for the foreseeable future. When the South concluded that the North were in breach of that promise, it attempted to secede.

6 London: Fontana Masterguides (1986) Chapters 6 and 7.