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I. INTRODUCTION

Many scholars have observed that the Constitution of the United States can be understood as an example of what Cass Sunstein calls an "incompletely theorized agreement."[1] The Constitution contains a number of extremely general terms, such as "liberty," "necessary and proper," and "due process."[2] The Framers of the Constitution, it

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1. *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739 (1995). The article itself notes that constitutional provisions are often incompletely specified. *Id.* For an explicit treatment of the U.S. Constitution as incompletely theorized in the sense of containing incompletely specified provisions, see, for example, A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383 (1996). For an implicit treatment in the context of the Fourteenth Amendment, see Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 61 (1955) (considering Senate debate on the Fourteenth Amendment, "may it not be that the Moderates and the Radicals reached a compromise permitting them to go to the country with language which they could, where necessary, defend against damaging alarms raised by the opposition, but which at the same time was sufficiently elastic to permit reasonable future advances?").

2. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 18 & amend. XIV, § 1.

is suggested, did not attempt to specify precisely how each of these principles would operate in every case.[3] On this view, the Constitution is incompletely theorized in the sense of representing "a comfortable and even emphatic agreement on a general principle, accompanied by sharp disagreement about particular cases."[4] For example, the Framers presumably could have agreed on the value of liberty in the abstract but disagreed sharply on its application to slaves.[5]

There is, however, another sense in which the Constitution can be seen as an incompletely theorized agreement. This second sense has received less attention in the existing scholarship, perhaps because it appears to conflict with the first. According to this sense, the Constitution is remarkable for containing so little theory and so few statements of general principle. What the interpretations of the Constitution in the previous paragraph take to be statements of general principle are, on closer inspection, almost never *merely* statements of principle. Outside of its errata and signatures, the Constitution of 1787 consists of only two elements: the single, performative sentence of the Preamble and the series of commands and permissions that make up the body of the document. Neither of these elements offers abstract, theoretical statements of general principle. On the one hand, the performative Preamble is not, strictly speaking, a descriptive statement at all; it is a performative enactment of the will of "the People" ratifying the Constitution at conventions across the thirteen states.[6] On the other hand, every clause in the body of the

3. *See* Bickel, *supra* note 1, at 62; Howard, *supra* note 1, at 392–95.

4. Sunstein, *supra* note 1, at 1739.

5. As Lincoln would later put it: "We all declare for liberty; but . . . [w]ith some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor." Abraham Lincoln, Address at Sanitary Fair, Baltimore, Maryland (Apr. 18, 1864), *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859–1865, at 589 (Don E. Fehrenbacher ed., 1989).

6. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 3–53 (2005) (arguing for the significance of the Preamble as not only text but deed, a performative enactment of popular sovereignty). On the peculiar characteristics of performatives, see generally J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisà eds., 2d ed. 1978).

document, without exception, is constructed around either a "shall," a "may," or a "shall not."[7] In grammatical form and function, these clauses are not theoretical justifications or elaborations. They are highly pragmatic directives.

The Constitution can thus be seen as an instance of the general phenomenon that Sunstein also finds at work in the agreement of judges on particular outcomes even where there is disagreement on the theory supporting the outcome.[8] That is, "when people diverge on some (relatively) high-level proposition, they might be able to agree if they lower the level of abstraction."[9] The members of the Philadelphia Convention might have had any number of theoretical rationales for adopting the specific rules contained in the body of the Constitution, some controversial, some uncontroversial. The notion of a social contract might have dictated the rules, or the rules might have been dictated by the will of God, the practical lessons of history, mere pragmatism, or some combination of the above.[10] But because the Framers did not include theoretical justifications or explanations within the body of the Constitution, it was not necessary to reach agreement on high-level abstractions. Like judges who agree on an outcome without agreeing on any high-level jurisprudential theory to dictate the outcome, the participants at the Convention were able to facilitate the drafting and ratification of the Constitution precisely by avoiding the "statements of general principle" that the Constitution is sometimes said to contain.

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7. The first and only explanatory clause appears in the Second Amendment. *See* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State . . . ."). On the exceptional nature of this clause within the U.S. Constitution, see Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 793 n.1 (1998).

8. *See* Sunstein, *supra* note 1, at 1740–41.

9. *Id.*

10. For the breadth of theoretical disagreements among the Framers, see generally JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996). James Madison remarked on the existence of conflicting theories even during the Convention. "Mr. Maddison [sic] observed that Gentlemen reasoned very clear on most points under discussion, but they drew different conclusions. What is the reason? Because they reason from different principles." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 147 (Max Farrand ed., 1966) [hereinafter FARRAND].

As the next section will argue, many state constitutions in the revolutionary era did offer explanations and justifications for their functional legal rules. Additionally, in the years since the summer of 1787, the drafters of many national constitutions have made a similar choice. To take only the two earliest examples, the celebrated Polish Constitution of May 3, 1791 begins with a lengthy, religiously infused preamble ("In the name of God, One in the Holy Trinity! . . . [p]ersuaded that our common fate depends entirely upon the establishing and rendering perfect a national constitution . . . ."[11]) and offers frequent statements of principle in justification of its choice of rules.[12] The French Constitution of September 3, 1791 similarly presents numerous statements of abstract principle and theoretical justification.[13]

But the Framers of the U.S. Constitution chose not to theorize their agreement anywhere outside of the minimal, fairly unobtrusive, and apparently uncontroversial purpose clause ("in Order to . . . .") within the Preamble.[14] The relative absence of theory in the Constitution is all the more remarkable given the vast symbolic importance that the Constitution has acquired in American life.[15] One might

11. USTAWA RZĄDOWA [CONSTITUTION] May 3, 1791, pmbl. (Pol.), *translated in* RETT R. LUDWIKOWSKI & WILLIAM F. FOX, JR., THE BEGINNING OF THE CONSTITUTIONAL ERA 303 (1993).

12. *See, e.g.*, *id.* art. I ("but as the same holy religion commands us to love our neighbors . . . .").

13. *See, e.g.*, CONST. OF 1791, Sept. 3, 1791, tit. I (Fr.), *translated in* LUDWIKOWSKI & FOX, JR., *supra* note 11, at 228 ("since liberty consists of being able to do only whatever is not injurious to the rights of others or to public security . . . ."); *id.* tit. III ("Sovereignty is one, indivisible, inalienable, and imprescriptible.").

14. U.S. CONST. pmbl. After the revised Preamble emerged from the Committee of Style and Arrangement, its purpose clause apparently attracted little controversy. Farrand, at least, records no debate over the clause. *Cf.* 3 FARRAND, *supra* note 10, at 651–85 (reviewing the general index, which contains no reference to the Preamble).

15. *See, e.g.*, Abraham Lincoln, Address to the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1832–1858, at 32 (Don E. Fehrenbacher ed., 1989) ("[S]o to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor . . . . And, in short, let it become the *political religion* of the nation . . . .").

expect such a symbolically weighted document to set forth a number of stirring declarations of principle, perhaps of the sort that the Declaration of Independence contains.[16] But the U.S. Constitution, outside the Preamble, does not. Whatever principles it might contain are apparently to be found in or between its bare legal rules or perhaps in its principled theoretical silence. Despite its reputation, the Constitution is less a stirring poem than a pragmatic, functionalist machine. In that sense, it may end up fitting a very American idea of what a poem is: William Carlos Williams' definition of a poem is a "machine made of words."[17]

II. BASELINE COMPARISONS: STATE CONSTITUTIONS AND THE ARTICLES OF CONFEDERATION

Judged in comparison to such feats of theoretical elaboration as the 1982 Chinese Constitution, with its thousand-word historical preamble and two thousand prefatory words of "General Principles,"[18] or the recent, failed European Union Constitution, weighing in at over four hundred pages in its "Reader-Friendly Edition,"[19] the U.S. Constitution certainly seems laconic. Likewise, compared to national constitutions drafted in the twentieth century, especially those that contain "directive principles" aiming to guide interpretation,[20] the U.S. Constitution seems minimalist in its use of theory. But was the Constitution's lack of theoretical self-justification exceptional at the time it was drafted?

16. *Cf.* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 134 (Amy Gutmann ed., 1997) ("If you want aspirations, you can read the Declaration of Independence . . . . There is no such philosophizing in our Constitution, which . . . is a practical and pragmatic charter of government.").

17. WILLIAM CARLOS WILLIAMS, SELECTED ESSAYS OF WILLIAM CARLOS WILLIAMS 256 (New Directions 1969) (1954).

18. *See* XIANFA [CONSTITUTION] Dec. 4, 1982, pmbl., art. 1–32 (China), *translated in* THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA 3–28 (1983).

19. *See generally* THE PROPOSED EU CONSTITUTION: THE READER-FRIENDLY EDITION (Jens-Peter Bonde ed., 2d ed. 2007), *available at* http://en.euabc.com/upload/readerfriendlybook.pdf.

20. For the existence of directive principles in the Irish and Indian Constitutions, see VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 709, 715 (2d ed. 2006).

In order to answer this question, we can compare the U.S. Constitution to the state constitutions drafted between 1776 and 1787, as well as the Articles of Confederation. The investigation will attempt to divide the contents of the constitutional documents into two general categories: functional rules and non-functional, theoretical elements. Inevitably, there will be a degree of imprecision in such an exercise, given the occasional difficulty of defining what should and should not count as functional or theoretical and the differences in the format and structure of the various constitutional documents. It also goes without saying that even the most "theoretical" element in a constitution can be described as serving some function, and even the most functional rule can be described as resting upon theoretical assumptions. But in practice, the distinction between functional rules and theory is sufficiently stable to produce useful results.

First, a few methodological notes are in order. Preambles tend to serve almost exclusively as explanations or justifications for the documents that follow. In the case of revolutionary-era state constitutions, preambles almost always recount (in the form of several "whereas" clauses) the history leading up to the creation of the documents. For these reasons, I have placed preambles in a separate category. The implication is that preambles tend to be, as a category, theoretical elements. Similarly, because Declarations of Rights tend to be permeated by statements of general principle whose functional value, if any, would be difficult to determine in any consistent way, I have placed them in a separate category as well.[21]

Finally, I have defined the parts of a constitution outside of its title, preamble, Declaration of Rights (if any), and signatures, as the "body" of the text. Within this body, I have defined as "theory" any clauses that solely offer explanations, justifications, or purposes for

21. The heightened likelihood that statements about fundamental rights, as opposed to statements about government structure, will incorporate explanatory and purposive clauses can be seen even outside formal Declarations of Rights. *See, e.g.*, N.Y. CONST. of 1777, arts. XXXVII–XL, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 2636–37 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE]. That is, the material that usually appears within Declarations of Rights tends to be accompanied by theoretical statements even when it appears outside such Declarations. *See id.*

the rules contained in the body. These theoretical clauses can be anything from the simplest "to" or "for" clause ("*to prevent altercation about such bills,* it is declared . . . ."[22] and "*for the more perfect satisfaction of the public*, the reasons and motives for making such laws shall be fully and clearly expressed . . . ."[23]) to the most elaborate statements of principle ("*And whereas the ministers of the gospel are, by their profession, dedicated to the service of God and the care of souls, and ought not to be diverted from the great duties of their function*; therefore, no minister of the gospel, or priest of any denomination whatsoever, shall . . . ."[24]).

Measured within these parameters, how does the theoretical content of the U.S. Constitution compare to that of other revolutionary-era constitutional documents? Table 1 provides the quantity of theory in revolutionary-era constitutional documents.

22. MD. CONST. of 1776, art. XI, *reprinted in* 3 THORPE, *supra* note 21, at 1693 (emphasis added).

23. PA. CONST. of 1776, § 15, *reprinted in* 5 THORPE, *supra* note 21, at 3086 (emphasis added).

24. N.Y. CONST. of 1777, art. XXXIX, *reprinted in* 5 THORPE, *supra* note 21, at 2637 (emphasis added).

	# of Words in Preamble	# of Words in Declaration of Rights	# of Words in Body of Constitution	# of Words of Theory in Body	% of Body Dedicated to Theory
State Constitutions					
New Hampshire (Jan. 5, 1776)[25]	404	N/A	526	0	0%
South Carolina (Mar. 26, 1776)[26]	1300	N/A	2425	12	0.5%
Virginia (June 12 & 29, 1776)[27]	575[28]	865	1993	13	0.7%
New Jersey (July 2, 1776)[29]	303	N/A	2152	19[30]	0.9%
Delaware (Sept. 21, 1776)[31]	N/A[32]	N/A	3412	12	0.4%

25. N.H. CONST. of 1776, *reprinted in* 4 THORPE, *supra* note 21, at 2451.

26. S.C. CONST. of 1776, *reprinted in* 6 THORPE, *supra* note 21, at 3241.

27. VA. CONST. of 1776, *reprinted in* 7 THORPE, *supra* note 21, at 3812. Virginia ratified its Declaration of Rights on June 12, 1776 and its Constitution on June 29, 1776. 7 THORPE, *supra* note 21, at 3812 n.a.

28. This figure includes both the lengthy preamble to the Constitution and the very brief preamble to the Declaration of Rights. *Id.* pmbl., *reprinted in* 7 THORPE, *supra* note 21, at 3812, 3814–15.

29. N.J. CONST. of 1776, *reprinted in* 5 THORPE, *supra* note 21, at 2594.

30. This figure is based on treating the following phrase as a justification clause: "That the legislative department of this government may, as much as possible, be preserved from all suspicion of corruption . . . ." *Id.* art. XX, *reprinted in* 5 THORPE, *supra* note 21, at 2598. In context, the sentence may then become ungrammatical, or at least acquire a grammatical structure different from that of the other articles. But there appears to be no other plausible way to interpret the sense of the clause. A similar construction appears in MD. CONST. of 1776, art. XI, *reprinted in* 3 THORPE, *supra* note 21, at 1693.

Pennsylvania (Sept. 28, 1776)[33]	502	976	4622	292[34]	6.3%
Maryland (Nov. 11, 1776)[35]	109	2459	6229	68	1.1%
North Carolina (Dec. 18, 1776)[36]	294	1060	2529	0[37]	0%
Georgia (Feb. 5, 1777)[38]	330	N/A	4064	11	0.3%
New York (Apr. 20, 1777)[39]	2444	N/A	5274	351	6.7%
Vermont (July 8, 1777)[40]	1174	1219	3904	196	5.0%
South Carolina (Mar. 19, 1778)[41]	237	N/A	5304	91	1.7%

31. DEL. CONST. of 1776, *reprinted in* 1 THORPE, *supra* note 21, at 562.

32. I have not counted the fifty-two word title of the Delaware Constitution. *See id.*

33. PA. CONST. of 1776, *reprinted in* 5 THORPE, *supra* note 21, at 3081.

34. It might be worth noting that § 46 of the 1776 Pennsylvania Constitution incorporates the contents of Pennsylvania's theory-laden Declaration of Rights into the state's Constitution, thereby arguably increasing the theoretical content of the Constitution relative to the 1787 U.S. Constitution. *Compare id.* § 46, *reprinted in* 5 THORPE, *supra* note 21, at 3091, *with* U.S. CONST.

35. MD. CONST. of 1776, *reprinted in* 3 THORPE, *supra* note 21, at 1686.

36. N.C. CONST. of 1776, *reprinted in* 5 THORPE, *supra* note 21, at 2787.

37. Like Pennsylvania's Constitution, North Carolina's Constitution incorporates the state's highly theoretical Declaration of Rights into the state's constitution. *Id.* art. XLIV, *reprinted in* 5 THORPE, *supra* note 21, at 2794.

38. GA. CONST. of 1777, *reprinted in* 2 THORPE, *supra* note 21, at 777.

39. N.Y. CONST. of 1777, *reprinted in* 5 THORPE, *supra* note 21, at 2623.

40. VT. CONST. of 1777, *reprinted in* 6 THORPE, *supra* note 21, at 3737. Vermont also ratified a Constitution on July 4, 1786. VT. CONST. of 1786, *reprinted in* 6 Thorpe, *supra* note 21, at 3749. But it is substantially similar to the earlier one for the purposes of this table.

41. S.C. CONST. of 1778, *reprinted in* 6 THORPE, *supra* note 21, at 3248.

Massachusetts (1780)[42]	303[43]	2150	8952	522	5.8%
Articles of Confederation (1777)[44]	N/A[45]	N/A	3387	88	2.6%
U.S. Constitution (1787)	52	N/A	4440	0[46]	0%

Table 1.[47]

The preceding table suggests that, viewed as a whole, the U.S. Constitution contains less theory than any comparable American constitutional document of the era. First, the Preamble to the U.S. Constitution is shorter than that of any of the state constitutions. It offers no history of the events leading up to its drafting, no recitation of "whereas" clauses, and contains even fewer words than the formulistic, treaty-like invocation ("To all to whom these Presents shall come . . . .") and extended title of the Articles of Confederation.[48]

42. MASS. CONST. of 1780, *reprinted in* 3 THORPE, *supra* note 21, at 1888.

43. This figure includes both the main preamble and the brief preamble to the section of the Constitution entitled "The Frame of Government." *See id.* pmbl., *reprinted in* 3 THORPE, *supra* note 21, at 1888–89, 1893.

44. ARTICLES OF CONFEDERATION of 1777, *reprinted in* 1 THORPE, *supra* note 21, at 9.

45. Perhaps because the Articles of Confederation have the basic form of a treaty, there is no true preamble. Instead, the Articles begin with a formula that often appeared at the start of treaties ("To all to whom these Presents shall come . . . ."), followed by a title including the names of all the states. *See id.*

46. It has been suggested that the Copyright Clause, U.S. CONST. art. I, § 8, cl. 8, might be read as containing an explanatory element. *See* Volokh, *supra* note 7, at 793 n.1. But in context, the clause need not be read as offering an explanation of the purposes for which Congress should establish copyrights. Rather, the clause grants Congress the power to pursue a general goal, and then the next clause defines the (or at least a) specific means for achieving that goal. In any case, when similar clauses appeared in state constitutions, that is, clauses arguably having the form of explanations but performing functional roles, I did not count them as theory.

47. The source for all constitutional materials is 1–7 THORPE, *supra* note 21.

48. ARTICLES OF CONFEDERATION of 1777, pmbl., *reprinted in* 1 Thorpe, *supra* note 21, at 9.

Second, the 1787 U.S. Constitution contains no Declaration of Rights. How this came to pass is an interesting question,[49] but for the concerns of this article, it simply means that the original U.S. Constitution lacked the source of the vast majority of theoretical speculation found in many of the state constitutions. Even if the Bill of Rights were included, the calculation of theoretical content would barely be affected. Unlike the Declarations of Rights in many of the state constitutions, the Bill of Rights consists entirely of concise, functional rules in the form of "shall" and "shall not" statements, with a single, notorious exception—the "being necessary" clause of the Second Amendment.[50] Also, if the Bill of Rights were treated as

49. *See, e.g.*, 3 FARRAND, *supra* note 10, at 143–44 (referencing James Wilson's explanation of the lack of a Bill of Rights).

50. U.S. CONST. amend. II; *see supra* note 7 and accompanying text. The degree of confusion, disagreement, and general frustration generated by this thirteen-word passage in the Second Amendment may provide the best argument for the Framers' anti-theoretical approach. In addition, it is possible to question Volokh's substantive claim that the justification clause of the Second Amendment should not be read as a condition on the operative clause. *See* Volokh, *supra* note 7, at 801. As a preliminary matter, none of the ostensibly analogous justification clauses he locates in state constitutions share the relevant structure of the Second Amendment justification clause. None of them refer to a factual state of affairs that may have been true in 1791 and may not be true now. A better analogy for the structure of the "being necessary" clause would be the following. Years ago, shortly before dying, a father issued the following command to his son: "An LL.B. from Yale being necessary to a successful legal career, you shall study law at Yale." Though it might have been the case at the time that an LL.B. from Yale was necessary for a successful legal career, it is probably not the case today—just as it is probably not the case today that the security of the United States, or of any one of the states, depends on the existence of well-regulated militias, though this might have been the case in 1791. In fact, strictly speaking, Yale no longer even offers LL.B.s—just as, strictly speaking, state militias in their 1791 form no longer exist. With these changed circumstances in mind, would the son be violating his father's command by studying law at Stanford, or not studying law at all? Who can say? Clearly, the father did not contemplate this turn of events. We can imagine any number of other, unstated reasons why the father might still wish his son to attend Yale; we can also imagine him specifically not wanting his son to attend Yale given the changed circumstances; or we can imagine him not caring one way or another, provided that his son has a successful legal career. It would be entirely reasonable to read the justification clause either as a condition for the operative clause or not as one, and neither text, intent, nor the state of the world establishes one of the two interpretations as the correct one. *But see* District of Columbia v.

the U.S. Constitution's Declaration of Rights, it would still be the most concise of such Declarations, containing only 481 words, a little more than half as many words as the next most spare version.[51]

Finally, the body of the U.S. Constitution does not contain a single clause of justification, explanation, or purpose. The only state constitutions that can say the same are the stopgap New Hampshire Constitution of January 1776, in which the state continues to refer to itself as a colony and pleads with Great Britain to create the conditions for a return to its prior condition ("PROTESTING and DECLARING that we neaver [sic] sought to throw off our dependence upon Great Britain, but felt ourselves happy under her protection . . . ."),[52] and the exceptionally laconic North Carolina Constitution of December 1776, which nevertheless implicitly contains a great deal of theory by incorporating its accompanying, typically theoretical Declaration of Rights.[53]

Thus, even when judged by contemporaneous standards, the U.S. Constitution is notable for its forbearance of theory.

III. HISTORY: DRAFTING AN INCOMPLETELY THEORIZED CONSTITUTION

How did the U.S. Constitution come to contain so little in the way of theoretical principles, as opposed to pragmatic directives? At least two explanations might be offered. The first involves the general institutional structure of the Philadelphia Convention. The second involves the intellectual orientations of the primary drafters of the Constitution, especially James Wilson and Edmund Randolph.

Heller, 554 U.S. 570, 576–78, 598–600 (2008) (introducing categorical legal distinction between "prefatory clause[s]" and "operative clause[s]," concluding that "a prefatory clause does not limit or expand the scope of the operative clause," and on that basis performing two-step analysis of Second Amendment, beginning with a determination of legal meaning of "operative clause" apart from "prefatory clause," and only then asking whether the latter "fit[s] with" the preceding interpretation of the former).

51. *See* U.S. CONST. amends. I–X.

52. N.H. CONST. of 1776, pmbl., *reprinted in* 4 THORPE, *supra* note 21, at 2452.

53. *See* N.C. CONST. of 1776, art. XLIV, *reprinted in* 5 THORPE, *supra* note 21, at 2794.

Both explanations lead to the conclusion that the work performed by the Committee of Detail between July 23 and August 6, 1787 was probably the decisive moment in the creation of our incompletely theorized Constitution.[54] The document produced by the Committee of Detail contains arguably even less theory than the final Constitution. On the one hand, it includes seven words of explanation in the body, whereas the Constitution includes none; on the other hand, its preamble contains substantially less of a statement of purpose.[55]

According to the first explanation, the nature of the committee structure at the Philadelphia Convention might have encouraged the production of a rather untheoretical document, regardless of the drafters' rhetorical preferences. The five-person Committee of Detail produced the first true draft of the Constitution, as distinct from various plans and resolutions phrased in rough, provisional wording.[56] The Convention charged the Committee of Detail with formalizing the results of the foregoing debate,[57] much as a lawyer might draft a contract after its content had been negotiated between two parties. The immediate audience of the drafters in the Committee of Detail was, thus, the Convention, not the general public.[58] This consideration by itself might have led to the production of a more pragmatic and less theoretical document.

Imagine, for example, if the Committee of Detail, under the influence of an especially theoretically minded member, or under the inspiration of one of the state constitutions, had produced a docu-

54. *See generally* John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 147, 163–66 (2006) (discussing the Committee of Detail).

55. *See generally* 2 FARRAND, *supra* note 10, at 177–189. The seven words of explanation are "for the security of the parties concerned." *Id.* at 184. In contrast to the preamble that emerged from the Committee of Style and Arrangement, the Committee of Detail's preamble merely states: "We the people of the States of . . . do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity." *Id.* at 177; *see* Vile, *supra* note 54, at 171–72 (discussing the Committee of Style and Arrangement).

56. *See* Vile, *supra* note 54, at 163–64.

57. John C. Hueston, Note, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765, 766 (1990) (discussing the modesty of the Convention's charge to the Committee).

58. *See id.*

ment freighted with declarations and explanations intended for a wider audience.[59] Doing so would not only have run the risk of creating unnecessary controversy, as participants at the Convention debated the details of the declarations and explanations, but might also have invited some derision. Confronted with a novel, unfamiliar theoretical clause beside a hard-won, strenuously negotiated rule, some participants might reasonably have wondered on what basis the Committee of Detail had determined itself also to be the Committee of Political Philosophizing. By far the safer, more lawyerly approach for the Committee of Detail, most of whose members had legal training, would have been to hew closely to the specific task they were given: explicitly, to formalize the rules agreed upon during the debates; and perhaps implicitly, to fill any gaps between those rules as uncontroversially as possible.

A second structural feature of the Committee of Detail might have reinforced the first: namely, that it was a committee. Those who have worked on the drafting of a document in a committee setting will probably be familiar with the tendency of committees to focus on anything that "stands out" from the rest of the document, whether in a good or bad way; to subject such elements to heightened scrutiny; and, as a result, to increase the chance that such elements will be mollified or removed. The result tends to be writing that contains less obtrusive, idiosyncratic, or provocative elements than would be contained in writing from a single hand. Phrased negatively, the result tends to be writing that is lifeless and bland, which may be why saying something reads like it was "written by committee" is a derogatory label, rather than a term of praise. Any attempt by one of the members of the Committee of Detail to introduce theoretical elaborations into the draft, especially inspirational

59. In particular, it is worth considering what James Madison or Gouverneur Morris might have produced, had they participated in the Committee of Detail. Madison's original draft of the Bill of Rights, for example, contained two more justification clauses, in addition to the one in the Second Amendment. *See* Volokh, *supra* note 7, at 796 n.10. Morris, through his work on the Committee of Style and Arrangement, added the most overtly theoretical content to the Constitution, the "in order to" portion of the Preamble. *See* RICHARD BROOKHISER, GENTLEMAN REVOLUTIONARY: GOUVERNEUR MORRIS, THE RAKE WHO WROTE THE CONSTITUTION 90–91 (2003); Vile, *supra* note 54, at 171.

statements of general principle or purpose, would have run counter to the general laws that seem to govern committee-based drafting.

Finally, Jon Elster has argued that secrecy in constitutional negotiations will tend to encourage practical bargaining, while public scrutiny will tend to encourage argument phrased in terms of impartial values (or, less productively, "stubbornness, overbidding, and grandstanding").[60] He presents the Philadelphia Convention as a paradigmatic example of the former type of constitutional negotiation.[61] If Elster's hypothesis is correct, then the secrecy of the Philadelphia Convention could have contributed to a relative de-emphasis on discussion in terms of general principles, which could, in turn, have contributed to the relative lack of theory in the Constitution.

Another complementary explanation for the relative lack of theory in the U.S. Constitution may lie in the intellectual orientations of its drafters, and in particular, of Edmund Randolph and James Wilson, both of whom appear to have produced drafts of the Constitution as members of the Committee of Detail.[62] Randolph laid down two guiding standards for the Committee's work:

> 1. To insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accomodated [sic] to times and events. [A]nd
>
> 2. To use simple and precise language, and general propositions, according to the example of the (several) constitutions of the several states.[63]

While the second standard seems to shed light on the use of ambiguous, highly general terms discussed in the introduction,[64] the

60. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 388 (1995).

61. *Id.* Elster presents the French Assembly of 1789 as a paradigm of the latter mode of constitutional negotiation. *Id.* at 388–89. Fittingly, this public assembly produced the theory-rich Declaration of the Rights of Man and Citizen. *See* Rett R. Ludwikowski, *Fundamental Constitutional Rights in the New Constitutions of Eastern and Central Europe*, 3 CARDOZO J. INT'L & COMP. L. 73, 78 (1995).

62. *See* Vile, *supra* note 54, at 163–64.

63. 2 FARRAND, *supra* note 10, at 137 & n.6.

64. *See supra* Part I.

first standard is the most relevant to the concerns of this article. It suggests that Randolph saw superfluity in constitutional drafting as a threat to the smooth functioning of government. As circumstances change, the basic structures of government must be sufficiently flexible to respond. Thus, Randolph presumably would have opposed attempts by any member of the Committee of Detail to depart from the skeletal articulation of rules that the Committee of Detail ultimately produced. Perhaps Randolph's resistance to constitutional excess also helps to explain the Committee of Detail's silent rejection, in its later August 22, 1787 report, of the inclusion of proposed rights-related provisions in the body of the Constitution.[65]

James Wilson's resistance to unnecessary theorizing seems to have been even more pronounced. There are hints throughout his contributions to the Philadelphia Convention and the Pennsylvania ratification debates that he possessed a strong skepticism toward the utility of high-level statements of principle and an appreciation of the ease with which general principles can be manipulated, ignored, and abused. In a characteristic argument regarding the powers of the states, Wilson is recorded as saying:

> The great difficulty, therefore, was the application of this general principle [of retained state power], for it was found impracticable to enumerate and distinguish the various objects to which it extended; and as the mathematics only are capable of demonstration, it ought not to be thought extraordinary that the convention could not develop a subject involved in such endless perplexity.[66]

The idea that mathematics alone, and not the natural language of lawyers and legislators, possesses a logically perfect structure susceptible to endless, certain, consistent inference, is an idea that did not receive a warm welcome among many legal thinkers until at least the late nineteenth century.[67] It is another way of saying that

65. *See* Vile, *supra* note 54, at 166.

66. 3 FARRAND, *supra* note 10, at 140.

67. For the critique of formalism in classical legal thought as the abuse of deduction, see generally Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000, in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A

general propositions do not decide concrete cases, or, as Wilson himself is recorded as stating, "[t]he Beauty of all Knowledge consists in the Application."[68] The phrase suggests that Wilson viewed mere theoretical knowledge, prior to its practical application, as in some sense empty or lifeless, or at least incomplete. A preference for the pragmatic cashing out of theories in terms of their specific applications, rather than the statement of theories in the abstract, is one of the hallmarks of American thought.[69] Wilson seems to have shared this preference, and the Constitution he helped to write reflects it by abjuring general principles in favor of operative rules.

IV. CONCLUSION

The incomplete theorization of our Constitution has not been without its costs. As Sunstein notes in a related context: "[I]f judges can agree on an abstraction, and if the abstraction can be shown to be a good one, judicial acceptance of that abstraction may hardly be troubling but, on the contrary, an occasion for celebration."[70] If a theory is good, then a highly theorized agreement might have advantages over an incompletely theorized one. American history could perhaps have been different if the abstract, theoretical statement of human equality in the Declaration of Independence had been included in our judicially enforceable Constitution. Indeed, some contemporary national constitutions have included abstract statements of social and economic rights partly in order to prevent their courts from filling any theoretical silence with unwanted principles, as oc-

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CRITICAL APPRAISAL 19, 39 & n.59 (David M. Trubek & Alvaro Santos eds., 2006).

68. 1 FARRAND, *supra* note 10, at 275.

69. *See generally, e.g.*, WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING, *in* WILLIAM JAMES: WRITINGS: 1902–1910, at 479–619 (Bruce Kuklick ed., Library of America 1987) (1907). Cornel West memorably identified pragmatism with "the American evasion of philosophy" in a book of that name. *See generally* CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM (1989). The bare functionality of the U.S. Constitution might be interpreted as one of America's earliest evasions of political philosophy.

70. Sunstein, *supra* note 1, at 1766.

curred on several occasions in American history, perhaps most notably in the *Lochner* era.[71]

But viewed as a whole, and considering that any theoretical statements included in the Constitution might not have been a cause for celebration at the time, but rather for the foundering of the constitutional enterprise, the incomplete theorization of the Constitution seems to have been a substantial success. It removed from debate contentious theoretical issues that might have led to the undermining of the Philadelphia Convention, a convention that some feared might never be replicated if it failed and whose success was perceived as vital to the continued security of republican government in the New World.[72] It allowed for the ratification of a single document despite whatever divergent theories of republicanism, religion, race, federalism, or executive power might have existed within and between the people of the various states. And it resulted in the creation of a Constitution that has survived for over two hundred years, despite radical, ongoing upheavals in the intellectual orientations and moral commitments of many of the people who govern themselves through it. If Professor Tribe is right that American constitutional law finds itself "at a juncture where profound fault lines have become evident at the very foundations of the enterprise,"[73] so that the writing of a constitutional treatise may not even be possible, this may only be a return to the state of profound and intentionally unresolved theoretical disagreement existing at the time of the Constitution's framing and inscribed in the document through its theoretical silence.

71. *See, e.g.*, Carl Baar, *Social Action Litigation in India: The Operation and Limits of the World's Most Active Judiciary*, *in* COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 77–86 (Donald W. Jackson & C. Neal Tate eds., 1992) (discussing the inclusion of non-enforceable social and economic "directive principles" in the Indian Constitution out of fear that courts might otherwise read *Lochner*-era principles of substantive due process into the text).

72. Alexander Hamilton's statement of the risk is perhaps the best known: "Henceforward, the motives will become feebler, and the difficulties greater. It is a miracle that we are now here . . . . It would be madness to trust to future miracles. A thousand causes must obstruct a reproduction of them." 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 259 (Jonathan Elliot ed., 1859).

73. Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 291, 295 (2005).